

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 31, 2022 – Day 3

Issue, Exception/Response

Issue NC-1: Exception: Stop B2H; Response: Department; Idaho Power Company

Issue NC-2: Exception: Stop B2H, Gilbert, Horst/Cavinato; Response:
Department; Idaho Power Company

Issue NC-3: Exception: Stop B2H; Response: Department; Idaho Power Company

Issue NC-4: Exception: Stop B2H; Response: Department; Idaho Power Company

Issue LU-9: Exception: Myers; Response: Idaho Power Company

Issue LU-5: Exception: Gilbert; Response: Idaho Power Company

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

IN THE MATTER OF:

**BOARDMAN TO HEMINGWAY
TRANSMISSION LINE**

STOP B2H COALITION

**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 assertions 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).

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).

First, factual disputes existed as to which IRP was relevant to the inquiry. IPC posited 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.

The ALJ did not construe this factual dispute in a manner most favorable to STOP. Instead, the ALJ mistakenly found in paragraphs 13-14 of her “undisputed facts” recital that the 2019 IRP was properly considered here. *See*, Need MSD Ruling p.7. The issue of whether the entire facility had, or had not, been acknowledged in an IRP was an issue requiring a factual determination. The issue of which IRP applied, required a factual determination. Here again, the ALJ erred by not viewing the evidence on these issues in the light most favorable to STOP.

The ALJ incorporated her Need MSD Order into the PCCO. For each and every reason set forth in STOP’s prior briefing (and in these Exceptions) on the Need issue, STOP takes exception to that July 29, 2021 Order, and the PCCO’s reliance on it.

iii. Scenic Resources (Issue SR-6)

In the PCCO the ALJ incorporates her prior ruling granting IPC’s MSD on Issue SR-6. PCCO p.27. In that prior ruling, the ALJ held that the relevant “standards simply require that the applicant demonstrate that the proposed facility is not likely to result in significant adverse impacts to identified resources. Consequently, the fact that Idaho Power did not collect constituent information in accordance with USFS SMS does not invalidate the visual impact assessment.” MSD Ruling and Order on Issue SR-6 pp.12-13 (SR-6 MSD Ruling). This holding highlights the crux of the factual dispute at the heart of SR-6. It was error for the ALJ to make this holding, because it relied on a reading of **the facts** that favored IPC, not STOP.

As outlined in STOP’s June 25, 2021 Memorandum in Opposition to IPC MSD on Issue SR-6 (STOP SR-6 Opp Memo), the issue of the reasonableness (or not) of the methodology

created by Idaho Power, and its sufficiency for determining the extent of impacts, are questions of fact. *See e.g.*, STOP SR-6 Opp Memo p.3.⁵ STOP also outlined that as a matter of law, IPC was not entitled to a ruling in its favor. STOP SR-6 Opp Memo p.4. The ALJ mistakenly ignored these points and construed the evidence in a light more favorable to IPC, rather than in the light most favorable to STOP. On an MSD, that was improper.

For each of the reasons set forth in the STOP SR-6 Opp Memo, STOP takes exception to The ALJ's SR-6 MSD Ruling and the PCCO's reliance on the reasoning and Order therein.

iv. Fish & Wildlife (Issue FW-1)

In the PCCO, the ALJ incorporates her prior ruling granting IPC's MSD on Issue FW-1, pertaining to sage grouse impacts. PCCO p.20. STOP had previously timely presented a Memorandum in Opposition to that Motion. STOP pointed out in that Memo that IPC's characterization of the facts omitted any actual analysis of impacts to Sage Grouse habitat. *See*, STOP FW-1 Opp Memo p.3. Further, STOP pointed out that IPC was not entitled to a ruling as a matter of law, because OAR 635-140-0025 requires that development be mitigated for both direct and indirect impacts. IPC has not – to date – done the impact analysis. Consequently, there is currently no way to ensure compliance with the Rule's requirement.

In her August 5, 2021 ruling on this MSD the ALJ set forth a number of allegedly “undisputed facts” and she construed those facts in IPC's favor - not in STOP's favor. *See*, Ruling and Order on MSD on Issue FW-1 pp.2-14 (FW-1 MSD Ruling). For example, there has been no actual analysis of impacts, something that is a clear requirement to determine the issue

⁵ In addition to STOP raising this issue, the Council itself emphasized the importance of having a subjective evaluation of impacts on Oregonians. *See e.g.*, EFSC ORDER ON APPEALS, November 25, 2020 pp.4, 19.

question⁶ and compliance (or not) with OAR 345-022-0060. Viewing that fact in the light most favorable to STOP, the complete lack of any analysis of impacts indicates that the applicant's analysis of impacts is inadequate. Stated another way, since there is no impact analysis, it is reasonable to assume that there are likely **to be impacts**, that need to be mitigated – impacts that have so far been undisclosed.

Rather than do any actual analysis, IPC is banking on all of that work being done in the future by ODFW using their HQT (Habitat Quantification Tool). However, the issue presented is whether IPC **has already** “adequately analyzed” sage grouse issues. The issue is framed in the past tense. The adequacy of the analysis must be judged as of now, not some hypothetical point in the future. STOP pointed that out (*See*, STOP Corrected FW-1 Opp Memo pp.2-5) but the ALJ nonetheless construed this fact in the light favorable to IPC/ODOE, rather than in the light most favorable to STOP. On an MSD, that was error.

The ALJ's Conclusion of Law on this issue (PCCO p.14) highlights this major factual dispute. The ALJ held that no limited party “presented evidence demonstrating any insufficiencies in Idaho Power's analysis of sage grouse habitat connectivity... or its analysis of potential indirect impacts...” *Id.* As outlined, STOP had briefed that issue and noted that as a factual matter there was *no* IPC analysis, and that as a matter of law, analysis is required in order to judge its adequacy. STOP FW-1 Opp Memo at p.3-.5

STOP incorporates its arguments made in the STOP FW-1 Opp Memo. STOP takes exception to the PCCO at p.20, and its reliance on the flawed FW-1 MSD Ruling.

⁶ FW-1: *Whether Applicant adequately analyzed sage grouse habitat connectivity in the Baker and Cow Valley Priority Areas of Conservation (PAC), the potential indirect impacts of the proposed facility on sage grouse leks, and the existing number of sage grouse in the Baker and Cow Valley PACs.*

C. Issues Disposed of During or After Contested Case Hearing

i. *Standard of Review and Burden of Proof*

Oregon’s Administrative Procedures Act directs that an Order in a Contested Case be issued “only as supported by, and in accordance with, reliable, probative and substantive evidence.” ORS 183.450(5). Agency decisions must “be rational, principled, and fair, rather than *ad hoc* and arbitrary.” *Gordon v. Bd. of Parole & Post Prison Supervision*, 343 Or 618, 633 (2007) (describing that notion as one “embodied in the APA”). The Oregon Court of Appeals interpreted ORS 183.450(5) as prescribing the preponderance of evidence standard of proof in contested cases. *See, e.g., Gallant v. Bd. Of Medical Examiners*, 159 Or App 175, 180 (1999). However, to prevail, STOP does not have to prove the opposite of any of ODOE’s findings or conclusions in its Final Order on the B2H project. *See, Corcoran v. Board of Nursing*, 197 Or App 517, 533 n.13 (2005) (“if the agency, which has the burden of proving misconduct, failed in that burden, why should we be concerned with whether a preponderance of the evidence in the record establish that, as a matter of historical fact, the licensee did not engage in such conduct.”).

ii. *Noise Control (NC-1, NC-2, NC-3, NC-4)*

STOP had standing in this contested case on several issues related to noise control and mitigation. STOP takes exception to the PCCO findings and conclusions related to NC-1, NC-2, NC-3, and NC-4.

a. *NC-1, NC-2, NC-3, and NC-4 Exceptions to Findings of Fact*

STOP takes exception to a number of Findings of Fact related to Noise Control. STOP excepts to Finding #112 (PCCO p.73) the extent that that this Finding asserts that authority to grant variances has been delegated or transferred to other agencies or local governments without any express rulemaking or delegation by DEQ or EQC, or a statutory change by the Oregon

legislature. *See*, STOP Closing Argument pp.7-9.

STOP takes exception to Finding #115 (PCCO p.74) where the ALJ finds that corona noise exceedances will be “infrequent.” As STOP demonstrated in its Closing, the evidence shows that exceedances occurring during forty-eight days per year, **would not** qualify as infrequent. *See*, STOP Closing Argument pp.14-15 (citing STOP direct testimony 9/17/2021, Exhibit #5 at p.13, letter from John Hector, former DEQ noise control program manager).

STOP takes exception to Finding #117 (PCCO pp.75-76). That finding states that “As set out in ASC Exhibit X, to determine the frequency of foul weather conditions that may cause corona noise exceedances at the NSRs, Idaho Power relied on historic weather data to predict the frequency of foul weather events at the NSR location. Idaho Power considered the variability of meteorological conditions on an hourly basis throughout the entire year.” As the evidence shows, corona noise is elevated when moisture (in any form) or other debris are on the lines and components.⁷

Finding #117 correctly states Idaho Power’s meteorological data and averaging is presented in the Table X-6 and X-7 in the ASC by IPC. However, STOP takes exception here because the use of total time averaged annual data is not representative of the reality on the ground, **and it misrepresents the meteorological data analysis per OAR 340-035-0035 (1)(b)(B)(i)**⁸ which Tables X-8 and X-9⁹ reflect correctly. In these tables the rate of “foul weather” is correctly estimated at 13% overall and 22% in the La Grande area, as opposed to 1% or 1.3% noted in the Tables referenced in the Finding. Reliance on the correct Table’s would

⁷ *See*, STOP Closing pp.14-15.

⁸ Based on any one hour in a 24-hour period. *See*, STOP Closing p.15.

⁹ ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28, pp.30-31.

have led to the conclusion that the rate of exceedances as allowed in this permit would not qualify as “infrequent.” *See*, STOP Closing pp.14-15.

Next, STOP takes exception to Finding of Fact #125 (PCCO pp.79-80) including to footnote 54 in that finding, which incorrectly relies on a BPA Memo to reach conclusions about frequency of foul weather. The evidence in the Record actually shows that **neither the BPA (nor the state of Washington) have an anti-degradation standard** like Oregon,¹⁰ making reliance on the BPA Memo factually and legally inappropriate. Moreover, that Memo was superseded by BPA’s 2005 Transmission Business Line (TBL) policy¹¹ and as stated by IPC’s own expert Mr. Bastash:

“Moreover, in BPA’s 2005 Transmission Business Line (“TBL”) policy, BPA adopted a comprehensive compliance strategy **that does not apply an antidegradation standard**, but rather includes the following requirements for new line construction *[for the BPA]*:

“TBL will design each new line to meet an L50 Exceedance Level of 50dB(A) at the edge of the right-of-way (ROW). This is under typical conditions of foul weather, altitude, and system voltage.”¹²

To be clear, the BPA Memo reflects an agreement between Oregon and Washington for BPA to be compliance with these states’ regulations. BPA does not have authority over states and this agreement between those parties is not relevant to how Oregon’s Noise Control standards, in particular its anti-degradation standard, apply to the B2H project.¹³

¹⁰ ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02, page 7879 of 10016; Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6 p.38. STOP Response Brief p.11.

¹¹ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6 / Exhibit M, BPA, *Audible Noise Policy* (Oct. 2005), p.3.

¹² *Id.*

¹³ Further, if a comparison with BPA’s policy regarding the frequency of foul weather were applied, it still mischaracterizes the region and therefore inappropriate. BPA’s memo states that that foul weather occurring at 1% of the time or less (or 1-7% foul weather in the Steen’s EIS), would be considered a dry climate and that foul weather would be considered “infrequent.” As discussed above in finding #117, using Oregon’s standards, the analysis area for the B2H experienced foul weather 13% - 22% on average from 2008-2012. Therefore, the notion that “east of the cascades” experiences foul weather infrequently is merely a common stereotype and not a factual

STOP excepts to Finding of Fact #127 (PCCO p.80), to the extent that it claims that IPC's approach to estimating potential exceedances of the ambient antidegradation standard was *conservative*, and likely overestimated the frequency of actual exceedances. In fact, the evidence shows that IPC failed to consider numerous conditions which create corona noise, such as ice, fog, dew point in temperature, the higher noise during 'burn-in' periods or maintenance which will occur over the life of the project, and damage to the line. Moreover, IPC uses averages to their advantage and avoids applying Oregon's rules when they can get away with it. The facts found at #115, 117, 125, & 127 demonstrate that IPC's noise calculations and averaging methods were in fact self-serving **and anything-but conservative**.¹⁴ See STOP Closing pp. 8-16.

b. NC-1 Conclusion & Opinion Exceptions

The ALJ made several findings of fact and one conclusion of law related to Issue NC-1. See, PCCO pp.73-85 (findings), and p.140 (conclusion of law). The ALJ referenced this issue in her Opinion at pp.190-192. STOP takes exception to the findings, conclusion and opinion because they misread the Rules and approve of an unlawful Rule modification perpetrated by the Project Order.

In Finding #114, the ALJ recognized that “[i]n the Second Amended Project Order, the Department modified the requirements of OAR 345-021-0010(1)(x)(E) to accommodate the linear nature of the proposed facility;” PCCO p.74. In other words, the ALJ found that an agency Rule was modified/amended, to reduce the analysis area, **using** a Project Order. The rationale

finding.

¹⁴ The ALJ also erred in accepting the IPC claim that maximum voltage will rarely occur. See, PCCO p.80. If this was in fact true, it highlights that STOP's NEED issues under N-1 and N-3 should have been heard completely in this case (rather than tossed out on MSD) because there clearly were factual issues about true voltage and capacity need.

given was that this was to: “accommodate the linear nature of the proposed facility.” *Id.*

It is true that OAR 345-015-0160(3) says the Department may amend a project order, but the Rule does not and cannot provide authority to amend a Rule. The Rule requirement that ODOE modified was a mandatory (“must identify”) obligation. STOP Closing pp.3-5. On the face of the Rule, there is no discretionary language for modification for any purpose, let alone simply because a project happens to be very long. *Id.*

This modification matters because a number of Noise Sensitive Receptors (NSRs) were not identified in Exhibit X, meaning the list of names does not correlate with the list of property owners who may be impacted by noise pollution from the proposed B2H Facility. The ODOE Order should have required that IPC follow the law in its construction and operation of the B2H Facility, so that all NSR property owners within one mile were properly identified - per OAR 345-021-0010(1)(x)(E).

As noted by the ALJ, ODOE’s Project Order instead **amended** the Rule to only require identification of NSR’s with a ½ mile distance. However, Rulemaking, including amendments of an already adopted Rule, can **only** be done in compliance with the Oregon Administrative Procedures Act (APA) – specifically ORS 183.335. The requirements of ORS 183.335 were not followed by ODOE, when making the change in the Rule from 1 mile to ½ mile. Consequently, that change was not lawful.

The ALJ mistakenly approved the ODOE modification or amendment of OAR 345-021-0010(1)(x)(E), under the theory that another part of OAR 345-021-0010(1) somehow gave ODOE authority to modify Subparts (x)(E) of the Rule, when issuing a Project Order. *See*, PCCO pp.191-192 (citing “...including any appropriate modifications to applicable provisions of this rule...” language, and stating that “...the Council’s **rules** authorize the Department to

modify the provisions of OAR 345-021-0010(1)...”(emphasis added). This is the crux of the problem. Rules cannot lawfully authorize amendment of a Rule. Instead, ORS 183.335 is the controlling Oregon law on Rulemaking.

Neither ODOE or the Council have authority to authorize ODOE to amend a Rule, without complying with the APA. To the extent that Subpart (1) of OAR 345-021-0010 is read – as the ALJ suggests - to give ODOE the authority to **bypass the APA** and to amend other parts of the Rule any time it issues a Project Order, that portion of Subpart (1) is ultra vires and unlawful.

The legally proper way to read the language that ODOE/IPC & the ALJ focus on, is that it refers to lawful modifications of the Rule that have taken place as required by the APA, prior to a Project Order being issued. If, for example, in this instance ODOE had adopted a Temporary Rule under ORS 183.335(5) - finding that the linear nature of this project made identifying everyone within 1 mile to somehow create a “serious prejudice” to IPC and to the public interest - then once that Temporary Rule was adopted, the Project Order could take the modified rule into account. That is what the subsection (1) language pointed to by the ALJ **should** be construed to mean, in order to give the Rule meaning – but also to prevent the Rule from being an unlawful or ultra vires attempt to avoid compliance with the APA provisions on Rulemaking.

The change from 1 Mile to ½ Mile was an amendment to the existing Rule. That amendment was made via Project Order, not via Rulemaking - in the manner required by the APA. Thus, that amendment is not lawful. *See*, ORS 183.335(11)(a)(“... a rule is not valid unless adopted in substantial compliance with the provisions of this section...”).

To the extent that ODOE and the ALJ are contending that part of Subpart (1) of the Rule authorized ODOE to side step the APA Rulemaking requirements, then that part of (1) as it is

being applied in this proceeding is itself unlawful and ultra vires. For those reasons, STOP takes exception to the ALJ's reliance on and reading of language in an agency Rule to authorize non-APA compliant amendments or modifications to other parts of the Rule.

c. NC-2 Conclusion & Opinion Exceptions

The ALJ's discussion of NC-2 presents the opinion that "the Council has the authority to make findings and to approve a variance from (and/or exception to) the requirements of OAR 340-035-0035." PCCO pp.194-195. The ALJ posits that this is "common sense." PCCO p.194. To the contrary, common-sense dictates that **only** the agency actually authorized to implement a Rule, has authority to issue a variance under the Rule. For the reasons set forth in its Closing, STOP takes exception to this portion of the PCCO. *See*, STOP Closing pp.5-8.

As STOP has consistently pointed out, ORS Chapter 467 and OAR Chapter 340 are exclusively the purview of Oregon Department of Environmental Quality (DEQ) and Oregon Environmental Control Commission (EQC). ODOE and EFSC do not have authority to usurp the power of another agency, absent a statutory or regulatory delegation to ODOE/EFSC. *See*, STOP Closing pp.7-8. There is no evidence in the Record that IPC (or anyone) ever asked DEQ or EQC for a variance. For the reasons outlined in its Closing Arguments, STOP takes exception to this portion of the PCCO, as well as the Conclusion of Law on Issue NC-2 (called N-2 here) at PCCO p.140.

In addition to the issues surrounding which agency has authority to grant a variance, STOP takes exception to the holding that the B2H Project meets the conditions for a blanket variance along the entire project corridor. As STOP has outlined throughout this process, including in its Closing, this variance is not consistent with the statute. *See*, STOP Closing pp.8-9. The law was intended to protect Oregonians from industrial intrusions – inasmuch as any

pollution source threatens their health, safety and welfare. *See, e.g.*, ORS 467.010.

Additionally, ORS 467.060(3) states: “In determining whether or not a variance shall be granted, the commission or the department shall consider the equities involved and the advantages and disadvantages to residents and to the person conducting the activity for which the variance is sought.” *See*, STOP NC-2 F. Kreider Direct p.7. There are no Findings of Fact which reference this requirement of consideration of the equities of the citizens who live at NSR’s or the citizens of Oregon generally. The Findings and Conclusions in the PCCO instead discuss only Idaho Power’s side of the equation. This was error, as the statute expressly requires the equities on the side of the affected public to also be considered.

In an effort to find that balance, STOP suggested in its Direct Testimony and its Closing that compensatory mitigation be offered in the form of noise easements if necessary. *See*, STOP Closing pp.18-19. STOP takes exception to the PCCO to the extent that it does not consider the balance of equities as required in ORS 467.060(3).

Finally, the evidence shows that this project cannot comply with ORS 467.010 and OAR 340-035-0035. *See*, STOP Closing pp.5-20; STOP Response pp.5-36. Neither a variance, nor an Exception, can be issued by Council - even if hypothetically, the Council had the authority to issue such. While STOP offered mitigation suggestions under NC-4, they are merely a conditional protection for affected Oregonians in case EFSC does not protect them, by denying the site certificate—or at a minimum by denying the variance and exception to the protective noise control laws and rules.

The evidence and the law show that the facts surrounding exceedances and NSRs are such that any exception should be granted **only** on an NSR-by-NSR basis, not on a blanket facility wide basis. *See*, STOP Closing pp.16-17. Applying a facility-wide variance would not

comply with ORS 467.010, because it would not protect the health, safety and welfare of each of the separate NSR occupants. The variance states that exceedances are based on NSR-by-NSR monitoring. In order to preserve the protectiveness of any mitigation, that mitigation should follow the same NSR-by-NSR formula. STOP urges EFSC not to accept this Finding, or Conclusion of Law and return to the ALJ to revise consistent with ordinary conventions of administrative law.

d. NC-3 – Visual Impact Methodology

STOP takes exception to the ALJ's Conclusion of Law: Issue NC-3. PCCO p.140. The ALJ mistakenly concluded that Idaho Power's methodologies for evaluating compliance with OAR 340-035-0035 were appropriate. *Id.*

STOP also takes exception to the portion of the ALJ's Opinion where she concluded that the baseline ambient 32 dBA figure that IPC originally proposed (or the subsequent 31 dBA) "was reasonable and fairly representative." PCCO pp.200-201. The ALJ erred in approving the IPC methodology, and in allowing IPC to use a 31 dBA as the representative baseline.

The original allegedly representative Monitoring Point 11 (MP 11) was inappropriate influenced by loud train noise, on a frequent basis. *See*, STOP Closing pp.21-22 & STOP Response pp.20-22. The ALJ's conclusion and opinion to the contrary (PCCO p.200-201) ignores a host of key un rebutted pieces of evidence.

First, the conclusion ignores the un rebutted evidence that there are actually 25-35 trains **per day** in the MP 11 area. *See*, STOP Closing pp.21-22 (citing Cross Ex. Transcript, Day 1 – 1-10-22, p.152, where an email from Union Pacific Railroad confirming that 25-35 trains per day number was discussed). Second, the conclusion ignores the un rebutted live witness reports, which verified audible train sounds for **more than** 30 minutes on multiple occasions – which

demonstrates that IPC's assumption that the MP 11 results were not influenced by long periods of train noise is without rational foundation. *See*, STOP Surrebuttal Testimony of Fuji Kreider-Stop B2H Coalition Exhibit A – 103211 Surrebutal Report and Attachments pp.13-17.

Third, the conclusions ignore IPC's own tables on baseline noise levels¹⁵ which show that **all the other** Rural Counties have much lower dBA's than what the ALJ accepted for Union County, based on MP 11 data. *See*, STOP Closing p.10, n.19;¹⁶ and STOP Direct testimony, Exhibit 5, p.4 Table 1 (showing typical dBA's closer to the 22 dBA measured by STOP's expert in his spot check evening test at the Larkin residence). Fourth, the conclusions ignore the expert opinions provided by STOP's noise expert, both in written form and on Cross Examination. *See*, STOP Closing p.22 (citing Cross Ex. Transcript, Day 1 – 1-10-22, pp.146-150).

In reality, a preponderance of the evidence points to a representative dBA of ~22-24, and that is what the ALJ should have adopted as the baseline for the Morgan Lake area. It was error to accept the IPC proposed figure of 31 dBA.

e. NC-4: Mitigation/proposed site conditions

STOP takes exception to the ALJ's conclusion on Issue NC-4. PCCO pp.205-212. The proposed mitigation measures and the Recommended Noise Control Conditions (as amended in the PCCO) are still not sufficient to adequately protect the public health, safety, and welfare. STOP excepts both to some of the substantive proposed changes, and to the ALJ's seeming refusal to consider proposed Condition language submitted by STOP in its Response Argument.

¹⁵ Table NC-4 in Proposed Order: ODOE - B2HAPPDoc2-1 Proposed Order on ASC w Hyperlink Attachments 2019-07-02. pp.647-648.

¹⁶ Cross Examination Hearing Day 1 at pp.13-14 (Mr. Bastasch acknowledging baseline dBA readings in Umatilla County of 25, in Baker County of 24-27 dBA, & in Malheur County of 24-27 dBA).

f. Substantive Exceptions to Proposed Site Conditions

STOP takes exception to Amended Recommended Noise Control Condition 1(c)(iv): (Site-specific mitigation plans) (PCCO pp.205-207) to the extent that it omits a key option (purchase of a noise easement) that **all parties agreed** was an appropriate thing to include. STOP's most-recently submitted proposed Noise Control Condition 1 is attached as Exhibit A.

This option was recommended in timely manner by STOP and other petitioners in Direct testimony¹⁷ and in STOP's Closing. *See*, STOP Closing pp.18-19. Such an option was also something that both IPC & ODOE agreed made sense. They agreed that there should be a list of optional next steps, "to include but not [be] limited to" purchase of noise easement¹⁸ or payments in lieu of other mitigations.¹⁹

Given strong language in the statute in favor of protecting Oregonians' health, safety and welfare, and the possibility of complete variance to the noise control rules and standards, the mitigation plan must be as robust as possible – and all parties agreed that should include purchase options. *See*, STOP Closing p.18. Omission of this option from Noise Condition 1(c)(iv) is completely inappropriate. It was error, or significant oversight, for the ALJ to propose this condition without language that included this option.

STOP takes exception to Amended Recommended Noise Control Condition 2(a): (Complaint Process) to the extent that it does not require that the IPC Noise Complaint Response Plan is both approved by ODOE, and distributed to all NSR's, **before** construction is commenced. STOP further takes exception to Condition 2(a) to the extent that it is not

¹⁷ STOP Direct, Proposed Site Conditions, p.2.

¹⁸ ODOE Rebuttal Testimony, Declaration of Ken Kosky p.17.

¹⁹ IPC – Rebuttal Testimony, Mark Bastasch p.55.

consistent with the language in Condition 2(b)(2), which extends the protection of the condition to owners of NSR property “within one mile” of the site boundary. For reference, STOP’s most-recently submitted proposed Noise Control Condition 2 is attached as Exhibit B.

As to the first exception, as written, the condition would allow IPC to submit a proposed Plan, and then immediately begin construction. This would leave citizens who experience noise issues thereafter, without information about and without an agency approved process to follow to raise their concerns. The Condition should specify that **before** any construction is allowed, a Noise Complaint Response Plan is both approved by ODOE, and distributed to all NSR’s. The last sentence of Noise Control Condition 2(a) should be revised to read:

“In addition, prior to construction, the certificate holder shall develop and submit to the Department **for approval and once approval is obtained distribute to all NSR properties with one mile of the site boundary** an operational noise complaint response plan.”

As to the second exception, currently Condition 2(b) provides:

“b. The plan shall specify that it is intended to address complaints filed by persons falling into one of the following categories: (1) the owner of an NSR property identified in Noise Control Condition 1, and for whom has received mitigation under Noise Control Condition 1... or (2) **An owner of an NSR property within one mile of the site boundary** who was not identified under Noise Control Condition 1 ...”
PCCO p.207 (emphasis added)

Section 2(a) should be drafted to be consistent with Section 2(b). The one mile NSR property scope should, as outlined, be incorporated into (1)(a) as well.

STOP also takes exception to the proposed Amended Recommended Noise Control Condition 2(E)(iv) (PCCO p.209) to the extent that it does not include STOP’s proposed language mandating that the noise specialist also be agreeable to all parties involved in a noise dispute. All parties agreed that the credentialing described in the condition is necessary.²⁰

²⁰ ODOE Rebuttal to Direct Testimony, Evidence and Response to Proposed Site Certificate Conditions p.69;

STOP's suggested the amendment to this condition included language that required that the noise specialist should be agreeable to all the parties: NSR, ODOE and IPC. *See*, STOP Closing pp.19-20. Given that the point of the process described in the condition is to resolve a dispute, it seems perfectly logical that all parties must agree on the contractor as an initial step under Condition 2(e)(iv). The ALJ articulated no good reason for not including this language.

STOP further takes exception to the proposed Noise Control Condition 3 (PCCO p.211) to the extent that it merely adopts the Proposed Order (PO)²¹ language, and in so doing it ignores both of the STOP proposed changes to this Condition. STOP's most-recently submitted proposed Noise Control Condition 3 is attached as Exhibit C.

The ALJ notes that: "Neither the Department nor Idaho Power proposed revisions to Recommended Noise Condition 3." That is true. However, as the ALJ recognized, STOP B2H **has** proposed new language clarifying mitigation measures, and requiring that Idaho Power "inspect, monitor, and implement necessary maintenance throughout the operational life of the project." PCCO p.211.

STOP recommended two things. First, that the condition include the additional requirements that IPC's own expert, Mark Bastasch, suggested in his testimony. *See*, STOP Response p.20 (citing IPC – Rebuttal Testimony, Mark Bastasch p.43.). Second, that there be additional Noise **specific** Monitoring and technology updates required. *See*, STOP Response pp.32-33

STOP's first recommendation has been ignored or overlooked in the ALJ's opinion and

Written Rebuttal Testimony of Ken Kosky, response A35; & IPC - Rebuttal Testimony, Mark Bastasch p.48, n.136.

²¹ ODOE - B2HAPPDoc2-1 Proposed Order on ASC w/Hyperlink Attachments 2019-07-02, p.656; p.71.

order. The IPC expert specifically suggested that IPC **use materials that have been designed and tested specifically to minimize occurrence of corona sound** during project operations, and **larger conductors with subconductor spacing to limit audible noise and interference.**²²

Further, IPC should be required to **use conductors that have a “non-specular” finish**, which is a method of sandblasting to age the conductor artificially to make it less reflective. The sandblasting process also cleans the conductors of most of the manufacturing oils that would otherwise contribute to additional sound.²³ STOP specifically proposed that these requirements be added. *See*, STOP Closing p.20.

In STOP’s Response Brief (pp.32-33) STOP went further and provided the wording **with red additions**. Specifically STOP asked that the condition read:

Recommended Noise Control Condition 3 (CON-NC-01 **and OPR-NC-02**): During construction, the certificate holder shall implement the following design measures and construction techniques to minimize potential corona noise during operations; **and inspect, monitor, and implement necessary maintenance throughout the operational life of the project:**

- a. For 500 kV transmission lines, use a triple bundled conductor configuration.
- b. Maintain tension on all insulator assemblies to ensure positive contact between insulators.
- c. Protect conductor surface to minimize scratching or nicking; **and clean debris from all conductors (e.g.: bird feces, tree debris, and oil, grease and other maintenance contaminants that may be utilized.)**
- d. **Use conductors that have a “non-specular” finish on all conductors within a mile of an NSR.**
- e. **The certificate holder will monitor and inspect the line, conductors, and assemblies to determine, and conduct, required maintenance and cleaning necessary to adhere to the conditions set forth in the site certificate. The inspection will take place on a monitoring schedule that aligns with the OPUC required Utility Wildfire plans or more frequently as needed or specified by the Department. A monitoring and maintenance report will be sent to the Department after such monitoring inspection (and maintenance) occurs.**

²² IPC - Rebuttal Testimony, Mark Bastasch p.43.

²³ *Id.*

f. The certificate holder will upgrade and/or apply technologies as they become available to mitigate for corona noise (i.e.: sound masking) in collaboration with the Department and property owners affected by corona throughout the life of the project.

These proposed changes, which were consistent with the ODOE & IPC testimony, should not have been ignored by the ALJ.

STOP's second recommendation was for additional noise monitoring. Specifically, STOP asked that the condition require a system to "inspect, monitor, and implement necessary maintenance throughout the operational life of the project" for noise issues. PCCO p.211.

The ALJ's response was to claim that "these proposed revisions/additions are unnecessary" because other recommended conditions already require IPC "to inspect, monitor, and maintain the facility." *Id.* However, as outlined in the STOP Response Brief (pp.31-33) the "other" monitoring requirements are **not specific to noise**.

Noise Control Condition 3 should require a specific Monitoring Plan for noise control. Consistent with the testimony of IPC's own expert, the noise monitoring plan should also require periodic review (10 years) and IPC should be required to update any noise control measures as available noise masking or reduction technology improves. *See*, STOP Closing p.20 (citing Bastasch testimony); and STOP Response pp.31-33. This is also consistent with the agency Rule on monitoring of noise requirements. *See*, OAR 345-021-0010 (1)(x)(D).

STOP further takes exception to the proposed Noise Control Conditions 4 and 5, to the extent that in both Conditions the ALJ has attempted to define "foul weather" as **only** rain. *See*, PCCO pp.211-212 (defining foul weather as "... rain rate of 0.8 to 5 millimeters per hour"). As the PCCO acknowledges elsewhere, foul weather can and does include **more than just rain**. *See e.g.*, Fact #128, PCCO p.80 (finding that "foul weather" includes both "rain or high humidity"); Opinion footnote #216, PCCO p.197 (noting that "corona sound may occur in high

humidity conditions "); and Opinion p.201 (recognizing the STOP contends that “fog, snow, humidity, condensation” are among the things that can cause corona noise, and the IPC “has acknowledged that corona noise can result from other conditions.”).

Given that all of the parties’ noise experts concur that at least humidity, and likely also fog, ice and other factors, can cause exceedance of corona noise, and given the PCCO’s own findings about those same issues, it is inappropriate and not consistent with the evidence to limit the definition of “foul weather” in this noise condition to only “rain” events. Words matter here. This Condition will be in effect for 100 years. The Council needs to be sure the wording of the condition is not unduly limited.

Finally, as discussed under NC-2, STOP takes exception to the use of a variance, as the variance is non-compliant with ORS 467.010 - because the project does not meet the necessary conditions *See*, STOP Closing pp.8-9 (citing STOP Direct NC2 Kreider pp.3-5 including Exhibit #4). **A blanket increase of 10 dBA (a doubling of sound) across 300 miles of Oregon is simply unacceptable.**

Moreover, as already outlined already, ODOE and EFSC do not have authority to grant such a variance. EFSC should **deny any variance** to Oregon’s noise control laws and regulations. If some exceedances are predicted, and/or occur, there could be exceptions specifically for those NSRs, per the noise control regulations²⁴, and appropriate mitigations designed with that NSR owner²⁵, and approved by the Department.

²⁴ OAR 340-035-0035 and NCPS-1.

²⁵ Per site-specific mitigation plans, under Noise Control Condition 1 and 2.

iii. *Scenic Resources (SR-7)*

a. *Substantive Exceptions Related to SR-7*

STOP repeatedly presented evidence and legal arguments regarding IPC's in-house developed unique and never peer reviewed scenic resource impact methodology. STOP noted that even though no particular methodology was required for scenic resource impact analysis, a methodology – rather than an amalgamation of self-serving portions of established (or, outdated) methodologies – is required. *See*, STOP Closing pp.21-24 and STOP Response Brief pp.33-35.

STOP takes exception to the Opinion, as well as a number of Findings of Fact, and the Conclusion of Law for SR-7. Additionally, STOP incorporates Lois Barry's Exceptions to Findings, Conclusions, and Opinion regarding visual impact assessment on SR-6, because those also apply to SR-7, as both issues challenge visual impact assessment.

STOP takes exception to the Findings of Fact related to Scenic Resources broadly, to the extent that any impact "on the affected human population" has been omitted. This phrase appears in OAR 345-001-0010(52), the definition of "significant" in the context of impacts, but neither the findings related to Scenic Resources, nor the Conclusion of Law, nor the Opinion contain any discussion on the impacts **to the affected human population**. Instead, IPC has merely made assumptions about viewer sensitivity, without actually assessing the significance of real subjective impacts.

Those assumptions and their qualitative ratings were created and evaluated solely by IPC's attorney and their consultant²⁶ after being required to respond to repeated requests from ODOE to address the Council's definition of significant and how it affects IPC's (mistaken)

²⁶ STOP Closing p.21 and Cross Examination Transcript, Hearing Day 6 (Louise Kling) pp.117-118 (acknowledging that IPC's in-house-developed methodology was not peer reviewed).

conclusion of no significant impact. For the reasons outlined in STOP’s Closing IPC’s chosen approach was improper. *See*, STOP Closing pp.21-23.

Finding of Fact #199 (PCCO p.104) notes that “Idaho Power’s methodology for assessing impact to visual resources incorporated the BLM visual ‘sensitivity level’ criterion and the USFS visual ‘concern’ criterion, both of which measure the degree to which viewers subjectively value a visual resource.” This is not factually correct. The evidence was clear that some, but not all, of the parts of the BLM and USFS methodologies were incorporated.

Specifically, there are key parts for establishing the baseline²⁷ for “Scenic Quality and Attractiveness” and “Landscape Character” (two components of the first baseline step in the three step IPC methodology.)²⁸ Yet in establishing baseline, IPC fails completely to mention a key factor - *viewer sensitivity*.²⁹ The USFS’ baseline methods rely on “Landscape Character” which also has no visual *concern* if one reads the details.³⁰ The final component part of the baseline assessment implies some measure of effects to human populations, as it is called “Viewer Groups and Characteristics.” However, when you look under the hood, one only finds viewer: location, geometry, and duration/exposure;³¹ not viewers’ **subjective value or experience**.

²⁷ ODOE - B2HAPPD0c3-35 ASC 18_Exhibit R_Scenic Resources_ASC 2018-09-28. p.147(“BLM... Visual values are established through the visual resource inventory (VRI) process, which classifies scenery based on the assessment of three components: scenic quality, **visual sensitivity**, and distance.” And “USFS describes baseline condition in a similar manner; however baseline components include measures of scenic attractiveness and integrity, landscape visibility (i.e., distance zones), and **concern level (i.e., sensitivity)**”).

²⁸ ODOE - B2HAPPD0c3-35 ASC 18_Exhibit R_Scenic Resources_ASC 2018-09-28. p.146.

²⁹ *Id.* pp.147-149.

³⁰ *Id.* pp.149-150.

³¹ ODOE - B2HAPPD0c3-35 ASC 18_Exhibit R_Scenic Resources_ASC 2018-09-28. p.150.

In Finding of Fact #201 (PCCO p.105) the ALJ asserts that “Idaho Power conservatively assumed the highest possible degree of sensitivity and subjective value for each **resource evaluated.**” (emphasis added). In ASC Exhibit R Attachment R-1, Idaho Power explained:

Viewer groups associated with each resource were evaluated to understand certain characteristics that inform the extent to which potential changes in landscape character and quality would be perceived (perception of change). *This assessment assumes a high sensitivity exists among all viewer groups based on the identification of the resource as important in a planning document. Therefore, this assessment instead focuses on understanding characteristics that describe the relationship of the observer to the potential impact, and the landscape context of that relationship.* Viewer characteristics assessed included viewer location (distance), viewer geometry (superior, inferior, or at grade), and viewer duration or exposure (BLM 1986). The landscape context included consideration of landscape type – i.e., focal or panoramic.³² (emphasis added)

The ALJ misses the point in her “finding.” The implication of IPC’s use of the words “high sensitivity” is that this alone means that the model is taking into consideration “significance and affects to the human population”.³³ But that is not the reality. While it is true that IPC’s newly created approach “assumes a high sensitivity among all viewer groups,” there is nothing in evidence beyond this repeated assertion to demonstrate *how* (or even *if*) impacts to views of scenic resources are being measured.

If one examines the methodology closely the high viewer sensitivity is not being measured, rather it’s the distance, geometry and duration that are being measured. The subsequent “Finding of Fact #202” further illuminates the issue. The ALJ outlines the model and describes what is being measured or assessed at each step in the three-part process. PCCO pp.105-107. In a nutshell: (1) In the evaluation of **baseline conditions**, existing landscape characteristics and qualities are described and/or ranked. However, although the title of sub-part

³² ODOE - B2HAPPDoc3-35 ASC 18_Exhibit R_Scenic Resources_ASC 2018-09-28, p.150. (emphasis added.)

³³ OAR 345-001-0010(52).

c. is: “Viewer group and characteristics” the actual description is not viewer subjective impacts. Instead it is at its heart a description of where someone is standing or looking. The key part reads:

“Viewer characteristics [of the supposedly “highly sensitive viewers”] assessed included viewer location (distance), viewer geometry (superior, inferior, or at grade), and viewer duration or exposure (BLM 1986). The landscape context included consideration of landscape type—i.e., focal or panoramic.”³⁴

In short, the “highly sensitive viewers’ characteristics are all being measured **in terms of location**, not in terms of the “significance” of the impacts.

In the second part of the IPC process “(2) Impact likelihood...”, there are four sub-parts with the last one being germane to this discussion. That is subpart “d. Magnitude of impact – resource change and viewer perception.” PCCO p.106. Here, resource change is determined by physical change (ie: a tower, a road cut that wasn’t there before; and determined by the IPC consultant); and “viewer perception” is not about how someone subjectively experiences or perceives the change³⁵, but rather “Idaho Power assessed viewer perception as low, medium or high based on **the location** of the viewer relative to the potential medium to high magnitude impact.” *See* Kling Rebuttal p.45 (emphasis added).

In the third part of the IPC methodology, “(3) Consideration of intensity, causation, and context (based upon Council’s definition of “significant” OAR 345-001-0010(52))” there are three sub-parts. PCCO p.106. The sub-section germane to this discussion is “a. Impact intensity,” which is a determination of significance based on a two-factor variable comparison:

³⁴ ODOE - B2HAPPD0c3-35 ASC 18_Exhibit R_Scenic Resources_ASC 2018-09-28. p.10.

³⁵ STOP B2H SR-7 Lois Barry Direct Testimony, pp.1-2; ODOE - B2HAPPD0c3-35 ASC 18_Exhibit R_Scenic Resources_ASC 2018-09-28. p.147.

resource change and viewer perception. Again, and at risk of redundancy, there is not an assessment of Oregonians subjective perceptions in the context of affected impacts to human populations. It is simply a measure of the **resource change** due to the project and where the **viewer happens to be looking** at it. STOP, along with others (including Ms. Barry) have repeatedly attempted to point out these important distinctions.³⁶

There has been a perennial debate over the course of the case (from the pASC, ASC, DPO, PO, discovery, MSD, testimony, cross examination, closing and response), regarding this visual impact assessment methodology which IPC created and then used. There has been broad confusion and disagreements about: which methodologies and which versions of methodologies are being applied, what the terms and definitions of the jargon used by various agencies vs common language mean, and what conclusions are reached (i.e.: no significant impacts) after the consultant and attorney completed *their* subjective scoring.

In her Opinion, the ALJ leans on this supposed “sensitivity,” as opposed to actual subjective viewer interpretation. PCCO p.256. As STOP outlined in its closing arguments, this is error because IPC used in part an outdated USFS methodology combined with portions of a BLM manual. No complete, cohesive methodology to analyze visual resource impacts was provided.

Furthermore, STOP takes exception to the Opinion on SR-7 (PCCO p 255) where the ALJ agrees with IPC’s ludicrous claim that they cannot apply the USFS updated “SMS methodology under the Council’s standards, because the Department specifically requested that the Company use a methodology that applied the Council’s definition of “significance. In fact, the current (1995) SMS methodology, including Chapter 3 Constituent Information, comes the

³⁶ See STOP Direct SR7 Barry pp 1-3, Closing pp.21-24, Response pp.33-35

closest to any approach used in IPC’s hybridized methodology to assessing the “effects on the human population.” The SMS approach would assess the expectations, desires, preferences, acceptable levels of quality, behaviors and values.³⁷ *See*, STOP Closing p.22 (“The experience of being ‘on the trails’ and re-tracing the steps of the pioneers is not something measured by a stationary KOP. The human population was not studied to determine the ‘impact on the affected human population.’”).

This type of assessment (the SMS) has been embraced as best practices³⁸ and STOP believes would satisfy the Council’s definition of significance. In addition, STOP excepts the ALJ’s opinion that “because Idaho Power attached the highest viewer sensitivity value to all of the resources evaluated, data collection on viewers’ subjective evaluations is unnecessary.” PCCO p.256. First, note that the ALJ correctly stated that IPC looks at “resources evaluated.” That is very different from viewer **perception** of impacts.

Second, within the model the use of the “high user sensitivity” appears in two ways: 1) it is an assumption “based on the identification of the resource as important in a planning document.”³⁹ 2) It is an obscure variable within the Viewer Groups (under baseline) and Magnitude of Impact (in Step 2, viewer perception).⁴⁰ However, again under deeper scrutiny the

³⁷ ODOE - B2HAPPDoc3-35 ASC 18_Exhibit R_Scenic Resources_ASC 2018-09-28 p.144 (USFS 1995 SMS).

³⁸ Lois Barry Exhibit 7 to Direct Testimony, R-4 (Changes and challenges in USDA Forest Service Scenic Resource Management under the 2012 Forest Planning Rule, Nancy A. Brunswick, Regional Landscape Architect, USDA Forest Service Visual Resource Stewardship Conference Proceedings GTR-NRS-P-183); *see also*, Best Management Practices for Reducing Visual Impacts of Renewable Energy Facilities on BLM-Administered Lands, First Edition, December 2013; Guide To Evaluating Visual Impact Assessments for Renewable Energy Projects, Robert Sullivan and Mark Meyer, Natural Resource Report NPS/ARD/NRR—2014/836.

³⁹ ODOE - B2HAPPDoc3-35 ASC 18_Exhibit R_Scenic Resources_ASC 2018-09-28. p.150.

⁴⁰ ODOE - B2HAPPDoc3-35 ASC 18_Exhibit R_Scenic Resources_ASC 2018-09-28. pp.10-11, 146-157

viewer perceptions are still being measured merely by distance, angles, duration, etc. In short, even if one claims to “assume” that all viewers are “highly sensitive” that assumption is pointless unless it applied or measured in the analysis in a way that takes into account the significance or subjective impacts of the proposed power line on viewers.

IPC’s newly created methodology for visual impact assessment was created and conducted solely by IPC’s consultant and their attorney. Their qualitative (therefore, necessarily subjective) assessment and ratings do not meet the requirements of OAR 345-022-0080, or OAR 345-022-0040 in light of the definition of “significance” in OAR 345-001-0010(52). The impacts to “affected human population,” are solely and subjectively those of the developers. In short, the weight of the evidence, as well as the law, is in STOP’s favor on this point. *See*, STOP Closing pp.21-24 and STOP Response pp.33-35.

b. Site Conditions and Mitigation Exceptions Under SR 7

In discussing proposed site conditions for SR-7, the ALJ concluded that:

“[i]n its Closing Argument on Issue SR-7, STOP B2H proposes a site certificate condition requiring Idaho Power to underground the transmission line for 1.7 miles in the area the NHOTIC as a mitigation measure to ensure compliance with the Scenic Resources standard. Because STOP B2H did not submit this proposed condition in accordance with the set schedule, it is untimely. Moreover, even if STOP B2H had submitted this proposal in a timely fashion, it is neither necessary nor appropriate. As discussed above in connection with Issue SR-2, the Council lacks jurisdiction to require Idaho Power to underground the project segment near the NHOTIC. Consequently, this proposed site certificate condition is denied.”

PCCO p.257. As previously outlined, STOP’s submission was in no way untimely, any more than ODOE’s and IPC’s were. For reference, STOP’s most-recently submitted proposed site condition for SR-7 is attached as Exhibit D. This site condition, while not in the ASC, is appropriate for Council consideration given that IPC provided an engineering report and their study concluded that the costs would be very high. PCCO p.251, n.338. IPC’s witness on this matter, Dennis Johnson of POWER Engineers stated during cross-examination that from a

technical perspective and “from a constructability perspective, “yes, we could build such a line.”⁴¹ Mr. Johnson also explained how in his assessment he changed the distance from 1.5 to 1.7 miles because he saw another way to route the undergrounding which would better hide the terminal of the line.⁴²

Considering the outpouring of public outcry about the NHOTIC’s viewshed, this mitigation measure cries out for Council consideration. Costs will be bore by ratepayers, not the company. Cost is also not a consideration under the Council’s review standards but protecting scenic resources and protected areas is required; therefore, no mitigation measure should be completely off the table, particularly one that IPC’s own witness acknowledged is buildable.⁴³

As discussed, the assertion that STOP’s proposed site condition was “untimely” is not accurate. The ALJ’s approach unfairly limited STOP’s ability to participate in the ongoing back-and-forth exchange between the parties on language of site conditions that was sustained throughout the closing argument and response briefing phase. OAR 345-015-0085(2) is clear that “any party or limited party may present evidence relating to the appropriateness, scope or wording of any other party’s proposed site certificate conditions and may present written proposed findings of fact, briefs and other argument concerning proposed conditions.” EFSC should remand with instructions to consider all positions presented on site certificate condition responses related to SR-7, including STOP’s Recommended Scenic Resource Condition 3 (and all other matters on which conditions were presented but not considered). *See generally*, Exhibit D.

⁴¹ Cross Examination Hearing Day 6 (Dennis Johnson) p.19 (acknowledging that IPC could bury the line.)

⁴² *Id.*, p.16 (describing the more hidden terminus.)

⁴³ *Id.*

Finally, the ALJ wrongly asserted that EFSC “does not have jurisdiction to require Idaho Power to underground the project segment near the NHOTIC.” PCCO p.257. In the face of what has been argued to be rather broad siting jurisdiction otherwise, it is confounding that EFSC would lack jurisdiction to propose mitigation simply because it is something an applicant for a site certificate found undesirable. Limiting jurisdiction based on a regulated entity’s wishes would be akin to artificially narrowing the “purpose and need” statement in a NEPA matter, wherein the government’s duty is “not to consider an infinite range of alternatives, only reasonable or feasible ones.” *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F3d 1142, 1155 (9th Cir 1997) *citing* 40 CFR § 1502.14(a)-(c).

Here, as STOP has discussed, the evidence shows that IPC’s own witness viewed undergrounding as feasible (or “constructable” or “buildable” in his own words). STOP does not seek an unreasonable range of mitigation options, merely fair consideration of alternatives that would lead to compliance with the relevant subsections of OAR 345-021-0010 regarding impacts to visual resources. There is no reason why EFSC would lack jurisdiction to implement undergrounding as a mitigating site condition—where appropriate—to limit significant impacts to visual resources.

iv. Soil Protection (SP-1)

As noted previously, STOP incorporates the exceptions outlined by Dr. Suzanne Fouty on this issue, and adopts those exceptions as its own.

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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

Karl G. Anuta
Law Office of Karl G. Anuta
735 SW 1st Ave, 2nd Floor
Portland, OR 97204
(503) 827-0320
kga@integra.net

Mike J. Sargetakis
Law Office of Mike Sargetakis, LLC
735 SW 1st Ave, 2nd Floor
Portland, OR 97204
(971) 808-1495
mike@sargetakis.com
Attorneys for STOP B2H Coalition

Noise Control

Recommended Noise Control Condition 1:

STOP's proposed version of Noise Control Condition 1 has been modified below for several purposes [addressed in Response pp 23-24], including to place the burden on the applicant, who will be creating the new industrial noise source; and to clarify and enhance and make more transparent the process around pre- and post-construction complaints and mitigation. (p. 24 STOP Response Brief)

Much of the Amended Noise Control Condition 1 is consistent with ODOE's latest Amended Noise Control Condition 1, with some exceptions.

- STOP has added detail to the Notice requirement to ensure that complaints from NSR property owners are aware of the procedural requirements for pursuing a complaint; and,
- Some specific remedies suggested by ODOE were removed, because they could be read to limit remedies for exceedances in any given range. STOP seeks to preserve flexibility and have remedies proscribed on a case-by-case basis. (p. 26 STOP Response Brief)

Amended Recommended Noise Control Condition 1:

“PRE-NC-01” phase:

- a. Prior to construction ALL NSRs within 1 mile of the facility will be notified in writing that they may be an impacted NSR and they will be informed of the mitigation process and of the complaint process.
- b. The notice will include:
 - i. The parameters of the mitigation and who is eligible.
 - ii. A list of mitigation options: to include but not limited to, IPC's suggested window treatments, home retrofits, air-sealing residences, outdoor plantings, and the purchase of noise easement or payments in lieu of other mitigations.
 - iii. It should be stated that the above list is “illustrative” and will likely change with technological advances in the future
 - iv. A description of the complaint process, including how to file a complaint, the necessary technical information, the ODOE/EFSC contact, and the certificate holder's contact information.
- c. Prior to construction, the certificate holder will ~~work~~ initiate discussions with the 41 NSR property owners identified in Attachment X-5 of the Final Order on the ASC (NSR: 8, 9, 10, 11, 5002, 69, 70, 5004, 46, 119, 121, 125, 5010, 5011, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 518, 111, 112, 133, 5008, 5009, 113, and 115) to develop mutually agreed upon Noise Exceedance Mitigation Plans, specific to each NSR location. The site-specific Noise Exceedance Mitigation Plans will include agreed upon measures that would

be implemented at the NSR location to minimize or mitigate the ambient antidegradation standard noise exceedance.

d.¹ ~~a.~~ If the certificate holder ~~executes an agreement with~~ and the NSR property owner agree upon a specific Noise Mitigation Plan, the certificate holder will submit a signed acknowledgement from the property owner to the Department for its records.

e. ~~b.~~ If an agreement between certificate holder and NSR property owner is not obtained, the certificate holder shall concurrently notify the Department and NSR property owner of the dispute and of Council review of the dispute to occur at a minimum of 30 days or the next regularly scheduled Council meeting, to the extent possible, from the date of the certificate holder's notice. The notice shall explain that the NSR property owner will be given an opportunity to provide comments to Council on the dispute, unless the Council Chair defers the dispute review to the Department. If this review is deferred to the Department, ~~appeals would be taken to EFSC~~. Review of the dispute will be based on the information per sub(i) below, and any other relevant facts provided by the NSR property owner and will result in a determination of the appropriate mitigation measure(s), proportional to the facility operational noise levels in excess of the ambient degradation standard, as determined to occur at the NSR property. The Council or Department's determination of appropriate mitigation is not binding on the NSR property owner or certificate holder if the NSR property owner opts not to accept the mitigation.

i. At the time of issuance of the notice per (b) above, certificate holder will submit to the Department:

- (1) the mitigation measures it offered the NSR property owner, the mitigation measures that the NSR property owner requested and an explanation of the dispute;
- (2) a list of the dates that the certificate holder communicated with, or attempted to communicate with, the NSR property owners; and (3) the names, addresses, and phone numbers of the NSR owners.

f. ~~e.~~ In working with NSR property owners under this condition, the certificate holder will review and discuss various options for mitigation, ~~including those listed under (b) above~~.

~~• For NSRs where an 11 to 14 dBA sound level increase above ambient noise levels are expected, certificate holder will purchase and install sound attenuating windows with an STC rating of 25-40.~~

~~• For NSRs where a 15 dBA or greater sound level increase is expected, certificate holder will purchase and install sound attenuating windows with an STC rating of above 40.~~

~~• If an owner of an NSR where an 11 dBA or greater sound level increase is expected provides a letter from a health care provider indicating that health care provider's belief that the owner has a health condition that is exacerbated by increased sound levels, upon~~

¹ Sections (d) and (e) are essentially the same as ODOE proposed changes to this Site Condition.

~~request, certificate holder will purchase and install sound attenuating windows with an STC rating of over 40 and would work with the NSR property owner to consider other mitigation options, as appropriate.~~

~~• At the request of an NSR property owner, certificate holder will offer alternative mitigation proposals, such as performing air sealing of the NSR residence, planting trees, or installing insulation.~~

~~g. d.~~ Prior to operation, the certificate holder will implement the mitigation measures agreed upon with the NSR property owners and/or as determined by EFSC to be the appropriate mitigation measures.

Noise Control

Recommended Noise Control Condition 2:

Similar to STOP's recommendations under Noise Control Condition 1, Condition 2 is set forth with the belief that the notification process needs to maintain the highest level of accessibility and transparency *before* construction begins. STOP has used ODOE's now proposed Noise Condition 2 as the base template, and has suggested changes to that form of the condition. (*STOP Response Brief p. 27*)

Some specific justification for proposed amendments follows:

- The one-mile condition under "b" was removed because it is not relevant how far away the NSR is from the noise source. A person should be able to file a complaint about corona noise, even if they are not a previously-identified NSR with predicted exceedances.
- Under "e. iii." "monitor" was added, because the collection of noise data is "monitoring," as opposed to "modeling," which is using data already collected to forecast possible outcomes.
- Under "e. iv." STOP merely aims to correct what IPC and ODOE agreed to previously, i.e., that the contractor should be *approved* by ODOE; this is particularly important if IPC and the complainant cannot come to an agreement on a licensed contractor to collect sound data.
- STOP supports ODOE's amendment which keeps the burden of the cost of noise monitoring on the developer whose project is emitting the noise.
- STOP recommends retaining one of ODOE's proposed amendments from its Rebuttal Testimony (at p. 69) regarding the application of the EFSC enforcement program rules, to retain consistency with other site conditions and remedies.
- The remaining edits are an effort to connect Condition 2 with applicable parts of Condition 1, and maintain internal consistency.

Amended Recommended Noise Control Condition 2:

a. Prior to construction, the certificate holder shall develop and submit to the Department an operational noise complaint response plan, **that discusses the information necessary to support a complainant's complaint, what corona noise and corona noise levels and effects are, and provides a process to verify actual noise levels of events resulting in complaints. The plan will be noticed to all NSRs per NC Condition 1 "PRE-NC-01".**

b. Under this plan, it shall be specified that the plan is intended to address complaints filed by persons falling into one of the following categories: (1) the owner of an NSR property identified in Noise Control Condition 1, and for whom has received mitigation under Noise Control Condition 1, but who believes that exceedances (as measured at their NSR property) are occurring in a manner not

otherwise allowed under Noise Control Condition 4 or Noise Control Condition 5; or
(2) An owner of an NSR property ~~within one mile of the site boundary~~ who was not identified under Noise Control Condition 1 and who has not received mitigation from the certificate holder, but who nevertheless believes that exceedances above the ambient degradation standard have occurred at their NSR property.

c. The plan shall include the following: Scope of the complaint response plan, including process for complaint filing, receipt, review and response. The scope shall clearly describe how affected persons will be provided necessary information for filing a complaint, ~~and~~ receiving a response, ~~and the process for reaching a resolution of the complaint.~~

d. The plan shall require that the certificate holder notify the Department within three working days of receiving a noise complaint related to the facility. The notification shall include the date the certificate holder received the complaint, the nature of the complaint, weather conditions of the date for which the complaint is based (including wind speed, temperature, relative humidity, and precipitation) as described by the complainant, duration of perceived noise issue, the complainant's contact information, the location of the affected property, and a schedule of any actions taken or planned to be taken by the certificate holder (including inspection and maintenance actions, or actions taken or planned to be taken pursuant to the processes described in subsection e of this condition).

e. The plan shall identify the following process if a noise complaint is received:

i. The certificate holder shall assess possible causes of the corona noise. If the complaint is received within the first 12 months of operation, the certificate holder will assess whether the corona noise is typical of noise that occurs during the transmission line "burn in period" (the first 12 months of operation) and ensure that it has taken appropriate measures near that NSR to minimize corona noise that may occur during the burn in period (e.g., use conductors with a nonspecular finish/sandblasting of conductors to make them less effective and clean them of manufacturing oils, protect the conductors to minimize scratching and nicking during construction).

ii. If it is determined the corona noise is not typical burn in period noise, the certificate holder will assess whether the noise exceeds the ambient antidegradation standard in a manner not otherwise allowed under Noise Control Condition 4 or Noise Control Condition 5. If the complainant's noise sensitive property or properties are included in Attachment X-5 of the Final Order on the ASC, the modeled sound level increases as presented in Attachment X-4 of the Final Order on the ASC may be relied upon to determine whether the corona noise exceeds the ambient antidegradation standard, unless the complainant voluntarily provides alternative noise data.

iii. If the complainant's NSR property or properties are not included in

Attachment X-5 of the Final Order on the ASC, the certificate holder shall **monitor and** model the sound level increases using the methods set forth in ASC Exhibit X, unless the complainant voluntarily provides alternative noise data.

iv. If the complainant voluntarily provides alternative noise data and it suggests an exceedance that had not previously been identified and mitigated, and/or an exceedance not otherwise allowed under Noise Control Condition 4 or Noise Control Condition 5, the complaint shall be verified through site specific sound monitoring conducted by an Oregon registered Professional Engineer, Board Certified by the Institute of Noise Control Engineering noise specialist, employed or contracted by the certificate holder, in accordance with NPCS-1 ~~unless otherwise and if~~ approved by the Department. If site specific sound monitoring is not authorized by the complainant, the certificate holder's modeling results may be relied upon to determine compliance.

v. In the event of a dispute regarding complainant's noise data and the certificate holder's data from site specific sound monitoring, certificate holder shall request that EFSC, in consultation with the Department's noise consultant, if necessary, make the final determination regarding which data will be used to determine whether corona noise exceeds the ambient antidegradation standard and/or in a manner not allowed under Noise Control Condition 4 or Noise Control Condition 5. The EFSC Chair may direct the Department to make this determination, **but if there has been a delegation, the Departments decision can still be appealed to EFSC.**

f. The plan shall specify that if it is determined pursuant to the process described in subsection e. of this condition that corona noise at the complainant's NSR property exceeds the ambient antidegradation standard in a manner not allowed under Noise Control Condition 4 or Noise Control Condition 5, and/or exceeds the ambient antidegradation standard at an NSR property that had not previously been predicted to experience exceedances under Noise Control Condition 1, the certificate holder **will be considered to be in violation of the site certificate and subject to the Council enforcement program rules in OAR 345 Division 29, until the certificate holder and the NSR property owner develops a mutually agreed upon mitigation plan to include agreed upon measures that would be implemented at the NSR location to minimize or mitigate the ambient antidegradation standard noise exceedance.**

i. If the NSR property was identified in Noise Control Condition 1 and has previously received mitigation by the certificate holder, and if it has been determined that the NSR property experiences exceedances not allowed under Noise Control Condition 4 or Noise Control Condition 5, the certificate holder will work with the complainant to identify supplemental mitigation measures, which may include any of the measures discussed in the ASC, **in Condition 1 of site certificate,** or other measures requested by the complainant.

ii. If the NSR property was not identified in Noise Control Condition 1 and has not been provided with mitigation by the certificate holder, certificate holder will work with the NSR property owner to identify appropriate mitigation measures, which may include any of the measures discussed in the ASC, **in Condition 1 of site certificate (per above)**, or other measures requested by the landowner.

iii. If, through the efforts described above, the certificate holder executes an agreement with the NSR property owner, the certificate holder will submit a signed acknowledgement from the property owner to the Department for its records. If an agreement between certificate holder and NSR property owner is not obtained, the certificate holder shall concurrently notify the Department and NSR property owner of the dispute and of Council review of the dispute to occur **in 30 days** or at the next regularly scheduled Council meeting, whichever is later, to the extent possible, from the date of the certificate holder's notice. The notice shall explain that the NSR property owner will be given an opportunity to provide comments to Council on the dispute, unless Council defers the dispute review to the Department, **in which case the Council remains as an appellate body**. Review of the dispute will be based on the information per **sub(a) sub(d) above and iv.** below and any other relevant facts provided by the NSR property owner and will result in a determination of the appropriate mitigation measure(s), proportional to the facility operational noise levels in excess of the ambient degradation standard, as determined to occur at the NSR property. The Council or Department's determination of appropriate mitigation is not binding on the NSR property owner or certificate holder if NSR property owner opts not to accept the mitigation.

iv. At the time of issuance of the notice per (iii) above, certificate holder will submit to the Department: (1) the mitigation measures it offered the NSR property owner, the mitigation measures that the NSR property owner requested and an explanation of the dispute; (2) a list of the dates that the certificate holder communicated with, or attempted to communicate with, the NSR property owners; and (3) the names, addresses, and phone numbers of the NSR owners.

~~g. The certificate holder shall provide necessary information to the complainant to support understanding of corona noise, corona noise levels and effects, and of the process to verify actual noise levels of events resulting in complaints.~~ If the complainant opts not to authorize the certificate holder to conduct monitoring, and it is otherwise determined pursuant to the process described in subsection e of this condition that corona noise does not exceed the ambient antidegradation standard, the noise complaint shall be considered fully resolved and no mitigation shall be required.

Noise Control

Recommended Noise Control Condition 3:

Given the current best available technology, and testimony of IPC experts, these specifications are not enough on their own to comply with the statutes and adequately protect public health. Further, because this project is projected to have a 100-year lifespan, and there is currently no technology available to sufficiently mask corona noise, conditions should be added which will require regular inspections to assure proper maintenance, and to preserve opportunities to update these conditions if technology is developed in the future which can more completely address the remaining issues with IPC's proposed design.

STOP proposes the following additions in red, to strengthen the proposed conditions. The primary issue STOP sought to remedy in its additional language for Amended Noise Control Condition 3 relates to the lack of a Monitoring Plan for noise control.¹ Specifically, the changes are:

- STOP added language to ensure that IPC's stated mitigation measures would be implemented, but that mitigation would not be limited to exclusively those measures, as technology changes and other options become available; and,
- One condition was added to require periodic review and updates to available technology for mitigation. (*STOP Response Brief, pp. 31-33*)

Amended Recommended Noise Control Condition 3: (CON-NC-01 and OPR-NC-02)

During construction, the certificate holder shall implement the following design measures and construction techniques to minimize potential corona noise during operations; **and inspect, monitor, and implement necessary maintenance throughout the operational life of the project:**

- a. For 500 kV transmission lines, use a triple bundled conductor configuration.
- b. Maintain tension on all insulator assemblies to ensure positive contact between insulators.
- c. Protect conductor surface to minimize scratching or nicking; **and clean debris from all conductors (e.g.: bird feces, tree debris, and oil, grease and other maintenance contaminants that may be utilized.)**
- d. **Use conductors that have a "non-specular" finish on all conductors within a mile of an NSR.**
- e. **The certificate holder will monitor and inspect the line, conductors, and assemblies to determine, and conduct, required maintenance and cleaning necessary to adhere to the conditions set forth in the site certificate. The inspection will take place on a monitoring schedule that aligns with the OPUC required Utility Wildfire plans or more frequently as**

¹ See ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02 p. 656

needed or specified by the Department. A monitoring and maintenance report will be sent to the Department after such monitoring inspection (and maintenance) occurs.

- f. The certificate holder will upgrade and/or apply technologies as they become available to mitigate for corona noise (i.e.: sound masking) in collaboration with the Department and property owners affected by corona throughout the life of the project.

STOP recommends additional language to Condition 3 or a new NC Condition OPR-NC-XX:

- a. Prior to operation, the certificate holder will develop a monitoring plan to collect data and assess the corona noise at key NSRs on a periodic basis for the life of the project. The plan will be approved by Council.
- b. During operation, the certificate holder shall monitor for corona noise at key NSRs, on a periodic and/or rotating basis (based on the approved plan) and submit all data to the Department. The certificate holder will also report any changes or maintenance activities that have occurred to the Department per the schedule set forth in the approved plan.
- c. In addition, before the end of each 10 year period of operation, the certificate holder shall complete an assessment of available new technology to further reduce corona or other noise from operations, and shall deliver that assessment to the Department. The Department shall review that assessment, within 90 days of its receipt, and shall provide directions to the certificate holder as to which new technologies the certificate holder needs to adopt and implement during the following 10 year period.

Recommended Scenic Resource Condition 3

IPC's analysis and newest proposed site conditions do not sufficiently protect against significant adverse impacts to irreplaceable visual resources along the National Historic Oregon Trail. Of particular significance are the scenic resources within and surrounding the National Historic Oregon Trail Interpretive Center (NHOTIC). Under Section 2 in Protected Areas standard (345-022-0040), IPC should not be able to build the B2H in the protected area if another way to construct the project is available. While STOP has argued for years about alternatives to the project itself, for the purposes of this Site Condition recommendation, STOP responds with two exclusive mitigation measures for the NHOTIC, that is: avoidance or undergrounding.

The legal and technical reasons supporting undergrounding are argued by Mr. Carbiener under issue SR-2.¹ STOP supports undergrounding the transmission line for 1.7 miles as a mitigation measure for non-compliance with SR-7. Cross examination of Dennis Johnson explains that this is a feasible technology.² Given that the NHOTIC scenic resource is iconic and meets the Council's definition of significant, the most robust mitigation is required, if avoidance (e.g.: moving the line) cannot be attained. (Closing pp 24-25)

ODOE also presented an Amended Scenic Resource Condition 3 in its Closing Argument.³ This proposed Condition impacts the NHOTIC, and thereby implicates SR-7 and a number of other issues in the case. STOP provides the following amendments, because it finds the proposed Amended Scenic Resource Condition 3 unacceptable because it does not protect this significant and irreplaceable scenic, recreational, and protective area. (*Response Brief pp 35-36*)

In response to ODOE's Amended Scenic Resource Condition 3, STOP proposed the amendments to Scenic Resources Condition 3.

Amended Scenic Resources Condition 3: At final facility design, the certificate holder shall ~~select transmission structures, to be constructed~~

- a. Commission a full engineering design study and specifications for ~~undergrounding the 500kV transmission line~~ in the vicinity of the National Historic Oregon Trail Interpretive Center between approximately Milepost 145.1 and Milepost 146.6 ~~(or the 1.7 mile stretch recommended by consultant Johnson)~~ with the following design modifications:
- b. ~~Construct the B2H line underground in the designated area.~~

¹ Carbiener, Closing SR-2 pp 4-6.

² Cross Examination Day 6 (Johnson) p. 18.

³ ODOE Closing Argument pp.185-186

~~a.—H-Frames;~~

~~b.—Tower height no greater than 130 Feet; and~~

~~c.—Weathered steel (or an equivalent coating)~~

~~Additionally, the certificate holder shall construct the facility using tower structures that meet the following criteria between approximately Milepost 146.6 and Milepost 146.7~~

~~a.—H-Frames;~~

~~b.—Tower heights no greater than 154 Feet; and~~

~~c.—Weathered steel (or an equivalent coating)~~

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
Mike J. Sargetakis
Of Attorneys for STOP B2H Coalition

By: Arrangement for hand delivery:

John C. Williams
PO Box 1384
La Grande, OR 97850

By: Electronic Mail:

David Stanish
Attorney at Law
Idaho Power Company
dstanish@idahopower.com

Lisa Rackner
Attorney at Law
Idaho Power Company
lisa@mrg-law.com

Jocelyn Pease
Idaho Power Company
Attorney at Law
jocelyn@mrg-law.com

Alisha Till
alisha@mrg-law.com

Joseph Stippel
Agency Representative
Idaho Power Company
jstippel@idahopower.com

Kellen Tardaewether
Agency Representative
Kellen.tardaewether@oregon.gov

Sarah Esterson
Oregon Department of Energy
Sarah.Esterson@oregon.gov

Patrick Rowe
Assistant Attorney General
Patrick.g.rowe@doj.state.or.us

Jesse Ratcliffe
Assistant Attorney General
jesse.d.ratcliffe@doj.state.or.us

Jeffery R. Seeley
jeff.seeley@doj.state.or.us

Mike Sargetakis
Attorney at Law
mike@sargetakis.com

Karl G. Anuta
Attorney at Law
Law Office of Karl G. Anuta
kga@integra.net

Stop B2H Coalition
fuji@stopb2h.org

Stop B2H Coalition
Jim Kreider
jkreider@campblackdog.org

Colin Andrew
candrew@eou.edu

Kathryn Andrew
lkathrynandrew@gmail.com

Lois Barry
loisbarry31@gmail.com

Peter Barry
petebarry99@yahoo.com

Gail Carbiener
mcgccarb@bendbroadband.com

Matt Cooper
mcooperpiano@gmail.com

Whit Deschner
deschnerwhit@yahoo.com

Jim and Kaye Foss
onthehoof1@gmail.com

Suzanne Fouty
suzannefouty2004@gmail.com

Susan Geer
susanmgeer@gmail.com

Irene Gilbert
ott.irene@frontier.com

Charles H. Gillis
charlie@gillis-law.com

Dianne B. Gray
diannebgray@gmail.com

Joe Horst and Ann Cavinato
joehorst@eoni.com

Virginia and Dale Mammen
dmammen@eoni.com

Anne March
amarch@eoni.com

Kevin March
amarch@eoni.com

JoAnn Marlette
garymarlette@yahoo.com

Michael McAllister
wildlandmm@netscape.net

Sam Myers
sam.myers84@gmail.com

John Winters
wintersnd@gmail.com

Charles A Lyons
marvinroadman@gmail.com

Svetlana Gulevkin
Svetlana.m.gulevkin@doj.state.or.us

Jonathan White
jondwhite418@gmail.com

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This exception is supported by the plain language of the DEQ noise statutes and rules and the fact that multiple court decisions make it clear that the authority to “interpret” the noise statutes and rules which the Oregon Department of Energy and the applicant claim exists is not supported by Oregon law or previous litigation.

469.401 Energy facility site certificate; conditions;

(2) The site certificate or amended site certificate shall contain conditions for the protection of the public health and safety, for the time for completion of construction, **and to ensure compliance with the standards, statutes and rules described in ORS 469.501 and 469.503. 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,”**

The courts have limited the authority of Agencies to interpret their own rules and statutes and in this case the Oregon department of energy is claiming the authority to interpret the rules of another agency. This is precluded by multiple court decisions, however, three which pertain to this contested case include:

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*

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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

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Gorsuch’s concurring judgment, which was joined by Justices Thomas, Alito and Kavanaugh argued that the Court should have done away with *Auer* completely.

Allowing the developer to avoid responsibility for impacts on residents exposed to noise in excess of the state noise standards does not preclude those citizens filing legal action regarding noise exceedances. Allowing an exception and variance for the developer would result in the state assuming the liability for litigation regarding future impacts. This alone should result in the Council being unwilling to support such a variance and exception. Council authority only extends to the site and actions of the developer. Any requirements placed upon the general public to comply with council demands is beyond the scope of EFSC authority. The legislative record provided by the Oregon Department of Energy regarding this issue states that the DEQ rules in no way removed the public’s right to litigate noise impacts.

I am incorporating my previous submissions regarding this issue as well as those provided by STOP B2H on all issues related to Noise as much of the information is directly related to my contested case.

NC-2: Whether the Department erred in recommending that Council grant a variance/exception from the Oregon DEQ’s Noise Rules, OAR 340-035-0035, and whether the variance/exception is inconsistent with ORS 467.010.

467.010 - Legislative findings and policy.

“The Legislative Assembly finds that the increasing incidence of noise emissions in this state at unreasonable levels is as much a **threat to the environmental quality of life in this state and the health, safety and welfare of the people of this state as is**

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pollution of the air and waters of this state. To provide protection of the health, safety and welfare of Oregon citizens from the hazards and deterioration of the quality of life imposed by excessive noise emissions, it is hereby declared that the State of Oregon has an interest in the control of such pollution, and **that a program of protection should be initiated.** To carry out this purpose, it is desirable to centralize in the Environmental Quality Commission the authority to **adopt reasonable statewide standards** for noise emissions permitted within this state and to implement and enforce compliance with such standards.”

Note: The statute defines noise pollution as a significant threat to the citizens which they need to be protected from and that there is an intent that the standards be consistent throughout the state. For residences exceeding the DEQ Ambient Noise Degradation Standard, allowing a variance or exception to the noise limits amounts to an inverse condemnation, or regulatory taking of private property.

In addition to arguing that the variance/exception did not require me to comment specifically on it due to the change from the Draft Order to the Proposed Order, I included in my request several examples of methods which the exception was based upon which invalidated the finding that an exception or variance was justified.

THE ACTUAL REQUEST FOR A CONTESTED CASE INCLUDED THE FOLLOWING LANGUAGE

“I am requesting standing and a contested case due to the failure of the Oregon Department of Energy to approve the methods used to assess noise impacts and the inaccurate methods used

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to assess the noise impacts of the development resulting in inaccurate determinations of the noise impacts the development will have.

1. There is no written approval of the procedures used that are contrary to the DEQ rules.
2. The Proposed Order interprets the language of the consultant, “Golder” to be an approval of the use of the period from 12:00 midnight till 5:00 a.m. as being the timeframe for establishing the number of exceedances when it only references the timeframe for establishing the ambient noise level and the incorrect interpretation of the noise rules resulted in a significant understatement of the number of noise exceedances. Using the reduced timeframe fails to establish the actual percentage of days when the standard would be exceeded which would preclude allowing an exception or variance to the noise rules based on an “infrequent” occurrence. It also fails to comply with the definitions included in the Noise Administrative rules. OAR 340-035-0035(i) states that no new industrial or commercial noise source shall cause or permit the operation of the noise source if the noise levels generated or indirectly caused by that noise source increase the ambient statistical noise levels, L10 or L50 by more than 10 dBA in any one hour, or exceed the levels specified in Table 8. The term “any one hour” is defined in OAR 345-035-0015(7) “Any One Hour” means any period of 60 consecutive minutes during the 24-hour day.
3. The use of the noise measurement taken from one location and applied to others without doing measurements at each location will be shown to result in inaccurate baseline noise levels.”

The ALJ stated, “Petitioner Gilbert asserts that there was no need to comment on this issue on the record of the DPO because the recommendation to allow this variance/exception is a

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material change in the Proposed Order. In its response, the Department agrees that this issue is properly raised in response to a material change and may be considered in the contested case proceeding.”

The abbreviated statement provided by EFSC cannot be used to eliminate the items which are required to be considered in making a decision regarding the issue of allowing an exception or variance, several which were specifically mentioned in my request for this contested case as noted above. The Proposed Contested Case Order specifically states the evidence and testimony regarding the need to have a legitimate process for establishing noise levels is being excluded from consideration in my contested case which documents a failure to consider relevant documentation in this contested case and supports the need for an exception to the Contested Case Proposed Order.

ERRORS IN THE PROPOSED CONTESTED CASE ORDER

1. Failure to consider evidence and testimony regarding the flawed process for establishing the baseline noise levels and increased noise levels that the development would create.
2. ODOE and the Council are interpreting another agency rules which is precluded by court decisions. Since the DEQ Noise Rules are simply quoting the statute, no agency has the authority to “interpret” what the legislature intended beyond the plain language of the statute and rules.
3. The statute and rule require an evaluation of the impacts to the “resident” and the impacts to the “developer” in determining whether a variance can be allowed, The file contains no documentation indicating the impacts to any resident impacted by the variance and the impacts stated are not limited to the impacts to the developer. The statute does not

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provide for general statements regarding supposed benefits to the public at large to support a variance.

4. The council will be waiving state statutes requiring specific methodologies in establishing noise levels which must be considered in allowing a variance or exception.
5. Failing to provide documentation that the methods used comply with state statutes.
6. A failure to determine impacts to the safety and health of citizens impacted by the increased noise levels who reside outside the site boundary.
7. Assuming control of citizens outside the site boundaries by requiring them to accept mitigation agreed to by the developer or forfeiting their right to mitigation of impacts.

Using an abbreviated statement of the issue to represent multiple individual requests to limit the scope of the contested case requests from the individuals.

8. The generic and limiting restatement of the issue was used to challenge the submission of evidence and testimony critical to proving my contested case and is precluded per DCLD v. Tillamook County, 34 Or LUBA 586(1998) Ors 197.763, ORS n197.835(3) and 197.763 which require that the issue be raised during the local proceeding, however, the statutory restriction does not apply to individual arguments regarding those issues.
9. DLCD v Curry County, 33 Or LUBA 778 (1997) also supports this exception as it states that when an issue is adequately raised, ORS 197.763 does not limit particular arguments related to that issue on appeal.

INTRODUCTION

While there is nearly an endless list of actions which necessitate an exception to the Draft Contested Case Hearing decision denying my contested case issue and testimony submitted in support of that issue, there is one that rises above most of the others. While the Council has

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the authority to determine compliance with the rules of another agency, that authority does not extend to interpreting the plain language of the statutes and rules of another agency and the developer is required to provide documentation that would be required by the other agency to council to support their decision.

The Project Order requires the following:

“APPLICATION REQUIREMENTS The applicant must adhere to the general requirements under OAR 345-021-0000, including, **for all state and local government agency permit approvals that the applicant proposes to be included in and governed by the site certificate, the submittal of information that would otherwise be required by the state or local government agency in an application for such permit, license or certificate [OAR 345-021- 12 0000(6)].** “

NOTE: The developer is required to submit the information that would be required by the Oregon Department of Environmental Quality to request or receive an exception or a variance. The file contains no such information or exhibit.

ADDITIONAL NOTE: It should be noted that the Oregon Department of Energy changed the requirements for complying with the Noise rules. The Project Order in force when the Noise evaluations were originally performed in required specific methods and information which was not provided by the developer. The Project Order was then changed to remove details that showed a failure to comply with the original Project Order,

“Exhibit X – Noise Applicable Paragraphs: **All paragraphs apply.** However, because of the linear nature of the proposed facility, the requirements of paragraph E are modified. Instead of one mile, to comply with paragraph E the applicant must develop a list of all owners of noise

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sensitive property, as defined in OAR 340-035- 0015, within one-half mile of the proposed site boundary. **Related Council and Other Standards:** General Standard of Review [OAR 345-022-0000]; DEQ Noise Control [**ORS 467.020 and ORS 467.030; OAR 340, Division 35**]

Discussion: The application shall contain a noise analysis and information to support a Council finding that the proposed facility, including any alternative routes proposed, will comply with the requirements of OAR 340-035-0035, or that an exception or variance may be issued by Council.”

The Project Order requires compliance with the Oregon Statutes regarding noise as quoted below:

“ORS 467.020 Except as provided in ORS 467.131 and 467.133, no person may emit, cause the emission of, or permit the emission of noise in excess of the levels fixed therefor by the Environmental Quality Commission pursuant to ORS 467.030.”

ORS 467.030

Adoption of noise control rules, levels and standards

(1) In accordance with the applicable provisions of ORS chapter 183, the Environmental Quality Commission shall adopt rules relating to the control of levels of noise emitted into the environment of this state and including the following:

“(b)Requirements and specifications for equipment to be used in the monitoring of noise emissions.

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(c) Procedures for the collection, reporting, interpretations and use of data obtained from noise monitoring activities.

(2) The Environmental Quality Commission shall investigate and, after appropriate public notice and hearing, shall establish maximum permissible levels of noise emission for each category established, as well as the method of measurement of the levels of noise emission.

(3) The Environmental Quality Commission shall adopt, after appropriate public notice and hearing, standards for the control of noise emissions which shall be enforceable by order of the commission.

Note: The Oregon Statute specifically required the development of the noise rules through rule development requirements of ORS chapter 183 as establishing the equipment, collection, reporting, monitoring and interpretations of data obtained from noise monitoring activities. The methods used were not consistent with those dictated by statute and the file contains no documentation showing that the alternate methods used were consistent with the requirements of the statute. The file does contain documentation that the use of the alternate procedures failed to provide results consistent with the requirements of the statutes. (See my closing comments and the Idaho Power results of their monitoring showing the significant variations in the results of their monitoring of sites within the area where NSR's were assigned an ambient noise level as equal to that at MP 11.

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My contested case addressed the actions and information used to support an exception and/or variance to the noise standard and the legitimacy of ODOE and the Energy Facility Siting Council assuming the authority to waive the requirements to authorize exceptions or variances as described in the following two rules:

STATUTES AND RULES

Since this contested case is based upon the fact that the Oregon Department of Energy and Energy Facility Siting Council did not apply the language of the rules of another agency the way the language would dictate in their decisions, this contested case is based upon legal precedent established in *Kisor v Wilkie*, 588 U.S.__(2019 Kisor) this US Supreme Court

Exceptions:

OAR 340-035-0010

(1) Upon written request from the owner or controller of a noise source, the Department may authorize exceptions as specifically listed in these rules.

(2) In establishing exceptions, the Department **shall consider the protection of health, safety, and welfare of Oregon citizens** as well as the feasibility and cost of noise abatement, the past, present, and future patterns of land use; the relative timing of land use changes and other legal constraints. For those exceptions which it authorizes the Department shall specify the **times during which the noise rules can be exceeded** and the quantity and quality of the noise generated, and when appropriate shall specify the increments of progress of the noise source toward meeting the noise rules.”

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Variances:

OAR 340-035-0100(l)

“Conditions for Granting. **The Commission** may grant specific variances from the particular requirements of any rule, regulation, or order to such specific persons or class of persons or such specific noise source upon such conditions as it may deem necessary to protect the public health and welfare, if it finds that strict compliance with such rule, regulation, or order is inappropriate because of conditions beyond the control of the persons granted such variance or because of special circumstances which would render strict compliance unreasonable, or impractical due to special physical conditions or cause, or because strict compliance would result in substantial curtailment or closing down of a business, plant, or operation, or because no other alternative facility or method of handling is yet available. Such variances may be limited in time.”

Decisions regarding the DEQ noise rules must be in compliance with the statute which defined how decisions were to be made, methods for determining compliance with the noise rules and can not be subject to the interpretations of the Oregon Department of Energy.

Additional Rules and Statutes which are referenced in this document and which apply to the use and application of Variances and Exceptions to the Noise Rules:

Definitions in OAR 340-035-0015

(7) “Any One Hour” means any period of 60 consecutive minutes during the 24-hour day.

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(37) “Noise Level” means weighted sound pressure level measured by use of a metering characteristic with an “A” frequency weighting network and reported as dBA.

NOTE: The definition of “noise Level” requires the measurement of the sound level.

(50) “Quiet Area” means any land or facility designated by the Commission as an appropriate area where the qualities of serenity, tranquility, and quiet are of extraordinary significance and serve an important public need, such as, without being limited to, a wilderness area, national park, state park, game reserve, wildlife breeding area, or amphitheater. The Department shall submit areas suggested by the public as quiet areas, to the Commission, with the Department’s recommendation.

(59) “Statistical Noise Level” means the noise level which is equaled or exceeded a stated percentage of the time. An L10 = 65 dBA implies that in any hour of the day 65 dBA can be equaled or exceeded only 10% of the time, or for 6 minutes.

NOTE: The above definition directs the developer to predict future noise exceedances based upon a 24 hr. day.

ORS 467.020 - Prohibition on emission of noise in excess of prescribed levels.

Except as provided in ORS 467.131 and 467.133, no person may emit, cause the emission of, or permit the emission of noise in excess of the levels fixed therefor by the Environmental Quality Commission pursuant to ORS 467.030.

4. Zirkerv v City of Bend “reasonably clear standards’ must be uniformly consistent with general authority for a variance under code

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ORS 467.030 - Adoption of noise control rules, levels and standards.

“(1) In accordance with the applicable provisions of ORS chapter 183, the **Environmental Quality Commission** shall adopt rules relating to the control of levels of noise emitted into the environment of this state and including the following:-----

(b) Requirements and specifications for equipment to be use”d in the monitoring of noise emissions.

(c) Procedures for the collection, reporting, interpretations and use of data obtained from noise monitoring activities.”

The Environmental Quality Council rules have the force of statute due to the specificity of the statute requiring them.

OAR 345-035-0110

In 1991, the Legislative Assembly withdrew all funding for implementing and administering [ORS Chapter 467 \(Noise Control\)](#) and the Department’s noise program.

Accordingly, the Commission and the Department have suspended administration of the noise program, including but not limited to processing requests for exceptions and variances, reviewing plans, issuing certifications, forming advisory committees, and responding to complaints. Similarly, the **public’s obligations to submit plans or certifications to the Department are suspended.**

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The public is not required to request certification of “quiet areas.” , however, the rules requiring a reduced noise level at these areas remain in force.

BACKGROUND:

The proposed order fails to comply with Oregon Statutes and rules requiring a specific set of detailed steps for determining noise impacts subject to a decision to allow an exception or variance which provides protection of the Health, Safety, Welfare of Oregon Citizens.

Assessment of the appropriateness of allowing a Variance or an exception must consider the noise impacts of the development on citizens safety and health.

OAR 340-035-0035 establishes a requirement that the ambient degradation standard not increase the noise level at a noise sensitive property more than 10dBA, which is determined by monitoring the actual ambient background noise using the procedures contained in the Noise Instruction Manual (NPCS-1) and predicting the future level of noise due to the new development which is then compared to the maximum allowable increase in ambient sound level of 10 dBA.

Errors in evaluating the Noise Impacts of the Development which void the decision to allow a variance or exception to the Noise Rules:

1. The developer failed to measure baseline noise levels at noise sensitive residences or noise sensitive properties

Neither the Oregon Statutes nor the Oregon Administrative Rules allow for “modeling” to determine the baseline noise level for locations impacted by the noise generated from the

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development. All references in the Oregon Statutes and Administrative rules use the term “monitoring” as the required action. By definition, “monitoring” requires obtaining actual measurements at a given location.

The reference on Page 639 to the Golder statement that the sound measurement procedures to be properly performed from a technical standpoint does not address the use of modeling to assign measurements from one location being applied to another where there were no sound measurements done.

2. The developer failed to identify the safety and health impacts of the noise based upon the physical and emotional health issues of impacted citizens and the impacts of the increased noise on those pre-existing conditions.
3. The developer failed to obtain authorization from the Council **prior** to the use of procedures not supported by the Administrative Rules or Oregon Statutes.
4. Nowhere in the application or Proposed Order is there a listing of the Alternate Procedures being used that are not consistent with those required by the Noise Rules or any explanation regarding why those alternate procedures should apply to this development or comply with Oregon Statutes.

Following are some areas where the procedures used to establish noise levels subject to an Exception or Variance failed to be consistent with the procedures defined in the rules for basing an Exception or Variance on.

--The Oregon Department of Energy Draft Proposed order suggests that the modeling performed by the applicant should be relied upon to determine if an exceedance has

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occurred. Modeling is not an appropriate method of determining if an exceedance occurred or is occurring once a development is built. In addition, the modeling failed to include all the potential issues that can result in increased corona noise. The modeling performed dealt with corona effects as a result of weather, but failed to include any of the multiple issues in addition to weather conditions which can cause or increase the corona noise level. It does not account for such things as damage to the line, dirt on the line, the break-in period of the line, etc. Because of this, modeling of noise impacts cannot be considered conclusive evidence that no noise exceedances are occurring. Once the development is completed, ORS 469.507 requires testing or sampling to show ongoing compliance with the standard. The developer has the burden of proof, not the impacted citizen to prove that the modeling completed by the applicant was not accurate. The procedure outlined in the draft proposed order when a noise exceedance is reported fails to comply with state statute. In the event of a noise exceedance, the Oregon Department of Energy should require the developer to purchase a noise easement or reduce the noise level through mitigation or other means to bring the noise level within the standard.

--Further, the noise measurements completed by the applicant to establish a baseline noise level failed to follow the procedure as outlined by DEQ's procedure manual NPC 1 which includes specific information and diagrams of the locations where noise monitoring should have occurred. The Draft Proposed Order states incorrectly that the "monitoring position for baseline sound measurements were set up on each property at a point 25 feet toward the noise source unless placed to accommodate property owners requests. Tetra Tech, who completed the monitoring contradicts this statement on page 7 of the Baseline Sound Survey saying, "MP's were placed in similar surroundings

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experiencing the same weather and acoustic conditions of where a resident was expected to spend the majority of time when outdoors.” There is no mention of DEQ requirements for the location of the Monitoring Points (MP). (B2HAPPDoc3-1 DPO Draft Proposed Order_Hyperlink Attachments 2019-05-22 Page 558)

PROBLEMS WTH MONITORING PROCESS

- Many residences had no monitoring done.
- There were instances when equipment malfunctioned .
- The developer used “averaging” over the entire 300 mile line to establish their projections regarding the times when weather conditions are likely to cause corona effect.
- The developer used the US Department of Energy Corona and Field Effects Program and the Datakustic Computer-Aided Noise Abatement Program standard 9613-2, Attenuation of Sound During Propagation Outdoors. These models are based upon a 24 hr. period. The use of only portions of the 24 hr. period invalidate the results.
- The developer attributed noise measurements at a single location to multiple other noise sensitive properties where measurement did not occur based upon a subjective evaluation that the terrain was similar or they were in the reviewers estimation close to the property that was actually measured. For example, the measurement for MP 11 was used to establish baseline noise level for a total of 63 noise sensitive properties according to Table 1 listing ,” Monitoring Points representing Noise Sensitive Receptors”, Page 2 of the “ Technical Memorandum, Ch2M dated April 29, 2016”. Monitoring Position 11 is 207 feet from the Union Pacific Railroad. This alone should preclude any determination that it is consistent with the other locations which do not have a railroad track located this

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near to them and it invalidates all results from the monitoring Position 11 being used as the baseline noise measurement applied to other noise sensitive receptors.

--The draft proposed order on Page 549 states that the developer used a point 25 feet toward the noise source~~xx~~ for monitoring to establish baseline sound measurements, except when accommodating a landowner request. Tetra Tech, who did the sound monitoring disagreed with this statement. They stated on Page 7 of the baseline sound survey dated January 2013 that the MP's were chosen where a resident was expected to spend the majority of time when outdoors or to accommodate landowner requests.).

(B2HAPPDoc3-1 DPO Draft Proposed Order_Hyperlink Attachments 2019-05-22 Page 558)

--The draft proposed order on Page 551 states that the development is in compliance with the Maximum Allowable Sound Level Standard, OAR 340-035-0035(l)(b)(B)(i). The developer and the Oregon Department of Energy only speak to the L50 standard of 50 dBA. They ignore the L10 standard of 55 dBA. The data in Table 5-1, Tetra Tech, Baseline Sound Survey, Page 59 and 60 show that there are exceedances of the L10 standard at MP-22, MP-23, MP-25 and MP-13. The developer is not in compliance with the Maximum allowable sound level standard.

--The draft proposed order references their noise consultant on page 550 stating that he “found the baseline noise analysis to be properly performed from a technical standpoint and the use of the “late night” noise level to be conservative in nature for use as the baseline noise level for comparison to the ambient antidegradation standard.” He did not say that this same “late night” timeframe should be used to determine the number of times the noise at the location was predicted to exceed the baseline noise level by 10 dBA or more which is what the

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developer did. The number of exceedances should have been established using the full 24 hr. day rather than the number of hrs. in a year when exceedances are predicted.

--The developer failed to do noise monitoring for the area within ½ mile of the entire site boundary. For example, no monitoring or modeling was done for the Modelaire neighborhood in spite of the fact that the site boundary goes right up to and along this area.

--No modeling was done for schools, churches, hospitals or libraries within ½ mile of the development in spite of the fact that OAR 340-035-0015(38) defines noise sensitive properties as including these structures.

5. The department failed to disclose the entire procedure being used when requesting confirmation from Consultants that the procedure would provide accurate results.
 - a. Consultant responses were taken out of context and comments regarding a specific issue were applied to the entire procedure.
6. No documentation was provided indicating that the complete evaluation procedures used would result in identification of noise impacts of the development consistent with the requirements of the Oregon Statute as defined in Oregon Administrative Rules or with accepted industry standards for determining noise impacts.
7. No baseline noise measurements are provided at 115 noise sensitive properties to determine if future exceedances of the standards occur or to support future monitoring to determine whether development exceeds standards.
8. ORS 469.507 requires the developer to monitor the environmental and ecological effects of construction and operation of the energy facility. It also requires the certificate holder to perform the testing and sampling necessary for the monitoring program or require the

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operator of the plant to perform the necessary testing or sampling. The developer cannot meet this requirement absent establishing the actual baseline noise levels.

The proposed order fails to identify the “quiet areas” that will be subject to noise exceedances. While the requirement for a specific recognition of quiet areas by the Commission has been suspended, the rules provide a definition which includes specific areas which are considered “quiet areas” for purposes of the noise rules.

OAR 540-035-0035 (50) “Quiet Area” means any land or facility designated by the Commission as an appropriate area where the qualities of serenity, tranquility, and quiet are of extraordinary significance and serve an important public need, such as, without being limited to, a wilderness area, national park, state park, game reserve, wildlife breeding area, or amphitheater. The Department shall submit areas suggested by the public as quiet areas, to the Commission, with the Department’s recommendation.

Quiet Areas. No person owning or controlling an industrial or commercial noise source located either within the boundaries of a quiet area or outside its boundaries shall cause or permit the operation of that noise source if the statistical noise levels generated by that source exceed the levels specified in Table 9 as measured within the quiet area and not less than 400 feet (122 meters) from the noise source.]

9. All decisions regarding what locations were “similar” to the areas where monitoring occurred were subjective and there is no documentation or peer review to support the developer’s claim that the determinations are valid. e The methods used have not been applied to any other energy development, any other state or federal agency, the developer must provide evidence supporting their claim that the methods are valid when reviewed

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as a whole.

10. The Oregon Department of Energy recommendation to allow a Variance and an Exception to the DEQ noise rules is inconsistent with their commitment to the public reflected in their document entitled “Siting of Energy Facilities in Oregon”. While this is not a requirement of the statutes or rules, it constitutes an ethical breach due to a failure to follow a commitment made to the public regarding their role of providing protection to the public from unreasonable noise impacts from developments they recommend approval for.

The Oregon Department of Energy states in their public document, “Siting of Energy Facilities in Oregon”, Page 1, December 2014 that “The Oregon Department of Environmental Quality (DEQ) has adopted noise standards. There is no DEQ noise permit, but the Council applies DEQ noise standards to all energy facilities.”

There is no documentation to indicate this process would comply with the noise standards, and there is no indication that either consultant used by the Oregon Department of Energy was asked to provide an opinion regarding the consultant, Golder was not asked to provide an opinion regarding the legitimacy of the entire process used. The results need to be shown to be consistent with those included in the DEQ rules . Lacking documentation that the method used would provide legitimate baseline noise levels, the methods fail to comply with the methodology defined by the statute as the procedures contained in DEQ rules. Noise measurements were completed for a sample of the locations where a baseline noise level was assigned without actually completing monitoring. Those results show that the assigned baseline levels fail to provide an accurate baseline noise level for determining whether a

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Variance or Exception is appropriate or to establish whether future noise impacts exceed the noise limits. Council lacks the authority to waive statutes and in this case the procedures are required by the statutes.

Additional Assignments of Error:

--No effort was made to determine if the alternative procedure of allowing the developer to apply the actual sound measurements at one location to others where no sound measurements were done would provide results consistent with those required by statute and defined by rule.

--It is not clear how many households or individuals would be impacted by allowing a variance or an exception, what the impacts would be and what protections and mitigation is necessary to protect the health, safety and welfare of those individuals. There was no identification of pre-existing conditions of residents impacted or the level of health and safety risk that the noise will create for citizens.

--The Oregon Department of Energy and Energy Facility Siting Council exceeded their authority in allowing a variance or exception and by changing the procedures established by Oregon Statutes and the Environmental Quality Commission upon which a variance or an Exception can be granted .

--The suspension of the funding for implementation and administration of Chapter 467 in 1991 as reflected in OAR 340-035-0110 means that the Commission is no longer processing variances. The Commission did not initiate a rule that delegated to DEQ the authority and conditions appropriate to grant variances. There no longer exists the

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opportunity to request or be granted a variance from the noise rules by use of the DEQ noise rules. It would require an amended noise statute and rule to delegate that power to DEQ or the Oregon Department of Energy and the Siting Council. The Commission is identified by statute as the only body with the authority to approve a variance and those actions have been suspended.

-- While litigation has supported the discretion available to an agency to interpret their own rules, this litigation does not extend to allowing one agency to apply their discretion when applying rules promulgated by another agency, or in the application of requirements of the Oregon Statutes.

- a. ORS 467.060(2) states, “The commission by rule may delegate to the Department of Environmental Quality, on such conditions as the commission may find appropriate, the power to grant variances and to make the finding required by subsection (1) of this section to justify any such variance.”

The Commission chose not to delegate this power to DEQ

- b. OAR 345-035-0100(2) describes the involvement of the Department of Environmental Quality plays in Variances. It states, ‘Procedure for Requesting. Any person requesting a variance shall make his request in writing to the Department for consideration by the Commission and shall state in a concise manner the facts to show cause why such variance should be granted.’”

DEQ simply receives the request and forwards it to the commission for action.

- c. OAR 345-035-0100(3) States that the Commission is the body with authority to Revoke or Modify a variance.

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--Even if the Commission had promulgated a rule allowing the Oregon Department of Environmental Quality to make the decisions per ORS 467.060(2), and the Oregon Department of Energy and Siting Council were able to interpret and apply the rules, the applicant and the Department failed to follow the statutory requirements placed on the Environmental Quality Commission in their decision process. The requirements are outlined in ORS 467.060 and partially referred in OAR 345-035-100

- a. ORS 467.060(3) states, “In determining whether or not a variance shall be granted, the commission or the department shall consider the equities involved and the advantages and disadvantages to residents and to the person conducting the activity for which the variance is sought.”

The developer and the Department of Energy failed to identify or evaluate the impacts and disadvantages to the residents that would be exposed to excessive noise levels being allowed would be subjected to including addressing the health problems of impacted residents, loss of property value, impacts to their quality of life, loss of the use of their property, etc. While the developer argues that the transmission line is a single source and a variance would apply to the single source for the length of the transmission line, defining the line as a single noise source does not change the fact that the impact of that noise source is going to be different at each noise sensitive property. It will depend upon distance from the NSR, weather patterns, landscape, vegetation, and a host of other impacts. This evaluation would have to be based upon the noise level and impact at each NSR and the people subjected to the noise exceedance. The application and file do not contain the information that would demonstrate that the developer

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established the significance of the impacts based upon the different locations and how they impact the amount of exceedance and the number of exceedances.

It is well established that noise can form a serious risk to the safety and health of citizens. For example:

The Oregon Health Authority in their “Strategic Health Impact Act Assessment on Wind Energy Development in Oregon”, March 2013 (1) provided information regarding the impact of noise on people. The report, Page 51, identify the fact that environmental noise is linked to sleep disturbance, annoyance, stress and decreased cognitive performance.(2-4) These effects can also effect physical health. There is evidence that chronic sleep disturbance and stress from noise exposure may increase risk for cardiovascular disease, decreased immune function, indocrine disorders, mental illness and other effects. (2, 4-7) The standard allowing a 10 dBA increase from baseline sound level will already be perceived as a doubling of the noise level.(5)

- b. The Proposed Order fails to require conditions necessary to protect the public health, safety and welfare of the citizens subject to the increased noise levels they will experience. The proposed order states that the developer will only be required to provide mitigation for impacts if they and the resident agree to implement them. The developer will control whether or not they provide any mitigation of impacts. In order to allow a variance or an exception, it is necessary to determine the methods to mitigate the noise impacts to the impacted residences.

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The proposed order leaves it up to the developer to decide whether or not to implement mitigation. There is no requirement to do so unless they agree with the impacted resident's requests.

Request for Exception to Ambient Antidegradation Standard

1. The definition of an exception refers directly to Section (l) of the rule for (a) Unusual and/or infrequent events.
2. Section 1 does not allow exceedances of the ambient statistical noise level by more than 10dBA in any one hour. “Any one hour is defined in the OAR 340-035-0015 (7) as “means any period of 60 consecutive minutes during the 24-hour day.

ORS 467.035 allowing an exemption to a noise emission source does not apply as it requires a rule change to identify it.

These arguments were submitted to the ALJ in support of my contested case request but were not evaluated or responded to in the Proposed Contested Case Order.

The contested case documents that the noise from this development will create significant, unacceptable and in some instances, unbearable noise impacts to citizens which preclude allowing an exception or a variance to the noise standard.

It documents a failure to follow the legitimate process for determining the impacts to residents subjected to a variance or exception as well as the fact that ODOE and the Council lack the authority to change, interpret or waive the statutes and rules of another agency.

REFERENCES:

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ORS 467.035

OAR 340-035

--Max Woods Memo

--- “Strategic Health Impact Assessment on Wind Energy Development in Oregon”, March 2013

Prepared by: Public Health Division, Oregon Health Authority

-- World Health Organization, Guidelines for Community Noise. 1999, World Health Organization, Geneva.

Litigation supporting this contested case:

1. Scott v City of Jacksonville OR LUBA (Jan. 2010, 2009-107)

Failure to adequately address a local criterion requiring that a proposed use have a “minimal adverse impact upon adjoining property.” Gave measures proposed to mitigate the increased noise, the mitigation measures were not related to the adverse impact criterion and the city provide no explanation of why the stated mitigation will comply with the standard.. (B2HAPPDoc3-1 DPO Draft Proposed Order_Hyperlink Attachments 2019-05-22 Page 558)

2. Scott v City of Jacksonville OR LUBA (Jan. 2010, 2009-107)

Failure to adequately address a local criterion requiring that a proposed use have a “minimal adverse impact upon adjoining property.” Gave measures proposed to mitigate the increased noise, the mitigation measures were not related to the adverse impact criterion and the city provide no explanation of why the stated mitigation will comply with the standard.. (B2HAPPDoc3-1 DPO Draft Proposed Order_Hyperlink Attachments 2019-05-22 Page 558)

“

--Zirkerv v City of Bend “reasonably clear standards’ must be uniformly consistent with general authority for a variance under code

Case 3:13-cv-01391-PK Document 1 Filed 08/09/13 Page 1 of 14 Page ID#: 1 -- --- --Williams v Invenergy, LLC, Complaint

There is a limit to the amount of noise pollution a development will create absent being recognized as trespass, This development will cause an invasion of noise which constitutes an illegal nuisance, a trespass recognizable under Oregon law, exacerbate preexisting health conditions, and create new illnesses due to the stress and interference with sleep patterns of those individuals exposed to noise exceedances.

I am requesting that the council authorize an exception to the Proposed Contested Case Order on issue NC-2, allow the excluded material I provided, and support the recommended site certificate condition related to “quiet areas”.

Irene Gilbert

Pro-Se Petitioner representing the public interest and STOP B2H co-chair

CERTIFICATE OF MAILING

“

On June 30, 2022, I certify that I filed the foregoing EXCEPTION TO ISSUE NC-2, THE EXCLUSION OF ARGUMENTS REGARDING THE METHODS USED TO ESTABLISH THE NOISE LEVELS AND THE DENIAL OF MY RECOMMENDED SITE CERTIFICATE CONDITION REGARDING THE NEED TO IDENTIFY AND ADDRESS “QUIET AREAS.” CLOSING BRIEF REGARDING ISSUE NC-2 with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

Irene Gilbert

Pro Se Petitioner

By: Arrangement for hand delivery:

John C. Williams

PO Box 1384

La Grande, OR 97850

By: Electronic Mail:

David Stanish

Attorney at Law

Idaho Power Company

dstanish@idahopower.com

Lisa Rackner

Attorney at Law

31 NC-2 Noise Exception

“

Idaho Power Company

lisa@mrg-law.com

Jocelyn Pease

Idaho Power Company

Attorney at Law

jocelyn@mrg-law.com

Alisha Till

alisha@mrg-law.com

Joseph Stippel

Agency Representative

Idaho Power Company

jstippel@idahopower.com

Kellen Tardaewether

Agency Representative

Kellen.tardaewether@oregon.gov

Sarah Esterson

Oregon Department of Energy

Sarah.Esterson@oregon.gov

32 NC-2 Noise Exception

“

Patrick Rowe

Assistant Attorney General

Patrick.g.rowe@doj.state.or.us

Jesse Ratcliffe

Assistant Attorney General

jesse.d.ratcliffe@doj.state.or.us

Jeffery R. Seeley

jeff.seeley@doj.state.or.us

Mike Sargetakis

Attorney at Law

mike@sargetakis.com

Karl G. Anuta

Attorney at Law

Law Office of Karl G. Anuta

kga@integra.net

Stop B2H Coalition

fuji@stopb2h.org

33 NC-2 Noise Exception

“

Stop B2H Coalition

Jim Kreider

jkreider@campblackdog.org

Colin Andrew

candrew@eou.edu

Kathryn Andrew

lkathrynandrew@gmail.com

Susan Badger-Jones

sbadgerjones@eoni.com

Lois Barry

loisbarry31@gmail.com

Peter Barry

petebarry99@yahoo.com

Ryan W. Browne

browner@eou.edu

“

Gail Carbiener

mcgccarb@bendbroadband.com

Matt Cooper

mcooperpiano@gmail.com

Whit Deschner

deschnerwhit@yahoo.com

Jim and Kaye Foss

onthehoof1@gmail.com

Suzanne Fouty

suzannefouty2004@gmail.com

Susan Geer

susanmgeer@gmail.com

Irene Gilbert

ott.irene@frontier.com

Charles H. Gillis

35 NC-2 Noise Exception

“

charlie@gillis-law.com

Dianne B. Gray

diannebgray@gmail.com

Joe Horst and Ann Cavinato

joehorst@eoni.com

Jim and Jane Howell

d.janehowell@gmail.com

Virginia and Dale Mammen

dmammen@eoni.com

Anne March

amarch@eoni.com

Kevin March

amarch@eoni.com

JoAnn Marlette

garymarlette@yahoo.com

“

Michael McAllister

wildlandmm@netscape.net

Jennifer Miller

rutnut@eoni.com

Sam Myers

sam.myers84@gmail.com

Louise Squire

squirrel@eoni.com

Stacia Jo Webster

staciajwebster@gmail.com

Jonathan White

jondwhite418@gmail.com

John Winters

wintersnd@gmail.com

Charles A Lyons

marvinroadman@gmail.com

37 NC-2 Noise Exception

“

Svetlana Gulevkin

Svetlana.m.gulevkin@doj.state.or.us

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

IN THE MATTER OF:)	PETIONERS JOEHORST AND
)	ANNA CAVINATO’S EXCEPTIONS
THE PROPOSED BOARDMAN TO)	TO ADMINISTRATIVE LAW
HEMINGWAY TRANSSMISSION LINE)	JUDGE WEBSTER’S RULINGS:
)	PROPOSED CONTESTED CASE
)	ORDER, MOTION FOR SUMMARY
)	DETERMINATION, PROCEDURAL
)	RULINGS; ISSUES NC2 AND PS6
OAH Case No. 2019-ABC-02833)	
)	DATED JUNE 30, 2022

Mr. Horst strongly disagrees with rulings made by the ALJ on many things. While Mr. Horst is not addressing all of these decisions, his most important points are made here.

1. As to the limited parties’ concerns regarding PS6

On page 214 of the ALJ's ruling, second paragraph, the judge writes:

“After final route selection and prior to construction of the transmission line, these safety measures will be fully vetted by the Department, in consultation with Union County and the City of La Grande where applicable.”

Mr. Horst has written in his testimony, rebuttals, letters, and briefs (1) “the city of La Grande specifically has requested on several occasions that the Mill Creek route not be used as it is most impactful to the residents of the city of La Grande due to the condition of the streets in this area, the streets getting to this location, geological hazard, and other hurdles as well. The ALJ did not

(1) See Mr. Horst’s closing brief (pg. 2) dated 02/28/2022, also Mr. Horst’s Direct testimony (pg1) dated 09/16/21.

respond to this specific issue at all. It is unclear to Mr. Horst as to why there was no response to this as it is probably the most significant reason this route should not be used. The city of La Grande's opinion holds a lot of weight why this route should not be used. If the department and IPC followed the City of La Grande's recommendations at all, the Millcreek route would not even be on the table. It has become very clear the ALJ is very biased as she is overlooking the important points and simply responding to the points that can easily be responded to.

2. Ruling on Idaho Power's Motion to Strike Portions of Mr.. Horst's Response Brief regarding Issue PS-6:

In the second paragraph of page 217, the ALJ writes:

“In the motion, Idaho Power moves to strike, or in the alternative give no weight to, statements in Mr. Horst's Response Brief pertaining to granting Idaho Power access to his property as unsupported by evidence in the record. Motion at 11. The ALJ agrees that this portion of Mr. Horst's brief is testimonial in nature, unsupported by evidence in the record, and not material to Issue PS-6. Therefore, the challenged statements are given no weight.”

Mr. Horst would like to make it clear that IPC's assertion they were not allowed access to study the road for necessary repairs is untrue and unsupported by evidence. (see Mr. Horst's response brief, pg. 4) dated 03/30/2022. It is unclear to Mr. Horst as to why this was even included in the rulings.

3. As to the limited parties' concerns regarding NC2

On page 193 of the ALJ's ruling it reads:

“Authority to grant the variance. Limited parties argue that the Council lacks the authority to grant a variance under the Noise Rules because, by statute, that authority rests solely with the EQC. In response, the Department and Idaho Power assert that the Council has comprehensive authority over energy facility siting matters, including the authority to apply the DEQ noise rules..... “

On page 194 the ALJ added:

“Furthermore, as set out in the findings, when the DEQ suspended its responsibilities on noise control matters, the agency specifically contemplated that local governments and in some cases, other agencies, would take over enforcement. The DEQ also recognized that the Department and the Council would continue to review site certificate applications to ensure that proposed facilities meet the State noise requirements.

It does authorize the Department and the Council granting exceptions or variances as long as they meet state requirements! The paragraph continues:

*“...Considering that the DEQ has lacked the ability to process requests for exceptions and variances to the noise standards for the last 30 plus years, it would be absurd to conclude that the Council lacks the authority to make findings and rule on an applicant’s request for a variance and/or exception under **ORS 467.060, OAR 340-035-0010 and OAR 340-035-0100.209.**” (Emphasis added.)*

There is nowhere in these three ordinances or statutes (in the previous paragraph), that give the department or the council the ability to grant these variances or exceptions. The ordinances the ALJ referenced are as follows:

Under ORS 467.060 reads:

(1) The Environmental Quality Commission by order may grant specific variances from the particular requirements of any rule or standard to such specific persons or class of persons or such specific noise emission source, upon such conditions as it may **consider necessary to protect the public health, safety and welfare**. . . . The commission shall grant a specific variance only if it finds that strict compliance with the rule or standard is inappropriate because:

(1)(d) reads: **No other alternative facility or method of operating is yet available.**

There are other alternatives and methods available... One real good alternative, and the only route that should ever have been proposed, is using the route that the BLM initially approved across government property as opposed to the later inserted routes that is privately owned (See direct testimony McAllister). Other methods include modifying the existing power line, putting the line underground in key places, and there are other methods as well. (See STOP B2H direct testimony, Exhibit #4.)

OAR 340-035-0010 reads:

(2) In establishing exceptions, the Department shall consider the protection of **health, safety, and welfare of Oregon citizens** as well as the feasibility and cost of noise abatement; **the past, present, and future patterns of land use**; the relative timing of land use changes; and other legal constraints. For those exceptions which it **authorizes the Department shall specify the times during which the noise rules can be exceeded** and the quantity and quality of the noise generated, and when appropriate shall specify the

increments of progress of the noise source toward meeting the noise rules. [emphasis added]

The only times that have been given is “during foul weather”. “During foul weather” is not specific at all! The noise, from these power lines, will be able to be heard very often especially during high humidity, fog, ice, changes in the dew point and as a result of maintenance. (See STOP B2H direct testimony, Exhibit #5.)

Rule 340-035-0100

Variances

(1) Conditions for Granting. The Commission may grant specific variances from the particular requirements of any rule, regulation, or order to such specific persons or class of persons or such specific noise source **upon such conditions as it may deem necessary to protect the public health and welfare. [emphasis added]**

The requested variances would do the opposite, it would harm the public health and welfare. The people of IPC do not have to live or listen to the noise, so it is not protecting their health and welfare. Variances are most certainly only to our disadvantage. How is a variance in this situation deemed necessary to protect the public health and welfare?

Again, there is nowhere in these three ordinances or statutes that give the department or the council the ability to grant these variances or exceptions.

Mr. Horst does not believe the ALJ either read these statutes or simply is following guidance by the and the department.

It would be absurd to think that the EQC or the DEQ would allow exceptions or variances to exceeded noise standards. Would exceptions or variances be allowed for excessive water or air pollution? Especially when it is unclear what or when the exceeded amount will be.

ORS 467.010 recognizes noise pollution equal to air and water pollution.

Oregon statute ORS 467.010 says “The Legislative Assembly finds that the increasing incidence of noise emissions in this state at unreasonable levels is as much a threat to the environmental quality of life in this state and the health, safety and welfare of the people of this state as is pollution of the air and waters of this state.”

Conclusion:

Mr. Horst feels that the proposed Mill Creek route will have significant impacts to the health and welfare of Mr. Horst and Anna Cavinato as well as three other residents that live on the upper portion of Hawthorne Dr. The City of La Grande has also expressed concerns about the impacts this route would have on the residents of La Grande.

According to the laws and statutes of Oregon, specifically the 3 the ALJ referenced, while the department and/or the council may have some ability to give exceptions or variances, exceptions or variances do not apply here legally.

Mr. Horst, as well as many other people, have spent a lot of hours, time, and money trying to get some kind of compromise from Idaho power and the department. For the most part, all of this time has been wasted time as the ALJ has ruled against almost every contested case issue, and ruled in favor of IPC and the department (who is supposed to be working for the citizens of Oregon),

Mr. Horst owns a very busy auto repair business; the time Mr. Horst has spent, just simply trying to get some resolve on important issues the B2H project will create, hundreds of hours. This has literally cost Mr. Horst thousands of dollars. The final rulings by the ALJ are very disappointing and discouraging to what should be a fair judicial system.

The biased in the ALJ's rulings are overwhelming, It has become very clear the ALJ is biased and is clearly under the guidance of the department. This should not ever happen under any circumstances. The ALJ's rulings have been very consistent with the department's testimony, motions to dismiss, and basically any of their ideals.

IPC could have prevented many of these contested case issues if they would have just tried to work with landowners.

The EFSC should remove, at a minimum, the Mill Creek route and should strongly consider removing the Morgan Lake route as well. There would be far less impact to Oregon citizens as well as the Oregon Trail if the recommended BLM route was used.

The EFSC should also deny any exceptions or variances in accordance with Oregon Law. The BLM preferred route would also minimize the need for these exceptions or variances.

Mr. Horst has asked this question many times and never received an answer...

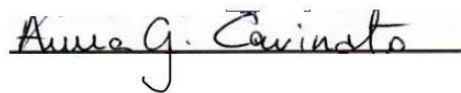
Why is the Oregon Department of Energy using their resources (that I am sure are paid by citizens of Oregon and not by the citizens of Idaho) working for Idaho Power Company as opposed to the citizens of Oregon?

Sincerely,

Joe Horst,



Anna Cavinato



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.



Joe Horst

By: Arrangement for hand delivery or US Mail:

John C. Williams
PO Box 1384
La Grande, OR 97850

By: Electronic Mail:

David Stanish
Attorney at Law
Idaho Power Company
dstanish@idahopower.com

Lisa Rackner

Attorney at Law
Idaho Power Company
lisa@mrg-law.com

Jocelyn Pease
Idaho Power Company
Attorney at Law
jocelyn@mrg-law.com

Alisha Till
alisha@mrg-law.com

Joseph Stippel
Agency Representative
Idaho Power Company
jstippel@idahopower.com

Kellen Tardaewether
Agency Representative
Kellen.tardaewether@oregon.gov

Sarah Esterson
Oregon Department of Energy
Sarah.Esterson@oregon.gov

Patrick Rowe
Assistant Attorney General
Patrick.g.rowe@doj.state.or.us

Jesse Ratcliffe
Assistant Attorney General
jesse.d.ratcliffe@doj.state.or.us

Jeffery R. Seeley
jeff.seeley@doj.state.or.us

Mike Sargetakis
Attorney at Law
mike@sargetakis.com

Karl G. Anuta
Attorney at Law
Law Office of Karl G. Anuta
kg@integra.net

Stop B2H Coalition
fuji@stopb2h.org

Stop B2H Coalition
Jim Kreider
jkreider@campblackdog.org

Colin Andrew
candrew@eou.edu

Kathryn Andrew
lkathrynandrew@gmail.com

Lois Barry
loisbarry31@gmail.com

Peter Barry
petebarry99@yahoo.com

Gail Carbiener
mcccarb@bendbroadband.com

Matt Cooper
mcooperpiano@gmail.com

Whit Deschner
deschnerwhit@yahoo.com

Jim and Kaye Foss
onthehoof1@gmail.com

Suzanne Fouty
suzannefouty2004@gmail.com

Susan Geer
susanmgeer@gmail.com

Irene Gilbert
ott.irene@frontier.com

Charles H. Gillis
charlie@gillis-law.com

Dianne B. Gray

diannebgray@gmail.com

Joe Horst and Ann Cavinato
joehorst@eoni.com

Virginia and Dale Mammen
dmammen@eoni.com

Anne March
amarch@eoni.com

Kevin March
amarch@eoni.com

JoAnn Marlette
garymarlette@yahoo.com

Michael McAllister
wildlandmm@netscape.net

Sam Myers
sam.myers84@gmail.com

John Winters
wintersnd@gmail.com

Charles A Lyons
marvinroadman@gmail.com

Svetlana Gulevkin
Svetlana.m.gulevkin@doj.state.or.us

**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 NC-1, NC-2,
NC-3 AND NC-4
(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 NC-1, NC-2, NC-3 and NC-4¹ and Mr. Horst/Ms. Cavinato and Ms. Gilbert timely filed exceptions to the PCCO regarding Issue NC-2.^{2,3}

In the Hearing Officer’s December 4, 2020 *Amended Order on Party Status, Authorized Representatives and Properly Raised Issue for Contested Case* Issues NC-1, NC-2, NC-3 and NC-4 were granted as contested case issues.

Issue NC-1 is: Whether the Department improperly modified/reduced the noise analysis area in Exhibit X from one mile of the proposed site boundary to ½ mile of the proposed site boundary and whether OAR 345-021-0010(1)(x)(E) requires notification to all owners of noise sensitive property within one mile of the site boundary.

Issue NC-2 is: Whether the Department erred in recommending that the Council grant a variance/exception from the Oregon DEQ’s Noise Rules, OAR 340-035-0035, and whether the variance/exception is inconsistent with ORS 467.010.

Issue NC-3 is: Whether the methodologies used for the noise analysis to evaluate compliance with OAR 340-035-0035 were appropriate and whether the ODOE erred in approving the methodology used to evaluate compliance with OAR 340-035-0035.

Issue NC-4 is: Whether the mitigation/proposed site conditions adequately protect the public health, safety and welfare.

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.⁴ Exceptions are written objections to

¹ STOP B2H Coalition Exceptions to Proposed Contested Case Order (hereinafter “STOP Exceptions”).

² Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order By Limited Party Gilbert Dated June 30, 2022 (hereinafter “Gilbert Exception on Issues NC-2”).

³ Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order By Limited Party Horst Dated June 30, 2022 (hereinafter “Horst Exception on Issues NC-2”).

⁴ ORS 183.469; OAR 137-003-0060

the proposed findings, conclusions of law or conditions.⁵ The exceptions must be based on the existing record, and should not include new or additional evidence.

II. ANALYSIS

A. STOP Exceptions to NC-1, NC-2, NC-3 and NC-4 Findings of Fact and Department Position

In the PCCO, recommended findings of fact are presented by standard or applicable rule, and are not distinguished by contested case issue. Therefore, all recommended findings of fact under the Noise Control Regulation section of the PCCO apply to Issues NC-1, NC-2, NC-3 and NC-4. For Issues NC-1, NC-2, NC-3 and NC-4, STOP takes exception to Finding of Fact #112 (PCCO p. 73) to the extent it “asserts that authority to grant variances has been delegated or transferred to other agencies or local governments without any express rulemaking or delegation by DEQ or EQC, or a statutory change by the Oregon legislature.”⁶ Because this exception is directly tied to STOP’s Exceptions to the Hearing Officer’s Conclusion and Opinion on Issue NC-2, the Department addresses it in subsection II.C. below.

STOP takes exception to Finding of Fact #115 (PCCO p. 74) in which the recommended findings state that corona noise exceedances will be infrequent. STOP contends they demonstrated “exceedances occurring during forty-eight days per year” would not qualify as infrequent.⁷ In making this argument, STOP continues to offer a misleading characterization of how often exceedances are estimated to occur.

The Department refers Council to its Closing Argument (pp. 83-102) and Responses to Closing Arguments (pp. 62 - 74). As explained therein, the preponderance of evidence, including testimony from an Idaho Power witness and expert witness retained by the

⁵ OAR 345-015-0085(5)

⁶ STOP Exceptions, Pages 12-13.

⁷ *Id.*, Page 13.

Department, demonstrates that while any exceedances of the ambient antidegradation standard may occur on average 48 days each year, they would occur only late at night during foul weather conditions, on average 1.3 percent of the total hours in a year across the entire length of the proposed transmission line. Given these facts and evidence, the Department believes the Hearing Officer correctly ruled that the preponderance of evidence demonstrates any exceedances would be infrequent.

STOP takes exception with regard to Finding of Fact #117 (PCCO pp. 75-76) contending that “the use of total time averaged data . . . misrepresents the meteorological data analysis per OAR 340-035-0035(1)(b)(B)(i) which Tables X-8 and X-9 reflect correctly.”⁸ STOP contends in those tables “the rate of ‘foul weather’ is correctly estimated at 13% *overall* and 22% in the La Grande area, as opposed to 1% or 1.3% noted in the Tables referenced in the Finding.”⁹ They assert that “[r]eliance on the correct Table’s [sic] would have led to the conclusion that the rate of exceedances as allowed in this permit would not qualify as ‘infrequent.’”

The Department does not agree with STOP’s interpretation of the Tables and governing rules. OAR 340-035-0035(1)(b)(B)(i) states:

(i) No person owning or controlling a new industrial or commercial noise source located on a previously unused industrial or commercial site shall cause or permit the operation of that noise source if the noise levels generated or indirectly caused by that noise source increase the ambient statistical noise levels, L10 or L50, by more than 10 dBA in any one hour, or exceed the levels specified in Table 8, as measured at an appropriate measurement point, as specified in subsection (3)(b) of this rule, except as specified in subparagraph (1)(b)(B)(iii). (Emphasis added).

“Any One Hour” is defined as “any period of 60 consecutive minutes during the 24-hour day.”

OAR 340-035-0015(7). In Table X-8¹⁰, IPC estimated the frequency of foul weather at

⁸ STOP Exceptions, Page 13.

⁹ *Id.*, emphasis added.

¹⁰ ODOE – B2HAppDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 30 of 371.

meteorological stations along the proposed transmission line. In this Table, they estimate the “Percent of Days with 1 hour or more of Foul Weather” as part of the analysis of whether there may be exceedances in excess of the level stated in OAR 340-035-0035(1)(b)(B)(i) - *i.e.*, more than 10 dBA *in any one hour*. IPC estimates that on average, across all the station locations, there will be an exceedance in any one hour on 13% of the days in a year. But, contrary to what STOP appears to be asserting, this does not mean foul weather will occur 13% of the “overall” hours the transmission line will be operating in a given year. That estimate is provided in Table X-6, which estimates foul weather will occur on average 1.3% *of the hours* in a given year.¹¹ Table X-6 estimate should be used when determining the frequency of exceedances because OAR 340-035-0035(1)(b)(B)(i) focuses on exceedances “in any one hour” not on “any one day.” And it is that estimate that should be used when determining whether to grant an exception. OAR 340-035-0035(6) states:

Exceptions: Upon written request from the owner or controller of an industrial or commercial noise source, the Department may authorize exceptions to section (1) of this rule, pursuant to rule 340-035-0010, for:

(a) Unusual and/or *infrequent events*
... (Emphasis added).

STOP would have Council assess how frequently foul weather (the “event” that could lead to an exceedance) may occur based not on how many hours the foul weather / exceedance itself may occur but on how many days in a year it may occur. This is akin to calling a day in which it rains from 3-5 am but is sunny the rest of the day a “rainy day.” The Department recommends Council find that there is no support for this approach in the rules.

STOP takes exception to Finding of Fact #125 (PCCO pp. 79-80) and the reference to a BPA Memo that explains BPA’s meteorological assessment of weather east of the Cascades and

¹¹ ODOE – B2HAppDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 27 of 371.

concludes corona sound caused by foul weather would be an infrequent event. STOP contends reliance on that memo is factually and legally inappropriate “because neither the BPA nor the state of Washington have an anti-degradation standard like Oregon.”¹² It does not matter that Washington doesn’t have an anti-degradation standard; the Department recommends Council find that it is still “factually appropriate” to consider that memo as evidence regarding how frequently foul weather occurs and to support a conclusion that corona sound caused during foul weather events would be infrequent because foul weather itself is infrequent.

STOP takes exception to Finding of Fact #127 (PCCO p. 80) to the extent it claims that IPC’s approach to estimating potential exceedances of the ambient antidegradation standard was conservative and likely overestimates the frequency of exceedances.¹³ The Department believes that finding is well-founded, and the example provided by the Hearing Officer supported by evidence in the record. The Hearing Officer’s finding therein that IPC estimated the level of corona sound that would be produced if the facility were operating at maximum voltage (550-kV) even though the line will reach that voltage only 0.01 percent of the time and during typical operations will be operated at substantially lower voltage (and hence generate lower sound levels) is clearly supported by evidence in the record. See discussion in ODOE’s Closing Brief, pp. 87 – 89 and documents referenced therein.¹⁴ While the PCCO does not cite to this evidence in Finding of Fact #127, in Finding of Fact #128 the Hearing Officer found exceedances would be infrequent because three conditions need to coincide to result in an exceedance: (1) low ambient noise environment, (2) foul weather and (3) transmission line operating at or near maximum voltage and did cite to evidence supporting that finding. The

¹² STOP Exceptions, Page 14.

¹³ *Id.*, Page 15.

¹⁴ Idaho Power Rebuttal Testimony of Mark Bastasch – Issues NC-1, NC-2, NC-3, NC-4 and NC-6 Pages 29-31 and ODOE – B2HAppDoc 3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28 Page 11 of 371.

evidence supporting the last factor – operation at or near maximum voltage overlaps with the evidence that the estimate of exceedances was conservative.

B. STOP Exceptions to NC-1 Conclusion and Opinion; and Department Position

Issue NC-1 asks: “Whether the Department improperly modified/reduced the noise analysis area in Exhibit X from one mile of the proposed site boundary to ½ mile of the proposed site boundary and whether OAR 345-021-0010(1)(x)(E) requires notification to all owners of noise sensitive property within one mile of the site boundary.”

In their exceptions on this issue, STOP wrongfully alleges that ODOE *amended* OAR 345-021-0010(1)(x)(E) when, in the Project Order, it required identification of the owners of noise sensitive property within ½ mile.¹⁵

Establishing a noise analysis area of ½ mile from the site boundary is permissible under statute and applicable rules. Council’s rules don’t specify an analysis area for determining compliance with the noise rules - OAR 345-021-0010(1)(x)(E) seeks only a list of names of persons owning noise sensitive property within one mile of the proposed facility. However, statute and Council rules expressly allow the Department, in the Project Order, to establish the application requirements and study area requirements for the site certificate application including application requirements in OAR 345-021-0010 applicable to the proposed facility. Council rule also authorizes the Department to modify any of the application content provisions set forth in OAR 345-021-0010. Per these authorizations, the Department required Idaho Power to analyze the noise impacts within ½ mile and required Idaho Power to develop a list of all owners of noise sensitive properties within ½ mile of the proposed site boundary, rather than one mile.

¹⁵ STOP Exceptions, Pages 16-17.

The allegation that OAR 345-021-0010(1)(x)(E) requires Idaho Power to notify all owners of noise sensitive property within one mile is not correct because that rule does not include any notification requirement.

Last, even if despite the aforementioned statutes and rules, STOP were correct that the Department did not have authority to “reduce” the analysis area by setting it at ½ mile, the argument is moot because in response to public input IPC has analyzed NSRs within one mile.¹⁶

Applicable Laws, Rules and Procedural History for Issue NC-1

The following statutes and rules are relevant to Issue NC-1:

ORS 469.330(3), which requires the Department to “*issue a project order establishing the statutes, administrative rules, council standards, local ordinances, application requirements and study requirements for the site certificate application. . .*” (emphasis added);

OAR 345-015-0160(1) which states that the Department “*shall send a project order to the applicant establishing the following: . . . (c) All application requirements in OAR 345-021-0010 applicable to the proposed facility . . .*” (emphasis added);

OAR 345-021-0010(1), which states: “[*t*]he project order described in OAR 345-015-0160(1) identifies the provisions of this rule applicable to application for the proposed facility, including any appropriate modifications to this rule. . . .” (emphasis added); and

OAR 345-021-0010(1)(x), which states an application must include information about noise generated by construction and operation of the proposed facility, which is to include, among other items predicted noise levels, analysis of the facility’s compliance with the noise regulations and, per subsection (E) “[*a*] list of the names and addresses of all owners of noise

¹⁶ See Applicant Idaho Power Company’s Response Brief and Motion to Strike for Contested Case Issues NC-1, NC-2, NC-2, NC-4 and NC-6 Pages 53-54, ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Pages 643-644 of 10016 n. 674 and ODOE – B2HAPPDoc3-41 ASC 24_ Exhibit X_Noise_ASC 2018-09-28. Pages 263 - 307 of 371.

sensitive property, as defined in OAR 340-035-0015, within one mile of the proposed site boundary” (emphasis added).

The following facts are relevant to this issue:

- The first Project Order (March 2, 2012) set the noise analysis area at one-half mile of the site boundary.¹⁷
- Similarly, the Second Amended Project Order (July 26, 2018), again stated the noise analysis area was set at one-half mile from the site boundary.¹⁸ It explained that “because of the linear nature of the proposed facility” the requirements of 345-021-0010(x) were modified to require the applicant to develop a list of noise sensitive properties within one-half mile instead of one mile.¹⁹
- ODOE expressly notified owners of NSR properties within ½ mile of the site boundary of the Draft Proposed Order²⁰ and Proposed Order.²¹
- In response to public input, IPC extended its noise analysis area to one mile from the site boundary where the ambient baseline sound levels were low enough that an exceedance might be possible²²; as a result of this analysis Idaho Power identified one potential exceedance that had not previously been identified; IPC has also provided maps showing NSRs predicted to exceed the ambient degradation standard²³ and identified the owners of noise sensitive properties.²⁴
- In response to concerns raised by STOP and other participants in the contested case, the Department and Idaho Power proposed amending recommended Noise Control Conditions, which the Hearing Officer has in turn proposed the Council include in the Final Order and site certificate. Under the amended recommended Noise Control Condition 1, Idaho Power would be required to develop mutually agreed upon noise mitigation plans with the owners of NSR properties at which exceedances are projected to occur. Under the amended recommended Noise Control Condition 2, Idaho Power would be required to update the list of NSRs within one mile of the site boundary to account for any changes since it was initially completed and to send notices to landowners on the updated list and address complaints from any owners of an NSR

¹⁷ ODOE – B2HNOIDoc 85 B2H-0185 Project Order 2012-03-02. Pages 30 and 33-34 of 40.

¹⁸ ODOE – B2HAPPDoc 15 ApASC Second Amended Project Order 2018-07-26. Page 25 of 29.

¹⁹ *Id.*, Page 23 of 29.

²⁰ ODOE – B2HAPPDoc2 DPO Public Notice 2019-05-22 Page 3 of 4 “Receipt of this Notice” No. 3.

²¹ ODOE – B2HAPPDoc3 Proposed Order_CC Public Notice 2020-07-02. Page 2 of 6 “Receipt of this Notice” No. 5.

²² See Applicant Idaho Power Company’s Response Brief and Motion to Strike for Contested Case Issues NC-1, NC-2, NC-2, NC-4 and NC-6 Pages 53-54, ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Pages 643-644 of 10016 n. 674 and ODOE – B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Pages 263 - 307 of 371.

²³ *Id.*

²⁴ B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Attachment X-7 Pages 333- - 371 of 371

property within one mile of the site boundary who has not received mitigation but who believes that exceedances of the ambient degradation standard have occurred at their NSR property.²⁵

The Department refers Council to its analysis of this issue in both its Closing Brief (pp. 79-83) and Response to Closing Arguments (pp. 60-62) as well as IPC's analysis in its Closing Argument and Response²⁶ and the Hearing Officer's analysis in the PCCO (pp. 190-192). As explained in those analyses, **the Department's project order governs the application requirements applicable to the proposed facility.** ORS 469.330(3) requires the Department to "issue a project order establishing the statutes, administrative rules, council standards, local ordinances, application requirements and study requirements for the site certificate application." OAR 345-021-0010(1) expressly states that the Department, in the Project Order, identifies which provisions of OAR 345-021-0010 apply to an application, including any modifications of the rule provisions. And OAR 345-015-0160(1) states that the Department "shall send a project order to the applicant establishing. . . (c) All application requirements in OAR 345-021-0010 applicable to the proposed facility . . ."

OAR 345-021-0010(1)(x)(E) seeks only a *list* of the names of the owners of noise sensitive property within one mile of a proposed facility, but neither that rule nor any other requires an applicant to analyze noise levels one mile from the proposed facility or provide notice to owners of noise sensitive property owners within a mile.

Therefore, contrary to STOP's contention, in setting the noise analysis area at one-half mile, the Department did not *amend* any rule, it simply exercised its authority, as expressly allowed by ORS 469.330(3), OAR 345-021-0010(1) and OAR 345-015-0160(1), to establish the

²⁵ PCCO, Pages 296 – 301.

²⁶ See Applicant Idaho Power Company's Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4 and NC-6, Pages 93-100 and Applicant Idaho Power Company's Response Brief and Motion to Strike for Contested Case Issues NC-1, NC-2, NC-2, NC-4 and NC-6 Pages 52-57.

requirements for the site certificate application, including requiring IPC to conduct a noise analysis within ½ mile and to a list NSR property owners within ½ mile of the proposed site boundary rather than one mile.

Despite this express language in statute and Council’s rules, STOP contends that the Department in a Project Order cannot in any way modify the application provisions described in OAR 345-021-0010 unless the Department has first adopted a rule or amendment to any provision in OAR 345-021-0010 that it deems does not apply or should be modified for a given application. Not only is this suggestion in direct conflict with the clear language of the aforementioned statute and rules and their intent to afford the Department flexibility in determining what must be provided in an application, it would place the Department in a position of potentially having to go through a new rulemaking with virtually every application for a site certificate.

Further, even if STOP were correct that the Department does not have authority to set the noise analysis area at ½ mile and must require the analysis at one mile from the site boundary, the argument is moot because, in response to public input, IPC extended its noise analysis area to one mile from the site boundary where the ambient baseline sound levels were low enough that an exceedance might be possible; as a result of this analysis Idaho Power identified one potential exceedance that had not previously been identified. The Department refers Council to IPC’s description of the expanded analysis it conducted of NSRs and related documents in the record.²⁷

²⁷ Applicant Idaho Power Company’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4 and NC-6, Pages 95-98; Applicant Idaho Power Company’s Response Brief and Motion to Strike for Contested Case Issues NC-1, NC-2, NC-2, NC-4 and NC-6 Pages 53-54, ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Pages 643-644 of 10016 and ODOE – B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Pages 263 - 307 of 371.

Also, as noted above, in response to concerns raised by STOP and other participants in the contested case, the Department and Idaho Power proposed amending recommended Noise Control Conditions, which the Hearing Officer has proposed the Council include in the Final Order and site certificate. Those include the amended recommended Noise Control Condition 2, which would require Idaho Power to update the list of NSRs within one mile of the site boundary to account for any changes since it was initially completed and to send notices to landowners on the updated list and address complaints from any owners of an NSR property within one mile of the site boundary who has not received mitigation but who believes that exceedances of the ambient degradation standard have occurred at their NSR property.²⁸

C. STOP Exceptions to NC-2 Conclusion and Opinion; and Department Position

Issue NC-2 asks: “Whether the Department erred in recommending that the Council grant a variance/exception from the Oregon DEQ’s Noise Rules, OAR 340-035-0035, and whether the variance/exception is inconsistent with ORS 467.010.”

As noted above, STOP takes exception to the PCCO Finding of Fact #112, which states, in relevant part, that:

“[i]n July 1991, upon legislative approval, the DEQ terminated the Noise Control Program as an agency cost savings measure due to reductions in General Fund support. (Rowe Decl. Attachment 1.) Although the DEQ terminated its Noise Control Program, the statutes and administrative rules remain in force. Now, enforcement of the noise standards falls under the responsibility of local governments and, in some cases, other agencies. The Department and Council must ensure that proposed energy facilities meet the DEQ’s noise control regulations. (*Id.*)”

²⁸ PCCO, Pages 296 – 301.

STOP also takes an exception to the Hearing Officer’s statement in the PCCO that “the Council has the authority to make findings and to approve a variance from (and/or exception to) the requirements of OAR 340-035-0035.”²⁹

STOP asserts “ORS Chapter 467 and OAR Chapter 340 are exclusively the purview of Oregon Department of Environmental Quality (“DEQ) and Oregon Environmental Control Commission (EQC). ODOE and EFSC do not have authority to usurp the power of another agency, absent a statutory or regulatory delegation to ODOE/EFSC.”³⁰ As support for this argument, STOP references its Closing Argument, pp. 7-8 and states there is no evidence in the record “that IPC (or anyone) ever asked DEQ or EQC for a variance.”³¹ But in neither its Exceptions nor in its Closing Argument does STOP even attempt to address the evidence the Department provided, and which the Hearing Officer referenced in the PCCO, that a DEQ rule, a DEQ Internal Management Directive and DEQ’s response to STOP’s discovery requests in the contested case all make it clear that EQC and DEQ no longer administer the noise control program, will not process requests for exceptions or variances, and local governments and EFSC may enforce the noise rules. The Department refers the Council to the analysis it provided in its Rebuttal to Direct Testimony, Evidence and Response to Proposed Site Certificate Conditions, pp. 59 – 65 and supporting Declaration (copy included with this Response). As noted therein, a DEQ rule, OAR 340-035-0110 states:

In 1991 the Legislative Assembly withdrew all funding for implementing and administering ORS Chapter 467 and the Department’s noise program. *Accordingly, the [Environmental Quality] Commission and the Department have suspended administration of the noise program, including but not limited to processing requests for exceptions and variances, reviewing plans, issuing certifications, forming advisory committees, and responding to complaints.*

²⁹ STOP Exceptions, p. 18, referencing the PCCO p. 194.

³⁰ *Id.*, p. 18.

³¹ *Id.*

Similar, the public's obligations to submit plans for certifications to the Department are suspended. (Emphasis added).

Additionally, a DEQ Internal Management Directive providing Staff Guidance on Noise Control Issues states:

Enforcement of State Noise Regulations: Although DEQ's Noise Control Program has been terminated, the noise statutes and administrative rules remain in force. Regulated noise sources are legally responsible for complying with state noise laws. The noise statutes are in ORS Chapter 467 and administrative rules in OAR 340 Division 35.

- *Enforcement now falls under the responsibility of local governments, and in some cases other agencies . . .*
- *The Energy Facility Siting Council (EFSC), under the Department of Energy, is authorized to approve the siting of large energy facilities in the State. EFSC staff review applications to ensure that proposed facilities meet the State noise regulations. (Emphasis added).³²*

Also, in response to a discovery request from STOP, DEQ provided a 4/8/13 memorandum from DEQ to ODOE providing comments on the preliminary Application for Site Certificate for the B2H Project that, with regard to noise matters, states:

DEQ believes it is instructive to IPC to consider that in 1991 DEQ terminated its Noise Control Program, upon legislative approval, due to reductions in statewide General Funding. As such the Noise Control statutes and administrative rules remain in force. However, because the program was defunded, *DEQ has no authority to respond to complaints, provide advice, or interpret state noise regulations per ORS 467; OAR 340 division 35*. Applicants are encouraged to work closely with local governments to review the implications for noise as a project component. (Emphasis added)³³.

These documents, none of which STOP addresses, all refute STOP's position that only EQC can issue a variance and that ODOE and EFSC are "usurping the power" of EQC and DEQ.

Further, state statutes clearly establish that EFSC determines if an ASC complies with statutes and rules normally administered by other agencies (subject to certain exceptions not

³² See enclosed copy of Declaration of Patrick Rowe Re: Oregon Department of Energy Rebuttal, Paragraph 2 and Attachment 1.

³³ See enclosed copy of Declaration of Patrick Rowe Re: Oregon Department of Energy Rebuttal, Paragraph 4 and Attachment 3.

applicable here) and that EFSC’s findings regarding compliance with such statutes and rules is binding on those agencies.³⁴ Thus, Council would not need approval from EQC or DEQ when making a decision regarding compliance with the noise rules even if EQC and DEQ were still administering those rules.

STOP notes that ORS 467.060(3) states “In determining whether or not a variance shall be granted, the commission or the department shall consider the equities involved and the advantages and disadvantages to residents and to the person conducting the activity for which the variance is sought.” STOP argues there are no Findings of Fact in the PCCO that reference this requirement, the Findings and Conclusions “discuss only Idaho Power’s side of the equation” and that “[t]his was error, as the statute expressly requires the equities on the side of the affected public to also be considered.”³⁵ STOP notes that it suggested compensatory mitigation be offered in the form of noise easements if necessary.³⁶ STOP doesn’t identify any evidence regarding disadvantages to residents that the Hearing Officer should have assessed in the PCCO. Further, under the amended recommended Noise Control Conditions, which the Hearing Officer has proposed, Idaho Power would take measures to mitigate impacts to residents that could be affected by the variance / noise from the proposed facility, thus addressing any disadvantages to residents. Under the amended recommended Noise Control Condition 1, Idaho Power would be required to (among other actions) develop mutually agreed upon mitigation plans with each

³⁴ See discussion in the PCCO, Pages 193-194, citing ORS 469.310 – the purpose of the energy facility statutes is to establish “a *comprehensive system* for the siting, monitoring and regulating of the location, construction and operation of all energy facilities in this state”; ORS 469.370(7), the Council must determine whether the proposed facility complies with “the standards adopted under ORS 469.501 *and any additional statutes, rules or local ordinances determined to be applicable to the facility the by project order, as amended.*” ORS 469.401(3) “. . . any certificate or amended site certificate signed by the chairperson of the council shall bind the state and all counties and cities and political subdivisions in this state as to the approval of the site and the construction and operation of the facility.”

³⁵ STOP Exceptions, p. 19.

³⁶ *Id.*

owner of an NSR property where an exceedance of the ambient antidegradation standard is estimated to occur.³⁷ And under amended recommended Noise Control Condition 2, Idaho Power would be required to (among other actions) address complaints from owners of an NSR property within one mile of the facility where an exceedance was not estimated but believes exceedances have occurred at their property.³⁸

Finally, STOP contends that “any exception should be granted only on an NSR-by-NSR basis” that applying a facility-wide variance “would not protect the health, safety and welfare of each of the separate NSR occupants” and that “mitigation should follow the same NSR-by-NSR formula.”³⁹ The Department does not agree. Applying a facility-wide exception and variance as recommended in the amended recommended Noise Control Conditions 4 and 5 would allow the facility to continue operating while the certificate holder, Department and/or Council assess any allegations of noise exceedances at NSRs not currently estimated to have exceedances. Further, and contrary to STOP’s assertion, the mitigation proposed in amended recommended Conditions 1 and 2⁴⁰ would be applied on an NSR-by-NSR basis, including mitigation for an owner of an NSR property within one mile of the site boundary who was not projected to have an exceedance but believes exceedances above the ambient degradation standard have occurred at their property.

D. STOP Exceptions re: NC-3 Impact Methodology; and Department Position

Issue NC-3 asks: “Whether the methodologies used for the noise analysis to evaluate compliance with OAR 340-035-0035 were appropriate and whether the ODOE erred in approving the methodology used to evaluate compliance with OAR 340-035-0035.

³⁷ PCCO, Pages 296-297 of 337.

³⁸ PCCO, Pages 297-301 of 337.

³⁹ STOP Exceptions, pp. 19-20.

⁴⁰ PCCO, Pages 296-301.

STOP takes exception to the Hearing Officer's conclusion of law on NC-3 and argues the Hearing Officer mistakenly concluded that Idaho Power's methodologies for evaluating compliance with OAR 340-035-0035 were appropriate, arguing it was in error to allow Idaho Power to use 31 dBA as the representative baseline in the Morgan Lake area because using Monitoring Point (MP) 11 to establish ambient noise levels was inappropriate due to train noise and other rural counties have lower dBAs than what the Hearing Officer' accepted for Union County.⁴¹

The Department refers Council to the analyses of this issue in the Department's Closing Brief (pp. 102-107), the Department's Responses to Closing Arguments (pp. 74-80), Idaho Power's Closing Arguments for Issues NC-1, NC-2, NC-3, NC-4, and NC-6 (pp. 71 - 89), Idaho Power's Response Brief and Motion to Strike for Issues NC-1, NC-2, NC-3, NC-4, and NC-6 (pp. 29 - 47) and in the PCCO (pp. 199 – 202). During the contested case, STOP provided testimony from a noise expert, Kerrie Standlee, regarding limited monitoring conducted near MP-11. Both Idaho Power's noise expert and a noise expert retained by the Department found that Mr. Standlee's monitoring was far less reliable than the sound data Idaho Power had collected because, among other reasons, Mr. Standlee collected only four hours of data in 1 day compared to the applicant's 125 hours of data over 31 days. Nevertheless, in response to concerns raised by STOP and other participants, during the contested case Idaho Power conducted additional noise monitoring to assess ambient noise levels at in the Morgan Lake area and that monitoring confirmed that the 32 dBA ambient baseline measured at MP 11 is fairly representative of other NSRs in Union County.

⁴¹ STOP Exceptions, pp. 20-21.

For these reasons and those noted in the aforementioned analyses, the Department believes the Hearing Officer correctly determined a preponderance of evidence demonstrates the methodologies the applicant used for noise analysis were appropriate.

E. STOP Exceptions re: NC-4 on Proposed Mitigation/Site Certificate Conditions; and Department Position

Issue NC-4 asks: “Whether the mitigation/proposed site conditions adequately protect the public health, safety and welfare.”

STOP takes exception to the Hearing Officer’s conclusion on Issue NC-4, arguing the proposed mitigation measures “are still not sufficient to protect the public health, safety and welfare.” The Department addresses STOP’s specific exceptions re: this Issue in the following section.

F. STOP Substantive Exceptions to Proposed Site Conditions

STOP contends the amended recommended Noise Control Condition 1 (c)(iv)⁴² should include an option for Idaho Power to purchase a noise easement or otherwise pay impacted property owners in lieu of other mitigations. The Department opposes including an option in amended recommended Noise Control Condition 1 for Idaho Power and the owners of NSR properties at which exceedances are projected to occur to agree upon a noise easement or other payment in place of the forms of mitigation described in that condition because 1) the condition language already offers an allowance for alternative mitigation to be evaluated and agreed upon IPC and NSR property owner and 2) it would be inappropriate for the Council to include the additional specificity without a connection to the protection of public health and safety impacts from noise-related impacts, consistent with the list of measures currently referenced in the condition (e.g. air sealing of residence, planting trees, or installing installation). A waiver and

⁴² The completed Amended Recommended Noise Control Condition 1 is in the PCCO, Pages 296-297.

compensation provides a financial benefit to the NSR property owner but does not automatically offer a public health and safety benefit.

STOP also takes exception to the amended recommended Noise Control Condition 2(a)⁴³ suggesting it be revised to read:

“In addition, prior to construction, the certificate holder shall develop and submit to the Department **for approval and once approval is obtained distributed to all NSR properties within one mile of the site boundary** an operational noise compliant response plan.”

STOP’s proposed condition language is redundant with existing language included in amended recommended Noise Control Condition 2(c), where the language states that the Operational Noise Complaint Response Plan must:

“..clearly describe how affected persons will be provided necessary information for filing a complaint and receiving a response, and will specify the information that the complainant must include in the complaint..

The Department believes that the information relevant and necessary for owners of NSR properties within 1-mile of the site boundary to ensure an adequate understanding of how to file noise complaints and what to expect from IPC in response is addressed in the above-referenced language. While IPC is not precluded from providing their entire Department-approved Operational Complaint Response Plan to NSR property owners to satisfy the above-recommended condition language, the Department does not agree that the additional, redundant requirement proposed by STOP is necessary.

STOP also takes exception to amended recommended Noise Control Condition 2 e.iv. (PCCO p. 209) to the extent it does not include STOP’s proposed language mandating that the noise specialist be agreeable to all parties involved in a noise dispute. This is not necessary. Under this subsection, the noise specialist must be an Oregon registered Professional Engineer,

⁴³ The completed Amended Recommended Noise Control Condition 2 is in the PCCO, Pages 297-301.

Board Certified by the Institute of Noise Control Engineering unless otherwise approved by the Department. Given this credential requirement, it is not necessary that the complainant agree to the specialist to ensure their qualifications. Further, if the complainant believes the specialist's data is not reliable or has any other concerns about the specialist, they could bring that up under the dispute resolution process described in subsection e.v. of the condition.

STOP takes exception to the proposed Noise Control Condition 3 (PCCO p. 211) because it does not include changes STOP proposed regarding the use of a “non-specular” finish on conductors and inspection, monitoring and maintenance.⁴⁴ As explained in its Response to Closing Arguments (pp. 87-88), the Department believes the measures STOP proposes are already covered under amended recommended Noise Control Condition 2(e)(i) which states:

..”The certificate holder shall..ensure that it **already** has taken appropriate measures near that NSR to minimize corona noise that may occur during the burn in period (e.g. use conductors with a nonspecular finish/sandblasting of conductors..)”

If any noise complaints are received by IPC, IPC must demonstrate that the conductors already have a non-specular finish, resulting in a design requirement that all conductors have a non-specular finish, which is also consistent with the conductor design proposed in the ASC⁴⁵, that must be demonstrated by IPC.

STOP's proposed language to require that IPC “inspect, monitor, and implement necessary maintenance throughout the operational life of the project” is vage and therefore would create challenges for the Department to both track and enforce. Recommended and Amended Recommended Noise Control Conditions already require an evaluation of operational issues upon receipt of complaints, which provide clear process requirements for IPC to

⁴⁴ STOP Exceptions, Pages 24-26.

⁴⁵ ODOE-B2HAPPDoc4-4 ASC 02a_Exhibit B_Project Description_ASC 2018-09-28 Page 70 of 96.

implement; and clear documentation for the Department to review, evaluate and enforce.

Therefore, the Department disagrees that STOP’s proposed language is necessary or appropriate.

STOP takes exception to the proposed Noise Control Conditions 4 and 5, to the extent that in both conditions “foul weather” is defined as only rain and appears to suggest that the definition of foul weather in those conditions be expanded to include humidity (and possibly fog, snow and condensation). The Department does not agree with this proposal. As recommended, Conditions 4 and 5 grant an exception and variance, respectively, to the ambient antidegradation standard during “foul weather.” Adding humidity or other factors to the definition of foul weather in those conditions would expand the circumstances under which an exception or variance would be granted, whereas the Department, consistent with the rules governing the granting of exceptions⁴⁶ and variances⁴⁷ is seeking to limit the times during which the noise rules can be exceeded.

G. Gilbert Exceptions on Issue NC-2

Ms. Irene Gilbert also filed exceptions on Issue NC-2. Immediately below, the Department addresses what appear to be Ms. Gilbert’s primary arguments in her exceptions. The Department also refers Council to the analyses of Issue NC-2 in the Department’s Closing Brief (pp. 83-102), the Department’s Responses to Closing Arguments (pp. 62-74), Idaho Power’s Closing Arguments for Issues NC-1, NC-2, NC-3, NC-4, and NC-6 (pp. 27-71), Idaho Power’s Response Brief and Motion to Strike for Issues NC-1, NC-2, NC-3, NC-4, and NC-6 (pp. 9-29) and in the PCCO (pp. 199 – 202).

⁴⁶ OAR 340-035-0010(2) “In establishing exceptions . . . the Department shall specify the times during which the noise rules can be exceeded and the quantity and quality of the noise generated . . .”;

⁴⁷ OAR 340-035-0100(1) “The Commission may grant specific variances from the particular requirements of any rule, regulation, or order . . . Such variances may be limited in time.”

Ms. Gilbert contends “there is one [of her exceptions re: NC-2] that rises above most others. While the Council has the authority to determine compliance with the rules of another agency, that authority does not extend to interpreting the plain language of the statutes and rules of another agency and the developer is required to provide documentation that would be required by the other agency to council to support their decision.”⁴⁸ She similarly alleges “ODOE and the Council are interpreting another agency’s rules which is precluded by Court decisions. Since the DEQ Noise Rules are simply quoting the statute, no agency has the authority to ‘interpret’ what the legislature intended beyond the plain language of the statute and rules.”⁴⁹

In response to this exception, the Department refers Council to its discussion above in Section II. C. addressing STOP’s exception to the Hearing Officer’s Conclusion of Law on Issue NC-2. Again, a DEQ rule, a DEQ Internal Management Directive and DEQ’s response to STOP’s discovery requests in the contested case all make it clear that EQC and DEQ no longer administer the noise control program, will not process requests for exceptions or variances, and local governments and EFSC may enforce the noise rules. Further, state statutes clearly establish that EFSC determines if an ASC complies with statutes and rules normally administered by other agencies and that EFSC’s findings regarding compliance with such statutes and rules is binding on those agencies.⁵⁰ Thus, contrary to Ms. Gilbert’s assertion, Council does have the authority to determine compliance with the DEQ noise rules. Two of the three cases Ms. Gilbert cites to on

⁴⁸ I. Gilbert NC-2 Noise Exception, p. 8.

⁴⁹ I. Gilbert NC-2 Noise Exception, p. 7.

⁵⁰ See discussion in the PCCO, Pages 193-194, citing ORS 469.310 – the purpose of the energy facility statutes is to establish “a *comprehensive system* for the siting, monitoring and regulating of the location, construction and operation of all energy facilities in this state”; ORS 469.370(7), the Council must determine whether the proposed facility complies with “the standards adopted under ORS 469.501 *and any additional statutes, rules or local ordinances determined to be applicable to the facility the by project order, as amended.*” ORS 469.401(3) “. . . any certificate or amended site certificate signed by the chairperson of the council shall bind the state and all counties and cities and political subdivisions in this state as to the approval of the site and the construction and operation of the facility.”

pp. 2-3 (*Gonzales* and *Kisor*) do not appear applicable here because they are federal, not state cases addressing interpretation of federal rules and thus not applicable to ODOE or EFSC, which are state agencies. Further, Ms. Gilbert has not explained why any of these cases would preclude Council from determining compliance with the noise rules given Council's comprehensive authority to determine compliance with statutes, rules, etc. applicable to a facility and that are normally administered by other agencies. Finally, contrary to Ms. Gilbert's allegation, Idaho Power has provided documentation that would be required by DEQ/EQC to support Council's decision, in ASC Exhibit X and related testimony and evidence in the contested case, which the Hearing Officer cited to in the Findings of Fact.⁵¹

Allegation regarding state liability

Ms. Gilbert alleges "[a]llowing an exception and variance for the developer would result in the state assuming the liability for litigation regarding future impacts."⁵² However, she does not cite to any statute or case law in support of this allegation nor does she attempt to explain her reasoning or identify a legal theory that might support a cause of action against the state under these circumstances.

Allegation of failure to determine health and safety impacts is unfounded

Ms. Gilbert also alleges the PCCO fails "to determine impacts to the safety and health of citizens impacted by the increased noise levels who reside outside the site boundary."⁵³ This allegation is misleading and contradicted by evidence in the record. First, there are no expected exceedances of the maximum allowable noise standard.⁵⁴ Second, Idaho Power estimates that

⁵¹ See, e.g., Findings of Fact 115 - 120 PCCO pp. 74-77.

⁵² I. Gilbert Exceptions, p. 4.

⁵³ I. Gilbert Exceptions, p. 8.

⁵⁴ See the Department's Closing Brief, p. 87 and ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Pages 648-649 of 10016 and ODOE – B2HAppDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28, Table X-5.

when in operation, during typical fair weather conditions, the facility will comply with the ambient antidegradation standard.⁵⁵ They estimate the facility may exceed the ambient antidegradation standard at 41 NSRs within ½ mile of the site boundary late at night (midnight to 5 am) during foul weather conditions, which they define as 0.8 to 5.0 millimeters per hour.⁵⁶ Based on data collected from weather stations along the proposed transmission line, it is expected that such exceedances would occur on average 1.3 of the total hours in a year.⁵⁷ Thus, it is not correct and misleading to allege that the applicant or the Hearing Officer in the PCCO have failed to determine impacts to the safety and health of citizens impacted by the increased noise levels who reside outside the site boundary.

Allegations regarding IPC's methodology for assessing noise impacts is beyond scope of NC-2

Ms. Gilbert makes allegations regarding the methodology Idaho Power employed to estimate noise.⁵⁸ Council should not entertain these allegations because they are beyond the scope of Issue NC-2 and, although they are related to Issue NC-3, Ms. Gilbert was not granted standing on that Issue. If Council nevertheless wishes to consider these arguments, the Department refers Council to its analysis of Issue NC-3 in section II. D. above.

H. Horst/Cavinato Exceptions on Issue NC-2

Mr. Horst and Ms. Cavinato filed exceptions regarding the Hearing Officer's opinion / analysis of Issue NC-2. They cite to the PCCO discussion of ORS 467.060, OAR 340-035-0010 and OAR 340-035-0100 and argue these statutes and rules don't "give the department or the

⁵⁵ See the Department's Closing Brief, p. 87 and ODOE – B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28, Page 23 of 371.

⁵⁶ See the Department's Closing Brief, p. 87-88, fn 199 through 201 and documents referenced therein.

⁵⁷ See the Department's Closing Brief, p. 88, fn 206 and documents referenced therein.

⁵⁸ E.g., I. Gilbert Exceptions, pp. 16-23.

council the ability to grant these variances or exceptions.”⁵⁹ Mr. Horst and Ms. Cavinato argue “[i]t would be absurd to think that the EQC or the DEQ would allow exceptions or variances to exceeded [sic] ⁶⁰noise standards.” To the extent Mr. Horst and Ms. Cavinato are arguing that EQC or DEQ would not allow exceptions or variances to the noise standards at all, that would fundamentally misunderstand the purpose of exceptions and variances, which of course is to authorize departing from the requirements of a regulation, ordinance, etc.

To the extent Mr. Horst and Ms. Cavinato are arguing the criteria for granting an exception and variance under OAR 340-035-0010 and 340-035-0100 are not met, the Department disagrees and refers them and the Council to the Department’s analysis in the Proposed Order,⁶¹ Closing Brief (pp. 84-92) and Response to Closing Arguments (pp. 62-74), to Idaho Power’s Closing Argument (pp. 27-68) and Response Brief and Motion to Strike for Contested Case Issues NC-1, NC-2, NC-3, NC-4 and NC-6 (pp. 9-28) and the PCCO (pp. 195-198). As explained therein, under OAR 340-035-0035(6)(a), an exception can be provided for unusual or infrequent events. A preponderance of evidence demonstrates exceedances of the ambient antidegradation standard would occur infrequently - during foul weather conditions and even then, only late at night when the line is operating at maximum capacity. Under OAR 340-035-0100 a variance may be granted if, among other reasons, strict compliance is inappropriate because of conditions beyond the control of the applicant or strict compliance would result in substantial curtailment of a business, plant or operation. Here, the cause of the exceedance (foul weather) is certainly beyond the control of the applicant as are certain legal constraints involved

⁵⁹ Horst, Cavinato Exceptions, pp. 3-5

⁶⁰ *Id.*, p. 6.

⁶¹ ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Pages 623 – 667 of 10016.

in the siting process and strict compliance with the noise rules would result in substantial curtailment (never building) of the proposed transmission line.

III. CONCLUSION

For the reasons set forth above, the Department recommends that the Council reject the exceptions on Issues NC-1, NC-2, NC-3 and NC-4 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,

ELLEN F. ROSENBLUM
Attorney General

/s/ Patrick Rowe

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

**ODOE Response to Exceptions –
Issues NC-1, NC-2, NC-3 and NC-4**

Exhibit 1

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
FOR 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 REBUTTAL TO DIRECT
TESTIMONY AND EVIDENCE AND
RESPONSE TO PROPOSED SITE
CERTIFICATE CONDITIONS**

OAH Case No. 2019-ABC-02833

November 12, 2021

- b. Limited Parties with Standing: Matt Cooper; Stop B2H Coalition
- c. Related Standard: Noise Control Regulation, OAR 345-035-0035
- d. Department Position: Establishing a noise analysis area of ½ mile from the site boundary is permissible under applicable rules. OAR 345-021-0010(1)(x)(1) requires an applicant to list noise sensitive properties, as defined in OAR 340-035-0014, within 1 mile of a proposed site boundary; it does not establish any notification requirements.
- e. Department Rebuttal Evidence

While reserving the right to reference other documents admitted into evidence in its Closing Argument and Response to Closing Arguments, the Department points to the following documents as relevant to its position on this issue:

- Proposed Order, Section IV.Q.1 Noise Control Regulation. ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 7651 of 10016
- ASC Exhibit X. ODOE – B2HAPPDoc3-41 ASC 24_ Exhibit X_Noise_ASC 2018-09-28 Pages 1 – 371.
- Second Amended Project Order, (x) – Exhibit X – Noise and Table 2. ODOE - B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26. Page 23 and 25 of 29.

16. Issue NC-2

- a. Issue Statement: Whether the Department erred in recommending that Council grant a variance/exception from the Oregon DEQ’s Noise Rules, OAR 340-035-0035, and whether the variance/exception is inconsistent with ORS 467.010.
- b. Limited Parties with Standing: Irene Gilbert, Diane Gray, Joe Horst and Anna Cavinato, Sam Myers; STOP B2H.
- c. Related Standard: Noise Control Regulation, OAR 345-035-0035
- d. Department Position: There is a preponderance of evidence to support Council finding that the criteria for granting a variance and exception are met.
- e. Direct Testimony and Evidence

The following direct testimony and evidence has been admitted into evidence for Issue NC-2⁵²:

- Stop B2H – Standlee direct testimony
- Stop B2H Exhibit 1 – Fuji Kreider Testimony (with attachment)
- Stop B2H Exhibit 2 – Lois Barry Testimony
- Stop B2H Exhibit 3 – Colburn letter 7-10-15
- Stop B2H Exhibit 5 – Standlee Report
- Stop B2H Exhibit 6 – Email exchanges
- Stop B2H Exhibit 12 – Larkin Testimony
- Gilbert testimony/opening argument
- Gilbert Exhibit 1
- Gilbert Exhibit 7
- Gilbert Exhibits 14-17 (photographs)
- Gilbert Exhibits 18-21 (photographs)
- Gilbert Exhibit 27 (OHA, Strategic Health Impact Assessment)
- Sam Myers direct testimony
- Horst testimony
- Horst Exhibit Q

f. Department Rebuttal Evidence and Testimony

While reserving the right to reference other documents admitted into evidence in its Closing Argument and Response to Closing Arguments, the Department points to the following testimony and documents as relevant to this issue:

- Written Rebuttal Testimony of Ken Kosky, Golder Associates and attachments included with this testimony.
- ASC Exhibit X Noise. ODOE – B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28 Pages 1 - 371.
- Proposed Order Section IV.Q.1. Noise Control Regulations. ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 626 of 10016.
- DEQ Internal Management Directive re: Staff Guidance on Noise Control Issues (effective July 2003) – Attachment 1 to the Declaration of Patrick Rowe.
- STOP B2H Coalition informal request for discovery to the Oregon Department of Environmental Quality – Attachment 2 to the Declaration of Patrick Rowe.
- Oregon Department of Environmental Quality response to STOP B2H Coalition informal request for discovery – Attachment 3 to the Declaration of Patrick Rowe.

⁵² List of Direct Testimony and Exhibits Admitted into the Contested Case Hearing Record, issued October 21, 2021.

g. Department Analysis/Rebuttal

STOP B2H makes several technical arguments regarding the noise analysis matters, which the Department addresses in the Written Rebuttal Testimony of Ken Kosky, Golder Associates.

STOP B2H also makes a legal argument that only the Oregon Environmental Quality Commission (“EQC”) can grant a variance to the DEQ noise control rules,⁵³ alleges that the EQC “continues to be responsible absent legislative action to modify rules” and takes issue with the fact that ODOE “has not consulted with the EQC” regarding noise issues in this site certificate review.⁵⁴ These assertions disregard EFSC’s comprehensive authority over energy facility siting matters, as well as a DEQ rule and DEQ directive regarding the noise program.

ORS 469.310 provides that the purpose of the energy facility siting statutes is to create “a comprehensive system for the siting, monitoring, and regulating of the location, construction and operation of all energy facilities in this state.” This language indicates clear legislative intent to grant EFSC comprehensive authority over the siting of energy facilities.

The energy facility siting process is often referred to as a one-stop permitting process because EFSC determines whether the proposed energy facility complies with EFSC standards as well as other state statutes and rules normally administered by other agencies. Issuance of the site certificate binds other state agencies and local governments to the construction and operation of the facility at the approved site. Two statutes in particular demonstrate this framework.

ORS 469.370(7) states “[a]t the conclusion of the contested case, the council shall issue a final order, either approving or rejecting the application based upon the standards adopted under

⁵³ STOP B2H Direct Testimony of Fuji Kreider on Issue NC-2, pp. 2-3

⁵⁴ *Id.*, p. 6

ORS 469.501 and any additional statutes, rules or local ordinances determined to be applicable to the facility by the project order, as amended.”⁵⁵

Additionally, ORS 469.401(3) states “any certificate or amended certificate signed by the chairperson of the council shall bind the state and all counties and cities and political subdivisions in this state as to the approval of the site and the construction and operation of the facility * * *. Each state or local government agency that issues a permit, license or certificate shall continue to exercise enforcement authority over the permit, license or certificate.”

These statutes establish that EFSC may assess if an application for a site certificate complies with state statutes and rules normally administered by other agencies and that EFSC’s findings regarding compliance with such statutes and rules, including the DEQ/EQC noise program requirements, is binding on those agencies, including EQC and DEQ. The Council does not need approval from EQC or DEQ when making a decision regarding compliance with the noise rules. The only power another agency retains over matters that are addressed in a site certificate is enforcement authority over any permit, license, etc. that it may be required to issue for an energy facility in light of a Council decision to grant a site certificate.

Here, the EQC/DEQ noise statutes and rules don’t include the issuance of a permit or license, thus whether EQC/DEQ retain the authority to enforce the noise rules would not be in question even if EQC and DEQ were still administering the noise program. However, were there any such question, a DEQ rule, a DEQ Internal Management Directive and DEQ’s responses to STOP B2H’s discovery requests in this matter all make it clear that EQC and DEQ no longer

⁵⁵ Similarly, the Council’s General Standard of Review, OAR 345-022-0000, requires Council to determine a preponderance of evidence on the record supports a conclusion that “the facility complies with all other Oregon statutes and administrative rules identified in the project order”.

administer the noise control program, will not process requests for exceptions or variances, and local government and EFSC may enforce the noise rules.

OAR 340-035-0110. Suspension of Commission and Department Responsibilities

This rule states:

In 1991, the Legislative Assembly withdrew all funding for implementing and administering ORS Chapter 467 and the Department's noise program. *Accordingly, the [Environmental Quality] Commission and the Department have suspended administration of the noise program, including but not limited to processing requests for exceptions and variances, reviewing plans, issuing certifications, forming advisory committees, and responding to complaints. Similarly, the public's obligations to submit plans or certifications to the Department are suspended. (Emphasis added).*

A DEQ Internal Management Directive providing Staff Guidance on Noise Control Issues⁵⁶ states:

Enforcement of State Noise Regulations: *Although DEQ's Noise Control Program has been terminated, the noise statutes and administrative rules remain in force.* Regulated noise sources are legally responsible for complying with the state noise laws. The noise statutes are in ORS Chapter 467 and administrative rules in OAR 340 Division 35.

- *Enforcement now falls under the responsibility of local governments, and in some cases, other agencies. . . .*

- *The Energy Facility Siting Council (EFSC), under the Department of Energy, is authorized to approve the siting of large energy facilities in the State. EFSC staff review applications to ensure that proposed facilities meet the State noise regulations.*

(Emphasis added).

Additionally, in January 2021, STOP B2H issued a discovery request asking DEQ for “all documents which demonstrate consultation between DEQ and Oregon Department of

⁵⁶ Declaration of Patrick Rowe, Attachment 1.

Energy regarding noise control regulations or standards for the Boardman to Hemingway transmission project.”⁵⁷ In response, DEQ attached a 4/18/13 memo from Randy Jones of DEQ to ODOE providing comments on the pASC for the B2H Project focusing on, among other issues, Clean Water Act permitting. With regard to noise matters, the memo states:

Noise

DEQ believes it is instructive to IPC to consider that in 1991 DEQ terminated its Noise Control Program, upon legislative approval, due to reductions in statewide General Funding. As such the Noise Control statutes and administrative rules remain in force. However, because the program was defunded, *DEQ has no authority to respond to complaints, provide advice, or interpret state noise regulations per ORS 467; OAR 340 division 35*. Applicants are encouraged to work closely with local governments to review the implications for noise as a project component.⁵⁸ (Emphasis added).

These documents refute STOP’s position that only EQC can issue a variance, that EQC continues to be responsible for the noise rules and that ODOE should have consulted with EQC.

Per the EFSC statutes and rules discussed above, EFSC has the authority to determine whether a facility complies with the DEQ noise rules, including whether to grant a variance or exception to those rules. As authorized by ORS 469.370(7), the Project Order identifies the DEQ Noise Control rules as applicable to the proposed facility and Council determines whether evidence on the record supports a finding of compliance with those rules. As part of this assessment, Council may consider whether an exception or variance to the rules is supported by findings necessary under ORS 467.060, OAR 340-035-0010 and OAR 340-035-0100. The Department notes that Council has taken this position in at least one other matter, stating: “[t]he DEQ no longer enforces the noise regulations and has no staff [to] administer variance requests. However, the Council could consider a variance, supported by findings necessary under ORS

⁵⁷ Declaration of Patrick Rowe, Attachment 2.

⁵⁸ Declaration of Patrick Rowe, Attachment 3.

467.060 and OAR 340-035-0100, if there were an insufficient basis for finding a wind facility in compliance with the noise standard.”⁵⁹ While DEQ could have retained authority to enforce the noise rules, OAR 340-035-0110 and the DEQ Internal Management Directive establish that they will no longer do so.

17. Issue NC-3

- a. Issue Statement: Whether the methodologies used for the noise analysis to evaluate compliance with OAR 340-035-0035 were appropriate and whether the ODOE erred in approving the methodology used to evaluate compliance with OAR 340-035- 0035.
- b. Limited Party with Standing: Stop B2H Coalition
- c. Related Standard: Noise Control Regulation, OAR 345-035-0035
- d. Department Position: The methodologies the applicant used for noise analysis were appropriate and allowable per OAR 340-035-0035(3)(a) and (b) for assessing the applicability of and compliance with the noise control regulations in OAR 340 Division 35.
- e. Direct Testimony and Evidence

The following direct testimony and evidence has been admitted into evidence for Issue

NC-3⁶⁰:

- Stop B2H – Standlee direct testimony
- Stop B2H Exhibit 3 – Colburn letter 7-10-15
- Stop B2H Exhibit 5 – Standlee Report
- Stop B2H Exhibit 6 – Email exchanges
- Stop B2H Exhibit 11 – Ashley O’Toole Testimony
- Stop B2H Exhibit 12 – Larkin Testimony

⁵⁹ *In the Matter of the Request for Amendment #2 of the Site Certificate for the Stateline Wind Project*, EFSC Final Order on Amendment #2, June 6, 2003, p. 100. https://www.oregon.gov/energy/facilities-safety/facilities/Facilities%20library/SWP_final_order_amend_2_060603.pdf

⁶⁰ List of Direct Testimony and Exhibits Admitted into the Contested Case Hearing Record, issued October 21, 2021.

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
FOR 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**

**DECLARATION OF PATRICK ROWE
RE: OREGON DEPARTMENT OF
ENERGY REBUTTAL**

OAH Case No. 2019-ABC-02833

WHEREFORE, the undersigned, Patrick Rowe, declares:

1. I am a Senior Assistant Attorney General with the Oregon Department of Justice, representing the Oregon Department of Energy (“Department”) in the above-referenced matter.

2. Attachment 1 to this Declaration is a true and correct copy of an Oregon Department of Environmental Quality Internal Management Directive re: Staff Guidance on Noise Control Issues, which the Department of Justice downloaded from the following link:

<https://www.oregon.gov/deq/Filtered%20Library/IMDnoisecontrol.pdf>

3. Attachment 2 to this Declaration is a true and correct copy of an informal discovery request from STOP B2H Coalition to the Oregon Department of Environmental Quality that I received via email on January 22, 2021.

4. Attachment 3 to this Declaration is a true and correct copy of the Oregon Department of Environmental Quality’s response to the STOP B2H informal discovery request that I received via email on January 26, 2021.

5. Attachment 4 to this Declaration is a true and correct copy of the A-Engrossed version of Oregon SB 951 (1995), which the Oregon Department of Justice obtained in researching the legislative history of ORS 469.402.

6. Attachment 5 to this Declaration is a true and correct copy of documents the Oregon Department of Justice obtained in researching the legislative history of ORS 469.402:

May 17, 1995 Testimony Before the House Legislative Rules Committee on Senate Bill 951 by John Savage, then-Acting Director of the Department of Energy, and a Department of Justice summary of the A-Engrossed Senate Bill 951 and an Oregon Department of Energy section-by-section summary of the A-Engrossed SB 951, both of which Mr. Savage stated in his testimony he was submitting to the Oregon House Legislative Rules Committee with his testimony.

I hereby declare that the above statement is true to the best of my knowledge and belief and that I understand it is made for use as evidence in a contested case hearing and is subject to penalty for perjury.

DATED this 12th day of November 2021.

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



Internal Management Directive

Subject:	Staff Guidance on Noise Control Issues	IMD Number:	AQ.00.010
Effective Date:	July 2003	Pages:	2
Revision Date:	March 31, 2006 (format only)		
Approval:			

Intent / Purpose / Statement of Need:

This guidance provides information on DEQ's former Noise Control Program and how staff should respond to noise inquiries and complaints.

Authority:

Applicability:

Background:

Oregon was one of the first states to adopt noise control regulations for airports, industry, racetracks, and motor vehicles. The regulations establish standards, provide exception and variance procedures, and provide enforcement. DEQ program responsibilities included technical assistance, education and public awareness, responding to complaints, and carrying out enforcement activities. The statute gives the Environmental Quality Commission (EQC) authority to withdraw enforcement of the state regulations in jurisdictions that have adopted noise regulations that meet or exceed the state regulations. The EQC has never exercised this authority. In the 1970s and 1980s, DEQ participated in the local comprehensive land use plan development process to ensure noise issues were addressed and that local plans acknowledged the state regulations. A number of local governments have adopted their own noise control standards, or have adopted DEQ's regulations by reference.

Program Termination: The DEQ, upon Legislative approval, terminated the Noise Control Program in July 1991 as an agency cost-savings measure due to reduction in General Fund support. Upon termination, DEQ took the necessary steps to inform local governments and the public, and provided guidance on how the statutes and rules would continue to apply. Additionally, DEQ provided local governments training on developing local noise ordinances and enforcement strategies.

Internal Contact:

Policy:

Attachment 1

P. Rowe Declaration

OAH Case No. 2019-ABC-02833

Page 1 of 2

Enforcement of State Noise Regulations: Although DEQ's Noise Control Program has been terminated, the noise statutes and administrative rules remain in force. Regulated noise sources are legally responsible for complying with the state noise laws. The noise statutes are in ORS Chapter 467 and administrative rules in OAR 340 Division 35.

- Enforcement now falls under the responsibility of local governments, and in some cases, other agencies. Options available to local governments and the public include:
- Local governments may enact and enforce the State standards, or may adopt their own standards and enforcement, as long as the standards are consistent with or exceed the State standards.
- In some cases, a private citizen or local government may bring a nuisance suit through private legal counsel or local district attorney's office.
- A local government may submit evidence of a state noise violation to the local district attorney's office, and enforcement would be at the discretion of that office.
- The Energy Facility Siting Council (EFSC), under the Department of Energy, is authorized to approve the siting of large energy facilities in the State. EFSC staff review applications to ensure that proposed facilities meet the State noise regulations. Smaller energy facilities that are exempt from EFSC's authority may be subject to county noise regulations, and must also comply with the State regulations.

Staff Response to Noise Related Inquiries: There is no longer a state noise program and funding for DEQ to respond to complaints, provide advice, or interpret the State noise regulations. DEQ must ensure that its resources are only spent on programs approved by the Legislature. Staff response to noise related inquiries need to be limited to the following:

- Explain that the noise program was terminated and that DEQ has no authority or resource to work on noise issues or respond to noise complaints.
- Citizen inquiries should be directed to the affected local government planning department or agency.
- If the caller has further concerns, express your regret in not being able to assist under the circumstances, and if necessary, offer to have your manager contact the individual.

Gulevkin Svetlana M

From: RecordsRequest <recordsrequest@deq.state.or.us>
Sent: Tuesday, January 26, 2021 2:04 PM
To: 'Mike Sargetakis'
Cc: Karl Anuta; dstanish@idahopower.com; Jocelyn Pease; Lisa Rackner; Alisha@mrg-law.com; jstippel@idahopower.com; Rowe Patrick G; Ratcliffe Jesse D; Seeley Jeffery; suzannefouty2004@gmail.com; joehorst@eoni.com; diannebgray@gmail.com; squirrel@eoni.com; Irene Gilbert; loisbarry31@gmail.com; Matt Cooper; Sam.myers84@gmail.com; YELLESETTY Leela
Subject: RE: Informal Requests for Discovery, STOP B2H Coalition OAH Case No. 2019-abc-02833
Attachments: Comment Table and Memo Form 4.18.13.docx

CAUTION EXTERNAL EMAIL* This email originated from outside of DOJ. Treat attachments and links with caution. *CAUTION EXTERNAL EMAIL

Good Afternoon,

DEQ, upon Legislative approval, terminated the Noise Control Program in July 1991. Please find below what we have in response to your informal request for discovery.

In response to INTERROGATORY: Randy Jones

In response to REQUEST FOR PRODUCTION: DEQ has attached the 1 responsive document to this email

Thank You,

Kristen

Kristen Mercer
Public Records Coordinator
Oregon Department of Environmental Quality
700 NE Multnomah Street, Suite 600
Portland, OR 97232
503.229.5475
merc.kristen@deq.state.or.us

PUBLIC RECORDS LAW DISCLOSURE:

This e-mail is a public record and is subject to public disclosure unless exempt from disclosure under Oregon Public Records law.

From: Mike Sargetakis <mike@oxbowlaw.com>
Sent: Friday, January 22, 2021 3:45 PM
To: RecordsRequest <recordsrequest@deq.state.or.us>
Cc: Karl Anuta <kga@integra.net>; dstanish@idahopower.com; Jocelyn Pease <jocelyn@mrg-law.com>; Lisa Rackner <lisa@mrg-law.com>; Alisha@mrg-law.com; jstippel@idahopower.com; Patrick.g.rowe@doj.state.or.us; Jesse.d.ratcliffe@doj.state.or.us; Jeff.seeley@doj.state.or.us; suzannefouty2004@gmail.com; joehorst@eoni.com; diannebgray@gmail.com; squirrel@eoni.com; Irene Gilbert <ott.irene@frontier.com>; loisbarry31@gmail.com; Matt Cooper <mcooperpiano@gmail.com>; Sam.myers84@gmail.com
Subject: Informal Requests for Discovery, STOP B2H Coalition OAH Case No. 2019-abc-02833

Dear Ms. Mercer-

Please see the attached informal requests for discovery, sent on behalf of STOP B2H Coalition in the above-referenced matter. This letter should be self-explanatory, but if it is not, please let Mr. Anuta or I know.

Thanks,
Mike Sargetakis

--

Mike Sargetakis (*he/him*)

Oxbow Law Group, LLC

620 SW Main Street, Suite 706

Portland, Oregon 97205

tel. 503 694 9362

fax (503) 914-1570

oxbowlaw.com

MEMORDUM

To: Sue Oliver
Oregon Department of Energy

From: Randy Jones
NE Regional Solutions Center, DEQ
Eastern Oregon University, Badgley Hall 233
1 University Blvd.
La Grande, Oregon 97850
(503)734-4193
Jones.randy@deq.state.or.us

Date: April 18, 2013

RE: **Oregon Department of Environmental Quality (DEQ)** Comments on the preliminary Application for Site Certificate for the Boardman to Hemingway Transmission Line Project

General Comments: [Include general comments here.]

Specific Comments:

National Pollution Discharge Elimination System (NPDES) Permitting

A National Pollution Discharge Elimination System (NPDES) 1220-C (Construction) will be required for the project so that project elements and activities such as stormwater runoff from staging areas and water runoff from concrete batch plant operations can be appropriately permitted. An additional consideration within the NPDES permit review is the IPC-generated erosion and sediment control plan at Attachment M in the Preliminary Application for Site Certificate (**pASC**). NPDES permitting authority is referenced at: Clean Water Act (CWA) section 402, 40 CFR; Oregon Revised Statutes (ORS) 468 and 468B; and Oregon Administrative Rules (OAR) 340.14, 41, 45, 52, and 55.

DEQ is in receipt of an NPDES 1200-C permit application (filed November 30, 2012) and payment for the permit application was received on December 10, 2012. This permit application is complete with the exception of the final site certification from the Oregon Department of Energy (ODOE). The permit application will be approved once the final transmission line alignment is determined and once the Energy Facility Siting Council determines that the B2H Project meets Oregon's land use standards.

CWA Section 401 Water Quality Certification

IPC has submitted a Joint Permit Application (JPA) as wetland impact is anticipated as an unavoidable function of the project purpose. If the US Army Corps of Engineers and the Oregon Department of State Lands conclude that wetland impacts are sufficiently significant to trigger a Section 401 Water Quality Certification (WQC) per Clean Water Act requirements, then DEQ will require a separate Section 401 WQC permit application and permit. DEQ manages and issues permits in Oregon under this section of the federal Clean Water Act.

Water quality specific information, however, is not typically included in the JPA, but is required for DEQ to evaluate potential impacts to water quality and beneficial uses. DEQ will require this information as a condition of permit issuance. It will be incumbent on IPC to demonstrate that the activity triggering Section 401 consideration complies with applicable [Clean Water Act](#) provisions (Sections 301, 302, 303, 306 and 307), [Oregon Water Quality Standards](#) at OAR 340 Division 41, and other state law requirements. This demonstration includes provision of environmental information on waterway(s) impacted by the project including wetlands and tributary streams, and confirmation of the status of such waterways impacted by the project ([Integrated Report](#)).

Appropriately, IPC has referenced in the **pASC** the identification of potential impact to water quality parameters ([Water Quality Standards, 303\(d\) list, TMDL](#)). The application should be modified to include an evaluation of potential water quality standard violations or contribution to violations, and an identification of measures to prevent or mitigate violations or contributions to violations. Other water quality specific regulatory information is referenced at OAR 340-048-0020.

Solid Waste Management and Water Pollution Control Facility Permitting

According to the Project Order, a Water Pollution Control Facility (WPCF) permit may be required for the project. It remains unclear whether any DEQ-issued permit for solid waste will be required. However, it seems pertinent to reiterate the following text.

The Oregon Energy Facility Siting Council (EFSC or Council) waste minimization approval standard is set forth in OAR 345-022-0120. Under OAR 345-022-0120, the Council must find through appropriate study that:

- *The applicant's solid waste and wastewater plans are likely to minimize generation of solid waste and wastewater in the construction and operation of the facility, and when solid waste or wastewater is generated, to result in recycling and reuse of such wastes;*
- *The applicant's plans to manage the accumulation, storage, disposal, and transportation of waste generated by the construction and operation of the facility are likely to result in minimal adverse impact on surrounding and adjacent areas.*

To demonstrate compliance with this standard, and in accordance with OAR 345-021-0010(1)(v), Exhibit V must include the following:

- (A) A description of the major types of solid waste and wastewater that construction, operation and retirement of the facility are likely to generate, including an estimate of the amounts.
- (B) A description of any structures, systems, and equipment for managing waste that are part of the Project.
- (C) A discussion of any actions or restrictions proposed by the applicant to reduce consumptive water use during construction and operation.
- (D) The applicant's plans to minimize, recycle, or reuse the solid waste and wastewater generated.
- (E) A description of any adverse impact on surrounding and adjacent areas from the accumulation, storage, disposal, and transportation of solid waste, wastewater and stormwater during construction and operation.
- (F) Evidence that adverse impacts are likely to be minimal.
- (G) The applicant's proposed monitoring program, if any, for minimization of solid waste and wastewater impacts.

Additionally, the Project Order requires Exhibit V to include the following specific information:

- *Information to support an application for a Water Pollution Control Facilities permit if an onsite septic system is proposed.*
- *A list of all hazardous materials that potentially would be stored or used at the Project site during construction or operation, and a description of the applicant's plans for managing hazardous waste in compliance with Oregon Department of Environmental Quality regulations.*
- *Information regarding how the applicant will manage or dispose of the debris generated by clearing activities, including brush disposal and excess material from road cut and fill operation.*

As documented in Table V-3 (Submittal Requirements Matrix), IPC has drafted Exhibit V to respond to each paragraph of OAR 345-021-0010(1)(v) described above, as well as the additional requirements set forth in the Project Order.

Noise

DEQ believes it is instructive to IPC to consider that in 1991 DEQ terminated its Noise Control Program, upon legislative approval, due to reductions in statewide General Funding. As such the Noise Control statutes and administrative rules remain in force. However, because the program was defunded, DEQ has no authority to respond to complaints, provide advice, or interpret state noise regulations per ORS 467; OAR 340 division 35. Applicants are encouraged to work closely with local governments to review the implications for noise as a project component.

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2022, the foregoing Oregon Department of Energy's RESPONSE TO EXCEPTIONS – ISSUE NC-1, NC-2, NC-3 and NC-4, and Exhibit 1, were 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 NC-1, NC-2, NC-3 and NC-4, and Exhibit 1, were served by First Class Mail or electronic mail as indicated below:

By: First Class Mail:

John C. Williams
PO Box 1384
La Grande, OR 97850

By: Electronic Mail:

Office of Administrative Hearings
P.O. Box 14020
Salem, OR 97309-4020
OED_OAH_REFERRAL@oregon.gov

Alisha Till
alisha@mtg-law.com

David Stanish
Attorney at Law
Idaho Power Company
dstanish@idahopower.com

Lisa Rackner
Attorney at Law
Idaho Power Company
lisa@mrg-law.com

Jocelyn Pease
Idaho Power Company
Attorney at Law
jocelyn@mrg-law.com

Joseph Stippel
Agency Representative
Idaho Power Company
jstippel@idahopower.com

Karl G. Anuta
STOP B2H Coalition
kga@integra.net

Kellen Tardaewether
Agency Representative
Oregon Department of Energy
Kellen.tardaewether@oregon.gov

Sam Myers
sam.myers84@gmail.com

Mike J. Sargetakis
STOP B2H Coalition
mike@oxbowlaw.com

Whit Deschner
deschnerwhit@yahoo.com

Susan Geer
susanmgeer@gmail.com

Kathryn Andrew
lkathrynandrew@gmail.com

Kevin March
kmarch1961@gmail.com

Susan Fouty
suzannefouty2004@gmail.com

Sarah Esterson
Sarah.esterson@oregon.gov

Jim Kreider
jkreider@campblackdog.org

Matt Cooper
mcooperpiano@gmail.com

Jim and Kaye Foss
onthehoof1@gmail.com

Charles A. Lyons
marvinroadman@gmail.com

Jonathan White
jondwhite418@gmail.com

Irene Gilbert
ott.irene@frontier.com

Michael McAllister
wildlandmm@netscape.net

Anne March
amarch@eoni.com

Peter Barry
petebarry99@yahoo.com

Jesse Ratcliffe
Jesse.d.ratcliffe@doj.state.or.us

Jeffery R. Seeley
Jeff.seeley@doj.state.or.us

Gail Carbiener
mcgcarb@bendbroadband.com

Stacia Jo Webster
staciajwebster@gmail.com

Joann Marlette
garymarlette@yahoo.com

Joe Horst and Ann Cavinato
joehorst@eoni.com

Virginia and Dale Mammen
dmammen@eoni.com

Dianne B. Gray
diannebgray@gmail.com

John Winters
wintersnd@gmail.com

Susan Badger-Jones
sbadgerjones@eoni.com

Lois Barry
loisbarry31@gmail.com

Colin Andrew
candrew@eou.edu

Jennifer Miller
rutnut@eoni.com

Stop B2H Coalition
fuji@stopb2h.org

Alisha Till
alisha@mrg-law.com

Patrick Rowe
Patrick.g.rowe@doj.state.or.us

DATED this 15th day of July, 2022.

/s/ Svetlana Gulevkin
Svetlana Gulevkin
Legal Secretary
Natural Resources Section
Oregon Department of Justice
Svetlana.m.gulevkin@doj.state.or.us

**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

APPLICANT IDAHO POWER
COMPANY'S RESPONSE TO LIMITED
PARTIES' EXCEPTIONS FOR
CONTESTED CASE ISSUES NC-1, NC-2,
NC-3, AND NC-4

OAH Case No. 2019-ABC-02833

July 15, 2022

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1 **I. INTRODUCTION**

2 Pursuant to OAR 345-015-0085(6) and the May 31, 2022 Proposed Contested Case Order,
3 Applicant Idaho Power Company (“Idaho Power” or the “Company”) submits its Response to
4 Limited Parties’ Exceptions for Issues NC-1, NC-2, NC-3, and NC-4.

5 **II. STANDARD OF LAW**

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

16 Parties or limited parties “with specific challenges to findings, conclusions and/or
17 recommended site certificate conditions in [ODOE’s] Proposed Order bear the burden” of
18 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).

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

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

1 **III. RESPONSE TO EXCEPTIONS**

2 **A. Issue NC-1**

3 The Hearing Officer granted limited party status to Matt Cooper and STOP B2H Coalition
4 (“STOP B2H”) for Issue NC-1, which asks:

5 *Whether the Department improperly modified/reduced the noise analysis area in*
6 *Exhibit X from one mile of the proposed site boundary to ½ mile of the proposed*
7 *site boundary and whether OAR 345-021-0010(1)(x)(E) requires notification to all*
8 *owners of noise sensitive property within one mile of the site boundary.*¹²

9 In the Proposed Contested Case Order, the Hearing Officer concluded that:

10 [ODOE] has the inherent authority to modify the provisions of OAR 345-021-
11 0010(1) via the project order, including the requirements of subparagraph (1)(x)(E)
12 [and] [ODOE] acted well within its authority in setting the minimum required
13 analysis area purposes of the Noise Control rules as the area within the site
14 boundary and one-half mile from the site boundary, based on the linear nature of
15 the proposed facility. The limited parties have not demonstrated any unlawful or
16 erroneous action by [ODOE] in this context.¹³

17 While Matt Cooper did not timely file exceptions on this issue, STOP B2H filed exceptions
18 for this issue on June 30, 2022. For the reasons discussed below, Idaho Power requests that the
19 Council adopt without modification the Hearing Officer’s findings of fact and conclusions of law
20 relevant to NC-1.

21 **1. STOP B2H, Exceptions, NC-1**

22 STOP B2H states that it takes exception to all findings of fact and conclusions of law
23 related to NC-1.¹⁴ However, in actuality, STOP B2H’s exceptions to the Proposed Contested Case
24 Order—as provided in its pleading—are limited to two particular arguments: (1) the Proposed

¹² Second Order on Case Management at 5.

¹³ Proposed Contested Case Order at 191-92.

¹⁴ STOP B2H Coalition Exceptions to Proposed Contested Case Order at 15 (June 30, 2022). [hereinafter, “STOP B2H Exceptions”].

1 Contested Case Order is in error because Item 114 (finding of fact), which provides that ODOE
2 modified the requirements of OAR 345-021-0010(1)(x)(E) in the Second Amended Project Order
3 to accommodate the linear nature of the proposed facility, represents an unlawful amendment to
4 the rule in violation of the Oregon Administrative Procedures Act (“APA”), ORS 183.010 –
5 183.690;¹⁵ and (2) the Proposed Contested Case Order is in error because Idaho Power failed to
6 identify all noise sensitive receptors (“NSRs”) within one mile of the facility as prescribed by
7 OAR 345-021-0010(1)(x)(E). As an initial matter, the arguments raised in STOP B2H’s Exception
8 were addressed in the contested case and were fully litigated. As Idaho Power explained in its
9 briefing,¹⁶ STOP B2H’s arguments are meritless for the reasons discussed below.

10 a. *STOP B2H, Exception 1, NC-1*

11 In its pleading, STOP B2H argues that ODOE’s Second Amended Project Order amended
12 OAR 345-021-0010(1)(x)(E) to require identification of only those NSRs that are located within a
13 half mile of the Boardman to Hemingway Transmission Line (“B2H” or the “Project) and that
14 amendment was conducted in violation of the notice and comment requirements of the Oregon
15 APA, ORS 183.335.¹⁷ This position is incorrect for two reasons. First, contrary to STOP B2H’s
16 claim that ODOE improperly amended OAR 345-021-0010(1)(x)(E), ODOE has not *amended* the
17 rule itself, which still stands in its original form. Rather, ODOE merely modified the *application*
18 of that rule to this particular project, consistent with ODOE’s authority under

¹⁵ STOP B2H Exceptions at 15-17; *see also* Proposed Contested Case Order at 74.

¹⁶ Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 52-57 (Mar. 30, 2022); Idaho Power’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 94-104 (Feb. 28, 2022).

¹⁷ STOP B2H Exceptions at 16-17.

1 OAR 345-0210000(4). Furthermore, as explained in Idaho Power’s Closing Argument,¹⁸
2 OAR 345-021-0000(4) provides that ODOE may waive or modify any of the application content
3 requirements listed in OAR 345-021-0010 that ODOE “determines are not applicable to the
4 proposed facility,” including those subsections setting forth study areas like OAR 345-021-
5 0010(1)(x)(E).¹⁹ Accordingly, because OAR 345-021-0000(4) provides ODOE *express* authority
6 to modify the application of the requirements of OAR 345-021-0010(1)(x)(E) to a particular
7 project, and because ODOE has not improperly amended OAR 345-021-0010(1)(x)(E) itself,
8 ODOE was *not* required to follow the procedures set out in ORS 183.335²⁰ and OAR 345-001-
9 0000(1)²¹ for a new or temporary rulemaking.²²

10 STOP B2H further argues that ODOE’s decision to require a list of NSRs within a half
11 mile of the Project site boundary instead of one full mile was improper on its face because the
12 requirement to provide a list of NSRs within one mile of the Project is mandatory and “there is no
13 discretionary language for modification for any purpose, let alone simply because a project
14 happens to be very long.”²³ This claim is patently incorrect because OAR 345-021-0000(4)

¹⁸ Idaho Power Company’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 93-103.

¹⁹ OAR 345-021-0000(4) (“If the applicant submits a written request for waiver or modification of requirements in OAR 345-021-0010 to the Department, the Department may waive or modify those requirements that the Department determines are not applicable to the proposed facility.”).

²⁰ ORS 183.335 describes the notice and comment process for an agency rulemaking.

²¹ OAR 345-001-0000(1) describes the notice requirements EFSC must follow before permanently adopting, amending, or repealing any rule.

²² Contrary to STOP B2H’s assertions, ODOE was not required to adopt a temporary rule under ORS 183.335(5). STOP B2H Exceptions at 17.

²³ STOP B2H Exceptions at 16. It is worth noting that STOP B2H mischaracterizes the Hearing Officer’s reasoning for finding that ODOE had authority to modify the application of the requirements in OAR 345-021-0010(1)(x)(E); specifically, STOP B2H claims that the Hearing Officer “mistakenly approved the ODOE modification or amendment of OAR 345-021-0010(1)(x)(E), under the theory that another part of OAR 345-021-0010(1) somehow gave ODOE authority to modify Subparts (x)(E) of the Rule, when issuing a Project Order.” *Id.* In fact, in the Proposed Contested Case Order, the Hearing Officer concludes that OAR 345-021-0000(4) grants ODOE the authority to modify the application requirement provisions in OAR 345-021-0010—a fact that the Hearing Officer notes STOP B2H

1 *explicitly grants ODOE discretion* to waive or modify the application requirements in
2 OAR 345-021-0010 when it “determines [those requirements] are not applicable to the proposed
3 facility.” Moreover, OAR 345-021-0010(1) itself explicitly contemplates that the Project Order
4 may modify the informational requirements contained in the rule. Specifically,
5 OAR 345-021-0010(1) states that the “project order . . . identifies the provisions of this rule
6 applicable to the application for the proposed facility, including any appropriate modifications to
7 applicable provisions of this rule.” For these reasons, ODOE’s decision to modify the scope of
8 the list of NSRs to fit the circumstances of the Project was entirely consistent with EFSC rules.

9 Finally, STOP B2H claims that the only legally proper way to interpret
10 OAR 345-021-0010(1) is that the only modifications that can be made to rule requirements must
11 be adopted pursuant to the Oregon APA *prior to* ODOE issuing a project order—as opposed to
12 modifications or waivers determined by ODOE under OAR 345-021-0000(4).²⁴ STOP B2H’s
13 interpretation is contrary to the plain language of OAR 345-021-0010(1) and reads into the rule an
14 APA requirement that simply is not there. It is also nonsensical because if the rule was formally
15 modified through a rulemaking, it would not require modification in an individual project order.
16 Moreover, such an interpretation would unnecessarily limit ODOE’s authority under
17 OAR 345-021-0000(4) to flexibly apply the application requirements in OAR 345-021-0010 to
18 differing circumstances.

19 In sum, under both a plain language and commonsense interpretation of
20 OAR 345-021-0000(4), ODOE was properly within its authority when it modified the application

acknowledged in its Response Brief. Proposed Contested Case Order at 191. The Hearing Officer continues that under OAR 345-021-0010(1), it is the project order that “identifies the applicable provisions of the content rule, including any appropriate modifications to applicable provisions of the rule.” *Id.*

²⁴ STOP B2H Exceptions at 17.

1 of the landowner listing requirement to noise sensitive properties located within a half mile of the
2 Project site boundary instead of those within one mile. Furthermore, pursuant to
3 OAR 345-021-0010(1), the Second Amended Project Order properly identified this modification,
4 which ODOE explained was necessary in view of the linear nature and length of the transmission
5 line—analyzing all NSRs within one mile would be both burdensome and unnecessary.²⁵
6 Therefore, Idaho Power requests that the Council adopt without modification the Hearing Officer’s
7 findings of fact and conclusions of law relevant to NC-1.

8 *b. STOP B2H, Exception 2, NC-1*

9 STOP B2H also argues that the Proposed Contested Case Order is in error because Idaho
10 Power failed to identify a number of NSRs in Exhibit X, i.e., those properties up to a one-mile
11 distance from the Project.²⁶ STOP B2H’s argument is baseless as it entirely ignores the fact that
12 Idaho Power did ultimately analyze the impact on NSRs out to one mile from the Project site
13 boundary.²⁷ Specifically, in response to concerns voiced by several parties, Idaho Power extended
14 its analysis out to one mile for any location with an expected ambient sound level low enough that
15 an exceedance might be possible.²⁸ As a result of this expanded analysis, the Company identified
16 one additional exceedance, NSR-518.²⁹ Therefore, even if ODOE’s modification of the
17 application of OAR 345-021-0010(1)(x)(E) were outside ODOE’s authority—which it was not—

²⁵ Second Amended Project Order at 21 (ODOE - B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26. Page 23 of 29).

²⁶ STOP B2H Exceptions at 16.

²⁷ Proposed Order at 636-37 n. 674 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 643-644 of 10016).

²⁸ Proposed Order at 636-37 n. 674 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 643-644 of 10016).

²⁹ Proposed Order at 652 n. 696 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 659 of 10016); *see also* Proposed Order, Attachment X-4: Tabulated Summary of Acoustic Modeling Results by Receptor Location, Table NC-1 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9804 of 10016).

1 the concern is moot because Idaho Power has in fact identified all exceedances out to one mile
2 from the site boundary. For the above reasons, Idaho Power requests that the Council adopt
3 without modification the Hearing Officer’s findings of fact and conclusions of law relevant to
4 NC-1.

5 **B. Issue NC-2**

6 The Hearing Officer granted limited party status to STOP B2H, Irene Gilbert, Dianne Gray,
7 Joe Horst and Anna Cavinato, and Sam Myers for Issue NC-2, which asks:

8 *Whether the Department erred in recommending that Council grant a*
9 *variance/exception from the Oregon [Department of Environmental Quality’s*
10 *(“ODEQ”) Noise Rules, OAR 340-035-0035, and whether the variance/exception*
11 *is inconsistent with ORS 467.010.*³⁰

12 In the Proposed Contested Case Order, the Hearing Officer concluded that:

13 [A] preponderance of the evidence establishes that, because corona sound from the
14 transmission line will result in occasional exceedances of the ambient
15 antidegradation standard, strict compliance with the DEQ’s noise rules is not
16 possible. However, because exceedances are only expected to occur during foul
17 weather, foul weather events are infrequent in the project area, and other
18 circumstances need to occur simultaneously to result in an exceedance (i.e., low
19 ambient noise environment and transmission line operating at full capacity), the
20 [Hearing Officer] finds that exceedances along the transmission line will be an
21 infrequent event (occurring less than 2 percent of the time). Even singling out the
22 La Grande area, which has a higher frequency of foul weather conditions than
23 Flagstaff Hill, Owyhee Ridge or Umatilla, Idaho Power’s modeling indicates that
24 exceedances are predicted to occur only 2.66 percent of the time. Furthermore, it is
25 important to note that even during foul weather conditions, the proposed facility
26 will not generate noise in excess of 50 dBA maximum allowable sound level for
27 industrial sources. For these reasons, [ODOE] appropriately determined that the
28 proposed facility is entitled to an exception under OAR 340-035-0035(6)(a).

29 ...

30
31
32 A preponderance of the evidence establishes that the Department’s
33 recommendations in this regard are consistent with the legislative policy

³⁰ Second Order on Case Management at 5.

1 established in ORS 467.010. The construction and operation of the proposed facility
2 does not threaten the environmental quality of life in this state and the health, safety
3 and welfare of the people of Oregon.³¹
4

5 STOP B2H, Ms. Gilbert, and Horst/Cavinato filed exceptions for NC-2 on June 30, 2022. For the
6 reasons discussed below, Idaho Power requests that the Council adopt without modification the
7 Hearing Officer’s findings of fact and conclusions of law relevant to NC-2.

8 **1. STOP B2H, Exceptions, NC-2**

9 In its pleading, STOP B2H makes the following arguments against the findings of facts
10 and conclusions of law relevant to NC-2: (1) contrary to Item 112 (finding of fact) in the Proposed
11 Contested Case Order, only ODEQ and the Oregon Environmental Quality Commission (“EQC”)
12 have the authority to approve a variance (or exception) under the Noise Rules; other agencies may
13 not enforce the Noise Rules without an express rulemaking or delegation by ODEQ or EQC, or a
14 statutory change by the Oregon Legislature;³² (2) the Proposed Contested Case Order is in error
15 because the Hearing Officer’s conclusion that an exception should be granted to B2H was incorrect
16 due to the frequency of foul weather events;³³ (3) the Proposed Contested Case Order is in error
17 because the Hearing Officer’s conclusion that B2H met the conditions for a variance was incorrect
18 and inconsistent with the requirements of ORS 467.010 and ORS 467.060(3);³⁴ and (4) the
19 Proposed Contested Case Order is in error because the Hearing Officer improperly concluded that
20 an exception and variance to the antidegradation standard could apply to the entire line as a whole
21 rather than on an NSR-by-NSR basis.³⁵ As an initial matter, the arguments raised in STOP B2H’s

³¹ Proposed Contested Case Order at 197-98.
³² STOP B2H Exceptions at 12-13, 18.
³³ STOP B2H Exceptions at 14-15, 19-20.
³⁴ STOP B2H Exceptions at 18-19.
³⁵ STOP B2H Exceptions at 19-20.

1 Exception were addressed in the contested case and were fully litigated. STOP B2H’s arguments
2 are meritless for the reasons discussed below.

3 a. *STOP B2H, Exception 1, NC-2*

4 In its pleading, STOP B2H argues that—contrary to Item 112 (finding of fact) and the
5 Hearing Officer’s conclusions in the Proposed Contested Case Order—EFSC lacks jurisdiction to
6 grant either a variance or exception from the Noise Rules, and therefore any variance or exception
7 granted by the Council would be tantamount to a violation of the Noise Control Statute and
8 ODEQ’s Noise Rules.³⁶ Item 112 (finding of fact), to which STOP B2H takes exception,
9 specifically provides that:

10 [ODEQ]’s Noise Control rules were first promulgated in 1974 to implement the
11 provisions of ORS Chapter 467. [ODEQ]’s rules, OAR Chapter 340, Division 35,
12 established standards, provided for exceptions and variances to those standards, and
13 provided for enforcement of the standards. In July 1991, upon legislative approval,
14 [ODEQ] terminated the Noise Control Program as an agency cost savings measure
15 due to reductions in General Fund support...Although [ODEQ] terminated its
16 Noise Control Program, the statutes and administrative rules remain in force. Now,
17 enforcement of the noise standards falls under the responsibility of local
18 governments and, in some cases, other agencies. [ODOE] and Council must ensure
19 that proposed energy facilities meet [ODEQ’s] noise control regulations.³⁷

20 As Idaho Power explained in its briefing,³⁸ STOP B2H’s argument regarding the Council’s
21 authority is not only unsupported by the law, it would also lead to an absurd result contrary to the
22 will of the Oregon Legislature, as evinced by the plain language of the statute and the legislative
23 history.

³⁶ STOP B2H Exceptions at 12-13, 18; STOP B2H Closing Argument at 6-7 (Feb. 28, 2022).

³⁷ Proposed Contested Case Order at 73.

³⁸ Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 9-29; Idaho Power’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 28-72.

1 EFSC is delegated comprehensive authority over energy facility siting matters in the state
2 of Oregon.³⁹ ORS 469.310 provides that the purpose of the energy facility siting statutes is to
3 create “a comprehensive system for the siting, monitoring and regulating of the location,
4 construction and operation of all energy facilities in this state.” This language indicates clear
5 legislative intent to delegate to EFSC broad authority over the siting of energy facilities, including
6 the authority to determine whether the proposed facility complies with Council standards as well
7 as other state statutes and rules normally administered by other agencies. In particular,
8 ORS 469.370(7) states that “[a]t the conclusion of the contested case, the council shall issue a final
9 order, either approving or rejecting the application based upon the standards adopted under
10 ORS 469.501 *and any additional statutes, rules or local ordinances determined to be applicable*
11 *to the facility by the project order*, as amended.”⁴⁰ Additionally, under ORS 469.401(3), any site
12 certificate or amended site certificate approved by the Council is binding on all state and local
13 institutions and political subdivisions, and “[e]ach state or local government agency that issues a
14 permit, license or certificate shall continue to exercise enforcement authority over the permit,
15 license or certificate.”

16 Based on a plain reading of these statutory provisions, EFSC has *express* jurisdiction to
17 assess whether an application for a site certificate complies with state statutes and rules usually
18 administered and enforced by other agencies, including ODEQ’s Noise Rules, and EFSC’s
19 findings regarding compliance with such statutes and rules is binding on those agencies. The EQC,
20 therefore, is not required to delegate administrative authority over noise variance/exception
21 determinations to EFSC through a separate rulemaking or delegation pursuant to

³⁹ Idaho Power Company’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 58.

⁴⁰ ORS 469.370(7) (emphasis added).

1 ORS 467.060(2).⁴¹ Furthermore, per ORS 469.370(7), the Council is not required to seek approval
2 from either the EQC or ODEQ when making a determination regarding a proposed facility’s
3 compliance with the Noise Rules, and whether an exception or variance to the Noise Rules is
4 warranted. EFSC is the final arbiter in the energy facility site certification process.

5 The legislative history of the variance statute also strongly suggests that, to the extent that
6 EFSC is required to implement the Noise Rules, it must also consider requests for variances and
7 exceptions as well. As discussed in Idaho Power’s Closing Argument, the Legislature adopted the
8 variance statute after ODEQ had promulgated its Noise Rules, to correct the “sharp restriction on
9 flexibility” reflected in ODEQ’s rules.⁴² In other words, after reviewing the rules that ODEQ had
10 developed, the Oregon Legislature responded by ensuring that businesses would have access to
11 relief from strict compliance under the appropriate circumstances. Therefore, the variance
12 provision is a critical component of the legal and regulatory framework mandated by the Oregon
13 Legislature and developed by ODEQ. Given these facts, requiring the Council to apply the Noise
14 Rules without variance or exception would thwart the will of the Oregon Legislature.

15 Moreover, STOP B2H’s “common-sense” argument that the Council cannot issue a
16 variance or exception would—in actuality—lead to an absurd result.⁴³ In 1991, the Oregon
17 Legislative Assembly withdrew all funding for implementing and administering ORS Chapter 467

⁴¹ See STOP B2H / Direct Testimony of Fuji Kreider / Issue NC-2, pp. 5-6 of 9 (arguing that the authority to issue a variance may be delegated only under ORS 467.060(2), which reads “[EQC] by rule may delegate to the Department of Environmental Quality, on such conditions as the commission may find appropriate, the power to grant variances and to make the finding required by subsection (1) of this section to justify any such variance”).

⁴² Idaho Power / Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 (Feb. 28, 2022) / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, Attachment A, Minutes of the Oregon Senate Committee on Environment and Energy for SB 243 (Feb. 16, 1977), pp. 3-4 of 7[hereinafter, “Minutes of the Oregon Senate Committee on Environment and Energy”].

⁴³ STOP B2H Exceptions at 18.

1 and the noise program.⁴⁴ Due to the lack of funding, the EQC and ODEQ suspended
2 administration of the noise program, including “processing requests for exceptions and variances,
3 reviewing plans, issuing certifications, forming advisory committees, and responding to
4 complaints.”⁴⁵ On the other hand, a 2003 Internal Management Directive from ODEQ, entitled
5 “Staff Guidance on Noise Control Issues”, confirms that while ODEQ’s noise program has been
6 terminated, local governments and other agencies, including EFSC, retain authority to administer
7 and enforce the noise statutes and administrative rules.⁴⁶ The applicable section of ODEQ’s
8 directive regarding enforcement authorities for the noise control program is provided below.

9 **Enforcement of State Noise Regulations:** Although DEQ’s Noise Control
10 Program has been terminated, the noise statutes and administrative rules remain in
11 force. Regulated noise sources are legally responsible for complying with the state
12 noise laws. The noise statutes are in ORS Chapter 467 and administrative rules in
13 OAR 340 Division 35.

- 14 • Enforcement now falls under the responsibility of local governments, and
15 in some cases, other agencies. . . .
- 16 • The Energy Facility Siting Council (EFSC), under the Department of
17 Energy, is authorized to approve the siting of large energy facilities in the
18 State. *EFSC staff review applications to ensure that proposed facilities meet*
19 *the State noise regulations.*⁴⁷

20 Given the fact that the Legislature clearly intended to allow for variances and exceptions
21 from strict application of the ODEQ Noise Rules, it makes no sense to conclude that an agency
22 charged with enforcing the Noise Rules has no authority to issue an exception or variance.

⁴⁴ OAR 340-035-0110.

⁴⁵ OAR 340-035-0110.

⁴⁶ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6 / Exhibit B, ODEQ, Staff Guidance on Noise Control Issues, 2 of 3.

⁴⁷ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6 / Exhibit B, ODEQ, Staff Guidance on Noise Control Issues, p. 2 of 3 (emphasis added).

1 Importantly, the Council has already considered this question and has concluded that the
2 Council “could consider a variance, supported by findings necessary under ORS 467.060 and
3 OAR 340-035-0100, if there were an insufficient basis for finding a . . . facility in compliance with
4 the noise standard.”⁴⁸ Therefore, based on the noise statutes and regulations, ODEQ’s own
5 interpretation of enforcement authorities under the noise standards, as well as EFSC’s practical
6 application of ODEQ’s Noise Rules in energy facility siting determinations, it is clear that EFSC
7 does indeed have authority to administer ODEQ’s Noise Rules in site certification proceedings,
8 including the authority to issue a variance or exception. STOP B2H’s conclusory arguments to the
9 contrary, which are not supported by the law or evidence in the record, are unpersuasive.

10 Finally, STOP B2H’s criticism that ODOE failed to consult with the EQC or ODEQ on
11 Idaho Power’s request for variance and exception is unreasonable.⁴⁹ In comments to ODOE filed
12 on April 18, 2013, Randy Jones of ODEQ verified that because the program was defunded in 1991,
13 ODEQ “has no authority to respond to complaints, provide advice, or interpret state noise
14 regulations per ORS 467; OAR 340 division 35.”⁵⁰

15 Accordingly, based on the law and the evidence in the record, EFSC clearly has the authority
16 to grant a variance and exception to the Noise Rules for the Project, and consultation with ODEQ

⁴⁸ *In re the Request for Amendment #2 of the Site Certificate for the Stateline Wind Project*, EFSC Final Order on Amendment #2 at 100-101 (June 6, 2003) [hereinafter, “Stateline Wind Project Final Order”]. A courtesy copy of this document was provided as Idaho Power / Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6/Attachment D, *In re the Request for Amendment #2 of the Site Certificate for the Stateline Wind Project*, Final Order on Amendment #2 (June 6, 2003), pp. 104-105 of 157.

⁴⁹ STOP B2H Exceptions at 8 (“There is no evidence in the Record that IPC (or anyone) ever asked [ODEQ] or EQC for a variance. For the reasons outlined in its Closing Arguments, STOP takes exception to this portion of the [Proposed Contested Case Order], as well as the Conclusion of Law on Issue NC-2.”).

⁵⁰ ODOE / Declaration of Patrick Rowe re: Oregon Department of Energy Rebuttal / Attachment 3, Oregon Department of Environmental Quality’s Response to the STOP B2H Informal Discovery Request (Jan. 26, 2021), p. 5 of 7.

1 on this point is neither required nor even possible. Furthermore, under ORS 469.350(2)⁵¹ and
2 OAR 345-001-0010(51)(a),⁵² ODEQ is a reviewing agency; thus, ODOE was required to send,
3 and did send, Idaho Power’s application to ODEQ for review and comment. To the extent that
4 ODEQ viewed itself as authorized to review the application for compliance with the Noise Rules,
5 it would have had that opportunity. For these reasons, Idaho Power requests that the Council adopt
6 without modification the Hearing Officer’s findings of fact and conclusions of law relevant to
7 these issues.

8 *b. STOP B2H, Exception 2, NC-2*

9 STOP B2H argues that the Proposed Contested Case Order is in error because the Hearing
10 Officer incorrectly concluded that the Council could grant B2H an exception from the
11 antidegradation standard because Idaho Power’s calculated frequency for predicted noise
12 exceedances caused by foul weather was “infrequent.”⁵³ Specifically, STOP B2H takes exception
13 to the following findings of fact in the Proposed Contested Case Order: **Item 115**—finding that
14 Idaho Power noted that the transmission line might exceed the antidegradation standard
15 infrequently during foul weather events;⁵⁴ **Item 117**— finding that Idaho Power relied on historic
16 weather patterns to predict the frequency of foul weather events at NSR locations, and that based
17 on this meteorological data, Idaho Power determined that foul weather conditions expected to

⁵¹ 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 Department of Environmental Quality, the Water Resources Commission, the State Fish and Wildlife Commission, the Water Resources Director, the State Geologist, the State Forestry Department, the Public Utility Commission of Oregon, the State Department of Agriculture, the Department of Land Conservation and Development, the Oregon Department of Aviation, any other state agency that has regulatory or advisory responsibility with respect to the facility and any city or county affected by the application.”).

⁵² OAR 345-001-0010(51)(a) (defining ODEQ as a “reviewing agency”).

⁵³ STOP B2H Exceptions at 13.

⁵⁴ STOP B2H Exceptions at 13; Proposed Contested Case Order at 74.

1 cause noise exceedances would occur approximately 1.3 percent of the time throughout the year,
2 and that such frequency should be categorized as “infrequent”;⁵⁵ **Item 125**—finding that, as further
3 evidence to support the conclusion that corona sound caused by foul weather would be infrequent,
4 Idaho Power presented an internal Bonneville Power Administration (“BPA”) memorandum dated
5 May 26, 1982, explaining that, based on BPA’s meteorological assessment of weather east of the
6 Cascades, corona sound caused by foul weather conditions east of the Cascades would be, by
7 definition, “infrequent” and therefore, the transmission line would be eligible for an exception to
8 the State’s Noise Rules;⁵⁶ and **Item 127**—finding that Idaho Power’s approach to estimating
9 potential exceedances of the ambient antidegradation standard is intentionally conservative and,
10 for that reason, likely overestimates the frequency of actual exceedances.⁵⁷

11 To respond to these concerns raised by STOP B2H during the Contested Case, Idaho Power
12 provided the expert witness testimony of Mark Bastasch, an acoustical engineer with extensive
13 experience evaluating compliance with ODEQ’s Noise Rules.⁵⁸ As explained in Mr. Bastasch’s
14 testimony and in Idaho Power’s briefing,⁵⁹ STOP B2H’s arguments and exceptions to findings of
15 fact are not persuasive and not supported by the evidence in the record.

16 While the Noise Rules were adopted to protect Oregonians from excessive environmental
17 noise, the Oregon Legislature never intended the Noise Rules to be so strictly followed as to
18 prevent businesses from operating, much less to obstruct essential services.⁶⁰ Indeed, the

⁵⁵ STOP B2H Exceptions at 13-14; Proposed Contested Case Order at 75-76.

⁵⁶ STOP B2H Exceptions at 14; Proposed Contested Case Order at 79-80.

⁵⁷ STOP B2H Exceptions at 15; Proposed Contested Case Order at 80, 80 n. 54.

⁵⁸ Idaho Power / Rebuttal Testimony of Mark Bastasch (Nov. 12, 2021) / Issues NC-1, NC-2, NC-3, NC-4, and NC-6; *see also* Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC 6, Exhibit A, Curriculum Vitae of Mark Bastasch.

⁵⁹ Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 16-28; Idaho Power’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 30-43.

⁶⁰ Minutes of the Oregon Senate Committee on Environment and Energy at 3-4.

1 legislative history for ORS 467.030 indicates that it was widely recognized that, in implementing
2 such rules, the deciding authority should weigh the environmental advantages of requiring strict
3 compliance with the Noise Rules against the economic impact resulting from such compliance.⁶¹
4 With these concerns in mind, the Oregon Legislature delegated authority to ODEQ to exempt
5 classes of activities from application of the Noise Rules, ORS 467.035, and adopted a variance
6 provision to ODEQ’s Noise Rules, ORS 467.060. With respect to exemptions in particular, the
7 Oregon Legislature authorized ODEQ/EQC to grant exemptions for certain categories of noise
8 emissions sources under ORS 467.035.⁶² ODEQ further created an exception from its Noise Rules
9 for “unusual and/or infrequent events.”⁶³ Importantly, corona noise, the main source of
10 exceedances for the Project, will result in exceedances only during foul weather events which are
11 infrequent in Eastern Oregon. Accordingly, an exception to the antidegradation standard is
12 justified in this case under OAR 340-035-0035(6)(a).

13 In its pleading, STOP B2H argues that the Hearing Officer erred in concluding that the
14 Council could grant B2H an exception from the antidegradation standard because Idaho Power’s
15 calculated frequency for predicted noise exceedances caused by foul weather events could not
16 reasonably be classified as “infrequent” for purposes of granting an exception.⁶⁴ However, based

⁶¹ Dominick Vetri, Statement in Connection with HB 3028, Noise Control Act of 1971, Senate Committee for Environmental Affairs at 4 (May 11, 1971) [hereinafter, “Statement of Dominick Vetri”]. Consistent with OAR 345-015-0046, Idaho Power asks that the Council take administrative notice of this document. A courtesy copy of these comments is provided as Idaho Power/ Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6/ Attachment B, Dominick Vetri, Statement in Connection with HB 3028, Noise Control Act of 1971, Senate Committee for Environmental Affairs (May 11, 1971), p. 4 of 5.

⁶² ORS 467.035(1) (In addition to the powers of the Environmental Quality Commission described in ORS 467.060 [Authority to Grant Variance], the commission by rule may exempt a class of activity within a category of noise emission sources from the application of a rule establishing maximum permissible levels of noise emission for that category of noise emission sources.”).

⁶³ OAR 340-035-0035(6)(a).

⁶⁴ STOP B2H / Direct Testimony of Fuji Kreider / Issue NC-2, p. 8 of 9; Irene Gilbert / Contested Case Opening Arguments / Issue NC-2, pp. 17-18 of 19.

1 on both a common-sense application of the term “infrequent”, as well as the only precedent
2 available interpreting that term for the purposes of corona noise, the number of exceedances is
3 appropriately categorized as infrequent.

4 As discussed above, the corona sound will result in exceedances of the antidegradation
5 standard *only* during foul weather events.⁶⁵ On this point, Idaho Power has demonstrated the
6 following facts:

7 1. Over the entire length of the line, foul weather, i.e., a rain rate of 0.8 to 5 millimeters
8 per hour (mm/hr), is expected to occur only 1.3 percent of the hours on an annual
9 basis.⁶⁶

10 2. In the La Grande area—where precipitation is somewhat more common—foul
11 weather is expected to occur in 2.66 percent of the hours on an annual basis.⁶⁷

12 In other words, Idaho Power has demonstrated that, on average and applying conservative
13 assumptions (which are explained in detail on pages 25–27 below), over the length of entire
14 transmission line, the Project will be in compliance with the Noise Rules’ antidegradation standard
15 approximately 98.7 percent of the time. When specifically considering that segment of the Project
16 located in the La Grande area, B2H will be in compliance approximately 97.3 percent of the time.
17 While ODEQ’s Noise Rules do not define the term “infrequent” for purposes of the exception, the
18 common meaning of that term is “seldom happening or occurring,” or “placed or occurring at wide

⁶⁵ ASC, Exhibit X, Section 3.4.5.2 at X-24 (ODOE – B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 28 of 371).

⁶⁶ ASC, Exhibit X, Section 3.4.5.2 at X-24 (ODOE – B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 28 of 371).

⁶⁷ ASC, Exhibit X, Section 3.4.5.2 at X-24 (ODOE – B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 28 of 371).

1 intervals in space or time.”⁶⁸ Based on this definition, it is entirely reasonable to conclude that
2 Idaho Power’s predicted exceedances will be “infrequent.”

3 Nevertheless, relying on a letter from John Hector, a former manager of ODEQ’s Noise
4 Control Program from 1973 to 1986, STOP B2H asserts that predicted exceedances cannot be
5 classified as infrequent because they will occur 48 days per year.⁶⁹ Specifically, STOP B2H argues
6 that the Hearing Officer should have relied on Table X-8 of Exhibit X , which “correctly” reflects
7 the average frequency of foul weather over all meteorological stations as 13 percent of days in a
8 year (i.e., 48 days) with one or more hours of foul weather—a value STOP B2H argues cannot be
9 classified as “infrequent”.⁷⁰ However, Mr. Hector’s focus on Table X-8 ignores critical data that
10 is also necessary to fully understand the frequency of foul weather in the analysis area. That is,
11 while it is true Idaho Power predicts that the ambient antidegradation standard will be exceeded
12 on average 48 days each year, it is equally true that when all hours of the year are considered, foul
13 weather will occur only 1.3 percent of the time.⁷¹ These two data points, when considered together,

⁶⁸ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6 / Exhibit E, Merriam-Webster Online Dictionary, Definition of Infrequent (Nov. 9, 2021), p. 1 of 1; *see also Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 611 (1993), *overturned on other grounds State v. Gaines*, 346 Or 160 (2009) (when the legislature does not provide a definition “words of common usage typically should be given their plain, natural, and ordinary meaning”).

⁶⁹ STOP B2H Exceptions at 13.

⁷⁰ STOP B2H Exceptions at 13-14; *see also* ASC, Exhibit X, Table X-8 at X-26 (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 30 of 371). STOP B2H also argues that the Hearing Officer should have relied on Table X-9, which details the predicted frequency of late nights with one hour or more of foul weather. STOP B2H Exceptions at 13-14; *see also* ASC, Exhibit X, Table X-9 at X-27 (ODOE – B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 31 of 371). Per Table X-9, the predicted frequency of late nights with one hour or more of foul weather was 4 percent overall, and 7 percent for La Grande; again, STOP B2H argues that these limited data points suggest that foul weather is not “infrequent” for purposes of determining whether an exception is warranted. STOP B2H Exceptions at 13-14; *see also* ASC, Exhibit X, Table X-9 at X-27 (ODOE – B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 31 of 371). Nevertheless, as discussed above, focus on these singular data points is based on an incomplete understanding of frequency. When coupled with the predicted frequency of foul weather events over total hours in a year (i.e., 1.3 percent), the evidence in the record demonstrates that the Hearing Officer correctly concluded that the frequency of foul weather in the analysis area was “infrequent”.

⁷¹ ASC, Exhibit X, Section 3.4.5.2 at X-24 (ODOE – B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 28 of 371).

1 indicate that foul weather will be infrequent. On the other hand, STOP B2H’s singular focus on
2 the number of days where an exceedance might occur gives the same weight to a day when it rains
3 for an hour as for a day when it rains for 24 hours straight.⁷² Thus, Mr. Hector’s approach is both
4 myopic and misleading.

5 STOP B2H also seems to argue that Idaho Power’s reliance on historic weather conditions
6 to predict the number of corona noise exceedances was flawed because the Company failed to
7 consider other causes of corona noise such as moisture and debris—thus underestimating the
8 number of exceedances.⁷³ In support of this view, STOP B2H relies on the testimony of Kerrie
9 Standlee, who claimed that he has personally heard corona sound triggered on a transmission line
10 near his own home in the absence of precipitation, and further claims corona sound can be triggered
11 by humidity as low as 85 percent.⁷⁴ These arguments fail for two reasons First, it is true that high
12 humidity can trigger corona sound—a fact that Idaho Power noted in its ASC. However,
13 Mr. Bastasch provided unrefuted evidence that the corona sound level associated with high
14 humidity is significantly quieter than the corona triggered by foul weather.⁷⁵ In fact, BPA’s
15 analysis of the North Steens transmission project reports that the corona sound occurring during
16 humid conditions is a full 10 dBA *less* the corona occurring during foul weather conditions.⁷⁶ The

⁷² Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 84 of 96.
⁷³ STOP B2H Exceptions at 13.
⁷⁴ STOP B2H / Direct Testimony of Fuji Kreider / Issue NC-2 / Exhibit 5, Standlee, K., ODOE B2H Proposed Order Review, pp. 5-6 of 15.
⁷⁵ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 82 of 96.
⁷⁶ Proposed Order, Attachment 5, *North Steens Transmission Line Project Appendix C Electrical Effects* at 43-44 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 7904-7905 of 10016); *see also* BLM, Extract of North Steens 230-kV Transmission Line Project Final Environmental Impact Statement, Section 3.17.3.3, Table 3.17-5 at 3.17-15 (Oct. 2011) (showing humid weather resulting in corona noise consistently 10 dBA below corona sound during wet weather at distances between 15 and 1,000 meters). Idaho Power asks that the Council take official notice of this document in accordance with OAR 345-015-0046(1)(b) since it was not previously submitted prior to the close of the record. A courtesy copy of this document is provided as Idaho Power / Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6/Attachment C, BLM, Extract of North Steens 230-kV Transmission Line Project Final Environmental Impact Statement (Oct. 2011), p. 3 of 4.

1 maximum increase in sound level predicted at any B2H NSR is 18 dBA under rain or foul weather
2 conditions.⁷⁷ Thus, when adjusting the B2H predictions for humid conditions by subtracting the
3 10 dBA difference cited by BPA, the maximum predicted increase triggered by humid conditions
4 would be 8 dBA, which is well below the ambient antidegradation standard threshold of 10 dBA.⁷⁸
5 In other words, Idaho Power’s modeling demonstrates that humidity alone will never result in
6 exceedances of the antidegradation standard at any location.

7 In addition, the corona sound resulting from nicks, scratches, and debris are most likely to
8 occur during the burn-in period, which, as noted by ODOE’s expert Gage Miller of Golder
9 Associates Inc. (“Golder Associates”), is temporary and not regarded as “typical operations” that
10 would serve as the basis for an “infrequency” definition.⁷⁹ Finally, the non-specular finish that
11 will be applied to the conductor by sandblasting will significantly eliminate debris and oils.⁸⁰ In
12 the unlikely event that these defects occur after the burn-in period, Idaho Power can remedy them
13 promptly with simple maintenance procedures.⁸¹ For the above reasons, Idaho Power’s use of
14 historic meteorological data to predict the frequency of foul weather events and potential
15 exceedances was appropriate.

16 STOP B2H also takes exception to the fact that Idaho Power relied on a memorandum from
17 BPA to support its conclusion that corona sound caused by foul weather conditions east of the
18 Cascades would be, by definition, “infrequent”.⁸² In particular, STOP B2H argues that Idaho

⁷⁷ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 82 of 96.
⁷⁸ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 82 of 96.
⁷⁹ G. Miller Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 37, line 22–page 38, line 2.
⁸⁰ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 43 of 96.
⁸¹ Idaho Power Company’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 47-49; Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 43 of 96.
⁸² STOP B2H Exceptions at 14.

1 Power cannot rely on the BPA memorandum because it “reflects an agreement between Oregon
2 and Washington for BPA to be compliance with these states’ regulations”—and therefore is not
3 relevant to Oregon’s antidegradation standard, and BPA’s interpretation of “infrequent” is not
4 authoritative.⁸³ However, these arguments are not persuasive. The interpretation of “infrequent”
5 reflected in the memorandum was developed by BPA, *working cooperatively with ODEQ*, to
6 evaluate the compliance of BPA’s transmission lines east of the Cascades. Importantly, this
7 memorandum provides the best, and indeed only, available precedent on which the Council can
8 determine how ODEQ would have interpreted the term “infrequent” as applicable to the corona
9 sound emitted by a transmission line.

10 By way of context, the Noise Control Act of 1972⁸⁴ gave the states the responsibility for
11 adopting noise control laws, and Executive Order No. 12088 requires that all federal agencies
12 comply with state and local noise ordinances.⁸⁵ As the primary—if not only—entity developing
13 high-voltage transmission lines in the region at that time, BPA operated under temporary noise
14 guidelines until the early 1980s, when it worked cooperatively *with ODEQ* to adopt interpretations
15 of ODEQ’s Noise Rules that would be applicable to transmission lines.⁸⁶ That interpretation is
16 reflected in an internal BPA memorandum dated May 26, 1982.⁸⁷ The memorandum explains that
17 BPA and ODEQ reached an interpretation of the Noise Rules that concluded that, given BPA’s
18 meteorological assessment of weather east of the Cascades, *corona sound caused by foul weather*

⁸³ STOP B2H Exceptions at 14.

⁸⁴ Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.*

⁸⁵ Executive Order No. 12088 (Oct. 13, 1978).

⁸⁶ *See* Proposed Order, Attachment 5, *BPA Memorandum on Sound Level Limits for BPA Facilities* at 18-19 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 7879-7880 of 10016). As reflected in the Memorandum, BPA also worked with the Washington State Department of Ecology to comply with that State’s noise control laws. *See id.*

⁸⁷ Proposed Order, Attachment 5 at 18-19 (Memorandum Re: Sound Level Limits for BPA Facilities) (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 7879-7880 of 10016).

1 *conditions east of the Cascades would be by definition “infrequent,”* and therefore, the
2 transmission line would be eligible for an exception to the Noise Rules.⁸⁸

3 In addition, for purposes of analyzing noise effects from specific transmission projects
4 located Eastern Oregon, BPA has specifically focused on the infrequent occurrence of foul weather
5 in the Project vicinity.⁸⁹ In this context, BPA’s meteorological analysis indicated foul weather
6 would occur between one percent and seven percent of the year, depending on the location of the
7 project.⁹⁰ For example, in the North Steens Transmission Line Project, where foul weather was
8 identified to occur seven percent of the year, rural residences with predicted foul weather sound
9 levels of 47 dBA were not identified as exceedances and no baseline sound monitoring was
10 conducted.⁹¹ Based on BPA’s framework, which Mr. Bastasch found to be a reasonable approach
11 for transmission line projects, Idaho Power’s results for predicted frequency of days with foul
12 weather events during late night hours (lasting one or more hours)—ranging from two to seven
13 percent in certain locations along the route—squarely fit into the infrequent category.

⁸⁸ Proposed Order, Attachment 5, *BPA Memorandum on Sound Level Limits for BPA Facilities* at 18 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 7879 of 10016) (“Based on a meteorological analysis of the frequency of these rain rates (0.8–5 mm/hr), [alternating current] transmission lines east of the Cascades will meet this criteria.”).

⁸⁹ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, pp. 33-34 of 96.

⁹⁰ See Proposed Order, Attachment 5, *North Steens Transmission Line Project Appendix C Electrical Effects* at 43-44 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 7904-7905 of 10016) (“Based on hourly precipitation records near the route of the proposed transmission line, such conditions are expected to occur about 7% of the time during the year in the North Steens area.”); Proposed Order, Attachment 5, *Big Eddy – Knight 500-kV Transmission Project Appendix E: Electrical Effects* at 92-93 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 7953-7954 of 10016) (describing frequency of foul weather events as 1 percent of the year based on meteorological data); Proposed Order, Attachment 5, *Klondike III/Biglow Canyon Wind Integration Project Appendix C: Electrical Effects* at 177-178 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8038-8039 of 10016) (describing frequency of foul weather events as 6 percent of the year based on meteorological data); Proposed Order, Attachment 5, *McNary-John Day 500-kV Transmission-line Project Electrical Effects* at 271-272 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8132-8133 of 10016) (describing frequency of foul weather events as 1 percent of the year based on meteorological data).

⁹¹ Proposed Order, Attachment 5, *North Steens Transmission Line Project Appendix C Electrical Effects* at 43-44 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 7904-7905 of 10016).

1 Thus, given that BPA worked directly with ODEQ to develop its interpretation of the word
2 “infrequent”—as applied to corona sound from a transmission line—that interpretation is highly
3 relevant and persuasive to this case. For this reason, the Hearing Officer was correct to rely upon
4 the BPA memorandum.⁹²

5 Finally, STOP B2H takes exception to the Hearing Officer’s finding that Idaho Power’s
6 approach to estimating potential exceedances of the ambient antidegradation standard was
7 conservative, and likely overestimated the frequency of actual exceedances.⁹³ In particular,
8 STOP B2H argues that Idaho Power’s approach to estimating exceedances could not be
9 conservative because Idaho Power failed to consider numerous conditions that create corona noise
10 (e.g., ice, fog, dew point, burn-in, etc.)—thus underestimating exceedances—and “uses averages
11 to [its] advantage.”⁹⁴ However, these arguments are not persuasive for several reasons.

12 First, as discussed above, other conditions, such as humidity, will never result in
13 exceedances of the antidegradation standard at any location.⁹⁵ In addition, the corona sound
14 resulting from nicks, scratches, and debris are most likely to occur during the burn-in period,
15 which, as noted by ODOE’s expert Gage Miller (Golder Associates), is temporary and not regarded
16 as “typical operations” that would serve as the basis for an “infrequency” definition.⁹⁶
17 Accordingly, the evidence in the record demonstrates that Idaho Power properly considered all

⁹² Moreover, in BPA’s 2005 Transmission Business Line (“TBL”) Policy, BPA adopted a comprehensive compliance strategy that does not apply an antidegradation standard, but rather includes the following requirements for new line construction: “TBL will design each new line to meet an L₅₀ Exceedance Level of 50dB(A) at the edge of the right-of-way (ROW). This is under typical conditions of foul weather, altitude, and system voltage.” Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6 / Exhibit M, BPA, Audible Noise Policy (Oct. 2005), p. 3 of 5.

⁹³ STOP B2H Exceptions at 15.

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⁹⁵ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 82 of 96.

⁹⁶ G. Miller Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 37, line 22–page 38, line 2.

1 relevant factors when determining potential exceedances, and thus did not underestimate the
2 number of potential exceedances.

3 Second, STOP B2H’s criticism that Idaho Power is using “averages to [its] advantage” is
4 based on an incomplete understanding of frequency. As discussed above, while it is true that Idaho
5 Power predicts that the ambient antidegradation standard will on average be exceeded during a
6 portion of 48 days each year, it is equally true that when all hours of the year are considered, foul
7 weather will occur only 1.3 percent of the time.⁹⁷ Furthermore, while it is true that Idaho Power
8 did calculate averages for the entire line when analyzing the expected frequency of exceedances,
9 Idaho Power also provided data broken down by the four weather stations the Company relied
10 upon: Flagstaff Hill, La Grande, Owyhee Ridge, and Umatilla National Wildlife Refuge.⁹⁸ That
11 data—which was specifically referenced by the Hearing Officer—is presented in the ASC,⁹⁹ and
12 confirms that even in the La Grande area, where foul weather is somewhat more common than
13 other areas, exceedances will nevertheless be infrequent.¹⁰⁰

14 Finally, in considering whether the predicted exceedances are appropriately characterized
15 as “infrequent”, it is important to note that a preponderance of evidence in the record demonstrates
16 that Idaho Power’s analysis was intentionally conservative. As discussed in the testimony of Mark

⁹⁷ ASC, Exhibit X, Section 3.4.5.2 at X-24 (ODOE – B2HAPPD0c3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 28 of 371).

⁹⁸ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 19 of 96.

⁹⁹ ASC, Exhibit X, Section 3.4.5.2, Table X-8 (ODOE - B2HAPPD0c3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 30 of 371) (daily and hourly frequency of foul weather).

¹⁰⁰ ASC, Exhibit X, Section 3.4.5.2, Table X-8 (ODOE - B2HAPPD0c3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 30 of 371).

1 Bastasch and ODOE’s expert witness, Ken Kosky (Golder Associates), Idaho Power’s approach
2 to estimating exceedances incorporated the following extremely conservative assumptions:¹⁰¹

3 • The volume of corona sound levels increases in relation to the amount of current on a
4 transmission line, with higher levels of current producing higher levels of corona. In this
5 case, Idaho Power estimated the level of corona sound modeling that would be produced
6 by B2H by incorporating an assumption that B2H is operating the voltage of the 500-kV
7 circuits at the maximum operational voltage of 550-kV. In fact, however, during typical
8 operations, B2H will be operated at a substantially lower voltage, and is expected to be
9 operated at 550-kV only 0.01 percent of the time.¹⁰² Therefore, exceedances are likely to
10 be less frequent than estimated.

11 • Actual exceedances are estimated to occur only during periods where ambient sound levels
12 are lowest, which typically occur during the late-night hours.¹⁰³ Because Idaho Power’s
13 model assumes that an exceedance occurs during *any* foul weather event¹⁰⁴—whether it
14 occurs during day or night—the Company’s analysis necessarily produces more
15 exceedances than will actually occur.

16 • Similarly, in calculating exceedances, Idaho Power’s model assumes a late-night ambient
17 sound level, which, as noted above, is assumed to be the quietest time of the day. However,
18 during those foul weather events that include moderate or heavy rain, the sound of droplets

¹⁰¹ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, pp. 29-31 of 96; ODOE / Written Rebuttal Testimony of Ken Kosky, Golder Associates Inc. (Nov. 12, 2021) / Issues NC-2, NC-3, NC-4, and NC-6, p. 15 of 24.

¹⁰² Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 30.

¹⁰³ ASC, Exhibit X, Section 3.2.1 (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 10 of 371); *see also* Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 27 of 96.

¹⁰⁴ ASC, Exhibit X, 3.3.2 (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 18 of 371).

1 hitting foliage will increase the actual ambient sound levels present, thus masking any
2 corona noise and decreasing the chance of an exceedance.¹⁰⁵ This masking phenomenon
3 represents yet another reason why Idaho Power’s analysis overstates the occurrence of
4 exceedances.

- 5 • Finally, in estimating ambient sound levels, Idaho Power removed from the calculation any
6 hour in which wind was greater than 10 mph, which is closely correlated to higher ambient
7 sound levels.¹⁰⁶ The Company also removed periods of rain, which as noted above, can
8 also increase ambient sound levels.¹⁰⁷ As a result, the ambient sound level assumed for
9 Idaho Power’s modeling is likely lower than actual conditions, which will result in more
10 exceedances than will actually occur.

11 As a result, Idaho Power’s analysis almost certainly overestimates the frequency of actual
12 exceedances, a fact that further justifies the grant of an exception. STOP B2H has offered no
13 evidence indicating otherwise.

14 In sum, based on the infrequent nature of noise exceedances, and the conclusion of
15 ODOE’s third-party consultant—Golder Associates—that Idaho Power’s meteorological
16 assumptions were conservative, Idaho Power adequately has demonstrated that an exception to
17 ODEQ’s Noise Rules is warranted.¹⁰⁸ For the same reasons, ODOE recommended in the Proposed

¹⁰⁵ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, pp. 35-36 of 96.

¹⁰⁶ ASC, Exhibit X, Section 3.2.1 (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 10 of 371)

¹⁰⁷ ASC, Exhibit X, Section 3.2.1 (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 9-11 of 371).

¹⁰⁸ See Proposed Order, Attachment 5, Golder Associates Memorandum at 3 (Dec. 19, 2017) (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8177 of 10016) (“The applicant’s Noise Exhibit X impact assessment study is reasonable, technically sound, and appropriately conservative in nature. The Project has a very low risk of having a negative impact on human health and a low risk of outdoor or indoor interference with human activities.”).

1 Order that the Council find that exceedances of the ambient antidegradation standard during foul
2 weather events would be infrequent or unusual under OAR 340-035-0035(6)(a), and that the
3 Council should grant an exception to the proposed facility.¹⁰⁹ Accordingly, Idaho Power requests
4 that the Council adopt without modification the Hearing Officer’s findings of fact and conclusions
5 of law relevant to these issues.

6 *c. STOP B2H, Exception 3, NC-2*

7 STOP B2H argues that the Proposed Contested Case Order is in error because the Hearing
8 Officer’s conclusion that B2H met the conditions for a variance is incorrect and inconsistent with
9 the requirements of ORS 467.010 and ORS 467.060(3).¹¹⁰ As Idaho Power explained in its
10 briefing and discusses further below,¹¹¹ STOP B2H’s arguments are not persuasive and not
11 supported by the evidence in the record.

12 *i. Compliance with ORS 467.010*

13 STOP B2H argues that the Hearing Officer’s conclusion that a variance is warranted is
14 inconsistent with ORS 467.010 (and OAR 340-035-0100¹¹²), which provides that the purpose of
15 ODEQ’s Noise Rules is to “provide protection of the health, safety and welfare of Oregon citizens
16 from the hazards and deterioration of the quality of life imposed by excessive noise emissions.”¹¹³

¹⁰⁹ Proposed Order at 645 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 652 of 10016).

¹¹⁰ STOP B2H Exceptions at 18-19.

¹¹¹ Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 16-29; Idaho Power’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 54-69.

¹¹² OAR 340-035-0100(1) (“The Commission may grant specific variances from the particular requirements of any rule, regulation, or order to such specific persons or class of persons or such specific noise source upon such conditions **as it may deem necessary to protect the public health and welfare**, if it finds that strict compliance with such rule, regulation, or order is inappropriate because of conditions beyond the control of the persons granted such variance or because of special circumstances which would render strict compliance unreasonable, or impractical due to special physical conditions or cause, or because strict compliance would result in substantial curtailment or closing down of a business, plant, or operation, or because no other alternative facility or method of handling is yet available. Such variances may be limited in time.”) (emphasis added).

¹¹³ STOP B2H Exceptions at 18-19.

1 This argument, which was addressed in detail by the acoustical engineering witnesses for both
2 Idaho Power and ODOE (Mr. Bastasch and Mr. Gage) is unpersuasive and unsupported by the
3 evidence in the record. On the contrary, as these expert witnesses established, the grant of a
4 variance is entirely consistent with the protection of the health, safety, and welfare of the State's
5 citizens. First, Idaho Power's analysis shows that corona noise from B2H will *never* exceed
6 ODEQ's maximum cap on sound levels from industrial sources of 50 dBA, which must be assumed
7 to be protective of public health, safety, and welfare.¹¹⁴ On this point, Mr. Bastasch notes in his
8 Rebuttal Testimony that other states that do not have an antidegradation standard, regard a 50 dBA
9 cap as sufficiently protective of public health.¹¹⁵ For instance, Washington State has established
10 identical limits, namely 50 dBA at residences,¹¹⁶ but does not impose an ambient antidegradation
11 standard. The ambient antidegradation approach is unique to Oregon, but its mere exceedance
12 does not constitute an impact to health, safety, and welfare of Oregon citizens.¹¹⁷ For these
13 reasons, during the infrequent exceedances that are predicted for B2H, Oregon citizens can be
14 reasonably expected to hear, sleep, and go about their daily activities in a manner similar to those
15 in Washington or other jurisdictions that do not have an ambient antidegradation threshold.¹¹⁸

16 Furthermore, as detailed above, potential impacts from the ambient antidegradation
17 standard exceedance along the proposed transmission line and the impacted NSR locations would
18 be infrequent as the Company anticipates exceedances to occur 1.3 percent of the time in a year

¹¹⁴ ASC, Exhibit X, Section 3.4.5.1 (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 20 of 371).

¹¹⁵ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 35 of 96.

¹¹⁶ WAC 173-60 *et seq.*

¹¹⁷ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 35 of 96.

¹¹⁸ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 35 of 96.

1 for the line overall, and 2.6 percent of the time in the La Grande area.¹¹⁹ Moreover, these
2 percentages are extremely conservative and likely overstate the rate of exceedances. As discussed
3 above, Idaho Power used conservative assumptions, e.g., quiet late-night hours and maximum
4 voltage, to assess the worst-case scenario for frequency of exceedances. Indeed, Idaho Power
5 expects that actual noise related impacts would be *minimal* as residents are assumed to be indoors
6 at the time of the exceedance during late-night and very early morning hours (12:00 a.m. to 5:00
7 a.m.) and during foul weather events (e.g., precipitation).¹²⁰

8 In addition, the conditions that the Hearing Officer has recommended that the Council
9 adopt contain robust conditions that will protect the health, safety, and welfare of citizens when
10 exceedances do occur. Under Amended Recommended Noise Control Condition 1, prior to
11 construction of B2H, Idaho Power will be required to consult with landowners of impacted NSRs
12 to develop mutually agreed upon Noise Exceedance Mitigation Plans specific to each NSR
13 location.¹²¹ Mitigation measures in these plans may include, but are not limited to, micro-siting of
14 the facility, as well as the installation of high-quality sound-reducing windows that have been
15 shown to be effective in reducing indoor sound levels.¹²² Furthermore, subsection (c) of Amended
16 Recommended Noise Control Condition 1 requires that the rating of the windows offered
17 corresponds with the degree of the exceedance predicted—with more highly rated windows
18 offered to landowners where higher levels of exceedance are expected or demonstrated.¹²³ Idaho

¹¹⁹ ASC, Exhibit X, Section 3.4.5.2 at X-24 (ODOE – B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 28 of 371).
¹²⁰ Proposed Order at 645-46 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 652-53 of 10016).
¹²¹ Proposed Contested Case Order at 296-97.
¹²² Proposed Order at 646 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 653 of 10016).
¹²³ Proposed Contested Case Order at 297.

1 Power is further offering windows with a higher rating to any landowner that provides a letter from
2 a health care provider indicating the health care provider's belief that the owner has a health
3 condition that is exacerbated by increased sound levels.¹²⁴ At the request of the landowner,
4 additional mitigation measures, such as performing air-sealing of the NSR, planting trees, or
5 installing insulation, may be considered.¹²⁵ Idaho Power is committed to working with each owner
6 of an NSR for which an exceedance is predicted, to identify the mitigation approach that is most
7 effective and responsive to their concerns.

8 Finally, under Amended Recommended Noise Control Condition 2, Idaho Power is
9 required to establish a system to receive, evaluate, and respond to landowner complaints associated
10 with operational corona noise, including complaints from landowners not identified in
11 Attachment X-5 of the Proposed Order.¹²⁶ The complaint response plan includes a process for
12 complaint filing, receipt, review and response for NSR exceedances evaluated in the ASC and
13 NSRs that are not identified in the ASC.¹²⁷

14 Based on the infrequent and minimal noise impacts anticipated by Idaho Power's modeling,
15 as well as the site certificate conditions meant to protect the health and safety of nearby residents,
16 Idaho Power adequately demonstrated that a variance to ODEQ's Noise Rules is warranted and in
17 compliance with ORS 467.010. For these reasons, Idaho Power requests that the Council adopt
18 without modification the Hearing Officer's findings of fact and conclusions of law relevant to
19 these issues.

¹²⁴ Proposed Contested Case Order at 297 (subsection (c)(iii)).

¹²⁵ Proposed Contested Case Order at 297 (subsection (d)).

¹²⁶ Proposed Contested Case Order at 297-301.

¹²⁷ Proposed Order at 647 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 654 of 10016).

1 ii. Compliance with ORS 467.060(3)

2 STOP B2H also argues that the Hearing Officer’s conclusion that a variance is warranted
3 for B2H is inconsistent with ORS 467.060(3), which provides: “In determining whether or not a
4 variance shall be granted, the commission or the department shall consider the equities involved
5 and the advantages and disadvantages to residents and to the person conducting the activity for
6 which the variance is sought.”¹²⁸ In support of this position, STOP B2H claims that the Hearing
7 Officer failed to identify or evaluate the “equities of the citizens who live at NSR’s or the citizens
8 of Oregon generally.”¹²⁹ STOP B2H’s argument is in error. In fact, the record in this case provides
9 compelling evidence demonstrating that the infrequent exceedances will not adversely impact the
10 quality of life of the residents who live at NSRs along the B2H route. As discussed above, the
11 corona noise is predicted to occur only during foul weather and is most likely to cause an
12 exceedance only during nighttime hours.¹³⁰ Under these conditions, most residents will be indoors
13 where the sound levels will be significantly attenuated.¹³¹ Moreover, because corona noise occurs
14 during period of rain, it may frequently be masked by the sound of precipitation hitting foliage.¹³²
15 As explained by Mr. Bastasch in his Rebuttal Testimony, the evidence confirms that B2H will not
16 cause exceedances of the ODEQ’s maximum allowable sound standards for industry sources, and

¹²⁸ STOP B2H Exceptions at 19.

¹²⁹ STOP B2H Exceptions at 19.

¹³⁰ ASC, Exhibit X, Section 3.4.5.2 at X-24 (ODOE – B2HAPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 28 of 371); *see also* Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6 / pp. 35-36 of 96.

¹³¹ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6 / p. 36 n.105 of 96.

¹³² Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, pp. 35-36 of 96.

1 Oregonians can reasonably be expected to “hear, sleep, and go about their daily activities” without
2 interruption.¹³³

3 STOP B2H also argues that if the Hearing Officer properly considered all equities as
4 required under ORS 467.060(3), then the Hearing Officer should have considered STOP B2H’s
5 suggestion that compensatory mitigation be offered in the form of noise easements, if necessary.¹³⁴

6 STOP B2H’s proposal for noise easements as compensatory mitigation is problematic given that
7 the Noise Rules do not seem to allow for noise easements as a path to compliance.

8 OAR 340-035-0035 specifically provides that “[n]o person owning or controlling a new industrial
9 or commercial noise source . . . shall cause or permit the operation of that noise source if the noise
10 levels generated or indirectly caused by that noise source” exceed the maximum allowable sound

11 levels or ambient antidegradation standard. The Noise Rules do specifically allow for wind
12 developers to comply with the rules through the purchase of a noise easement.¹³⁵ However, the

13 Legislature’s adoption of that path to compliance for wind developers only would suggest that it
14 is not available to developers of other sources. Thus, it would appear that for B2H, the only path

15 to compliance with the Noise Rules is a variance or exception.¹³⁶ That said, Idaho Power does
16 note that Amended Recommended Noise Control Condition 1 requires Idaho Power to work with

¹³³ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 35 of 96. While one landowner, Mr. Larkin, has described his concern that corona sound may impact his health, he has provided no evidence from a health professional to support his concern. *See* STOP B2H / Declaration of Greg Larkin, Fact Witness (Sept. 18, 2021) / Issues NC-2, NC-3, and NC-4, p. 2 of 2; Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, pp. 78-79 of 96; Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 23-24. Thus, while it is certainly appropriate for the Council to consider all reasonable impacts when evaluating whether to grant a variance and an exception, the weight of the evidence suggests that the expected exceedances of the ambient antidegradation standard will not, in fact, cause the impacts that STOP B2H fears. *See* Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 23-24.

¹³⁴ STOP B2H Exceptions at 19.

¹³⁵ *See*, OAR 340-035-0035(1)(B)(iii)(III).

¹³⁶ The rules do allow for wind developers to avoid application of the Noise Rules through the purchase of an easement. OAR 340-035-0010; OAR 340-035-0035(5); OAR 340-035-0100.

1 landowners to develop a site-specific mitigation plan, and if a particular landowner prefers
2 payment in lieu other mitigation measures, Idaho Power would be willing to discuss that option.¹³⁷
3 Nevertheless, nothing in the record suggests that a review of equities under ORS 467.060(3) would
4 necessitate that Idaho Power offer noise easements as compensatory mitigation to impacted NSRs.
5 For these reasons, Idaho Power requests that the Council adopt without modification the Hearing
6 Officer’s findings of fact and conclusions of law relevant to these issues.

7 *d. STOP B2H, Exception 4, NC-2*

8 STOP B2H finally argues that it was improper for the Hearing Officer to grant an exception
9 and variance to the antidegradation standard to the entire Project rather than on an NSR-by-NSR
10 basis.¹³⁸ Specifically, STOP B2H claims without support or justification that granting a “blanket”
11 variance or exception for the transmission line is contrary to statute.¹³⁹ This argument is
12 unpersuasive for several reasons.

13 First, neither the variance statute or the Noise Rules give any indication that a variance or
14 exception must be granted on an NSR-by-NSR basis.¹⁴⁰ Moreover, requiring an exception or
15 variance on an NSR-by-NSR basis prior to operations is completely impractical for a linear project
16 such as B2H which is approximately 300 miles long. As Mr. Bastasch noted in his testimony, the
17 Noise Rules were developed with the intention that they would primarily be used to investigate
18 complaints made once projects were operational.¹⁴¹ Here, it is necessary to ensure compliance via

¹³⁷ Proposed Contested Case Order at 296-97; *see also* Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 55 of 96.

¹³⁸ STOP B2H Exceptions at 19-20.

¹³⁹ STOP B2H Exceptions at 18. While STOP B2H states that it has explained this position in its Closing Arguments, it did not.

¹⁴⁰ OAR 340-035-0035(6); OAR 340-035-0100(1).

¹⁴¹ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 92 of 96.

1 an exception and/or variance prior to construction, during the permitting phase, such that orderly
2 development can reasonably proceed.¹⁴² Importantly, B2H involves a single sound source, and an
3 exceedance along that single sound source would prompt the need for either an exception or a
4 variance that applies to the Project as a whole regardless of the location of the exceedance.¹⁴³
5 Therefore, it is logical that any exception or variance would be granted for the transmission line
6 as a whole.

7 Indeed, EFSC precedent suggests that, in considering a request for a variance, the Council
8 considers the request for a facility as a whole. For example, in EFSC’s Final Order approving a
9 certificate amendment for the Stateline Wind Project, the Council found that, although the wind
10 project complied with the Noise Rules, the “special circumstances” and characteristics inherent in
11 wind energy facilities warranted consideration and granting of a variance, *if necessary*.¹⁴⁴ In
12 coming to this conclusion, the Council noted several ways in which wind energy facilities were
13 inherently different from other industrial noise sources, such as gas-fired combustion facilities, all
14 of which suggested that a variance may be necessary.¹⁴⁵

15 First, the Council found that—unlike the noise level measured from an operating gas-fired
16 combustion facility, which is relatively constant independent of wind conditions—wind turbines
17 necessarily produce more noise as wind causes the turbine to rotate.¹⁴⁶ That is, because of the
18 wind energy facility’s inherent design, noise levels generated by the facility are dependent on wind
19 conditions outside human control.¹⁴⁷ Similarly, here, the issue of corona sound presents significant

¹⁴² Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 92 of 96.

¹⁴³ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 92 of 96.

¹⁴⁴ Stateline Wind Project Final Order, *supra* note **Error! Bookmark not defined.**, at 100.

¹⁴⁵ Stateline Wind Project Final Order, *supra* note **Error! Bookmark not defined.**, at 100.

¹⁴⁶ Stateline Wind Project Final Order, *supra* note **Error! Bookmark not defined.**, at 100.

¹⁴⁷ Stateline Wind Project Final Order, *supra* note **Error! Bookmark not defined.**, at 100.

1 challenges for major transmission lines that must comply with ODEQ’s Noise Rules because
2 corona is triggered by foul weather conditions, which are outside Idaho Power’s control.

3 Second, the Council noted that a wind energy facility is comprised of a collection of
4 multiple “point sources” of noise spread over a large geographic area, in contrast to a combustion
5 facility that generally acts as a single point source.¹⁴⁸ The Council indicated that, due in part to
6 this inherently spread-out structure, there are no practical mitigation measures that could be
7 applied to wind turbines, such as those that are applicable to a combustion facility (e.g., an
8 appropriate enclosure of the noise source or installation of silencers).¹⁴⁹ While not dispositive of
9 the question, EFSC’s discussion suggests that, had the Council found that a variance was necessary
10 for operation of the wind project, it would have considered such a variance for the project as a
11 whole.

12 For these reasons, the Hearing Officer’s conclusions should be adopted without
13 modification.

14 **2. Irene Gilbert, Exceptions, NC-2**

15 In addition to making the same arguments as STOP B2H, which are discussed above,
16 Ms. Gilbert makes several additional claims of error regarding the Hearing Officer’s conclusions
17 that a variance and exception would be warranted. As an initial matter, Ms. Gilbert’s arguments
18 are not tied to any specific exceptions to the Proposed Contested Case Order as required by
19 OAR 345-015-0085(5),¹⁵⁰ and her claims should therefore be rejected. Nevertheless, should the

¹⁴⁸ Stateline Wind Project Final Order, *supra* note **Error! Bookmark not defined.**, at 100.

¹⁴⁹ Stateline Wind Project Final Order, *supra* note **Error! Bookmark not defined.**, at 100.

¹⁵⁰ 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.”).

1 Council wish to consider Ms. Gilbert’s arguments, Idaho Power addresses each of her claims
2 below.

3 a. *Irene Gilbert, Exception 1, NC-2*

4 Ms. Gilbert cites *Kisor v. Wilkie*¹⁵¹—as well as other federal cases¹⁵²— for the proposition
5 that courts will give deference to an agency’s interpretation of its own rules, so long as that
6 interpretation is plausible.¹⁵³ While it is not clear how these cases are relevant to the jurisdictional
7 issue raised in NC-2, Ms. Gilbert seems to suggest that ODEQ and/or the EQC have historically
8 interpreted their rules to allow *only* themselves to grant variances or exceptions, and therefore the
9 Hearing Officer was incorrect in concluding that EFSC has authority to grant a variance or
10 exception to the antidegradation standard.¹⁵⁴ This argument is unpersuasive for two reasons.

11 First, Ms. Gilbert offers no support for the view that EQC has ever found that it is the only
12 body that can grant a variance or exception from its rules and Idaho Power can find no evidence
13 that such a precedent exists. To the extent that Ms. Gilbert may simply be pointing out that the
14 EQC has issued variances or exceptions before its enforcement program was eliminated, that fact
15 cannot be understood to imply that no other agency is authorized to do so when such agency is in
16 the position of enforcing ODEQ’s Noise Rules, such as the Council is required to do in this case.
17 On the other hand, EFSC clearly interprets its own rules to allow it authority to grant variances

¹⁵¹ 139 S Ct 2400, 2416-17 (2019).

¹⁵² Ms. Gilbert cites the following federal cases for the same proposition that an administrative rule interpreting the issuing agency's own ambiguous regulation may receive substantial deference: *Gonzales v. Oregon*, 546 U.S. 243 (2006); *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001); *Auer v. Robbins*, 519 U.S. 452, 461-463 (1997); *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-845 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Gilbert Exception for NC-2 at 2-4, 12. Idaho Power is unable to determine without a proper citation what case entitled “*Zirkerv v City of Bend*” Ms. Gilbert is referring to, and therefore does not address that case here. *Id.* at 2.

¹⁵³ Irene Gilbert Contested Case Exception Regarding NC-2, the Exclusion of Arguments Regarding the Methods Used to Establish the Noise Levels and the Denial of My Recommended Site Certificate Condition Regarding the Need to Identify and Address “Quiet Areas” at 2-4, 12 (June 30, 2022) [hereinafter, “Gilbert Exception for NC-2”].

¹⁵⁴ Gilbert Exception for NC-2 at 2-4.

1 and exceptions to the Noise Rules when it is evaluating compliance with such rules for energy
2 facilities under its jurisdiction.¹⁵⁵ To the extent that the deference concept is even applicable in
3 this context,¹⁵⁶ it is EFSC’s interpretation that should be afforded deference.

4 Second, *Kisor* and the other federal cases cited by Ms. Gilbert are inapplicable to this
5 contested case because that precedent applies only to federal agencies—EFSC is a state agency.
6 In Oregon, a court conducting judicial review of an agency’s interpretation of its own regulations
7 does not rely on United States Supreme Court deference doctrines, rather “Oregon courts [] defer
8 [] to an agency’s interpretation of its own rule if the interpretation is plausible and not inconsistent
9 with the rule, the rule’s context, or any other source of law.”¹⁵⁷

10 For these reasons, Idaho Power requests that the Council adopt without modification the
11 Hearing Officer’s findings of fact and conclusions of law relevant to these issues.

12 *b. Irene Gilbert, Exception 2, NC-2*

13 Ms. Gilbert argues that the Hearing Officer’s conclusion that a variance or exception is
14 warranted is in error because it is not clear how many people would be impacted by the variance
15 or exception.¹⁵⁸ But this is simply not the case. Idaho Power’s noise analysis has established that
16 there are likely 41 households along the 300-mile transmission line that will experience
17 exceedances of the ambient antidegradation standard, and who thereby may be impacted.¹⁵⁹ That

¹⁵⁵ Idaho Power Company’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 60; see also *In re the Request for Amendment #2 of the Site Certificate for the Stateline Wind Project*, EFSC Final Order on Amendment #2 at 100-101 (June 6, 2003).

¹⁵⁶ “Oregon courts [] defer[] to an agency’s interpretation of its own rule if the interpretation is plausible and not inconsistent with the rule, the rule’s context, or any other source of law.” *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm’n*, 346 Or 366, 410 (2009).

¹⁵⁷ *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).

¹⁵⁸ Gilbert Exception for NC-2 at 24.

¹⁵⁹ Idaho Power Company’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 24.

1 said, as discussed in Idaho Power’s Closing Argument, both ODOE’s and Idaho Power’s experts
2 agree that the site certificate conditions, including required mitigation, will protect the health and
3 safety of the public.¹⁶⁰ Thus, the record provides extensive evidence indicating the number of
4 residents that could be impacted, as well as the limited nature of the impacts. For these reasons,
5 Idaho Power requests that the Council adopt without modification the Hearing Officer’s findings
6 of fact and conclusions of law relevant to these issues.

7 *c. Irene Gilbert, Exception 3, NC-2*

8 Ms. Gilbert further argues that the Hearing Officer erred in concluding that a variance or
9 exception was warranted because the Oregon Health Authority (“OHA”) in their “Strategic Health
10 Impact Act Assessment on Wind Energy Development in Oregon,” found that “environmental
11 noise is linked to sleep disturbance, annoyance, stress and decreased cognitive performance,” and
12 that there is evidence that “chronic sleep disturbance and stress from noise exposure” may lead to
13 serious health issues.¹⁶¹ However, the OHA study is extremely general and high-level in nature,
14 and does not find or even imply that such health effects might result from sounds that are (1)
15 infrequent, and (2) below ODEQ’s maximum noise threshold of 50 dBA for the L₅₀ during late-
16 night hours—such as the corona sound expected from B2H.¹⁶² Yet it is precisely these
17 characteristics that serve as the basis for the opinions of both Golder Associates¹⁶³ and

¹⁶⁰ Idaho Power Company’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 35-38.

¹⁶¹ Gilbert Exception for NC-2 at 27-28; *see also* Irene Gilbert’s Contested Case Closing Brief Regarding Issue NC--2 at 24-25; Irene Gilbert / Contested Case Opening Arguments / Issue NC-2 / Exhibit 27, Oregon Health Authority, Strategic Health Impact Assessment on Wind Energy Development in Oregon (Mar. 2013).

¹⁶² *See generally* STOP B2H / Direct Testimony of Fuji Kreider / Issue NC-2/ Exhibit 7, Oregon Health Authority, Strategic Health Impact Assessment on Wind Energy Development in Oregon (Mar. 2013).

¹⁶³ Proposed Order, Attachment 5, Golder Associates Memorandum at 3 (Dec. 19, 2017) (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8177 of 10016) (“The applicant’s Noise Exhibit X impact assessment study is reasonable, technically sound, and appropriately conservative in nature. The Project has a very

1 Mr. Bastasch,¹⁶⁴ that B2H will not negatively impact the health or welfare of Oregonians. The
2 more generalized findings are irrelevant to this case and should be given no weight. For these
3 reasons, Idaho Power requests that the Council adopt without modification the Hearing Officer’s
4 findings of fact and conclusions of law relevant to these issues.

5 *d. Irene Gilbert, Exception 4, NC-2*

6 Ms. Gilbert argues that the Hearing Officer erred in concluding that a variance/exception
7 is consistent with ORS 467.010 because Idaho Power failed to identify those landowners with
8 “pre-existing conditions.”¹⁶⁵ In raising this concern, Idaho Power assumes that Ms. Gilbert is
9 referring to landowners who have a health condition that they believe may be exacerbated by
10 elevated sound levels. This concern is premature. Amended Recommended Noise Control
11 Condition 1 requires that, after Idaho Power receives a site certificate and before construction, the
12 Company consult with landowners where exceedances are expected about potential mitigation
13 plans.¹⁶⁶ Moreover, as amended by the Hearing Officer, Noise Control Condition 1 requires that,
14 in the course of these mitigation discussions, Idaho Power will ask about any such health
15 conditions.¹⁶⁷ This condition is consistent with Idaho Power’s proposal that enhanced mitigation
16 be provided for landowners with such health conditions. Adoption of the Hearing Officer’s
17 Amended Recommended Noise Control Condition 1 will ensure that Ms. Gilbert’s concerns will
18 be addressed at the appropriate time. That said, it is worth noting that of the 41 NSRs where
19 exceedances are predicted, there was only one person who raised concerns about his health (which

low risk of having a negative impact on human health and a low risk of outdoor or indoor interference with human activities.”).

¹⁶⁴ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 35 of 96.

¹⁶⁵ Gilbert Exception for NC-2 at 17.

¹⁶⁶ Proposed Contested Case Order at 296-97.

¹⁶⁷ Proposed Contested Case Order at 296-97 (subsection (c)(iii)).

1 were not substantiated by any health care professional, but which Idaho Power assumed to be
2 correct).¹⁶⁸ Idaho Power therefore requests that the Council adopt without modification the
3 Hearing Officer’s findings of fact, conclusions of law, and recommended site conditions relevant
4 to these issues.

5 *e. Irene Gilbert, Exception 5, NC-2*

6 Similar to STOP B2H, Ms. Gilbert argues that the Hearing Officer’s conclusion that a
7 variance/exception is warranted for B2H is inconsistent with ORS 467.060(3), which provides:
8 “In determining whether or not a variance shall be granted, the commission or the department shall
9 consider the equities involved and the advantages and disadvantages to residents and to the person
10 conducting the activity for which the variance is sought.”¹⁶⁹ As discussed above, all evidence
11 confirms that B2H will not cause exceedances of the ODEQ’s maximum allowable sound
12 standards for industry sources, and Oregonians can reasonably be expected to “hear, sleep, and go
13 about their daily activities” without interruption.¹⁷⁰ Accordingly, the evidence in the record
14 demonstrates that the Hearing Officer properly consider the equities of all involved parties, and
15 Idaho Power requests that the Council adopt without modification the Hearing Officer’s findings
16 of fact and conclusions of law relevant to these issues.

17 *f. Irene Gilbert, Exception 6, NC-2*

18 Ms. Gilbert argues that the Hearing Officer’s conclusion that an exception is warranted
19 because foul weather events causing corona noise are “infrequent” is in error as Idaho Power

¹⁶⁸ STOP B2H / Direct Testimony of Fuji Kreider / Issue NC-2/ Exhibit 12, Declaration of Greg Larkin (Sept. 14, 2021).

¹⁶⁹ Gilbert Exception for NC-2 at 26.

¹⁷⁰ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 35 of 96.

1 averaged foul weather frequency over the entire transmission line route.¹⁷¹ However, this claim is
2 misleading. It is true that, when analyzing the expected frequency of exceedances, Idaho Power
3 did calculate averages for the entire line. For instance, Idaho Power found that on average,
4 exceedances of the ambient antidegradation standard would occur 1.3 percent of the time.¹⁷²
5 However, Idaho Power also provided data broken down by the four weather stations the Company
6 relied upon: Flagstaff Hill, La Grande, Owyhee Ridge, and Umatilla National Wildlife Refuge.¹⁷³
7 That data—which was specifically referenced by the Hearing Officer—is presented in the ASC,¹⁷⁴
8 and confirms that even in the La Grande area, where foul weather is somewhat more common than
9 other areas, exceedances will nevertheless be infrequent.¹⁷⁵ In sum, the preponderance of the
10 evidence in the record demonstrates that it was appropriate for Idaho Power to average the
11 frequency of foul weather events over the entire Project area, and therefore the Hearing Officer
12 did not err in determining that the resulting predicted frequency was “infrequent” for purposes of
13 warranting an exception to the antidegradation standard. For these reasons, Idaho Power requests
14 that the Council adopt without modification the Hearing Officer’s findings of fact and conclusions
15 of law relevant to these issues.

16 *g. Irene Gilbert, Exception 7, NC-2*

17 Ms. Gilbert also argues that the Proposed Contested Case Order is in error because ODOE’s
18 recommended site certificate conditions fail to require Idaho Power to comply with ORS 469.507,

¹⁷¹ Gilbert Exception for NC-2 at 19; Irene Gilbert’s Contested Case Closing Brief Regarding Issue NC-2- at 15.

¹⁷² Idaho Power Company’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 50; ASC, Exhibit X at X-24 (ODOE - B2HAPPDoc3-41 ASC 24_ Exhibit X_Noise_ASC 2018-09-28. Page 28 of 371).

¹⁷³ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 19 of 96.

¹⁷⁴ ASC, Exhibit X, Section 3.4.5.2, Table X-8 (ODOE - B2HAPPDoc3-41 ASC 24_ Exhibit X_Noise_ASC 2018-09-28. Page 30 of 371) (daily and hourly frequency of foul weather).

¹⁷⁵ ASC, Exhibit X, Section 3.4.5.2, Table X-8 (ODOE - B2HAPPDoc3-41 ASC 24_ Exhibit X_Noise_ASC 2018-09-28. Page 30 of 371).

1 which requires that a site certificate holder establish programs for monitoring the environmental
2 and ecological effects of the facilities subject to site certificates to assure continued compliance
3 with the terms and conditions of the site certificate.¹⁷⁶ The statute also requires site certificate
4 holders to perform the testing and sampling necessary for the monitoring.¹⁷⁷ Ms. Gilbert argues
5 that the complaint process contained in Recommended Noise Control Condition 2 fails to comply
6 with these requirements because “[t]he developer has the burden of proof, not the impacted citizen
7 to prove that the modeling completed by the applicant was not accurate.”¹⁷⁸ Ms. Gilbert is
8 incorrect. ORS 469.507 requires only that a monitoring program be adopted; it does not specify
9 when or how the monitoring should be conducted. In this case, it was entirely reasonable for the
10 Hearing Officer to adopt a complaint process as the required monitoring program for two reasons.
11 First, exceedances are expected only during foul weather, which is infrequent and not always
12 predictable.¹⁷⁹ Therefore, monitoring in the absence of a specific complaint would be extremely
13 challenging to time. Second, the transmission line is 300 miles long, which would render
14 monitoring along the length of the line, in the absence of any specific concern, unreasonably
15 expensive. Idaho Power therefore requests that the Council adopt without modification the Hearing
16 Officer’s findings of fact and conclusions of law relevant to this issue.

17 *h. Irene Gilbert, Exception 8, NC-2*

18 Similar to STOP B2H, Ms. Gilbert argues that in the event of a noise exceedance, ODOE
19 should require the developer to purchase a noise easement or reduce the noise level through

¹⁷⁶ Gilbert Exception for NC-2 at 17-19, 21-22; *see also* Irene Gilbert’s Contested Case Closing Brief Regarding Issue NC-2- at 18; *see also* ORS 469.507(1)

¹⁷⁷ ORS 469.507(2)

¹⁷⁸ Gilbert Exception for NC-2 at 18.

¹⁷⁹ ASC, Exhibit X at X-31 (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 35 of 371).

1 mitigation or other means to bring the noise level within the standard.¹⁸⁰ Idaho Power requests
2 that the Council reject this proposal for the same reasons provided on pages 33-34 above.

3 *i. Irene Gilbert, Exception 9, NC-2*

4 Ms. Gilbert also argues that the Proposed Contested Case Order is in error because “the
5 developer will control whether or not they provide any mitigation of impacts.”¹⁸¹ This claim is
6 demonstrably false. Subsection (b) of Amended Recommended Noise Control Condition 1
7 provides that if an agreement is not reached between the parties as to a specific Noise Mitigation
8 Plan, either the Council or ODOE will ultimately determine the appropriate mitigation measures
9 proportional to the facility operational noise levels in excess of the ambient degradation
10 standard.¹⁸² Furthermore, the Council or ODOE’s determination of appropriate mitigation is not
11 binding on the NSR property owner or Idaho Power *if the NSR property owner opts not to accept*
12 *the mitigation.*¹⁸³ In sum, the preponderance of the evidence in the record demonstrates that in no
13 way or form does Idaho Power have *final say* on the appropriate mitigation at each individual
14 NSR. For these reasons, Idaho Power requests that the Council adopt without modification the
15 Hearing Officer’s findings of fact and conclusions of law relevant to these issues.

16 *j. Irene Gilbert, Exception 10, NC-2*

17 Finally, Ms. Gilbert claims that, in the event the Council grants Idaho Power an exception
18 or variance, then the State would become liable for future noise impacts caused by B2H.¹⁸⁴ As an
19 initial matter, it is not entirely clear what Ms. Gilbert is arguing here. However, to the extent that

¹⁸⁰ Gilbert Exception for NC-2 at 18; *see also* Irene Gilbert’s Contested Case Closing Brief Regarding Issue NC-2- at 14.

¹⁸¹ Gilbert Exception for NC-2 at 27-28.

¹⁸² Proposed Contested Case Order at 296-97.

¹⁸³ Proposed Contested Case Order at 296-97 (subsection (b)).

¹⁸⁴ Gilbert Exception for NC-2 at 4, 30.

1 Ms. Gilbert is claiming that impacted landowners can bring private actions or common-law claims
2 against the Council for approving Idaho Power’s ASC, the one case she cites does not support this
3 proposition,¹⁸⁵ and she does not provide any additional evidence or legal precedent relevant to her
4 claim. For these reasons, Idaho Power requests that the Council reject Ms. Gilbert’s argument and
5 adopt without modification the Hearing Officer’s findings of fact and conclusions of law relevant
6 to these issues.

7 **3. Horst/Cavinato, Exceptions, NC-2**

8 Joe Horst and Anna Cavinato have requested exceptions on the following bases, which are
9 identical to arguments made by STOP B2H: (1) EFSC does not have authority to grant a
10 variance/exception,¹⁸⁶ (2) a variance would not be in compliance with ORS 467.060 (and
11 OAR 340-035-0100),¹⁸⁷ and (3) Idaho Power should have considered conditions other than foul
12 weather (e.g., humidity, fog, ice, line condition, etc.) when estimating exceedances.¹⁸⁸ Idaho
13 Power responds by referring to its discussion of these issues on pages 9-36 above. In addition,
14 Mr. Horst and Ms. Cavinato argue that the Hearing Officer erred in finding that a variance is
15 warranted because there are alternative methods to avoiding exceedances.¹⁸⁹ Idaho Power
16 discusses this additional claim below.

¹⁸⁵ Gilbert Exception for NC-2 at 30 (citing *Williams v. Invenergy, LLC*, Case No.: 3:13-cv-01391-AC, 2014 U.S. Dist. LEXIS 173160 (Dec. 16, 2014) (regarding statutory nuisance, common-law nuisance, and trespass claims against wind farm operators, not the state)).

¹⁸⁶ Petitioners Joe Horst and Anna Cavinato’s Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order, Motion for Summary Determination, Procedural Rulings; Issues NC-2 and PS-6 at 2-3 (June 30, 2020) [hereinafter, “Horst/Cavinato Exception”].

¹⁸⁷ Horst/Cavinato Exception at 3-4.

¹⁸⁸ Horst/Cavinato Exception at 4-5.

¹⁸⁹ Horst/Cavinato Exception at 4.

1 a. *Horst/Cavinato, Exception 1, NC-2*

2 In their pleading, Horst/Cavinato argue that Idaho Power could have avoided exceedances
3 in the La Grande area either by selecting a Bureau of Land Management (“BLM”)-approved route
4 or constructing the transmission line underground; thus, a variance is unwarranted.¹⁹⁰ This
5 argument was fully litigated in the contested case and is unpersuasive for several reasons. First,
6 due to the myriad of legal and practical constraints explained in the evidentiary record, it was
7 impossible for Idaho Power to select a route that would have avoided all or nearly all NSRs in the
8 general La Grande area. In selecting a route, Idaho Power was required to, and did in fact balance
9 numerous competing constraints and opportunities, which are discussed in detail in Section 3.1 of
10 Exhibit B of the ASC and the siting studies attached to Exhibit B.¹⁹¹ Constraints that drove Idaho
11 Power to consider segments of the B2H route closer to certain NSRs included:

- 12 • Federal land management agency requirements, including the federal land
13 management plans governing many of the federal lands in the analysis area.
- 14 • The transmission line route on lands managed by the BLM and United States Forest
15 Service (“USFS”) as issued in the BLM’s and USFS’s respective Records of
16 Decision (“RODs”).
- 17 • Western Electricity Coordinating Council Common Corridor Criteria and prudent
18 utility practice, including minimum separation distances from existing transmission
19 lines to ensure reliability of facilities.

¹⁹⁰ Horst/Cavinato Exception at 4.

¹⁹¹ ASC, Exhibit B, Section 3.1, at B-9 to B-48 (ODOE - B2HAPDoc3-3 ASC 02a Exhibit B Project Description_ASC 2018-09-28. Page 15-54 of 96); *see also* ASC, Exhibit B, Attachments B-1, B-2, B-3, B-4 (ODOE - B2HAPDoc3-3.1 ASC 02b Exhibit B Attachment B-1 to B-4 2018-09-28. Page 1-478 of 478); ASC, Exhibit B, Attachment B-6 (ODOE - B2HAPDoc3-3.4 ASC 02e Exhibit B Attachment B-6 and B-7a_ASC 2018-09-28. Page 1-20 of 162).

- 1 • The Council’s Fish and Wildlife Habitat Standard that applies the Oregon
2 Department of Fish and Wildlife’s habitat mitigation policy, which (1) does not
3 permit siting of an energy facility on lands designated Category 1 habitat, and
4 (2) recommends avoidance and minimizing impacts to Greater Sage Grouse
5 habitat.
- 6 • The Council’s Protected Area Standard, which does not permit siting of an energy
7 facility in certain protected areas, such as parks, scenic waterways, and wildlife
8 refuges, and certain federally designated areas, such as areas of critical
9 environmental concern, wilderness areas, wild and scenic rivers, BLM Class I and
10 U.S. Department of Agriculture, Forest Service Retention visual management
11 areas, national monuments, and National Wildlife Refuges.
- 12 • Requirements imposed as part of the EFSC review process and compliance with
13 site certificate conditions.¹⁹²

14 Given these constraints, as well as other considerations, such as feasibility of construction and
15 financing (e.g., undergrounding), Idaho Power concluded that the Company could not construct
16 B2H without exceedances of the antidegradation standard.¹⁹³

17 Idaho Power also disagrees that the Company could have avoided exceedances in the
18 La Grande area if it constructed the route approved by the BLM (presumably, the route referred to

¹⁹² Proposed Order at 650 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 657 of 10016).

¹⁹³ Proposed Order at 650 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 657 of 10016). While Idaho Power considered constraints regarding transmission line routing on lands managed by the BLM, those issues are not discussed in this section because they do not apply to the Morgan Lake Alternative.

1 as the “Glass Hill Alternative”).¹⁹⁴ Idaho Power has worked to develop an acceptable route through
2 the La Grande area *for over a decade*.¹⁹⁵ Early on, Idaho Power considered the Glass Hill Route,
3 along with at least one other route in the vicinity of Morgan Lake.¹⁹⁶ However, the Confederated
4 Tribes of the Umatilla Indian Reservation opposed the Glass Hill Route due to impacts to cultural
5 resources.¹⁹⁷ Moreover, the Glass Hill Route proposal was met with substantial opposition from
6 the affected landowners and other interested parties, some of whom formed the Glass Hill
7 Coalition specifically to challenge that route.¹⁹⁸ The Morgan Lake Alternative was developed in
8 response to those concerns, as well as in response to a request made by one of the affected
9 landowners during the federal National Environmental Policy Act (“NEPA”) process to locate the
10 route closer to the border of their property rather than bisecting it.¹⁹⁹ The Mill Creek Route was
11 also developed during the NEPA process, in response to the County’s request to site the Project in
12 parallel with the existing 230-kv line.²⁰⁰

13 When Idaho Power designed the Mill Creek Route and the Morgan Lake Alternative, the
14 Company refined the siting to address the constraints and opportunities in the local area, including
15 the need to avoid NSRs to the degree it was feasible.²⁰¹ To the extent it was necessary to locate

¹⁹⁴ Horst/Cavinato Exception at 4; *see also* Idaho Power / Testimony of Fuji Kreider on Issue NC-2 / Issue NC-2, p. 4 of 9; Idaho Power / Rebuttal Testimony of Joseph Stippel / Issues NC-1 and NC-2, p. 12 of 16.

¹⁹⁵ Idaho Power / Rebuttal Testimony of Joseph Stippel / Issues NC-1 and NC-2, p. 12 of 16.

¹⁹⁶ Idaho Power / Rebuttal Testimony of Joseph Stippel / Issues NC-1 and NC-2, p. 12 of 16.

¹⁹⁷ Proposed Order, Attachment 5: Referenced Reviewing Agency Comment Letters and Documents at 351-52 (Memorandum from Eric Quaempts, Department of Natural Resources Director for the Confederated Tribes of the Umatilla Indian Reservation, to Kellen Tardaewether, Senior Siting Analyst for the Oregon Department of Energy at 2-3 (Sept. 1, 2017)) (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8213 of 10016) (“The [Confederated Tribes of the Umatilla Indian Reservation] recommended avoidance of Glass Hill in the [Draft Environmental Impact Statement] due to a combination of natural and cultural resource concerns the [Confederated Tribes of the Umatilla Indian Reservation] raised over the years in our discussions regarding the B2H line.”).

¹⁹⁸ Idaho Power / Rebuttal Testimony of Joseph Stippel / Issues NC-1 and NC-2, p. 12 of 16.

¹⁹⁹ Idaho Power / Rebuttal Testimony of Joseph Stippel / Issues NC-1 and NC-2, p. 12 of 16.

²⁰⁰ Idaho Power / Rebuttal Testimony of Joseph Stippel / Issues NC-1 and NC-2, pp. 12-13 of 16.

²⁰¹ Idaho Power / Rebuttal Testimony of Joseph Stippel / Issues NC-1 and NC-2, p. 13 of 16.

1 the route in proximity to an NSR in a manner that is expected to result in an exceedance to the
2 Noise Rules, Idaho Power explained the specific constraints relevant to those NSRs in Exhibit X
3 of the ASC.²⁰²

4 Based on the above, Idaho Power has adequately demonstrated that due to a myriad of
5 competing constraints and opportunities that drive siting of the Project at a larger scale, many of
6 which are outside the Company's control, the Company is unable to avoid all noise exceedances
7 along the proposed route and alternative segments. Mr. Horst's and Ms. Cavinato's argument that
8 Idaho Power should not be granted a variance because the Company could have proceeded with
9 the Glass Hill Alternative or undergrounding is not persuasive. For these reasons, Idaho Power
10 requests that the Council adopt without modification the Hearing Officer's findings of fact and
11 conclusions of law relevant to these issues.

12 **C. Issue NC-3**

13 The Hearing Officer granted limited party status to STOP B2H for Issue NC-3, which asks:

14 *Whether the methodologies used for the noise analysis to evaluate compliance with*
15 *OAR 340-035-0035 were appropriate and whether the ODOE erred in approving*
16 *the methodology used to evaluate compliance with OAR 340-035-0035.*²⁰³

17 In the Proposed Contested Case Order, the Hearing Officer concluded that:

18 [A] preponderance of the evidence establishes that Idaho Power's methodologies
19 for evaluating compliance with OAR 340-035-0035 were appropriate and [ODOE]
20 did not err in approving Idaho Power's methodology.²⁰⁴

²⁰² Idaho Power / Rebuttal Testimony of Joseph Stippel / Issues NC-1 and NC-2, p. 13 of 16; *see also* ASC, Exhibit X at X-31 – X-48 (ODOE - B2HAPPDoc3-41 ASC 24_ Exhibit X_Noise_ASC 2018-09-28. Page 35-52 of 371).

²⁰³ Second Order on Case Management at 5.

²⁰⁴ Proposed Contested Case Order at 202.

1 STOP B2H filed exceptions for this issue on June 30, 2022. For the reasons discussed
2 below, Idaho Power requests that the Council adopt without modification the Hearing Officer’s
3 findings of fact and conclusions of law relevant to NC-3.

4 **1. STOP B2H, Exceptions, NC-3**

5 STOP B2H argues that the Proposed Contested Case Order is in error because the Hearing
6 Officer mistakenly concluded that Idaho Power’s methodologies for evaluating compliance with
7 OAR 340-035-0035 were appropriate.²⁰⁵ In particular, STOP B2H argues that: (1) the Hearing
8 Officer was incorrect when she concluded that the 32 dBA ambient baseline measured at
9 Monitoring Position (“MP”) 11 was “reasonable and fairly representative” of other NSRs in the
10 Morgan Lake area;²⁰⁶ (2) the Hearing Officer erred in accepting Idaho Power’s revised baseline
11 ambient of 31 dBA from MP 100 as it was also not “reasonable and fairly representative” of other
12 NSRs in the Morgan Lake area;²⁰⁷ and (3) the Hearing Officer erred when she failed to adopt a
13 baseline ambient of approximately 22-24 dBA as measured by STOP B2H’s noise expert, Kerrie
14 Standlee.²⁰⁸ As an initial matter, the arguments raised in STOP B2H’s Exception were addressed
15 in the contested case and were fully litigated. As Idaho Power explained in its briefing,²⁰⁹
16 STOP B2H’s arguments are meritless for the reasons discussed below.

17 *a. STOP B2H, Exception 1, NC-3*

18 In its pleading, STOP B2H argues that the 32 dBA measured at MP 11 overestimates the
19 average ambient sound level at NSRs in the Morgan Lake area because MP 11 is very close to the

²⁰⁵ STOP B2H Exceptions at 20.

²⁰⁶ STOP B2H Exceptions at 20.

²⁰⁷ STOP B2H Exceptions at 20-21.

²⁰⁸ STOP B2H Exceptions at 21.

²⁰⁹ Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 29-47; Idaho Power’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 72-90.

1 tracks of the Union Pacific railroad.²¹⁰ In particular, STOP B2H relies on the testimony of its
2 expert witness, Mr. Standlee, and other anecdotal reports which claimed that the sound of passing
3 trains could persist for long enough periods, either separately or in combination, to influence the
4 L₅₀ calculation—which would require such sounds to persist at least 30 minutes out of the hour.²¹¹
5 To support this argument in his report filed with STOP B2H’s Direct Testimony, Mr. Standlee
6 noted that “[a]ccording to [Union Pacific], there can be 10 to 12 . . . one-mile-long trains traveling
7 by the site at all hours of the day and night[.]”²¹² This estimate was similar to other estimates of
8 daily train traffic in the area. For instance, according to Ms. Gilbert’s Declaration, the owner of
9 the residence at MP 11 estimated that there could be around five trains on a quiet day, and up to
10 14 to 15 trains on a busy day.²¹³

11 In his Rebuttal Testimony, Idaho Power’s noise expert, Mark Bastasch, acknowledged that
12 a combination of several trains, or perhaps a very long train passing within an hour could

²¹⁰ STOP B2H Exceptions at 20-21.

²¹¹ STOP B2H Exceptions at 20-21 (“[T]he conclusion ignores the un rebutted live witness reports, which verified audible train sounds for more than 30 minutes on multiple occasions – which demonstrates that IPC’s assumption that the MP 11 results were not influenced by long periods of train noise is without rational foundation.”); *see also* STOP B2H / Surrebuttal Testimony of Fuji Kreider / Issues NC-2, NC-3, and NC-4 / Exhibit A, K. Standlee, B2H Noise Rebuttal Testimony Review, p. 2 of 17. To support this claim, Mr. Standlee relies on volunteer observations where the volunteer recorded the duration of time train sound was audible. *Id.* at p. 3 of 17. However, as noted by Mr. Bastasch, changes in A-weighting and audibility are not one hundred percent correlated, and therefore one cannot rely solely on an observation of audibility to assess the impact to an A-weighted sound level. M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 52, line 21– page 53, line 23 (sur-sur-rebuttal testimony of Mr. Bastasch). At hearing, Mr. Standlee generally agreed with Mr. Bastasch on this point. K. Standlee Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 148, lines 10-14. Indeed, during the 2:00 a.m. to 3:00 a.m. hour when monitoring at the Larkin residence, Mr. Standlee even noted that he could *hear* a train horn coming from the direction of MP 11, but that the train sound did not have any influence on the measured noise levels. STOP B2H / Direct Testimony of Fuji Kreider / Issue NC-3 / Exhibit 5, Standlee, K., ODOE B2H Proposed Order Review, p. 4 of 15. Accordingly, the volunteer observations of audible train noise should be afforded little to no weight for the determination of this issue.

²¹² STOP B2H / Direct Testimony of Fuji Kreider / Issue NC-3 / Exhibit 5, Standlee, K., ODOE B2H Proposed Order Review, p. 3 of 15.

²¹³ STOP B2H / Direct Testimony of Fuji Kreider / Issue NC-3 / Exhibit 10, Declaration of Irene Gilbert, p. 1 of 6 (Sept. 17, 2021).

1 *hypothetically* influence the mean L₅₀.²¹⁴ Mr. Bastasch noted, however, that such a scenario is
2 highly unlikely because there is no indication that the trains passing MP 11 are so frequent or so
3 long as to impact many hours of the day, and even an occasional noise spike that persists for 30
4 minutes or more would be effectively filtered out over long-term samples where the L₅₀ is an
5 average of all total hours.²¹⁵ On this point, it should be noted that Ms. Gilbert provided links to
6 an audio/video recording of the train passing MP 11.²¹⁶ The recording, which is only 1:29 minutes
7 long, seems to capture the sound of the train as it approaches, passes, and then travels away from
8 MP 11.²¹⁷ According to Mr. Bastasch, this fact suggests that even if Ms. Gilbert is correct that up
9 to 15 trains pass MP 11 in a day, those sounds would not be of a duration that would impact the
10 hourly L₅₀, particularly considering that they would be spread out throughout the day.²¹⁸

11 STOP B2H further argues that the Hearing Officer ignored unrebutted evidence that there
12 were actually 25 to 35 trains that passed MP 11 per day.²¹⁹ To be clear, Idaho Power did address
13 the lack of credibility of this evidence in its briefing.²²⁰ At the time of the hearing, despite the fact
14 that Mr. Standlee had not been called for cross-examination, STOP B2H’s lawyer made a special
15 request that Mr. Standlee be allowed to take the stand to make a “correction” to his testimony.²²¹

²¹⁴ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 61 of 96.

²¹⁵ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, pp. 61-63 of 96; M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 124, line 8 – page 125, line 3.

²¹⁶ STOP B2H / Direct Testimony of Fuji Kreider / Issue NC-3 / Exhibit 10, Declaration of Irene Gilbert, p. 1 of 6.

²¹⁷ STOP B2H / Direct Testimony of Fuji Kreider / Issue NC-3 / Exhibit 10, Declaration of Irene, p. 1 of 6. The Hearing Officer excluded Ms. Gilbert’s video that is linked in Exhibit 10 with respect to Ms. Gilbert’s testimony offered on NC-2 but did not exclude that exhibit with respect to STOP B2H’s testimony on NC-3. For that reason, Idaho Power addresses Ms. Gilbert’s Exhibit 10 under NC-3. Rulings on Objections to Limited Parties’ Direct Testimony and Exhibits at 13 (Oct. 15, 2021), p. 13 of 25.

²¹⁸ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 62 of 96.

²¹⁹ STOP B2H Exceptions at 20-21.

²²⁰ Idaho Power’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 75-76.

²²⁰ STOP B2H Exceptions at 20-21.

²²¹ K. Standlee Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 144, lines 3-6 (“Mr. Standlee needs to correct a statement in his testimony that I’d like to cover briefly with him.”).

1 When he was allowed to do so, Mr. Standlee stated that he had since received updated information
2 from a member of STOP B2H suggesting that the actual number of trains passing through “the
3 geography” on a daily basis is 25 to 35 trains.²²² Mr. Standlee offered no documentary evidence
4 to support this claim—testifying only that it was based on an email from the Union Pacific Railroad
5 to one of STOP B2H’s members.²²³ This additional evidence should be given no weight. First,
6 STOP B2H did not offer the referenced email into evidence and, in any event, offered no evidence
7 of the question posed to Union Pacific that elicited the purported response. And more importantly,
8 the statement that 25 to 35 trains pass through the general “geography” per day is vague; that is, it
9 is not remotely clear what “geography” the statement refers to, and therefore it cannot be
10 understood as a statement of how many trains pass MP 11 on a daily basis. Finally, this latest
11 claim is completely at odds with the declarations of the residents in the area who claim that there
12 are usually between five to 15 trains a day that pass MP 11.²²⁴ For these reasons, this new
13 estimation for daily train traffic passing MP 11 is questionable and should be rejected. Even
14 assuming any of the more credible estimates for average daily train traffic passing MP 11, it is
15 highly unlikely that sounds from such trains would influence the mean L₅₀, which was averaged
16 over hundreds of hours.

17 Regardless, the question of whether trains passing MP 11 influenced the average ambient
18 sound level measured at the location is in fact a moot point as Idaho Power performed supplemental
19 monitoring closer to the Morgan Lake area generally confirming the 32 dBA baseline. In response

²²² K. Standlee Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 145, lines 2-17; *Id.* at page 152, lines 10-18.

²²³ K. Standlee Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 151, line 23 – page 152, line 9.

²²⁴ STOP B2H / Direct Testimony of Fuji Kreider / Issue NC-3 / Exhibit 10, Declaration of Irene, p. 1 of 6.

1 to the limited parties’ concerns regarding the appropriateness of using the 32 dBA ambient noise
2 level to represent the Morgan Lake NSRs—and as part of the contested case, Idaho Power
3 performed supplemental noise monitoring at four additional locations along the Morgan Lake
4 Alternative and Mill Creek Route *that were significantly closer to the clusters of NSRs* along those
5 routes.²²⁵ These monitoring points are identified as MP 100, MP 101, MP 102, and MP 103.²²⁶
6 Under the same conservative conditions used in Idaho Power’s initial ambient sound level
7 monitoring, *i.e.*, during the late-night period of midnight to 5:00 a.m. when winds were less than
8 10 mph, and where wind speed was evaluated on the basis of the hourly gust, the mean L₅₀ was
9 31 dBA at MP 100, 36 dBA at MP 101, 32 dBA at MP 102, and 43 dBA at MP 103.²²⁷ Substituting
10 these values for the average ambient sound level of 32 dBA from MP 11 yields the following
11 results:

- 12 • For the Mill Creek Route, the number of exceedances remains the same—two
13 exceedances along the route.²²⁸
- 14 • For the Morgan Lake Alternative, where the ambient is assumed to be 31 dBA for
15 all NSRs, the number of exceedances increases from two to four.²²⁹ However,
16 because these two additional exceedances are right on the edge of compliance (*i.e.*,
17 one dBA above the 10 dBA ambient antidegradation threshold),²³⁰ and the

²²⁵ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 63 of 96.

²²⁶ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 63 of 96.

²²⁷ Idaho Power / Sur-sur-rebuttal Testimony of Mark Bastasch / Issues NC-2, NC-3, and NC-4 / Exhibit I, Corrected Tables 1 and 2 of Rebuttal Testimony of Mark Bastasch, p. 2 of 2.

²²⁸ Idaho Power / Sur-sur-rebuttal Testimony of Mark Bastasch / Issues NC-2, NC-3, and NC-4 / Exhibit C, Reanalysis of MP 11 Area - Proposed Route (Mill Creek) - Map 1, p. 3 of 3.

²²⁹ Idaho Power / Sur-sur-rebuttal Testimony of Mark Bastasch / Issues NC-2, NC-3, and NC-4 / Exhibit B, Reanalysis of MP 11 Area – Morgan Lake Alternative, pp. 3-4 of 4.

²³⁰ Using the 31 dBA ambient baseline, the foul weather increase over late night baseline for NSR-118 and NSR-132 is +11 dBA. Idaho Power / Sur-sur-rebuttal Testimony of Mark Bastasch / Issues NC-2, NC-3, and NC-4 / Exhibit B, Reanalysis of MP 11 Area – Morgan Lake Alternative, pp. 3-4 of 4.

1 transmission line will be operating at a maximum voltage only 0.01 percent of the
2 time,²³¹ when the transmission line assumes normal operations it is very unlikely
3 that these additional exceedances will actually occur.²³²

4 Based on these results, Idaho Power has adequately demonstrated that the 32 dBA ambient
5 sound level measured at MP 11 is representative of other NSRs in the Morgan Lake area.

6 For all the above reasons, the Council should adopt the Hearing Officer’s findings and
7 conclusions on this issue without modification.

8 *b. STOP B2H, Exception 2, NC-3*

9 STOP B2H also argues that the Hearing Officer erred in accepting Idaho Power’s revised
10 ambient of 31 dBA from MP 100 as it was also not “reasonable and fairly representative” of other
11 NSRs in the Morgan Lake area.²³³ However, this argument is unpersuasive and unsupported by
12 the evidence in the record.

13 Idaho Power performed supplemental monitoring at locations in the Morgan Lake area in
14 order to address STOP B2H’s concerns that acoustic conditions at MP 11 were not representative
15 of NSRs in the Morgan Lake area. As discussed above, in performing this supplemental
16 monitoring, Idaho Power selected four separate locations located in close proximity to the clusters
17 of NSRs near the Mill Creek Route and Morgan Lake Alternative, which were designated as
18 MP 100, MP 101, MP 102, and MP 103. In particular, Idaho Power selected MP 100 to represent

²³¹ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 30 of 96.

²³² M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 64, lines 2-20 (sur-sur-rebuttal testimony of M. Bastasch). The sound level under normal operating conditions for the Project is 2 dBA less than under the conservative maximum voltage conditions used for Idaho Power’s noise analysis. *Id.* The predicted sound levels at the two new exceedances, NSR-118 and NSR-132 along the Morgan Lake Alternative, are +11. Idaho Power / Sur-sur-rebuttal Testimony of Mark Bastasch / Issues NC-2, NC-3, and NC-4 / Exhibit B, Reanalysis of MP 11 Area – Morgan Lake Alternative, p. 3 of 4. Accordingly, under normal operating conditions, the sound levels at these two sites would be +9, and thus in compliance with the antidegradation standard.

²³³ STOP B2H Exceptions at 20-21.

1 the NSRs along the Morgan Lake Alternative because the location appeared likely to prove the
2 quietest location in the area. Indeed, MP 100 is located on private property on a parcel
3 *immediately adjacent* to Morgan Lake Park and is in a very similar setting as the park. Moreover,
4 MP 100 is located in an area that is not as heavily treed as many locations in the Morgan Lake
5 area.²³⁴ This fact is particularly important because, as Mr. Bastasch noted during his Sur-sur-
6 rebuttal Testimony, wind blowing through the tops of treetops increases the noise levels in the
7 Morgan Lake area.²³⁵ Therefore, MP 100 was selected to represent a conservative baseline for
8 sound levels in the Morgan Lake area.²³⁶ And, in fact, MP 100 proved to be the quietest of all of
9 the supplemental MPs.

10 For MP 100, Idaho Power measured an ambient sound level of 31 dBA, which
11 Mr. Bastasch noted at hearing is similar to the 32 dBA measured at MP 11.²³⁷ Indeed, a one
12 decibel difference is so subtle that it is not “perceivable” by the human ear.²³⁸ The mean L₅₀
13 measured at the other supplemental monitoring positions that were placed closer to the cluster of
14 NSRs in the Morgan Lake area were either equal to or greater than the ambient sound level of 32
15 dBA measured at MP 11. Accordingly, not only are both MP 11 and MP 100 representative of the
16 NSRs in the Morgan Lake area, but the ambient background levels measured from both sites are
17 also indeed conservative for the purpose of Idaho Power’s noise analysis.

²³⁴ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 64 of 96.

²³⁵ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 44, lines 4-11.

²³⁶ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 62, line 15 – page 63, line 9.

²³⁷ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 65, lines 1-7 (“[T]he resulting sound level of 31 is very close to what was determined for MP-11 of — of 32. That’s a one-decibel difference. General guidance would say that that’s not a perceivable difference. So I think it indicates that the value of 32 was — was not uncharacteristic based on the data that we collected.”).

²³⁸ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 65, lines 1-7. A sound of 1 dBA is right at the threshold of hearing (1000 Hz). Proposed Order at 620 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 627 of 10016).

1 At the time of hearing, STOP B2H’s lawyer, Mr. Anuta, further asked Mr. Bastasch
2 whether Idaho Power would consider substituting the ambient sound level of 31 dBA measured at
3 MP 100 for the ambient sound level of 32 dBA measured at MP 11, in order to calculate
4 exceedances in along the Morgan Lake Alternative.²³⁹ Idaho Power assumed that Mr. Anuta made
5 this request because 31 dBA is a more conservative measure—that is more likely to result in an
6 exceedance that Idaho Power would need to mitigate per the proposed site certificate conditions.
7 While Mr. Bastasch answered that he had not discussed the matter with Idaho Power,²⁴⁰ the
8 Company considered Mr. Anuta’s question, and determined that given the fact that MP 100 is
9 significantly closer to the Morgan Lake Alternative than MP 11, it was appropriate to use the
10 MP 100 ambient sound level to calculate exceedances for the NSRs along the Morgan Lake
11 Alternative. As noted above, assuming an ambient sound level of 31 dBA instead of 32 dBA
12 results in additional exceedances at two residential NSRs along the Morgan Lake Alternative and
13 as a result, two additional NSRs will receive mitigation under the proposed site certificate
14 conditions. Therefore, Idaho Power proposed—and the Hearing Officer adopted—that
15 Recommended Noise Control Condition 1 be revised to include these two additional exceedances
16 (NSR-118 and NSR-132), which will require Idaho Power to work with the owners of these NSRs
17 to agree to appropriate mitigation (changes shown in red).²⁴¹

²³⁹ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), at page 127, lines 2-10.

²⁴⁰ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), at page 127, line 10.

²⁴¹ Proposed Contested Case Order at 296-97. In addition, as indicated in Exhibit B of Mr. Bastasch’s Sur-sur-rebuttal Testimony, two structures previously identified as NSRs do not actually qualify as such. Idaho Power / Sur-sur-rebuttal Testimony of Mark Bastasch / Issues NC-2, NC-3, and NC-4 / Exhibit B, *Reanalysis of MP 11 Area – Morgan Lake Alternative*, at p. 3 of 4. NSR-119, NSR-121, and NSR-125 are all located on Mr. Larkin’s property. While NSR-125 was properly identified as a residence, Idaho Power has since confirmed that NSR-119 and NSR-121 are, respectively, a shed and a general-purpose building. Idaho Power / Sur-sur-rebuttal Testimony of Mark Bastasch / Issues NC-2, NC-3, and NC-4 / Exhibit B, *Reanalysis of MP 11 Area – Morgan Lake Alternative*, at p. 3 of 4; see also Exhibit X, Attachment X-7 at Map 14 (ODOE - B2HAPDoc3-41 ASC 24_ Exhibit X_Noise_ASC 2018-09-28. Page 335, 352

1 **Amended Recommended Noise Control Condition 1:**

2
3 Prior to construction, the certificate holder will ~~work with~~ initiate discussions with
4 the following 41 NSR property owners at which it has estimated exceedances of
5 the ambient antidegradation standard may occur identified in Attachment X-5
6 and/or Attachment X-4 of the Final Order on the ASC (NSR: 8, 9, 10, 11, 5002, 69,
7 70, 5004, 46, ~~118 119, 121,~~ 125, 5010, 5011, 92, 93, 94, 95, 96, 97, 98, 99, 100,
8 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 518, 111, 112, 132, 133, 5008,
9 5009, 113, and 115) to develop mutually agreed upon Noise Exceedance Mitigation
10 Plans, specific to each NSR location. The site-specific Noise Exceedance
11 Mitigation Plans will include agreed upon measures that would be implemented at
12 the NSR location to minimize or mitigate the ambient antidegradation standard
13 noise exceedance.
14

15 For these above reasons, the evidence in the record demonstrates that the Hearing Officer's
16 acceptance of the 31 dBA baseline ambient was reasonable; therefore, the Council should adopt
17 the Hearing Officer's findings of fact and conclusions of law on this issue without modification.

18 *c. STOP B2H, Exception 3, NC-3*

19 STOP B2H finally argues that the 32 dBA measured at MP 11 (and the 31 dBA measured
20 at MP 100) is not representative, and the Hearing Officer should have adopted the approximate
21 22-24 dBA measurements recorded by Mr. Standlee as the ambient baseline.²⁴² However, the
22 Hearing Officer correctly found that Mr. Standlee's monitoring results were insufficient to
23 establish a lower ambient baseline.

24 *i. Mr. Standlee's Monitoring Is Unpersuasive*

25 In an attempt to cast doubt on Idaho Power's use of 32 dBA to represent the ambient sound
26 level in the Morgan Lake area, Mr. Standlee presented the findings of his own sound monitoring
27 at the residence of Greg Larkin, who is one of the owners of an NSR where an exceedance is

of 371) (showing NSR-119 on Parcel 03S37E2400800, which is owned by Mr. Larkin). Therefore, Idaho Power requested, and the Hearing Officer accepted, that these "NSRs" be removed from ODOE's Recommended Noise Control Condition 1. Proposed Contested Case Order at 296-97.

²⁴² STOP B2H Exceptions at 21.

1 predicted along the Morgan Lake Route.²⁴³ Mr. Standlee conducted his monitoring at the Larkin
2 residence on one early morning in September 2021, from 12:25 a.m. to 4:00 a.m., and found that
3 the measured L₅₀ ranged from 20-29 dBA.²⁴⁴ Accordingly, Mr. Standlee concluded that “the
4 ambient noise at residences in the vicinity of Morgan Lake is likely 10 to 12 [dBA] lower than the
5 level used in the B2H noise analysis.²⁴⁵

6 *1. Mr. Standlee’s Monitoring Was for Too Short a Period to Establish an Ambient Baseline.*

7 As explained by Mr. Bastasch, sound levels in any given location are subject to significant
8 variability over time, due to factors like changes in weather.²⁴⁶ For that reason, in order to calculate
9 a truly representative average ambient sound level, it is necessary to monitor for a statistically
10 significant period of time. For example, ODEQ’s Sound Manual, NPCS-1, recommends that
11 ambient sound level be calculated based on *at least* three separate days of data.²⁴⁷ However, in
12 order to be assured of capturing a truly representative data set, Idaho Power performed its initial
13 monitoring at its original 17 MPs over two- to four-week periods.²⁴⁸ Similarly, Mr. Bastasch
14 recorded data at the supplemental monitoring positions (MP 100, MP 101, MP 102, and MP 103)

²⁴³ STOP B2H / Direct Testimony of Fuji Kreider / Issue NC-2 / Exhibit 5, Standlee, K., ODOE B2H Proposed Order Review, pp. 3-5 of 15.

²⁴⁴ STOP B2H / Direct Testimony of Fuji Kreider / Issue NC-2/ Exhibit 5, Standlee, K., ODOE B2H Proposed Order Review, p. 4 of 15.

²⁴⁵ STOP B2H / Direct Testimony of Fuji Kreider / Issue NC-2/ Exhibit 5, Standlee, K., ODOE B2H Proposed Order Review, p. 4 of 15.

²⁴⁶ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 62 of 96 (“I do want to emphasize that ambient sound levels vary both temporally and spatially. There is no single ambient sound level or perfect ambient sound level or location; the ambient sound level will vary even at the same location due to the myriad of factors.”).

²⁴⁷ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6 / Exhibit C, ODEQ, Sound Measurement Procedure Manual, p. 14 of 38.

²⁴⁸ ASC, Exhibit X, Attachment X-1 (Sept. 2018) (ODOE - B2HAPPDoc3-41 ASC 24 Exhibit X Noise_ASC 2018-09-28. Page 70-126 of 371). The initial measurement period commenced March 6, 2012, and ended on May 10, 2012, and the supplemental measurement period commenced March 11, 2013, and ended on June 12, 2013. Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 24 of 96.

1 in the Morgan Lake area for approximately three weeks.²⁴⁹ This longer-term monitoring allowed
2 Idaho Power to provide a *reliable* average ambient sound level against which to calculate expected
3 exceedances of the ambient antidegradation standard.

4 Given these facts, Mr. Standlee’s dataset is just too small to draw any conclusions about
5 what an average ambient sound level would be at Mr. Larkin’s residence over a longer period of
6 time. And although in his Direct Testimony, Mr. Standlee clearly argued that the measured
7 ambient sound level at the Larkin residence (i.e., an L₅₀ in the low twenties) should be relied on as
8 the correct ambient baseline for other NSRs in the Morgan Lake area,²⁵⁰ under sharp criticism
9 from Mr. Bastasch and Ken Kosky of Golder Associates, ***Mr. Standlee retracted his position and***
10 ***later admitted in his Sur-rebuttal Testimony that he “never intended” his monitoring at the***
11 ***Larkin residence to be understood as an average ambient sound level for that location.***²⁵¹

12 Mr. Standlee nevertheless continued to argue that Mr. Bastasch’s monitoring at MP 100,
13 which produced some time periods where sound levels were in the mid-twenties, proves that his
14 monitoring at the Larkin residence was not “automatically questionable.”²⁵² However,
15 Mr. Bastasch’s point was not that Mr. Standlee’s data itself was questionable.²⁵³ On the contrary,
16 Mr. Bastasch recorded some similar, short-lived quiet periods at MP 100 and at
17 MP 11.²⁵⁴ Mr. Bastasch’s point was that Mr. Standlee’s dataset for the Larkin residence was too
18 small to be accepted as establishing an average ambient sound level for the purposes of ODEQ’s

²⁴⁹ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 15 of 96.

²⁵⁰ STOP B2H / Direct Testimony of Fuji Kreider / Issue NC-3 / Exhibit 5, Standlee, K., ODOE B2H Proposed Order Review, pp. 3-5 of 15.

²⁵¹ STOP B2H / Surrebuttal Testimony of Fuji Kreider / Issues NC-2, NC-3, and NC-4 / Exhibit A, K. Standlee., B2H Noise Rebuttal Testimony Review, p. 7 of 17.

²⁵² STOP B2H / Surrebuttal Testimony of Fuji Kreider / Issues NC-2, NC-3, and NC-4 / Exhibit A, K. Standlee, B2H Noise Rebuttal Testimony Review, p. 7 of 17.

²⁵³ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 72, lines 6-12.

²⁵⁴ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 72, lines 13-24.

1 Noise Rules,²⁵⁵ and further that the sample could not be squared with the results of Mr. Bastasch’s
2 own long-term monitoring at four different monitoring positions in the general area which
3 provided L₅₀’s ranging from 31 dBA to 43 dBA.²⁵⁶ Therefore, Mr. Bastasch concluded that the
4 very quiet period Mr. Standlee just happened to capture in three and a half hours was simply one
5 of those unusual quiet periods that would not be sustained in the longer term.²⁵⁷

6 2. Because Mr. Standlee Did Not Properly Calibrate His Monitoring Equipment, the Data
7 from the Larkin Residence Is Unreliable and Unverifiable.

8 Even accounting for the fact that Mr. Standlee’s dataset is too small, the data is further
9 undermined by the fact that Mr. Standlee failed to follow the most basic procedures for ensuring
10 reliable and verifiable data. The ODEQ Sound Manual requires that equipment be field calibrated
11 before monitoring to ensure that the equipment is working correctly and set up properly.²⁵⁸ In
12 addition, the ODEQ Sound Manual requires that monitoring equipment be laboratory calibrated
13 within one year from monitoring, again to ensure the equipment is working properly.²⁵⁹ As
14 discussed below, Mr. Standlee failed to comply with either of these requirements.

15 First, STOP B2H’s lawyer, Karl Anuta, confirmed via email that Mr. Standlee did not
16 perform a field calibration prior to monitoring sound levels at Mr. Larkin’s residence.²⁶⁰ Mr. Anuta

²⁵⁵ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, pp. 70-71 of 96.

²⁵⁶ Idaho Power / Sur-sur-rebuttal Testimony of Mark Bastasch / Issues NC-2, NC-3, and NC-4 / Exhibit I, Corrected Tables 1 and 2 of Rebuttal Testimony of Mark Bastasch, p. 2 of 2.

²⁵⁷ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, pp. 70-71 of 96; M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 72, lines 13-24.

²⁵⁸ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 74, line 12 – page 75, line 1; *see also* Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6 / Exhibit C, ODEQ, Sound Measurement Procedures Manual, p. 9 of 38.

²⁵⁹ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6 / Exhibit C, ODEQ, Sound Measurement Procedures Manual, p. 9 of 38.

²⁶⁰ Idaho Power / Sur-sur-rebuttal Testimony of Mark Bastasch / Issues NC-2, NC-3, and NC-4 / Exhibit F, Email Exchange Between Lisa Rackner and Karl Anuta Regarding Equipment Calibration (Jan. 10, 2021), p. 1 of 2.

1 did point out that Mr. Standlee performed a “field check” of his equipment,²⁶¹ which is a quick
2 check of the meter; however, Mr. Standlee did not record the result of the field check.²⁶² Second,
3 at the time Mr. Standlee performed his monitoring, his equipment had not been calibrated in the
4 laboratory for over four years (the equipment was last lab calibrated on January 4, 2017).²⁶³ While
5 at hearing, Mr. Bastasch stated that he was not taking the position that Mr. Standlee’s data, in and
6 of itself, was flawed due to these defects, Mr. Bastasch noted that the data could not be *verified as*
7 *accurate*.²⁶⁴ For these same reasons, Mr. Kosky similarly concluded in his Rebuttal Testimony
8 that “it is not possible to evaluate the validity or accuracy of the data” provided by Mr. Standlee.²⁶⁵

9 In his email, Mr. Anuta seems to suggest that Mr. Standlee’s field check of his equipment
10 prior to monitoring at the Larkin residence may have obviated the need for a full field
11 calibration.²⁶⁶ However, this suggestion should be rejected. First, the ODEQ Manual requires a
12 field calibration and not a field check.²⁶⁷ Second, as explained by Mr. Bastasch, a field check
13 differs from a field calibration in critical respects. A field calibration requires that the equipment
14 be put into calibration mode, that a field calibrator instrument be placed on the microphone, and
15 that the meter store the calibrated value to accommodate for deviations before and after the

²⁶¹ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 73, line 20 – page 74, line 11; Idaho Power / Sur-sur-rebuttal Testimony of Mark Bastasch / Issues NC-2, NC-3, and NC-4 / Exhibit F, Email Exchange Between Lisa Rackner and Karl Anuta Regarding Equipment Calibration, p. 1 of 2.

²⁶² M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 75, lines 2-6.

²⁶³ STOP B2H / Surrebuttal Testimony of Fuji Kreider / Exhibit A, K. Standlee, B2H Noise Rebuttal Testimony Review, pp. 18-19 of 26.

²⁶⁴ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 73, lines 2-13.

²⁶⁵ ODOE / Written Rebuttal Testimony of Ken Kosky, Golder Associates Inc. / Issues NC-2, NC-3, NC-4, and NC-6, p. 11 of 24.

²⁶⁶ Idaho Power / Sur-sur-rebuttal Testimony of Mark Bastasch / Issues NC-2, NC-3, and NC-4 / Exhibit F, Email Exchange Between Lisa Rackner and Karl Anuta Regarding Equipment Calibration, p. 1 of 2.

²⁶⁷ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 74, lines 22-25; Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6 / Exhibit C, ODEQ, Sound Measurement Procedures Manual, p. 9 of 38.

1 measurement period.²⁶⁸ On the other hand, a field check takes only a couple of seconds, and does
2 not store or otherwise record the results. And importantly, for his own field check, Mr. Standlee
3 did not even write down his results and offered only his “memory” of the results.²⁶⁹ In fact, Mr.
4 Standlee’s approach was so unorthodox that Mr. Bastasch testified at hearing that in all of his years
5 of experience, he has never known an acoustical engineer to attempt to substitute a field check for
6 a field calibration, when the results were intended for use in a legal or administrative proceeding.²⁷⁰

7 In his Sur-Rebuttal Testimony, Mr. Standlee further appeared to argue that it was
8 reasonable for him not to perform a laboratory calibration of his monitoring equipment because he
9 did not frequently use the equipment.²⁷¹ Again, the ODEQ Sound Manual *requires* that
10 monitoring equipment be laboratory calibrated within one year from monitoring to ensure that the
11 equipment is working properly.²⁷² The fact that Mr. Standlee provided documentation of
12 calibration of his equipment *after* the monitoring had been performed does not cure this procedural
13 flaw.²⁷³ The whole point of up-to-date and contemporaneous calibration is to make sure that the
14 equipment is functioning properly in the field and to provide a record of calibration so that the
15 results can be verified and validated.²⁷⁴ In sum, because Mr. Standlee ignored the ODEQ Sound
16 Manual, monitored for just a few hours, and failed to follow the most basic quality control

²⁶⁸ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 74, lines 12-21.
²⁶⁹ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 74, lines 3-11.
²⁷⁰ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 75, lines 7-11.
²⁷¹ STOP B2H / Surrebuttal Testimony of Fuji Kreider / Exhibit A, K. Standlee, B2H Noise Rebuttal Testimony Review, p. 10 of 26 (“I believe that the meter had been used a total of approximately 10 to 12 hours of accumulated time, in the approximately three years since its use began.”).
²⁷² M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 75, lines 12-22; Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6 / Exhibit C, ODEQ, Sound Measurement Procedures Manual, p. 9 of 38.
²⁷³ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 76, line 15 – page 77, line 1.
²⁷⁴ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), page 77, lines 2-15.

1 procedures, his monitoring data from the Larkin residence cannot be relied upon, and certainly
2 cannot be confirmed. Such evidence, therefore, should be rejected and should certainly not be used
3 to establish an ambient baseline.

4 ii. The Ambient Baselines Measured in Other Rural Counties Is Irrelevant.

5 In support of the approximate 22-24 dBA ambient baseline, STOP B2H further points to
6 Table NC-4 of the Proposed Order²⁷⁵ to argue that Idaho Power’s measured ambient sound level
7 for Union County is significantly higher than those in Malheur, Baker or Umatilla Counties, which
8 STOP B2H notes are also rural counties.²⁷⁶ From there, STOP B2H jumps to the illogical
9 conclusion that, since all these counties are rural counties, the recorded level in Union County
10 must be incorrect.²⁷⁷ This reasoning, however, is based on a misunderstanding of the data. First,
11 as pointed out by Mr. Bastasch at hearing, Table NC-4 does not compare the ambient sound levels
12 found at all monitoring positions in the different counties.²⁷⁸ Rather, Table NC-4 shows the
13 ambient sound level at only those monitoring positions that are associated with exceedances of the
14 antidegradation standard.²⁷⁹ As Mr. Bastasch explained, exceedances of the ambient
15 antidegradation standard are most likely to result when multiple conditions occur at the same time:
16 maximum voltage levels and foul weather, all during a quiet time period, typically characterized
17 as having low wind speeds during the late-night hours.²⁸⁰ It is for that reason that the Company
18 conservatively selected the average ambient sound levels from the quietest part of the night.²⁸¹

²⁷⁵ Proposed Order at 640 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 647 of 10016).

²⁷⁶ STOP B2H Exceptions at 21; *see also* STOP B2H Closing Argument at 11.

²⁷⁷ STOP B2H Exceptions at 21; *see also* STOP B2H Closing Argument at 11.

²⁷⁸ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), at page 108, lines 6-23.

²⁷⁹ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), at 140, lines 1-9.

²⁸⁰ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 31 of 96.

²⁸¹ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p.18, 66 of 96.

1 So, in looking only at the ambient sound levels associated with monitoring positions where
2 exceedances are predicted to occur, STOP B2H is pointing to what are most likely the quietest
3 monitoring positions in each county in an attempt to prove that, overall, the recorded sound level
4 in Union County is higher than the recorded sound level in the other counties.

5 More importantly, even if the average ambient sound levels recorded by Idaho Power for
6 all monitoring positions demonstrated that the average ambient sound level in Union County is
7 higher, that fact would not indicate that Idaho Power’s monitoring data is incorrect. On the
8 contrary, a designation as rural is not the only factor that drives sound levels. As Mr. Bastasch
9 discussed at hearing, a more heavily treed area is likely to have a higher ambient sound level, and
10 in rural counties, wind through the tops of trees is the predominant driver of sound levels.²⁸² Mr.
11 Bastasch further noted that both the monitoring positions and the NSRs in Union County are in
12 fairly heavily treed areas,²⁸³ and so it would not be surprising if the sound level were higher as
13 compared to areas where there are fewer trees. In fact, a review of the photos associated with all
14 monitoring positions contained in all counties suggests that there are very few located in areas of
15 numerous evergreen trees, which characterize the Morgan Lake area. Many of the monitoring
16 positions in other counties appear from the photos to be located in areas with no trees (e.g., MP 3,
17 MP 14, MP 27, MP 31) while the photos suggest that many more are located in areas with no
18 evergreen trees, but rather sparse deciduous trees that have lost their leaves (e.g., MP 6, MP 15,

²⁸² M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), at page 43, line 10 - page 44, line 11.

²⁸³ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), at page 43, line 10 - page 44, line 11.

1 MP 16, MP 17, MP 19, MP 20, MP 22, MP 23, MP 25, MP 30).²⁸⁴ For this reason, the most
2 plausible explanation for the relatively higher sound levels in the Morgan Lake area is that it is
3 more heavily treed than the areas associated with other monitoring positions.²⁸⁵

4 iii. The Hearing Officer Did Not Ignore Mr. Standlee’s Expert Opinions,
5 But Rather Found Them Unpersuasive.

6 Finally, STOP B2H argues that the Hearing Officer’s conclusions ignore Mr. Standlee’s
7 expert opinions.²⁸⁶ That is simply incorrect; rather, the Hearing Officer found Mr. Standlee’s
8 opinions to be unpersuasive. Specifically, the Hearing Officer noted:

9 Mr. Standlee’s monitoring at Mr. Larkin’s residence is not persuasive evidence that
10 the ambient sound levels at NSRs in the vicinity of Morgan Lake are likely 10 to
11 12 decibels lower than the 32 dBA measured at MP 11 (or the 31 dBA measured at
12 MP 100). As Mr. Standlee conceded in his Surrebuttal Report (STOP B2H
13 Surrebuttal Exhibit A at 7), the results from one night of measurements at the
14 residence should not be used to determine representative ambient noise levels for
15 the residence. Simply stated, the dataset from the Larkin residence is simply too
16 small to prove anything with regard to the average ambient sound levels for NSRs
17 along the Mill Creek or the Morgan Lake Alternative routes. Similarly, the data
18 from the Larkin residence does not establish that Idaho Power’s methodology for
19 determining average ambient sound levels was flawed or otherwise
20 inappropriate.²⁸⁷

21 Accordingly, the Hearing Officer carefully assessed the strength of Mr. Standlee’s evidence and
22 correctly found it to be lacking. For all the above reasons, the Council should adopt the Hearing
23 Officer’s findings of fact and conclusions of law on this this issue without modification.
24

²⁸⁴ ASC, Exhibit X, Attachment X-2: Baseline Sound Survey (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 127 of 371); ASC, Exhibit X, Attachment X-3: Supplemental Baseline Sound Survey for the Tub Mountain, Burnt River, and East of Bombing Range Road Alternate Corridors (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 217 of 371).

²⁸⁵ Note that STOP B2H made this particular argument for the first time at hearing, and so Idaho Power was deprived of the opportunity to conduct a specific analysis of the comparative drivers of sound levels in the various counties. Other factors, such a population density, presence of transportation (e.g., highways, railways, etc.), and other sources of noise, which may be more or less prevalent in a rural county, may have played a predominant role.

²⁸⁶ STOP B2H Exceptions at 21.

²⁸⁷ Proposed Contested Case Order at 201.

1 **2. Irene Gilbert, Exceptions, NC-3**

2 In her Exception for NC-2, Ms. Gilbert includes numerous arguments regarding the
3 methodology that Idaho Power used to establish average ambient baselines and predicted
4 exceedances of the ambient antidegradation standard. However, any issues regarding Idaho
5 Power’s noise monitoring methodology would be properly raised under NC-3, for which
6 Ms. Gilbert was not granted limited party status.²⁸⁸ For that reason alone, the Council should
7 decline to consider Ms. Gilbert’s arguments specific to noise monitoring methodology.

8 Ms. Gilbert nevertheless argues that she should be allowed to raise exceptions to Idaho
9 Power’s noise monitoring methodology because she raised such issues in her Petition for Party
10 Status, and that in qualifying Ms. Gilbert for limited party status under NC-2 but not NC-3, the
11 Hearing Officer had improperly framed her issues.²⁸⁹ This argument should be rejected because
12 Ms. Gilbert did not raise this concern in her appeal to the Hearing Officer’s Order on Party Status

²⁸⁸ Second Order on Case Management at 5.

²⁸⁹ Gilbert Exception for NC--2 at 5-6, 8. In support of this argument Ms. Gilbert relies on a Land Use Board of Appeals (“LUBA”) decision: *Department of Land Conservation and Development v. Tillamook County*, LUBA No. 97-250, 34 Or. LUBA 586, *590-91 (June 25, 1998) (finding that “nothing in in ORS 197.835(3) or ORS 197.763 requires petitioner to raise particular ‘arguments’ during the local proceedings in order to address those arguments on appeal. ORS 197.835(3) specifies that ‘issues [on appeal before LUBA] shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.763[.]’ ... The statutory restrictions to raising issues on appeal do not apply to new arguments on appeal regarding issues that were raised below”). Gilbert Exception for NC--2 at 8. However, this case is inapplicable to Ms. Gilbert’s argument as it applies to appeals to the Land Use Board of Appeals under ORS 197.763 and also notes that for issues raised on appeal such issues *still* have to be raised with sufficient specificity before the close of record; such statute does not apply to exceptions before the Council. It is important to note that Ms. Gilbert references another LUBA decision for the same proposition, but the citation is incorrect; therefore, Idaho Power assumes Ms. Gilbert is referring to *Department of Land Conservation and Development v. Curry County*, LUBA No. 97-014, 33 Or. LUBA 728, 733, 1997 Ore. Land Use Bd. App. LEXIS 916, *11 (1997) for the finding that “ORS 197.763 does not require...that petitioner or another participant raise all arguments related to an issue raised below, in order to advance those arguments on appeal.” Gilbert Exception for NC--2 at 8. For the reasons discussed above, the finding in *Curry County* is not applicable to exceptions to the Proposed Contested Case Order.

1 to the Council, and therefore waived it.²⁹⁰ Accordingly, the Council should decline to consider
2 Ms. Gilbert’s arguments regarding Idaho Power’s noise monitoring methodology.

3 However, in the event that the Council wishes to consider Ms. Gilbert’s arguments
4 regarding Idaho Power’s noise monitoring methodology, these issues are properly considered in
5 NC-3. Idaho Power notes that the arguments raised in Ms. Gilbert’s Exception were addressed in
6 the contested case and were fully litigated. As Idaho Power explained in briefing,²⁹¹ Ms. Gilbert’s
7 arguments are meritless for the reasons discussed below.

8 a. *Irene Gilbert, Exception 1, NC-3*

9 Ms. Gilbert argues that Idaho Power’s use of representative monitoring positions to
10 establish the ambient sound levels for NSRs was inconsistent with ODEQ’s Noise Rules because
11 “[b]y definition, ‘monitoring’ requires obtaining actual measurements at a given location.”²⁹² She
12 also criticizes the methodology because she states that “no effort was made to determine” whether
13 the representative monitoring approach would provide results consistent with monitoring at every
14 location.²⁹³ However, the Noise Rules do not require that monitoring be conducted at every NSR

²⁹⁰ In response to the Hearing Officer’s request that Ms. Gilbert identify issues that could be transferred to STOP B2H for argument, Ms. Gilbert identified Issues 1-5 of her Petition for Party Status, which covered all of her arguments presented below concerning methodology. List of Recommended Issues to be Transferred from Irene Gilbert as an Individual to STOP B2H and Irene Gilbert Request for Full Standing as a Party to the Contested Case at 2 (Sept. 29, 2020); *see also* Irene Gilbert Petition for Party Status at 1-3 (Aug. 27, 2020). Despite Ms. Gilbert’s recommendation to transfer Issues 1-5 from her Petition for Party Status to STOP B2H for argument, Ms. Gilbert continued to object to ODOE’s framing of these issues. *See* Irene Gilbert Objection to ODOE Recommendations Regarding Contested Case Issues for the B2H Proposed Transmission Line at 1-2 (Oct. 2, 2020). Nevertheless, Ms. Gilbert did not raise her lack of limited party status for issues regarding noise monitoring methodology in her appeal to the Hearing Officer’s Order on Party Status. *See* Irene Gilbert Appeal of Judge Greene-Webster’s Order on Party Status and Issues for Contested Case Hearings (Nov. 5, 2020).

²⁹¹ Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 39-46.

²⁹² Gilbert Exception for NC-2- at 16-17.

²⁹³ Gilbert Exception for NC-2- at 24.

1 within the analysis area,²⁹⁴ and given the number of NSRs (133),²⁹⁵ it would have been
2 unreasonably costly to do so. Accordingly, it was reasonable and appropriate for Idaho Power to
3 rely on representative monitoring positions along the Proposed Route. Most importantly, none of
4 the acoustical experts who testified in this case have questioned whether the representative
5 approach was appropriate.²⁹⁶ For the above reasons, Idaho Power requests that the Council adopt
6 without modification the Hearing Officer’s findings of fact and conclusions of law relevant to
7 NC-3.

8 *b. Irene Gilbert, Exception 2, NC-3*

9 Ms. Gilbert also argues that Idaho Power’s monitoring approach “failed to follow the
10 procedure as outlined by [ODEQ’s Sound Measurement Procedure Manual NPC5-1²⁹⁷] which
11 includes specific information and diagrams of the locations where noise monitoring should have
12 occurred.”²⁹⁸ In making this argument, Ms. Gilbert points to the requirement that monitoring
13 equipment be set up at a point 25 feet toward the noise source, and also points to the fact that Idaho
14 Power acknowledged that in some instances its contractor, Tetra Tech, stated that they varied the

²⁹⁴ OAR 340-035-0035(3). While the rules specify the appropriate measurement point at an NSR, they do not mandate that monitoring must be performed at each NSR in the analysis area. *See id.*

²⁹⁵ Levels of Project noise were predicted at 133 NSRs that were identified within the analysis area. ASC, Exhibit X, Section 3.2.2 (ODOE – B2HAPPDoc3-41 ASC 24 Exhibit X_Noise_ASC 2018-09-28. Page 11 of 371).

²⁹⁶ Memorandum from Kerrie Standlee to Max Woods, ODOE (Mar. 6, 2016) (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8396-8397 of 10016). After Mr. Standlee received the March 15, 2016 CH2M Technical Memorandum entitled “Updated Monitoring Point Applicability for Boardman to Hemingway (B2H),” he reviewed the document to evaluate whether the information provided was sufficient enough for him to conclude that the ambient noise at residences along the revised B2H line path could be found in the data already collected in 2012. *Id.* While Mr. Standlee noted that “it might be possible to find representative data within the 2012 data” he concluded he would need more information on the representativeness of the monitoring locations for the residences along the new route. *Id.* However, at no point did he question the method of using representative monitoring positions for multiple NSRs. *Id.* ODOE later deemed this methodology appropriate. ASC, Exhibit X, Attachment X-6, May 6, 2016 Email from Max Woods to David Stanish (ODOE - B2HAPPDoc3-41 ASC 24 Exhibit X_Noise_ASC 2018-09-28. Page 309 of 371).

²⁹⁷ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6 / Exhibit C, ODEQ, Sound Measurement Procedure Manual.

²⁹⁸ Gilbert Exception for NC-2- at 18.

1 distance in some instances to accommodate property owners’ requests if the new location
2 “maintained the intended goals of the monitoring program.”²⁹⁹ However, Tetra Tech’s approach
3 should not be regarded as a material deviation from ODEQ’s directions. Even if it was somehow
4 improper for Tetra Tech to make small variations in the placement of measurement equipment,
5 there is no support for the notion that these variations would have invalidated the results,
6 particularly in view of the conservative nature of Idaho Power’s measurement approach. As
7 Mr. Bastasch explained, while he himself did not perform this monitoring, landowners typically
8 request that monitoring equipment be moved farther from a residence, which results in a
9 monitoring position that is farther from household sources of noise.³⁰⁰ In other words, to the extent
10 that Tetra Tech responded to landowner requests by adjusting the placement of equipment, the
11 result would have been a lower ambient sound level than otherwise would have been recorded—
12 which would yield more conservative results.³⁰¹ For the above reasons, Idaho Power requests that
13 the Council adopt without modification the Hearing Officer’s findings of fact and conclusions of
14 law relevant to NC-3.

²⁹⁹ Gilbert Exception for NC-2- at 18-19. *See*, ASC, Exhibit X, Attachment X-3: Supplemental Baseline Sound Survey for the Tub Mountain, Burnt River, and East of Bombing Range Road Alternate Corridors at 7 (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 228 of 371) (“MPs were placed in similar surroundings experiencing the same weather and acoustic conditions to where a resident was expected to spend the majority of time when outdoors. However, some property owners voiced opinions and preferences on the exact locations of the MP on their properties. To accommodate property owners, field engineers sited the MPs per the property owners’ requests if that location maintained the intended goals of the monitoring program.”).

³⁰⁰ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, pp. 73-74 of 96.

³⁰¹ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, pp. 73-74 of 96; *see also* ASC, Exhibit X, Section 3.2.3.2 at X-7 (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 11 of 371).

1 c. Irene Gilbert, Exception 3, NC-3

2 Ms. Gilbert similarly argues that Idaho Power lacked documentation validating its
3 methodology for assessing an ambient baseline and that “the methods fail to comply with the
4 methodology defined by the statute as the procedures contained in [ODEQ] rules.”³⁰² In particular,
5 Ms. Gilbert argues that Golder Associates did not approve the use of the period from 12:00
6 midnight till 5:00 a.m. as being the appropriate timeframe for establishing the number of
7 exceedances.³⁰³ However, ODOE³⁰⁴ and ODOE’s consultant, Golder Associates,³⁰⁵ confirmed that
8 the monitoring positions and methodology used to assess ambient baselines and potential
9 exceedances were reasonable.³⁰⁶ In fact, in his Rebuttal Testimony, Mr. Ken Kosky (Golder
10 Associates) explicitly approves Idaho Power’s approach of using the period from 12:00 midnight
11 till 5:00 a.m. to represent the lowest possible ambient conditions—the most conservative approach
12 to determining the number of potential exceedances.³⁰⁷ For the above reasons, Idaho Power
13 requests that the Council adopt without modification the Hearing Officer’s findings of fact and
14 conclusions of law relevant to NC-3.

³⁰² Gilbert Exception for NC--2 at 23-24; *see also* Gilbert Exception for NC-2- at 6 (“There is no written approval of the procedures used that are contrary to the [ODEQ] rules.”).

³⁰³ Gilbert Exception for NC-2- at 6.

³⁰⁴ ASC, Exhibit X, Attachment X-6, May 6, 2016 Email from Max Woods to David Stanish (ODOE - B2HAPPDoc3-41 ASC 24 Exhibit X Noise_ASC 2018-09-28. Page 309 of 371).

³⁰⁵ ODOE / Written Rebuttal Testimony of Ken Kosky, Golder Associates, Inc. / Issues NC-2, NC-3, NC-4, and NC-6, pp. 4-9 of 24; *see also* Proposed Order, Attachment 5: Documents and Agency Consultation in Referenced Proposed Order (added after DPO) at 314 (Dec. 19, 2017) (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8175 of 10016) (“Golder’s review of the Sound Survey Analysis and Results (Exhibit X, Section 3.4.5.2), Noise Control Regulation OAR 340-035-0035(3) sound measurement procedures, and Attachment X-6 found the baseline noise analysis to be properly performed from a technical standpoint and the use of the ‘late night’ noise level to be conservative in nature for use as the baseline noise level for comparison to the Ambient Antidegradation Standard [OAR 340-035-0035(1)(b)(B)(i)].”).

³⁰⁶ Proposed Order at 628 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 635 of 10016).

³⁰⁷ ODOE / Written Rebuttal Testimony of Ken Kosky, Golder Associates, Inc. / Issues NC-2, NC-3, NC-4, and NC-6, pp. 4-5 of 24.

1 d. Irene Gilbert, Exception 4, NC-3

2 Ms. Gilbert states that there were instances where Idaho Power’s equipment
3 malfunctioned.³⁰⁸ Idaho Power assumes that Ms. Gilbert is referring to the fact that during the
4 supplemental monitoring in the Morgan Lake area there were instances where the solar panels
5 powering the monitoring equipment lost connectivity due to insufficient sunshine the previous
6 day. However, as discussed at hearing, after reviewing the data gaps, Mr. Bastasch concluded that
7 given the overall length of the monitoring, these gaps would not have significantly skewed or
8 otherwise invalidated the data collected by Idaho Power, and no party has offered any explanation
9 to the contrary.³⁰⁹ Therefore, this concern is unfounded. For the above reasons, Idaho Power
10 requests that the Council adopt without modification the Hearing Officer’s findings of fact and
11 conclusions of law relevant to NC-3.

12 e. Irene Gilbert, Exception 5, NC-3

13 Ms. Gilbert is concerned that in determining weather conditions that would cause corona
14 sound, Idaho Power averaged weather conditions over the entire 300-mile transmission line.³¹⁰
15 However, in making this observation, Ms. Gilbert entirely ignores the fact that Idaho Power
16 provided data not only on an averaged basis, but, as detailed above on pages 25 and 42, also
17 provided data on a weather station by weather station basis.³¹¹ In so doing, Idaho Power provided
18 weather data specific to the Union County and the Morgan Lake area about which Ms. Gilbert has
19 voiced concerns. For the above reasons, Idaho Power requests that the Council adopt without

³⁰⁸ Gilbert Exception for NC-2- at 19.

³⁰⁹ M. Bastasch Testimony, Cross-Examination Hearing Day 1, January 10, 2022 (Tr. Day 1), at page 58, lines 2-11.

³¹⁰ Gilbert Exception for NC-2- at 19.

³¹¹ ASC, Exhibit X, Section 3.4.5.2 at X-24 (ODOE - B2HAPPDoc3-41 ASC 24_ Exhibit X_Noise_ASC 2018-09-28. Page 28 of 371).

1 modification the Hearing Officer’s findings of fact and conclusions of law relevant to NC-3.

2 *f. Irene Gilbert, Exception 6, NC-3*

3 Ms. Gilbert argues that it was inappropriate for Idaho Power to use only portions of a
4 24-hour period to produce results for its monitoring.³¹² Idaho Power assumes that in making this
5 argument, Ms. Gilbert is referring to previously made arguments that by using late night sound
6 levels to establish the ambient sound levels at monitoring positions, that somehow, in determining
7 the frequency of exceedances under ODEQ’s antidegradation standard,³¹³ Idaho Power counted
8 only those exceedances predicted to occur at night.³¹⁴ This position is illogical and contrary to the
9 evidence, and as a result, the Hearing Officer granted Idaho Power Summary Determination in its
10 favor on this issue.³¹⁵ Specifically, as discussed in Idaho Power’s Motion for Summary
11 Determination,³¹⁶ to assess the Project’s compliance with the antidegradation standard, Idaho
12 Power crafted a multi-step modeling and monitoring methodology.

13 First, Idaho Power performed an initial screening to determine which NSRs within the
14 analysis area might potentially experience exceedances. To perform this screening, and at
15 ODOE’s recommendation, Idaho Power applied a simplified assumption of 20 dBA as the baseline
16 ambient noise level for each of the NSRs.³¹⁷ Then, Idaho Power modeled the predicted corona

³¹² Gilbert Exception for NC-2- at 6, 14, 19, 21.

³¹³ OAR 340-035-0035(1)(b)(B)(i). Under the ODEQ rules, an exceedance occurs whenever the ambient noise exceeds the L₅₀ or L₁₀ levels. Idaho Power applied the L₅₀ noise standard because it is more restrictive. Proposed Order at 636 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 643 of 10016).

³¹⁴ Gilbert Exception for NC-2- at 6.

³¹⁵ Ruling and Order on Motion for Summary Determination on Contested Case Issue NC-5 at 10 (Aug. 9, 2021).

³¹⁶ Applicant Idaho Power Company’s Motion for Summary Determination of Contested Case Issue NC-5 at 5-8 (May 28, 2021).

³¹⁷ ASC, Exhibit X at X-6 (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 10 of 371) (“Step 3: Initial screening-level modeling results of the transmission line were calculated based on the foul weather conditions, and an assessment was completed to determine the likely maximum received sound at NSRs within the monitoring analysis area. This likely maximum received sound level was added to a conservative assumed ambient

1 noise during foul weather events as it would impact each NSR—which is a logarithmic function
2 of the noise produced at the source, geographic features, and the distance to the NSR.³¹⁸ Using
3 these values, Idaho Power inferred compliance at all NSRs where the modeled ambient noise,
4 including the added noise from the Project, was less than 30 dBA—that is, where the Project
5 yielded less than a 10-dBA increase above the assumed baseline.³¹⁹ NSRs for which the screening
6 indicated a potential exceedance, were moved forward for to a second stage for more detailed
7 analysis.

8 During the second stage of analysis, Idaho Power set up monitoring stations at
9 representative locations along the Project route to determine the actual baseline ambient sound
10 levels for each of the NSRs.³²⁰ Using the data obtained, Idaho Power determined the baseline
11 noise levels by averaging the measured sound levels during the late-night time period between
12 12:00 a.m. and 5:00 a.m.³²¹ Idaho Power selected this late-night time period for establishing the
13 baseline ambient noise levels because that is the quietest possible time period of the day and, as a
14 result, ambient noise is the lowest. This approach maximized the possibility that the Project’s

sound level of 20 dBA, as requested by the Oregon Department of Energy (ODOE). If potential for increasing baseline ambient sound levels by 10 dBA or less could be reasonably assumed, compliance with the ambient antidegradation standard provided in OAR 340-035-0035(1)(b)(B)(i) was inferred.”).

³¹⁸ ASC, Exhibit X at X-6 (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 10 of 371)

³¹⁹ ASC, Exhibit X at X-6 (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 10 of 371)

³²⁰ ASC, Exhibit X at X-6 (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 10 of 371)

(“Step 4: For NSRs that showed a potential exceedance condition of the ODOE-requested 30 dBA threshold, representative baseline sound measurements were conducted at or near these locations. A sound monitoring protocol was developed in consultation with ODOE (see Attachment X-1).”).

³²¹ ASC, Exhibit X at X-6 (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 10 of 371)

(“Step 5: From the baseline measurements, the representative existing L₅₀ sound levels were calculated and new compliance thresholds were defined to assess conformance with the ambient antidegradation standard. The representative existing L₅₀ sound levels were calculated by taking the average of the measured L₅₀ sound levels for the late night time period (12:00 a.m. to 5:00 a.m.)”); *see also* Proposed Order at 637 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 644 of 10016).

1 modeled noise would result in a potential exceedance and therefore ensured that the results would
2 be as conservative as possible.³²²

3 Once the baseline ambient was determined for each NSR, Idaho Power estimated the
4 frequency with which the predicted corona noise would cause exceedances at each NSR. To do
5 so, the Company relied on historic weather data to predict the frequency of such foul weather
6 events at the NSR location on an hourly basis throughout the entire year.³²³ Based on this analysis,
7 the Company determined that the weather that could be expected to cause exceedances may occur
8 approximately 1.3 percent of the time throughout the year.³²⁴ Importantly, that 1.3 percent figure
9 was based on an average of the foul-weather conditions *during all hours of the day throughout*
10 *the entire year.*³²⁵

11 Based on Ms. Gilbert’s assertions in her Exception, it appears that she has confused the
12 very conservative method by which the Company calculated baseline ambient sound levels—using
13 the quietest part of the night between 12:00 a.m. and 5:00 a.m.—with the time period for which
14 the Company determined exceedances—which is all hours of the day. However, all evidence in
15 the record demonstrates that Ms. Gilbert’s understanding is incorrect, and therefore her argument
16 regarding Idaho Power’s methodology should be disregarded. For the above reasons, Idaho Power

³²² ASC, Exhibit X at X-6 (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 10 of 371); see also Proposed Order, Attachment 5: Documents and Agency Consultation in Referenced Proposed Order (added after DPO) at 314 (Dec. 19, 2017) (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8175 of 10016) (“Golder’s review of the Sound Survey Analysis and Results (Exhibit X, Section 3.4.5.2), Noise Control Regulation OAR 340-035-0035(3) sound measurement procedures, and Attachment X-6 found the baseline noise analysis to be properly performed from a technical standpoint and the use of the ‘late night’ noise level to be conservative in nature for use as the baseline noise level for comparison to the Ambient Antidegradation Standard [OAR 340-035-0035(1)(b)(B)(i)].”).

³²³ ASC, Exhibit X at X-8 (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 12 of 371).

³²⁴ ASC, Exhibit X at X-24 (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 28 of 371).

³²⁵ ASC, Exhibit X at X-24. (demonstrating that 1.3% is the four-year total average of foul-weather conditions during day, night, and late-night (12:00 a.m. to 5:00 a.m.) timeframes).

1 requests that the Council adopt without modification the Hearing Officer’s findings of fact and
2 conclusions of law relevant to NC-3.

3 *g. Irene Gilbert, Exception 7, NC-3*

4 Ms. Gilbert continues to voice concerns about Idaho Power’s reliance on MP 11 to establish
5 ambient sound levels for the NSRs in the Morgan Lake area.³²⁶ Idaho Power addressed all of these
6 concerns in its Closing Argument³²⁷ and the discussion above in response to STOP B2H’s
7 exceptions for NC-3. For the above reasons, Idaho Power requests that the Council adopt without
8 modification the Hearing Officer’s findings of fact and conclusions of law relevant to NC-3.

9 *h. Irene Gilbert, Exception 8, NC-3*

10 Ms. Gilbert also asserts that Idaho Power is not in compliance with the maximum allowable
11 sound standards for L₁₀ and L₅₀ as the average ambient sound levels at MP 13, MP 22, MP 23, and
12 MP 25 are sometimes above 50 dBA or even 55 dBA.³²⁸ While it is not clear what Ms. Gilbert’s
13 actual point is here, this argument seems to be based on confusion of the antidegradation standard
14 and the maximum allowable sound standards. Idaho Power notes that average ambient sound
15 levels based on monitoring, as shown in the Table 5-1 of the Baseline Sound Survey
16 (Attachment X-2 of Exhibit X of the ASC), are the basis for determining potential exceedances of
17 the ambient antidegradation standard and are not related *per se* to determination of compliance
18 with the maximum allow sound standards.³²⁹ Rather, compliance with the maximum allowable

³²⁶ Gilbert Exception for NC--2 at 11, 19 (citing Irene Gilbert’s Contested Case Closing Brief Regarding Issue NC-2- at 15-16).

³²⁷ Idaho Power Company’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 71-92.

³²⁸ Gilbert Exception for NC--2 at 20; *see also* Irene Gilbert’s Contested Case Closing Brief Regarding Issue NC-2- at 16-17.

³²⁹ ASC, Exhibit X, Attachment X-2: Baseline Sound Survey, Table 5-1: Description of Monitoring Positions, Measurement Durations and Results (March 6, 2012 to May 10, 2012) (ODOE - B2HAPPDoc3-41 ASC 24_Exhibit X_Noise_ASC 2018-09-28. Page 191 of 371).

1 sound levels is based on *predicted* foul weather sound levels modeled on three-dimensional sound
2 traveling from the proposed transmission line to an NSR.³³⁰ Per Idaho Power’s supplemental
3 monitoring, the highest predicted sound level expected for any NSR is 46 dBA and this value is
4 safely within the most conservative maximum allowable sound standards for L₁₀ and L₅₀, i.e., 55
5 dBA and 50 dBA respectively.³³¹ For the above reasons, Idaho Power requests that the Council
6 adopt without modification the Hearing Officer’s findings of fact and conclusions of law relevant
7 to NC-3.

8 *i. Irene Gilbert, Exception 9, NC-3*

9 Ms. Gilbert argues that Idaho Power failed to perform noise monitoring for the area within
10 a half mile of the entire site boundary.³³² In particular, Ms. Gilbert states that “no monitoring or
11 modeling was done for the Modelaire neighborhood in spite of the fact that the site boundary goes
12 right up to and along this area.”³³³ However, Ms. Gilbert provided no evidence to support her
13 claim, and Mr. Bastasch’s testimony shows MP 102 is quite close to the NSRs in the Modelaire

³³⁰ ASC, Exhibit X, Section 3.2.1 at X-6 (ODOE - B2HAPDoc3-41 ASC 24_ Exhibit X_Noise_ASC 2018-09-28. Page 10 of 371) (“Initial screening-level modeling results of the transmission line were calculated based on the foul weather conditions, and an assessment was completed to determine the *likely maximum received sound at NSRs* within the monitoring analysis area.”) (emphasis added in parenthetical); *see also* ASC, Exhibit X, Attachment X-1: Baseline Sound Monitoring Protocol at 2 (ODOE - B2HAPDoc3-41 ASC 24_ Exhibit X_Noise_ASC 2018-09-28. Page 75 of 371) (“The modeling methodologies involved two separate analytical methods. The first was the US Department of Energy’s (DOE) Corona and Field Effects (CAFE) program, which was used to determine anticipated corona noise source levels (DOE, undated). The second modeling methodology employed the Datakustik Computer-Aided Noise Abatement Program (CadnaA) program, which conforms to the Organization for International Standardization (ISO) standard 9613-2 (1996), Attenuation of Sound During Propagation Outdoors. CadnaA was used to model how sound travels outward from the transmission line to receivers in three dimensions. Together, these two methods were used to estimate potential increase in sound levels as a result of the Project, assuming a rural background.”).

³³¹ Idaho Power / Sur-sur-rebuttal Testimony of Mark Bastasch / Issues NC-2, NC-3, and NC-4 / Exhibit C, Reanalysis of MP 11 Area - Proposed Route (Mill Creek) - Map 1 (Note that NSR-5004 which was originally modeled as 47 dBA, is now 46 dBA); *see also* Proposed Order, Attachment X-4: Tabulated Summary of Acoustic Modeling Results by Receptor Location (ODOE - B2HAPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9804 of 10016) (showing NSR-5004 as 47 dBA).

³³² Gilbert Exception for NC--2 at 21; *see also* Irene Gilbert’s Contested Case Closing Brief Regarding Issue NC-2- at 17.

³³³ Gilbert Exception for NC--2 at 21; *see also* Irene Gilbert’s Contested Case Closing Brief Regarding Issue NC-2- at 17.

1 neighborhood (i.e., the Hawthorne Loop), within less than a mile.³³⁴ Therefore, Ms. Gilbert’s
2 concern is unsupported and contrary to the record evidence. For the above reasons, Idaho Power
3 requests that the Council adopt without modification the Hearing Officer’s findings of fact and
4 conclusions of law relevant to NC-3.

5 *j. Irene Gilbert, Exception 10, NC-3*

6 Ms. Gilbert states that no modeling was performed for schools, churches, hospitals or
7 libraries within a half mile of the development in spite of the fact that OAR 340-035-0015(38)
8 defines noise sensitive properties as including these structures.³³⁵ Ms. Gilbert is incorrect. As
9 explained in the ASC, Idaho Power identified all NSRs withing one half mile of the Project,
10 regardless of whether they were a residence, school, church, or library.³³⁶ Importantly, Ms. Gilbert
11 does not identify any such structures that she believes that Idaho Power failed to identify. For the
12 above reasons, Idaho Power requests that the Council adopt without modification the Hearing
13 Officer’s findings of fact and conclusions of law relevant to NC-3.

14 *k. Irene Gilbert, Exception 11, NC-3*

15 Ms. Gilbert claims that ODOE “failed to disclose the entire procedure being used when
16 requesting confirmation from Consultants that the procedure would provide accurate results.”³³⁷
17 Idaho Power does not understand what Ms. Gilbert is referring to in making this claim, but can

³³⁴ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 65 of 96; *see also* Idaho Power / Sur-sur-rebuttal Testimony of Mark Bastasch / Issues NC-2, NC-3, and NC-4 / Exhibit C, Reanalysis of MP 11 Area -Proposed Route (Mill Creek) - Map 1, p. 1 of 3. MP 102, while properly within the analysis area for noise monitoring, is approximately 4,000 ft or 0.75 miles south of the Modelaire neighborhood.

³³⁵ Gilbert Exception for NC--2 at 21; *see also* Irene Gilbert’s Contested Case Closing Brief Regarding Issue NC-2- at 17.

³³⁶ Attachment X-4 identifies non-residential NSRs including schools, correctional facilities. Proposed Order, Attachment X-4: Tabulated Summary of Acoustic Modeling Results by Receptor Location at 1 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9806 of 10016).

³³⁷ Gilbert Exception for NC--2 at 21; *see also* Irene Gilbert’s Contested Case Closing Brief Regarding Issue NC-2- at 17.

1 only state there is no indication in the record or elsewhere suggesting that ODOE’s consultants
2 were not fully apprised of Idaho Power’s monitoring approach when they concluded it to be
3 conservative and reasonable.³³⁸ Given that Ms. Gilbert has provided no support for her argument,
4 Idaho Power requests that the Council adopt without modification the Hearing Officer’s findings
5 of fact and conclusions of law relevant to NC-3.

6 *l. Irene Gilbert, Exception 12, NC-3*

7 Ms. Gilbert again argues that the Proposed Order fails to identify the “quiet areas” that will
8 be subject to noise exceedances.³³⁹ To the extent Ms. Gilbert challenges the Proposed Order, and
9 not the factual findings or conclusions of law in the Proposed Contested Case Order—Ms. Gilbert
10 has provided no basis for disputing the Hearing Officer’s findings or conclusions, and her
11 argument should be rejected on that basis.³⁴⁰ However, to the extent that the Council wishes to
12 consider Ms. Gilbert’s exception to the Hearing Officer’s rejection of her proposed site condition
13 regarding “quiet areas”, there is no evidence in the record that such a condition is necessary as
14 discussed below.

15 Ms. Gilbert takes exception to the Hearing Officer’s rejection of her “quiet areas” proposed
16 site certificate condition, which provides:

³³⁸ Proposed Order, Attachment 5: Documents and Agency Consultation in Referenced Proposed Order (added after DPO) at 314 (Dec. 19, 2017) (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8175 of 10016) (“Golder’s review of the Sound Survey Analysis and Results (Exhibit X, Section 3.4.5.2), Noise Control Regulation OAR 340-035-0035(3) sound measurement procedures, and Attachment X-6 found the baseline noise analysis to be properly performed from a technical standpoint and the use of the ‘late night’ noise level to be conservative in nature for use as the baseline noise level for comparison to the Ambient Antidegradation Standard [OAR 340-035-0035(1)(b)(B)(i)].”).

³³⁹ Gilbert Exception for NC--2 at 22; *see also* Irene Gilbert’s Contested Case Closing Brief Regarding Issue NC-2- at 18.

³⁴⁰ 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.”).

1 Idaho Power will determine if the protected areas, national parks, game preserves
2 and wildlife breeding areas within ½ mile of the proposed transmission line comply
3 with the “quiet areas” standard for noise impacts prior to starting construction on
4 any section of the transmission line and provide the results to the Counsel for
5 review and approval.³⁴¹

6 Ms. Gilbert’s site condition appears to be a requirement that Idaho Power monitor all
7 protected areas, national parks, game preserves and wildlife breeding areas—which she assumes
8 are “quiet areas” under OAR 340-035-0015(50) *per se*—within a half-mile of the proposed
9 transmission line to determine compliance with the maximum allowable noise standard for quiet
10 areas.³⁴² However, Ms. Gilbert’s proposal is based on a misunderstanding of the definition of
11 “quiet areas”. Under ODEQ’s Noise Rules, a “quiet area” is defined as “any land or facility
12 **designated by the [EQC]** as an appropriate area where the qualities of serenity, tranquility, and
13 quiet are of extraordinary significance and serve an important public need.”³⁴³ The rule goes on to
14 state that a quiet area **may** include, but is not limited to “a wilderness area, national park, state
15 park, game reserve, wildlife breeding area, or amphitheater.”³⁴⁴ Importantly, the definition
16 continues that it is the responsibility of ODEQ to submit areas suggested by the public as quiet
17 areas to the ECQ for review, and it is the purview of ECQ to designate such areas as “quiet
18 areas.”³⁴⁵ In other words, the definition of a “quiet area” is a location that already has been
19 proposed by a member of the public, and designated by EQC. Given that all the evidence in this
20 case indicates that no quiet areas have been designated, it would be impossible for Idaho Power to

³⁴¹ Gilbert Exception for NC-2 at 30; Proposed Contested Case Order at 291-92.

³⁴² OAR 340-035-0035(1)(c). Table 9 is available here:
<https://secure.sos.state.or.us/oard/viewAttachment.action?ruleVrsnRsn=244153>.

³⁴³ OAR 340-035-0015(50).

³⁴⁴ OAR 340-035-0015(50).

³⁴⁵ OAR 340-035-0015(50).

1 monitor quiet areas. As Idaho Power discussed in its briefing,³⁴⁶ while “quiet areas” are mentioned
2 in ODEQ regulations, ODEQ has not maintained a noise program since 2003.³⁴⁷ Furthermore,
3 ODEQ does not maintain a list of quiet areas and it is not clear that it ever did. Indeed, Idaho
4 Power was unable to find any evidence that such a list exists.³⁴⁸ Ms. Gilbert also has provided no
5 evidence of a designated quiet area within a half mile of the transmission. Therefore, her proposed
6 site condition must be rejected.

7 For the above reasons, the Hearing Officer was correct in denying Ms. Gilbert’s proposed
8 site condition as unnecessary and inappropriate; Idaho Power requests that the Council adopt
9 without modification the Hearing Officer’s findings of fact, conclusions of law, and recommended
10 site certificate condition determinations on these issues.

11 *m. Irene Gilbert, Exception 13, NC-3*

12 Ms. Gilbert argues that the selection of monitoring positions to represent groups of NSRs
13 was “subjective” and there is no “peer review” to support the selection of the representative
14 locations.³⁴⁹ However, Ms. Gilbert fails to mention the fact that ODOE³⁵⁰ and ODOE’s consultant,
15 Golder Associates,³⁵¹ confirmed that the monitoring positions were reasonable.³⁵² Moreover, the

³⁴⁶ Idaho Power's Closing Arguments for Contested Case Issues NC-2 NC-3 NC-4 and NC-6 at 69-70.
³⁴⁷ Idaho Power / Rebuttal Testimony of Joseph Stippel / Issues NC-1 and NC-2, p. 4 of 16; *see also* Idaho Power / Rebuttal Testimony of Joseph Stippel / Issues NC-1 and NC-2 / Exhibit A, ODEQ, Staff Guidance on Noise Control Issues.
³⁴⁸ Idaho Power / Declaration of Counsel Lisa Rackner Regarding Noise Control Issues (Nov. 12, 2021)/ Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 3 of 4; Idaho Power / Declaration of Counsel Lisa Rackner Regarding Noise Control Issues / Issues NC-1, NC-2, NC-3, NC-4, and NC-6 / Exhibit B, Email Correspondence between Karl Juengling and Lisa Rackner (Nov. 5, 2021), pp. 1-2 of 2.
³⁴⁹ Gilbert Exception for NC--2 at 22-23; *see also* Irene Gilbert’s Contested Case Closing Brief Regarding Issue NC-2- at 19.
³⁵⁰ ASC, Exhibit X, Attachment X-6, May 6, 2016 Email from Max Woods to David Stanish (ODOE - B2HAPPDoc3-41 ASC 24 Exhibit X Noise ASC 2018-09-28. Page 309 of 371).
³⁵¹ ODOE / Written Rebuttal Testimony of Ken Kosky, Golder Associates, Inc. / Issues NC-2, NC-3, NC-4, and NC-6, pp. 6-7 of 24.
³⁵² Proposed Order at 628 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 635 of 10016).

1 only monitoring position that was challenged—MP 11—was validated through Idaho Power’s
2 supplemental monitoring in the Morgan Lake area, which demonstrated that the selection of MP
3 11 was conservative and reasonable. For the above reasons, Idaho Power requests that the Council
4 adopt without modification the Hearing Officer’s findings of fact and conclusions of law relevant
5 to NC-3.

6 **D. Issue NC-4**

7 The Hearing Officer granted limited party status to STOP B2H for Issue NC-4, which asks:

8 *Whether the mitigation/proposed site conditions adequately protect the public*
9 *health, safety and welfare.*³⁵³

10 In the Proposed Contested Case Order, the Hearing Officer concluded that:

11 In their respective Closing and Response briefs, both [ODOE] and Idaho Power
12 proposed revisions to the Recommended Noise Control Conditions incorporating
13 many of STOP B2H’s suggestions and clarifying Idaho Power’s obligations for
14 working with NSR property owners, implementing mitigation measures, and
15 addressing noise complaints[Accordingly,] a preponderance of the evidence
16 establishes that the proposed mitigation measures and the Recommended Noise
17 Control Conditions (as amended . . .) adequately protect the public health, safety,
18 and welfare.³⁵⁴

19 STOP B2H filed two exceptions for this issue on June 30, 2022: (1) the Proposed Contested
20 Case Order is in error because the Hearing Officer wrongly concluded that Idaho Power’s proposed
21 mitigation and the site certificate conditions are sufficient to adequately protect the public health,
22 safety, and welfare;³⁵⁵ and (2) the Hearing Officer improperly rejected certain of STOP B2H’s
23 proposed site conditions on the ground that they were filed after the deadline set in the Contested
24 Case Schedule.³⁵⁶ For the reasons discussed below, Idaho Power requests that the Council adopt

³⁵³ Second Order on Case Management at 5.

³⁵⁴ Proposed Contested Case Order at 204-05.

³⁵⁵ STOP B2H Exceptions at 4-5, 21.

³⁵⁶ STOP B2H Exceptions at 21.

1 without modification the Hearing Officer’s findings of fact, conclusions of law, and recommended
2 site certificate conditions relevant to NC-4.

3 **1. STOP B2H, Exception 1, NC-4**

4 STOP B2H argues that the Proposed Contested Case Order is in error because the Hearing
5 Officer wrongly concluded that Idaho Power’s proposed mitigation and the site certificate
6 conditions (as amended) are sufficient to adequately protect the public health, safety, and
7 welfare.³⁵⁷ However, this argument is without merit; the evidence in the record demonstrates that
8 Idaho Power’s proposed mitigation and the Noise Control site certificate conditions—as amended
9 by the Hearing Officer— are sufficiently protective of the public for the following reasons.

10 *First*, Idaho Power will be required under Recommended Noise Control Condition 3 to
11 minimize operational noise associated with the transmission line to the extent feasible through the
12 following measures: using a triple bundled configuration for 500-kV transmission lines;
13 maintaining tension on all insulator assemblies to ensure positive contact between insulators; and
14 protecting the conductor surface to minimize scratching or nicking.³⁵⁸

15 *Second*, for those NSRs where Idaho Power anticipates an exceedance of the ambient
16 degradation standard, the Company will work with the landowners to develop a mutually agreed
17 upon mitigation plan (*see* Amended Recommended Noise Control Condition 2).³⁵⁹ It is true that
18 Idaho Power has not yet provided a final mitigation plan for each individual landowner. However,
19 Idaho Power has committed to offering landowners the specific mitigation measure that it regards
20 as the most effective in most cases. In particular, in its Rebuttal Testimony, Idaho Power proposed

³⁵⁷ STOP B2H Exceptions at 4-5, 21.

³⁵⁸ Proposed Order, Attachment 1: Draft Site Certificate at 44 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 748 of 10016).

³⁵⁹ Proposed Contested Case Order at 297-301.

1 that ODOE’s Recommended Noise Control Condition 1 specify that, for NSRs where an
2 exceedance is predicted, Idaho Power will offer to install sound-reducing windows of a rating that
3 corresponds with the degree of the exceedance predicted.³⁶⁰ Idaho Power’s revision also required
4 the Company to offer windows with a higher rating to any landowner that provides a letter from a
5 health care provider indicating the health care provider’s belief that the owner has a health condition
6 that is exacerbated by increased sound levels.³⁶¹ These measures—which the Hearing Officer
7 adopted in Amended Recommended Noise Control Condition 1³⁶²— are all designed to protect
8 public health, and are more than adequate to do so, given the infrequency of exceedances, and the
9 fact that the ODEQ’s 50 dBA cap on sound levels will not be exceeded.

10 *Third*, in the event Idaho Power receives a complaint regarding corona noise from a
11 landowner not already identified by the Company’s noise analysis, Idaho Power will have in place
12 a system to receive and respond to such complaints under Amended Recommended Noise Control
13 Condition 2.³⁶³ If and when it is established that an exceedance is occurring, Idaho Power will
14 work with the complainant to develop a site-specific mitigation plan to address the exceedance.³⁶⁴
15 In response to STOP B2H’s concern as to how the complaint process would be implemented, in
16 its Response to Site Conditions filed on November 12, 2021, the Company proposed revisions to
17 ODOE’s Recommended Noise Control Condition 2 specifying that if Idaho Power and the
18 landowner cannot come to an agreement, either the Council or ODOE would be responsible for a

³⁶⁰ Idaho Power/ Rebuttal Testimony of Mark Bastasch/ Issues NC-1, NC-2, NC-3, NC-4, and NC-6, pp. 55-56 of 96.

³⁶¹ Idaho Power/ Rebuttal Testimony of Mark Bastasch/ Issues NC-1, NC-2, NC-3, NC-4, and NC-6, pp. 55-56 of 96.

³⁶² Proposed Contested Case Order at 296-97.

³⁶³ Proposed Contested Case Order at 297-301.

³⁶⁴ Proposed Contested Case Order at 297-301 (subsection (f)).

1 final determination on the appropriate mitigation, if applicable.³⁶⁵ This provision was adopted by
2 the Hearing Officer.³⁶⁶ Accordingly, the evidence in the record demonstrates that Idaho Power’s
3 proposed mitigation and the Noise Control site certificate conditions—including those the Hearing
4 Officer amended in the Proposed Contested Case Order (1, 2, 4, and 5)—adequately protect public
5 health, safety, and welfare. For these reasons, Idaho Power requests that the Council adopt without
6 modification the Hearing Officer’s findings of fact, conclusions of law, and site certificate
7 conditions relevant to this issue.

8 **2. STOP B2H, Exception 2, NC-4**

9 In its pleading, STOP B2H takes exception to the Hearing Officer’s rejection of certain of
10 STOP B2H’s proposed site conditions on the grounds that they were filed after the deadline set in
11 the Contested Case Schedule. In rejecting these proposed site certificate conditions, the Hearing
12 Officer noted that, because they had been filed in STOP B2H’s Response Brief, ODOE and Idaho
13 Power did not have any opportunity to respond.³⁶⁷ The Hearing Officer’s decision was proper for
14 the following reasons.

15 The Council’s rules establish the process for submittal of proposed site certificate
16 conditions, and specify that parties must submit proposed site certificate conditions to the hearing
17 officer in writing “*according to a schedule set by the hearing officer.*”³⁶⁸ In this case, the Hearing

³⁶⁵ Idaho Power’s Response to Limited Parties’ Proposed Site Certificate Conditions at 20-22 (Nov. 12, 2021); *see also* Proposed Order, Attachment 1: Draft Site Certificate at 42-43 (ODOE - B2HAPPD0c2 Proposed Order on ASC and Attachments 2019-07-02. Page 746-747 of 10016); ASC, Exhibit X, Section 3.5, at X-55 (ODOE - B2HAPPD0c3-41 ASC 24_ Exhibit X_Noise_ASC 2018-09-28. Page 59 of 371). In response to STOP B2H’s and ODOE’s proposed amendments, Idaho Power proposed that if the Company and the landowner cannot come to an agreement, Idaho Power and the complainant will develop their own proposed mitigation plans and submit those plans to ODOE for consideration in approving a final mitigation plan. *See* Applicant Idaho Power Company’s Response to the Oregon Department of Energy’s Proposed Conditions at 16 (Dec. 3, 2021) [hereinafter, “Idaho Power’s Response to ODOE”].

³⁶⁶ Proposed Contested Case Order at 297-301 (subsection (e)(v)).

³⁶⁷ STOP B2H Exceptions at 4-5.

³⁶⁸ OAR 345-015-0085 (Hearing Officer’s Proposed Contested Case Order) (emphasis added).

1 Officer set the updated schedule for submittal of proposed site conditions in the Second Order on
2 Case Management, which indicated that they were to be filed by September 17, 2021.³⁶⁹
3 Accordingly, any conditions that were submitted after that date were untimely.

4 Nevertheless, STOP B2H argues that it was inappropriate for the Hearing Officer to reject
5 its proposed site conditions as untimely because the Hearing Officer considered and adopted site
6 condition language proposed by ODOE and Idaho Power in their Closing and Response Briefs.³⁷⁰
7 However, the circumstances were not analogous. The site condition language proposed by ODOE
8 and Idaho Power in their briefings were modifications to conditions that had first been presented
9 in the Proposed Order—and importantly, these modifications were proposed in response to
10 requests made by STOP B2H and other limited parties in prior filings.³⁷¹ That is, ODOE and Idaho
11 Power were proposing modifications to existing recommended site conditions that had been
12 requested by limited parties, and for that reason, the Hearing Officer would have correctly
13 concluded that these changes would be acceptable to the limited parties. Idaho Power’s
14 recommendations in response to STOP B2H’s proposed changes to site certificate conditions are
15 provided below:

- 16 • In response to STOP B2H’s concerns that the mitigation plan process described in
17 Recommended Noise Control Condition 1 is too vague,³⁷² Idaho proposed an
18 additional subsection (c) to that condition, which requires the Company to offer

³⁶⁹ 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 Sept. 17, 2021).

³⁷⁰ STOP B2H Exceptions at 4-5, 21.

³⁷¹ Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 57-66; Idaho Power’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 104-21.

³⁷² STOP B2H / STOP B2H Coalition Proposed Site Conditions (Sept. 17, 2021) / Issue NC-4, p. 3 of 4.

1 certain mitigation measures (e.g., sound-attenuating windows proportional to the
2 degree of the predicted exceedance).³⁷³ This provision was adopted by the Hearing
3 Officer.³⁷⁴

- 4 • In response to Section 4 of STOP B2H’s Proposed Noise Control Condition 1,
5 which would require a process for resolving complaints filed under Recommended
6 Noise Control Condition 2,³⁷⁵ Idaho Power proposed an amendment to
7 subsection (d) of Recommended Noise Control Condition 2 addressing the
8 information parties would need to provide to ODOE regarding mitigation
9 measures.³⁷⁶ In its Response Brief, Idaho Power proposed additional amendments
10 regarding this same topic in response to revisions proposed by ODOE and general
11 recommendations proposed by STOP B2H.³⁷⁷ ODOE’s and Idaho Power’s
12 proposed amendments, which were in response to STOP B2H’s general
13 recommendations, were adopted by the Hearing Officer in the Proposed Contested
14 Case Order.³⁷⁸

- 15 • In response to STOP B2H’s concern as to how the complaint process would be
16 implemented, in its Response to Site Conditions filed on November 12, 2021, the
17 Company proposed revisions to ODOE’s Recommended Noise Control
18 Condition 2, specifying that if Idaho Power and the landowner cannot come to an

³⁷³ Idaho Power Company’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 110-11.

³⁷⁴ Proposed Contested Case Order at 296-97 (subsection (c)).

³⁷⁵ STOP B2H / STOP B2H Coalition Proposed Site Conditions (Sept. 17, 2021) / Issue NC-4, p. 3 of 4.

³⁷⁶ Idaho Power Company’s Closing Arguments for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 11.

³⁷⁷ Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues NC-1, NC-2, NC-3, NC-4, and NC-6 at 62-66.

³⁷⁸ *See, e.g.*, Proposed Contested Case Order at 297-301 (subsection (c))

1 agreement, either the Council or ODOE would be responsible for a final
2 determination on the appropriate mitigation, if applicable.³⁷⁹ This provision was
3 adopted by the Hearing Officer.³⁸⁰

4 Accordingly, the contested case record demonstrates that the site certificate condition amendments
5 that ODOE and Idaho Power proposed in their briefings were in response to requests for such
6 modifications by limited parties in their testimonies and proposed site certificate condition filings.

7 On this point, it is notable that STOP B2H has not objected to the Hearing Officer’s
8 adoption of those proposed modifications. On the other hand, the conditions proposed by
9 STOP B2H in its briefing were wholly novel conditions to which neither ODOE or Idaho Power
10 had had an opportunity to respond. For that reason, the Hearing Officer did not have a full record
11 on these proposals and appropriately rejected these conditions, consistent with EFSC rules. That
12 said, in the event that the Council wishes to substantively evaluate these conditions, Idaho Power
13 discusses them below.

14 *a. STOP B2H, Exception 2A, NC-4*

15 STOP B2H takes exception to Amended Recommended Noise Control Condition 1(c)(iv)
16 to the extent that listed mitigation methods do not include purchase of noise easements.³⁸¹ In
17 support of this argument, STOP B2H inaccurately claims that Idaho Power agreed that the

³⁷⁹ Idaho Power’s Response to Limited Parties’ Proposed Site Certificate Conditions at 20-22 (Nov. 12, 2021); *see also* Proposed Order, Attachment 1: Draft Site Certificate at 42-43 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 746-747 of 10016); ASC, Exhibit X, Section 3.5, at X-55 (ODOE - B2HAPPDoc3-41 ASC 24_ Exhibit X_Noise_ASC 2018-09-28. Page 59 of 371). In response to STOP B2H’s and ODOE’s proposed amendments, Idaho Power proposed that if the Company and the landowner cannot come to an agreement, Idaho Power and the complainant will develop their own proposed mitigation plans and submit those plans to ODOE for consideration in approving a final mitigation plan. *See* Applicant Idaho Power Company’s Response to the Oregon Department of Energy’s Proposed Conditions at 16 (Dec. 3, 2021) [hereinafter, “Idaho Power’s Response to ODOE”].

³⁸⁰ Proposed Contested Case Order at 297-301 (subsection (e)(v)).

³⁸¹ STOP B2H Exceptions at 22.

1 purchase of noise easements is an appropriate compensatory mitigation mechanism.³⁸² The
2 Hearing Officer appropriately did not require Idaho Power to offer noise easements for the
3 following reasons.

4 First, as discussed above on pages 33-34, Idaho Power determined that STOP B2H's
5 recommendation for purchase of noise easements is problematic given that the Noise Rules do not
6 seem to allow for easements to be used in lieu of compliance for any source other than wind
7 facilities. Thus, the only carve-out from strict compliance with the Noise Rules is for developers
8 to be granted a variance or exception. That said, Idaho Power does note that Amended
9 Recommended Noise Control Condition 1 requires Idaho Power to work with landowners to
10 develop a site-specific mitigation plan, and if a particular landowner prefers payment in lieu of
11 having Idaho Power install mitigation, Idaho Power would be willing to discuss that option. For
12 these reasons, the evidence in the record demonstrates that it is unnecessary—and potentially
13 contrary to the Noise Rules—to modify Amended Recommended Noise Control Condition 1(c)(iv)
14 to include the purchase of noise easements for the Project. With respect to STOP B2H's other
15 changes to Amended Recommended Noise Control Condition 1, including the added detail to the
16 notice requirement regarding NSRs within one mile and what information should be included in
17 the notice,³⁸³ Idaho Power notes that STOP B2H's proposed changes are confusing and redundant
18 of the 41 NSRs already described in the condition. For these reasons, Idaho Power requests that
19 the Council adopt without modification the Hearing Officer's Amended Recommended Noise
20 Control Condition 1.

³⁸² STOP B2H Exceptions at 22.
³⁸³ STOP B2H Exceptions, Attachment A, 1-2 of 3.

1 b. STOP B2H, Exception 2B, NC-4

2 STOP B2H argues that Amended Recommended Noise Control Condition 2 should be
3 revised: (1) to specify that all NSR property owners within one mile of the Project must receive
4 notice of the operational noise complaint response plan;³⁸⁴ and (2) to mandate that a noise
5 specialist *agreeable to all parties* be involved in a noise exceedance dispute.³⁸⁵ Both of these
6 conditions are unnecessary.

7 First, STOP B2H argues that the last sentence of Amended Recommended Noise Control
8 Condition 2(a) should be revised to include the following text in red:

9 After the Site Certificate has been issued and before landowner
10 consultations contemplated in Condition 1, the certificate holder will prepare a new
11 version of Attachment X-7, which will update landowner information and correct
12 any errors (Updated Attachment X-7). The certificate holder will send notices to all
13 landowners listed in Updated Attachment X-7, which notice shall inform the
14 recipient: (a) that the recipient is the owner of an NSR; and (b) the requirements of
15 Noise Control Conditions 1 and 2 as adopted by the Council. In addition, prior to
16 construction, the certificate holder shall develop and submit to the Department for
17 approval and once approval is obtained distribute to all NSR properties with one
18 mile of the site boundary an operational noise complaint response plan.³⁸⁶

19 STOP B2H's proposed changes are redundant of the first half of Amended Recommended
20 Noise Control Condition 2(a), and therefore unnecessary. That is, the first part of the site
21 certificate condition requires Idaho Power to update the list of NSRs within one mile of the Project,
22 which is contained in Attachment X-7, to account for any changes since Attachment X-7 was
23 initially completed, to correct for any errors in Attachment X-7, and to send notices to landowners
24 on the updated list. Accordingly, Idaho Power requests that the Council adopt without
25 modification the Hearing Officer's Amended Recommended Noise Control Condition 2(a).

³⁸⁴ STOP B2H Exceptions at 23.

³⁸⁵ STOP B2H Exceptions at 23.

³⁸⁶ STOP B2H Exceptions at 23.

1 STOP B2H also argues that Amended Recommended Noise Control Condition 2(e)(iv)
2 should be revised to specify that “all parties” must agree to the noise specialist that Idaho Power
3 is required to employ during the complaint process.³⁸⁷ Idaho Power understands that STOP B2H
4 is concerned with the objectivity of the noise specialist, but the condition already addresses such
5 concerns. As amended in the Proposed Contested Case Order, Noise Control Condition 2(e)(iv)
6 now states:

7 If the complainant voluntarily provides alternative noise data and it suggests an
8 exceedance that had not previously been identified and mitigated, and/or an
9 exceedance not otherwise allowed under Noise Control Condition 4 or Noise
10 Control Condition 5, the complaint shall be verified through site specific sound
11 monitoring conducted **by an Oregon registered Professional Engineer, Board
12 Certified by the Institute of Noise Control Engineering noise specialist, employed
13 or contracted by the certificate holder, in accordance with NPCS-1 unless
14 otherwise approved by the Department.** If site specific sound monitoring is not
15 authorized by the complainant, the certificate holder’s modeling results may be
16 relied upon to determine compliance.³⁸⁸

17
18 The licensing requirement, in addition to compliance with NPCS-1, are sufficient conditions to
19 ensure the objectivity of the noise specialist; therefore, STOP B2H’s proposal that all parties agree
20 to the specialist is unnecessary. Furthermore, requiring all parties to agree to a noise specialist will
21 likely lead to drawn-out disputes—which would undermine the efficiency and effectiveness of the
22 complaint process. To the extent, however, STOP B2H proposes that the noise specialist should
23 be approved by ODOE,³⁸⁹ Idaho Power does not object to that clarification in Amended
24 Recommended Noise Control Condition 2(e)(iv) (shown in blue):

25 If the complainant voluntarily provides alternative noise data and it suggests an
26 exceedance that had not previously been identified and mitigated, and/or an
27 exceedance not otherwise allowed under Noise Control Condition 4 or Noise
28 Control Condition 5, the complaint shall be verified through site specific sound

³⁸⁷ STOP B2H Exceptions at 23.

³⁸⁸ Proposed Contested Case Order at 299.

³⁸⁹ STOP B2H Exceptions, Exhibit B, p. 3 of 4.

1 monitoring conducted by an Oregon registered Professional Engineer, Board
2 Certified by the Institute of Noise Control Engineering noise specialist, employed
3 or contracted by the certificate holder, in accordance with NPCS-1, and unless
4 otherwise approved by the Department. If site specific sound monitoring is not
5 authorized by the complainant, the certificate holder's modeling results may be
6 relied upon to determine compliance.³⁹⁰

7 Idaho Power opposes any other revisions to Amended Recommended Noise Control
8 Condition 2 proposed by STOP B2H in Exhibit B to the Exception—which were not briefed—
9 because such changes are likely to introduce inconsistencies and confusion. In particular, Idaho
10 Power opposes STOP B2H's proposal to modify subsection (f) such that, in the event the parties
11 cannot agree upon a mitigation plan, Idaho Power will automatically be found to be in violation of
12 the site certificate conditions.³⁹¹ This proposal is entirely unbalanced, providing landowners with
13 no incentive to agree to reasonable mitigation proposals, and in fact would serve as incentive for
14 landowners to insist on measures that are entirely unreasonable. For these reasons, Idaho Power
15 requests that the Council adopt without modification the Hearing Officer's Amended
16 Recommended Noise Control Condition 2. However, should the Council find that it would be
17 reasonable for ODOE to approve the noise specialist, Idaho Power does not object to that
18 modification as discussed above.

19 *c. STOP B2H, Exception 2C, NC-4*

20 STOP B2H argues that Amended Recommended Noise Control Condition 3 should be
21 revised to reflect commitments made on behalf of Idaho Power by its witness, Mr. Bastasch, and
22 further to and specify that Idaho Power is required to conduct noise-specific monitoring for the

³⁹⁰ Proposed Contested Case Order at 299.

³⁹¹ STOP B2H Exception, Exhibit B, p. 3 of 4.

1 life of the project.³⁹² Amended Recommended Noise Control Condition 3 with both STOP B2H's
2 additional revisions (in red) is shown below:

3 **Amended Recommended Noise Control Condition 3: (CON-NC-01 and OPR-**
4 **NC-02)**

5 During construction, the certificate holder shall implement the following design
6 measures and construction techniques to minimize potential corona noise during
7 operations; and inspect, monitor, and implement necessary maintenance throughout
8 the operational life of the project:

- 9 a. For 500 kV transmission lines, use a triple bundled conductor configuration.
- 10 b. Maintain tension on all insulator assemblies to ensure positive contact
- 11 between insulators.
- 12 c. Protect conductor surface to minimize scratching or nicking; and clean
- 13 debris from all conductors (e.g.: bird feces, tree debris, and oil, grease and
- 14 other maintenance contaminants that may be utilized.)
- 15 d. Use conductors that have a “non-specular” finish on all conductors within a
- 16 mile of an NSR.
- 17 e. The certificate holder will monitor and inspect the line, conductors, and
- 18 assemblies to determine, and conduct, required maintenance and cleaning
- 19 necessary to adhere to the conditions set forth in the site certificate. The
- 20 inspection will take place on a monitoring schedule that aligns with the
- 21 OPUC required Utility Wildfire plans or more frequently as needed or
- 22 specified by the Department. A monitoring and maintenance report will be
- 23 sent to the Department after such monitoring inspection (and maintenance)
- 24 occurs.
- 25 f. The certificate holder will upgrade and/or apply technologies as they
- 26 become available to mitigate for corona noise (i.e.: sound masking) in
- 27 collaboration with the Department and property owners affected by corona
- 28 throughout the life of the project.

29 Idaho Power does not oppose STOP B2H's proposed addition of subsection (d) to the extent that
30 such provisions already reflect commitments made by Idaho Power (shown in blue):

31 **Amended Recommended Noise Control Condition 3: (CON-NC-01)**

32 During construction, the certificate holder shall implement the following
33 design measures and construction techniques to minimize potential corona noise
34 during operations:

³⁹² STOP B2H Exception at 24-26.

- 1 a. For 500 kV transmission lines, use a triple bundled conductor configuration.
- 2 b. [Use conductors that have a “non-specular” finish.](#)
- 3 c. Maintain tension on all insulator assemblies to ensure positive contact
- 4 between insulators.
- 5 d. Protect conductor surface to minimize scratching or nicking.

6 However, Idaho Power opposes STOP B2H’s other revisions: (1) expanding the
7 applicability of this condition beyond the construction phase; (2) requiring Idaho Power to clean
8 debris from the transmission lines (e.g., bird feces); (3) requiring Idaho Power to submit a periodic,
9 noise-specific monitoring and maintenance plan to ODOE or the Council; and (4) requiring that
10 Idaho Power upgrade the transmission line as soon as new technologies become available.³⁹³

11 As an initial matter, it is important to note that STOP B2H mischaracterizes Mr. Bastasch’s
12 Rebuttal Testimony as supporting these changes.³⁹⁴ Rather, Mr. Bastasch’s Rebuttal Testimony—
13 as cited by STOP B2H—*only* supports the commitment by Idaho Power to use conductors that
14 have a “non-specular” finish, a method of sandblasting to age the conductor artificially to make it
15 less reflective, which also cleans the conductors of most of the manufacturing oils that would
16 otherwise contribute to additional sound.³⁹⁵ Second, STOP B2H’s proposals are unnecessary and
17 impractical for several reasons.

18 First, STOP B2H’s proposal to expand the condition inspection and maintenance beyond
19 the construction phase to “throughout the operational life of the project” is impractical and
20 unnecessary. In particular, STOP B2H’s proposal that Idaho Power be required to keep the entire
21 transmission line free from debris (e.g., bird feces) throughout the operations phase is completely
22 impractical considering the fact that the line is hundreds of miles long. Instead, the framework

³⁹³ STOP B2H Exceptions at 25-26; *see also* STOP B2H Exceptions, Exhibit C, pp. 1-2 of 2.

³⁹⁴ STOP B2H Exceptions at 26.

³⁹⁵ Idaho Power / Rebuttal Testimony of Mark Bastasch / Issues NC-1, NC-2, NC-3, NC-4, and NC-6, p. 43 of 96.

1 adopted by the Hearing Officer ensures that should debris on the line cause an exceedance that
2 impacts a landowner along the B2H route, the landowner can file a complaint with Idaho Power
3 to ensure it is resolved.³⁹⁶ Moreover, it is worth mentioning that another recommended site
4 certificate condition—Recommended Organizational Expertise Condition 1, addressing the
5 Transmission Maintenance Inspection Plan—already requires Idaho Power to inspect, monitor,
6 and maintain the facility.³⁹⁷ While this condition would not ensure that the transmission line is
7 free from debris all of the time, it will ensure that any major maintenance issues regarding the line
8 are addressed.

9 Additionally, it would be completely impractical to require that Idaho Power modify the
10 transmission line every time a new mitigation technology became “available”—which in itself is a
11 vague and disputable standard. Again, under the complaint process, Idaho Power would be responsible
12 for addressing any exceedances that might arise during operations. If a new technology presented the
13 most reasonable and effective approach to resolving the concern, it could be proposed by either the
14 landowner or Idaho Power. For these above reasons, Idaho Power requests that the Council adopt
15 Recommended Noise Control Condition 3 without modification. However, should the Council find
16 that it would be reasonable for Recommended Noise Control Condition 3 to include the
17 requirement that conductors have a “non-specular” finish, Idaho Power does not oppose that
18 revision as discussed above.

³⁹⁶ Proposed Contested Case Order at 297-301 (Amended Recommended Noise Control Condition 2).

³⁹⁷ Proposed Order, Attachment 1: Draft Site Certificate at 7-8 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 711-12 of 10016).

DATED: July 15, 2022

MCDOWELL RACKNER GIBSON PC



Lisa F. Rackner, OSB No. 873844

lisa@mrg-law.com

Jocelyn Pease, OSB No. 102065

jocelyn@mrg-law.com

419 SW 11th Avenue, Suite 400

Portland, Oregon 97205

Telephone: (503) 595-3925

Facsimile: (503) 595-3928

David Stanish

dstanish@idahopower.com

Idaho Power Company

Attorneys for Idaho Power Company

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 NC-1, NC-2, NC-3 AND NC-4** 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 ISSUES NC-1, NC-2, NC-3 AND NC-4** was served by First Class Mail or electronic mail as indicated below:

By: First Class Mail:

John C. Williams
PO Box 1384
La Grande, OR 97850

By: Electronic Mail:

David Stanish
Attorney at Law
Idaho Power Company
dstanish@idahopower.com

Lisa Rackner
Attorney at Law
Idaho Power Company
lisa@mrg-law.com

Jocelyn Pease
Idaho Power Company
Attorney at Law
jocelyn@mrg-law.com

Alisha Till
alisha@mrg-law.com

Joseph Stippel
Agency Representative

Idaho Power Company
jstippel@idahopower.com

Mike Sargetakis
Attorney at La
Oxbow Law Group, LLC
mike@oxbowlaw.com

Karl G. Anuta
Attorney at Law
Law Office of Karl G. Anuta
kg@integra.net

Kellen Tardaewether
Agency Representative
Kellen.tardaewether@oregon.gov

Sarah Esterson
Oregon Department of Energy
Sarah.Esterson@oregon.gov

Patrick Rowe
Assistant Attorney General
Patrick.g.rowe@doj.state.or.us

Emma Borg
emma.t.borg@doj.state.or.us

Jesse Ratcliffe
Assistant Attorney General
jesse.d.ratcliffe@doj.state.or.us

Jeffery R. Seeley
jeff.seeley@doj.state.or.us

Svetlana Gulevkin
svetlana.m.gulevkin@doj.state.or.us

Stop B2H Coalition
fujj@stopb2h.org

Stop B2H Coalition
Jim Kreider
jkreider@campblackdog.org

Colin Andrew

candrew@eou.edu

Kathryn Andrew
lkathrynandrew@gmail.com

Susan Badger-Jones
sbadgerjones@eoni.com

Lois Barry
loisbarry31@gmail.com

Peter Barry
petebarry99@yahoo.com

Gail Carbiener
mcgcarb@bendbroadband.com

Matt Cooper
mcooperpiano@gmail.com

Whit Deschner
deschnerwhit@yahoo.com

Jim and Kaye Foss
onthehoof1@gmail.com

Suzanne Fouty
suzannefouty2004@gmail.com

Susan Geer
susanmgeer@gmail.com

Irene Gilbert
ott.irene@frontier.com

Dianne B. Gray
diannebgray@gmail.com

Joe Horst and Ann Cavinato
joehorst@eoni.com

Charles A Lyons
marvinroadman@gmail.com

Virginia and Dale Mammen
dmammen@eoni.com

Anne March
amarch@eoni.com

Kevin March
kmarch1961@gmail.com

JoAnn Marlette
garymarlette@yahoo.com

Michael McAllister
wildlandmm@netscape.net

Jennifer Miller
rutnut@eoni.com

Sam Myers
sam.myers84@gmail.com

Louise Squire
squirrel@eoni.com

Stacia Jo Webster
staciajwebster@gmail.com

Jonathan White
jondwhite418@gmail.com

John Winters
wintersnd@gmail.com

/s/ Suzanne Prinsen

Suzanne Prinsen
Legal Assistant

BEFORE THE ENERGY FACILITIES SITING COUNCIL

for the

STATE OF OREGON

IN THE MATTER OF:) PETITIONER SAM MYER'S EXCEPTIONS
THE PROPOSED BOARDMAN TO) TO ADMINISTRATIVE LAW JUDGE
HEMINGWAY TRANSMISSION LINE) WEBSTER'S RULINGS:
OAH Case No. 2019-ABC-02833) PROPOSED CONTESTED CASE ORDER;
ISSUES LU-9
DATED JUNE 30, 2022

INTRODUCTION

Whether Applicant adequately analyzed the risk of wildfires from operation of the proposed transmission lines, especially during "red flag" warning weather conditions, and the impact the proposed transmission lines will have on Mr. Myers' ability to use an aerial applicator on his farmland.

Mr. Myers disagrees with many of the factual and legal conclusions, and characterizations of the evidence, that are contained in the Proposed Contested Case Order (PCCO). Mr. Myers cited evidence by a preponderance of the evidence that many of the ALJ's rulings and conclusions stated in the PCCO are not accurate. Though the scope of errors found in the PCCO is continuous, Mr. Myers has limited the exceptions detailed here to only a few specific issues. However, do not misinterpret filing limited exceptions as agreement with the ALJ's rulings and conclusions in the PCCO that the evidence shows were erroneous.

Mr. Myers submits five specific exceptions. Each specific exception warrants, including that ESFC reverse the ALJ's Ruling on LU-9 in the PCCO and deny the site certificate. In the alternative to a full denial, and due to the lack of Idaho Power Company's documented mitigation efforts in the Proposed Order, Mr. Myer's requests that EFSC to remand this issue back to ODOE for further development and determination of compliance.

SPECIFIC EXCEPTIONS

Exception #1: The ALJ erred in finding that Idaho Power Company adequately analyzed the risk of project-related wildfire during Red Flag warning weather conditions.

Under "Findings of Fact" Judge Webster says, on page 184, "Although the proposed facility is not yet under construction, Idaho Power analyzed the potential fire risk zones along the proposed route in its 2022 Wildfire Mitigation Plan."¹ However, her base premise is incorrect. The ALJ says, on page 184, "Contrary to Mr. Myers' contentions, Idaho Power adequately analyzed the risk of project-related wildfire during Red Flag warning weather conditions."² Such a claim is false.

According to the 2022 Wildfire Mitigation Plan, Idaho Power has researched Red Flag Warnings in proposed transmission line route. However, they have failed to incorporate the area that poses the highest level of risk – OR 641 – which 25% of B2H would run through. IPC states on page 6, "RFWs for Idaho Power's service territory include Idaho Zones (IDZ) 401, 402, 403, 413, 420 and 422; and Oregon Zones (OR) 636, 637, 642, 634, 644, 645 and 646; and are monitored and are factored into Idaho Power's determination of whether to initiate a PSPS."³

¹ Proposed Contested Case Order, 2022

² Proposed Contested Case Order, 2022

³ Wildfire Public Safety Power Shutoff Plan, page 6, Wildfire Mitigation Plan 2022

Yet, rendering the public data collected from the National Weather Service from 2019-2021, which Mr. Myers references on page 6 of his Closing Brief, OR 641 had the most documented Red Flag Warnings in comparison to the potential risk zones highlighted by IPC.⁴ The EFSC can and should take administrative notice of this evidence available to the public that clearly supports Mr. Myers' conclusions.

Though IPC has a direct link to the National Weather Service, specifically when they highlight Red Flag Warnings, they obviously missed the public data in an area that makes up a large chunk of their proposed transmission line. If IPC had adequately analyzed potential fire risk zones along the proposed route, OR 641 would be included in the list worthy of a potential Public Safety Power Shutdown.

Therefore, Judge Webster's assertion that Idaho Power analyzed the potential fire risk zones along the proposed route is incorrect. The error is pertinent to the ALJ's proposed ruling. It merits denial of the site certificate. In the alternative, the error merits remand of issue LU-9 for further development and determination of compliance.

Exception #2: The ALJ erred in finding high winds pose little risk for wildfires caused by transmission line ignition.

Under "Finding of Facts" Judge Webster says, on page 184, "The evidence also demonstrates that the risk of a project-related fire is very low even during Red Flag Warning conditions and/or gusty wind conditions"⁵ Mr. Myers strongly disagrees with the ALJ's finding.

⁴ Myers Closing Brief, LU-9, 2022

⁵ Proposed Contested Case Order, 2022

The evidence clearly shows, especially when looking at wildfire data from bordering states, that high winds can directly affect wildfires caused by transmission line ignition.

Though Judge Webster disagrees, we must look at previous evidence from the catastrophic California wildfires. On multiple filings, both in his Declaration Testimony⁶ and Closing Brief⁷, Mr. Myers highlights the work of Joseph Mitchell outlining the risks and evidence to support transmission line faults igniting wildfires.⁸ Not only are the potential wind speeds/gusts, humidity and dry landscapes in Eastern Oregon, specifically OR641, similar to where fires have ignited in California, but also the fine, dusty soils. That facts are 500 kV transmission lines have ignited fires in comparable landscapes. Also, wind speeds increase the intensity and rate of spread of wildfires.⁹ Ignoring the risk, whether high or low, could be detrimental to agriculture in Morrow County.

Therefore, Judge Webster's assertion that risk of a project-related fire is very low is incorrect. The error is pertinent to the ALJ's proposed ruling. It merits denial of the site certificate. In the alternative, the error merits remand of issue LU-9 for further development and determination of compliance.

Exception #3: The ALJ erred in finding that if a fire were to occur on Mr. Myers farm it would have minimal soil impact and there's no need for IPC to have a soil rehabilitation plan in place.

⁶ Sam Myers Declaration LU-9 Testimony, 2021

⁷ Myers Closing Brief LU-9, 2022

⁸ Power Lines and Catastrophic Wildland Fire in Southern California

⁹ Mr. Myers requests that EFSC take administrative notice of these facts.

Under “Findings of Facts” Judge Webster ruled, on page 185, “Furthermore, a preponderance of the evidence also demonstrates that, if a fire were to occur at or near Mr. Myers’ agricultural operations, the fire would most likely result in minimal damage to soils.”¹⁰ Mr. Myers fully disagrees and submits that the preponderance of evidence demonstrates that soils would most likely be significantly damaged.

Mr. Myers provided not only research, but also the personal testimony of Roger Morter proving the impacts of a quick moving fire on the soils in Morrow County.¹¹ In Mr. Morter’s case, the negative soil effects encompassed an 8-year span. Rehabilitation of local soil, no matter how big, fast, or hot the fire, takes time. In the agricultural business, time is money and the amounts are usually significant.

Judge Webster’s ruling is not only erroneous, but also negligent of the facts. Because of the lasting effects on local livelihoods, whether the risk of a transmission line fire is high or low, IPC must take responsibility. The error merits denial of the site certificate. In the alternative, Mr. Myers requests that EFSC remand the application back to ODOE for development of a rehabilitation plan in place along the proposed route before issuance of a site certificate.

Exception #4: The ALJ erred in finding that the B2H Transmission Line complies with the Land Use standard.

Under the “Findings of Facts” Judge Webster states, on page 186, “Idaho Power has shown that the project complies with the Land Use standard notwithstanding the impact the project may have on Mr. Myers’ farm practices.”¹² Mr. Myers refuses to accept the ruling and

¹⁰ Proposed Contested Case Order, 2022

¹¹ Myers Closing Brief, pages 11-12, 2022

¹² Proposed Contested Case Order, 2022

argues that the ALJ knowingly overlooked the evidence and impact the proposed project will have on his farming practices, specifically aerial spraying.

Mr. Myers' believes the ALJ is giving a 'good enough' stamp of approval for the Land Use Standard and completely disregarding that the standard is not met for his farmland. Judge Webster confirms, on page 185, that IPC has admitted the impact the transmission line will have on Mr. Myers' farming practices.¹³ Thus, it appears IPC has wrongfully been given an exception to the rule and Mr. Myers refuses to allow his land be the martyr for that error in judgement.

Therefore, Mr. Myers requests denial of the site certificate. In the alternative, Mr. Myers requests that EFSC remand the application back to ODOE for further analysis, particularly of methods to eliminate impacts on Mr. Myers' farming practices.

Exception #5: The ALJ erred in finding that Mr. Myers did not timely offer testimony from the article by Zhaolin Gu into the hearing record.

Under the "Finding of Facts" Judge Webster says, on page 187, "Because Mr. Myers did not timely offer testimony from the *Sunrise Powerlink* matter or the article by Zhaolin Gu in the hearing record, he may not rely on this evidence in his closing argument."¹⁴ The finding is incorrect.

Contrary to what the ALJ has stated, Mr. Myers introduced and used the article by Zhaolin Gu in his Declaration Testimony on page 4, dated September 17, 2021.¹⁵ In fact, not

¹³ Proposed Contested Case Order, 2022

¹⁴ Proposed Contested Case Order, 2022

¹⁵ Sam Myers Declaration LU-9 Testimony, 2021

only was the article introduced to evidence in a timely matter, but the exact excerpt in question is also found in Mr. Myers' Closing Brief on page 9.

Therefore, Judge Webster has erred in striking the article by Zhaolin Gu from the record. The error is pertinent to her ruling for the reasons stated in Mr. Myers' Closing Brief on page 9. The error merits denial of the site certificate application. In the alternative, Mr. Myers requests that EFSC remand issue LU-9 back to ODOE for further analysis and development.

SUMMARY

In summary, IPC has failed to comply with the Land Use Standards under OAR 345-022-0030. Based on the exceptions highlighted above, it is blatantly clear that Judge Webster has erroneously ruled in IPC's favor in at least five ways. It remains obvious that neither IPC or the ALJ is willing to acknowledge or take responsibility for the elevated risk of fire along the B2H route, specifically in Morrow County. The ALJ's ruling not only fails to protect Mr. Myers' farmlands, but also infringes Oregon's Land Use Standards.

Each and every one of the Exceptions merits denial of the site certificate. In the alternative, Mr. Myers requests that ESFC reverse the ALJ's Ruling on LU-9 in the PCCO and remand this issue back to ODOE for further development and determination of compliance.

CONCLUSION

Mr. Myers requests that the EFSC review the record and revisit the pivotal rulings and conclusions identified the Exceptions. The EFSC should modify the PCCO to deny the site permit for the reasons outlined.

DATED: June 30, 2022

Respectfully Submitted,

/s/ Sam Myers

Sam Myers

CERTIFICATE OF MAILING

On June 30, 2022, I certify that I filed the foregoing Closing Brief with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

/s/ Sam Myers

Sam Myers

By: First Class Mail:

John C. Williams

PO Box 1384

La Grande, OR 97850

By: Electronic Mail:

David Stanish

Attorney at Law

Idaho Power Company

dstanish@idahopower.com

Lisa Rackner

Attorney at Law

Idaho Power Company

lisa@mrg-law.com

Jocelyn Pease

Idaho Power Company

Attorney at Law

jocelyn@mrg-law.com

Alisha Till

alisha@mrg-law.com

Joseph Stippel

Agency Representative

Idaho Power Company

jstippel@idahopower.com

Kellen Tardaewether

Agency Representative

Kellen.tardaewether@oregon.gov

Sarah Esterson

Oregon Department of Energy

Sarah.Esterson@oregon.gov

Patrick Rowe

Assistant Attorney General

Patrick.g.rowe@doj.state.or.us

Jesse Ratcliffe

Assistant Attorney General

jesse.d.ratcliffe@doj.state.or.us

Jeffery R. Seeley

jeff.seeley@doj.state.or.us

Mike Sargetakis

Attorney at Law

Oxbow Law Group, LLC

mike@oxbowlaw.com

Karl G. Anuta

Attorney at Law

Law Office of Karl G. Anuta

kga@integra.net

Stop B2H Coalition

fuji@stopb2h.org

Stop B2H Coalition

Jim Kreider

jkreider@campblackdog.org

Colin Andrew

candrew@eou.edu

Kathryn Andrew

lkathrynandrew@gmail.com

Susan Badger-Jones

sbadgerjones@eoni.com

Lois Barry

loisbarry31@gmail.com

Peter Barry

petebarry99@yahoo.com

Ryan W. Browne

browner@eou.edu

Gail Carbiener

megccarb@bendbroadband.com

Matt Cooper

mcooperpiano@gmail.com

Whit Deschner

deschnerwhit@yahoo.com

Jim and Kaye Foss

onthehoof1@gmail.com

Suzanne Fouty

suzannefouty2004@gmail.com

Susan Geer

susanmgeer@gmail.com

Irene Gilbert

ott.irene@frontier.com

Charles H. Gillis

charlie@gillis-law.com

Dianne B. Gray

diannebgray@gmail.com

Joe Horst and Ann Cavinato

joehorst@eoni.com

Jim and Jane Howell

d.janehowell@gmail.com

Virginia and Dale Mammen

dmammen@eoni.com

Anne March

amarch@eoni.com

Kevin March

amarch@eoni.com

JoAnn Marlette

garymarlette@yahoo.com

Michael McAllister

wildlandmm@netscape.net

Jennifer Miller

rutnut@eoni.com

Sam Myers

sam.myers84@gmail.com

Louise Squire

squirrel@eoni.com

Stacia Jo Webster

staciajwebster@gmail.com

Jonathan White

jondwhite418@gmail.com

John Winters

wintersnd@gmail.com

Charles A Lyons

marvinroadman@gmail.com

Svetlana Gulevkin

Svetlana.m.gulevkin@doj.state.or.us

/s/ Sam Myers

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

IN THE MATTER OF:

**BOARDMAN TO HEMINGWAY
TRANSMISSION LINE**

) EXCEPTION TO ALLOWING A
) SUMMARY DETERMINATION
) REMOVING ISSUE LU-5 FROM THE
) CONTESTED CASES FOR B2H, DENYING
) ME THE USE OF EXHIBITS PROVIDED
) IN THIS CONTESTED CASE WHICH
RELATE TO OTHER CONTESTED CASES,
DENYING PROPOSED SITE
CERTIFICATE CONDITIONS RELATING
TO THIS ISSUE.

Energy Facility Siting Council:

OAH Case No. 2019-ABC-02833

To: Energy Facility Siting Council

Rather than address the subject of the contested case, the hearings officer made extensive arguments regarding the fact that the decision was consistent with the Union County Administrative Rules and quoting multiple pages of material from the Proposed Order that was not referenced by the applicant and was provided related to compliance with the Union County Administrative Rules UZPSO

The issue of the Contested case was stated as: “The applicant relied upon Union County Administrative Rules UZPSO as stated on Page 148 of the Draft Proposed Order. This resulted in the incorrect identification of forest land relying upon the predominant use rather than the soil class to identify forest and in Union County.”

I am relying upon my previously submitted documents regarding this issue and am providing legal references which preclude the use of the county procedures, require evaluation of soil types with timber production capacity of 20 cubic feet per acre to be considered as forest land absent other limitations, failing to address actual forest impacts in other rule decisions and failing to require landowner compensation to be consistent with the mitigation credited to the developer on forest lands, and failing to allow the use of exhibits and arguments in this case to be used in other contested cases including LU-7 and LU-8. I am also incorporating material from the soils testimony and contested cases which relate to this issue.

A. Court decisions regarding definition of Forest Land: Provided to support the need to allow an exception to the Proposed Contested Case Order regarding Forest Land issues.

1. *Potts v. Clackamas County 42 Or LUBA I.* “Whether property is “suitable for commercial forest uses under Goal 4 definition depends upon the properties capacity for

production of commercial tree species, not necessarily the past or current level of production, or whether the property is or could be part of a commercial-scale timber business.”

2. *Rogue Advocates v. Josephine County, 66, Or LUBA 45 (2012)* This case decision also states “Because the Goal 4 rule was amended in 2008 and 2011 to provide a 8)(scforest land subject to Goal 4, the county cannot simply apply its acknowledged comprehensive plan standards for identifying forest land-----”
 3. *Rogue Advocates v. Josephine County, 66, Or LUBA 45 (2012)* “Because OAR 660-006-0010 provides a set of prioritized, mandatory sources of data and a prescribed alternative method that must be used to determine whether land is forest land subject to Goal 4, the applicability of OAR 660-006-0010 cannot be avoided by concluding, based on different data or different methodology, that land is not forest land subject to Goal 4”
 4. *Rogue Advocates v. Josephine County, 2015-097/2016-009*
 5. *Local government decisions which verify or alter non-conforming uses of property must apply the appropriate statutory framework, which includes ORS 197.763 (notice and hearing requirements), ORS 215.130 (state requirements for nonconforming use statutes), and the applicable local land development ordinance.*
 6. *Wetherell v. Douglas County, 50 Or LUBA 167 (2005)* “Goal 4 does not permit local governments to determine whether land is “forest land” subject to the goal based on the absence of timber productivity ratings for soils or the assumption that unrated soils cannot produce timber.”
 7. *Cattoche v Lane Co. 79 Or LUBA 466(2019)* A county errs by determining that land is not forest land simply because it is not predominantly forested.
1. ORS 469.504 requires compliance with statewide land use goals,
 2. ORS 527.722 restricts local government adoption of rules regulating forest operations. This statute states local governments cannot “adopt any rules, regulations or ordinances or take any other actions that prohibit, limit, regulate, subject to approval or in any other way affect forest practices on forestlands located outside of the acknowledged urban growth boundary.
 3. ORS 197.250 states: “ all comprehensive plans and land use regulations adopted by a local government to carry out those comprehensive plans and all plans, programs, rules or regulations affecting land use adopted by a state agency or special district shall be in compliance with the goals within one year after the date those goals are approved by the Land Conservation and Development Commission.

Facts:

---The Order on Summary Determination failed to address the Contested Case Issue which was that the Developer and the Council are precluded by law and court decisions from using the Union County Administrative Rules in identifying Forest Land for Goal 4 Compliance.

1. The Planning Director, Scott Hartell, stated that he based the information he provided to Idaho Power entirely upon the Local Rules.
2. He confirmed that the only document that he provided and which the decisions regarding the cubic feet per acre per year of timber production based upon Soil Type was Exhibit 1 entitled, "Pilot Program Soil Ratings for Union County, March 16, 1993"
3. He confirmed that he had identified three types of land use in the Timber/Grazing Zone designation in Union County, and that the information in Exhibit 1 was overlaid with the soil types from the GIS for the parcels being crossed by the transmission line, resulting in a determination that the soil was primarily either forest, Range or Agricultural land.
4. Mr. Hartell stated that there was no determination of the annual cubic feet per year of timber production for the soils that were identified on his chart as range or agricultural land.
5. Scott Hartell confirmed in his deposition that the Union County rules were used to determine Forest Land and that the only land with a timber production capacity that was identified as "forest land" was that with a capacity of 63 cfay or greater and that soil capacity was not determined for any land identified as Range or Grazing land in the grazing/forest zone.
6. The Hearings Officer ignored the contested case issue and argued that the decisions were consistent with the County rules including quoting multiple pages of the Proposed Order which is the subject of the Contested Case request as supporting her denial.

All decisions proposed relating to the determination of forest lands need to receive a council exemption and the issue needs to be reheard.

Irene Gilbert

Pro-Se Petitioner representing myself and the Public Interest,

Co-Chair of STOP B2H

CERTIFICATE OF MAILING

On June 30, 2022, I certify that I filed the foregoing EXCEPTION TO ALLOWING A SUMMARY DETERMINATION REMOVING ISSUE LU-5 FROM THE CONTESTED CASES FOR B2H, DENYING ME THE USE OF EXHIBITS PROVIDED IN THIS CONTESTED CASE WHICH RELATE TO OTHER CONTESTED CASES, DENYING PROPOSED SITE CERTIFICATE CONDITIONS RELATING TO THIS ISSUE.

with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

By: Arrangement for hand delivery or US Mail:

John C. Williams
PO Box 1384
La Grande, OR 97850

By: Electronic Mail:

David Stanish
Attorney at Law
Idaho Power Company
dstanish@idahopower.com

Lisa Rackner
Attorney at Law
Idaho Power Company
lisa@mrg-law.com

Jocelyn Pease
Idaho Power Company
Attorney at Law
jocelyn@mrg-law.com

Alisha Till
alisha@mrg-law.com

Joseph Stippel
Agency Representative
Idaho Power Company
jstippel@idahopower.com

Kellen Tardaewether
Agency Representative
Kellen.tardaewether@oregon.gov

Sarah Esterson
Oregon Department of Energy
Sarah.Esterson@oregon.gov

Patrick Rowe
Assistant Attorney General
Patrick.g.rowe@doj.state.or.us

Jesse Ratcliffe
Assistant Attorney General
jesse.d.ratcliffe@doj.state.or.us

Jeffery R. Seeley
jeff.seeley@doj.state.or.us

Mike Sargetakis
Attorney at Law
mike@sargetakis.com

Karl G. Anuta
Attorney at Law
Law Office of Karl G. Anuta
kga@integra.net

Stop B2H Coalition
fuji@stopb2h.org

Stop B2H Coalition
Jim Kreider
jkreider@campblackdog.org

Colin Andrew
candrew@eou.edu

Kathryn Andrew
lkathrynandrew@gmail.com

Susan Badger-Jones
sbadgerjones@eoni.com

Lois Barry
loisbarry31@gmail.com

Peter Barry
petebarry99@yahoo.com

Gail Carbiener
mcgcarb@bendbroadband.com

Matt Cooper
mcooperpiano@gmail.com

WhitDeschner

deschnerwhit@yahoo.com

Jim and Kaye Foss
onthehoof1@gmail.com

Suzanne Fouty
suzannefouty2004@gmail.com

Susan Geer
susanmgeer@gmail.com

Irene Gilbert
ott.irene@frontier.com

Charles H. Gillis
charlie@gillis-law.com

Dianne B. Gray
diannebgray@gmail.com

Joe Horst and Ann Cavinato
joehorst@eoni.com

Virginia and Dale Mammen
dmammen@eoni.com

Anne March
amarch@eoni.com

Kevin March
amarch@eoni.com

JoAnn Marlette
garymarlette@yahoo.com

Michael McAllister
wildlandmm@netscape.net

Jennifer Miller
rutnut@eoni.com

Sam Myers
sam.myers84@gmail.com

Louise Squire
squirrel@eoni.com

Stacia Jo Webster
staciajwebster@gmail.com

Jonathan White
jondwhite418@gmail.com

John Winters
wintersnd@gmail.com

Charles A Lyons
marvinroadman@gmail.com

Svetlana Gulevkin
Svetlana.m.gulevkin@doj.state.or.us

**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

APPLICANT IDAHO POWER
COMPANY'S RESPONSE TO LIMITED
PARTIES' EXCEPTIONS FOR
CONTESTED CASE ISSUES LU-5, LU-7,
LU-8, AND LU-9

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 for Issues LU-5, LU-7, LU-8, and LU-9.

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 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).

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

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

1 **III. RESPONSE TO EXCEPTIONS**

2 **A. Issue LU-5, LU-7, and LU-8**

3 The Hearing Officer granted Irene Gilbert limited party status for LU-5, LU-7, and LU-8
4 which ask, respectively:

5 *LU-5: Whether calculation of forestlands must be based on soil class or whether*
6 *it is sufficient to consider acreage where forest is predominant use.*¹²

7 *LU-7: Whether the evaluation of proposed facility impacts to the cost of forest*
8 *practices accurately determined the total acres of lost production or indirect*
9 *costs.*¹³

10 *LU-8: The adequacy of Applicant’s evaluation of proposed facility impacts to the*
11 *cost of forest management practices and whether mitigation must be provided for*
12 *the entire length of the transmission line for the operational lifetime.*¹⁴

13 Issue LU-5 was resolved earlier in the contested case proceeding—in July 2021—via a
14 motion for summary determination (“MSD”). In the Proposed Contested Case Order, the Hearing
15 Officer incorporated her MSD rulings by reference and summarized her finding on LU-5 as
16 follows: “The ALJ found that, in accordance with the Union County Zoning, Partition, and
17 Subdivision Ordinance (UCZPSO), Idaho Power properly used SSURGO soil classification data
18 in determining the predominant use of hybrid-zoned land in Union County.”¹⁵

19 In the Proposed Contested Case Order, the Hearing Officer summarized her resolution of
20 LU-7 and LU-8 as follows:

21 To summarize, with regard to Issue LU-7, a preponderance of evidence in the
22 record demonstrates that Idaho Power accurately identified the amount of forest
23 land impacted by the proposed facility in Union County, and accurately estimated
24 the total acres of lost production and indirect costs. Ms. Gilbert has not shown

¹² Second Order on Case Management at 5.
¹³ Second Order on Case Management at 5.
¹⁴ Second Order on Case Management at 5.
¹⁵ Proposed Contested Case Order at 24 (May 31, 2022).

1 otherwise. With regard to Issue LU-8, the preponderance of the evidence
2 establishes that Idaho Power adequately evaluated the proposed facility’s impacts
3 on the cost of forest management practices. The proposed measures to mitigate
4 impacts on forested areas are adequate and appropriate, and Ms. Gilbert has not
5 presented any evidence to demonstrate otherwise.¹⁶

6 In her exception, Ms. Gilbert argues that all issues relating to the determination of forest
7 lands need to “receive a council exemption and the issue needs to be reheard.”¹⁷ Although
8 Ms. Gilbert captioned her exception as addressing LU-5, because she more broadly challenges all
9 issues related to the determination of forest lands, Idaho Power interprets her exception to also
10 address LU-7 and LU-8—though none of her arguments are explicitly tied to a particular issue.

11 As an initial matter, Ms. Gilbert’s arguments are not tied to any specific exceptions to the
12 Proposed Contested Case Order as required by OAR 345-015-0085(5), and her claims should
13 therefore be rejected.¹⁸ Nevertheless, should the Council wish to consider Ms. Gilbert’s
14 arguments, Idaho Power addresses each of her claims below.

15 In her exception, Ms. Gilbert simply reiterates the arguments she made during the contested
16 case in connection with LU-5, LU-7, and LU-8. Idaho Power has provided extensive briefing on
17 these issues, and the record supports the Hearing Officer’s findings of fact and conclusions of law
18 contained within the Proposed Contested Case Order. Accordingly, Idaho Power respectfully
19 requests that the Council adopt the Hearing Officer’s findings of fact and conclusions of law
20 relevant to LU-5, LU-7, and LU-8 without modification.

¹⁶ Proposed Contested Case Order at 177 (May 31, 2022).

¹⁷ Irene Gilbert Exception for LU-5 at 3 (June 30, 2022).

¹⁸ 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.”).

1 **1. Background Relevant to Evidentiary Record for LU-5, LU-7, LU-8**

2 LU-5 was resolved earlier in the contested case proceeding—in July 2021—via MSD, and
3 Ms. Gilbert did not file any testimony or exhibits in connection with LU-7 or LU-8 by the
4 September 17, 2021 deadline. Because Ms. Gilbert did not file any testimony, Idaho Power did
5 not have an opportunity to provide any responsive testimony on these issues. Accordingly, as it
6 relates to LU-5, the record includes the material offered in connected with the MSD, Ms. Gilbert’s
7 response to Idaho Power’s MSD, and Idaho Power’s reply. In connection with LU-7 and LU-8, no
8 party or limited party provided testimony or evidence during the contested case process.

9 Irene Gilbert deposed Union County Planning Director Scott Hartell in June 2021.¹⁹
10 Ms. Gilbert filed a copy of Mr. Hartell’s deposition transcript (“Hartell Transcript”) as an
11 attachment to her response to Idaho Power’s MSD.²⁰ The Hearing Officer then granted Idaho
12 Power’s MSD and dismissed LU-5 from the contested case.²¹ Although Ms. Gilbert still had
13 limited party status to raise LU-7 and LU-8, Ms. Gilbert did not file any testimony or evidence in
14 support of her positions on those issues.²² After the evidentiary record had closed, Ms. Gilbert
15 stated that she intended to cite the Hartell Transcript as evidence in support of her arguments on
16 LU-7 and LU-8.²³ However, the Hearing Officer responded that, although the Hartell Transcript
17 was “part of the contested case hearing record for purposes of Issue LU-5,” it was not appropriate
18 to add the Hartell Transcript to the list of admitted evidence LU-7 and LU-8 for Ms. Gilbert had

¹⁹ Irene Gilbert / Response to Idaho Power’s MSD of LU-5 (June 10, 2021) / Issue LU-5 / Exhibit 3, Hartell Transcript.

²⁰ Irene Gilbert / Response to Idaho Power’s MSD of LU-5 (June 10, 2021) / Issue LU-5 / Exhibit 3, Hartell Transcript.

²¹ Ruling and Order on Motion for Summary Determination on Contested Case Issues LU-2, LU-3, LU-5 and LU-6 at 24.

²² 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 9-10.

²³ Email from Irene Gilbert to B2H Service List Re: Second Amended List of Testimony and Exhibits Admitted into the Contested Case Hearing Record - In the Matter of Boardman to Hemingway Transmission Line - OAH Case No. 2019-ABC-02833 (Feb. 14, 2022 at 5:51 p m.).

1 not offered the Hartell Transcript in support of her positions on those issues prior to September 17,
2 2021, which was the deadline for filing testimony and exhibits.²⁴

3 Ms. Gilbert subsequently submitted an offer of proof requesting that the Hearing Officer
4 reconsider her conclusion that evidence offered in support of LU-5 could not be considered as
5 evidence for Ms. Gilbert’s positions on LU-7 and LU-8.²⁵ Idaho Power filed a request for
6 clarification, stating that the Company did not oppose Ms. Gilbert’s request to include the Hartell
7 Transcript in the Exhibit List.²⁶ Idaho Power also requested that, in the event the Hearing Officer
8 determines that the Hartell Transcript may not appropriately be considered in connection with
9 LU-7 and LU-8, that the Hearing Officer nonetheless review the Hartell Transcript and include an
10 assessment of whether her findings would be changed, had she considered the excluded
11 document.²⁷

12 In response, the Hearing Officer clarified that evidence submitted during the MSD phase
13 could not be considered as evidence for issues remaining in this contested case because documents
14 filed in support of or opposition to an MSD “are not subject to the evidentiary standards set out in
15 ORS 183.450 and OAR 137-003-0050.”²⁸ Unlike testimony and evidence offered during the
16 hearing phase of the contested case, evidence filed during the MSD phase is “taken at face value
17 and is considered in a manner most favorable to the non-moving party.”²⁹ For that reason,
18 “affidavits and supporting exhibits filed in support of or in opposition to a motion for summary

²⁴ Proposed Contested Case Order at 178.

²⁵ See Gilbert Offer of Proof (Feb. 19, 2022).

²⁶ Idaho Power’s Request for Clarification and Response to Irene Gilbert’s Offer of Proof at 3-4 (Feb. 24, 2022).

²⁷ Idaho Power Company’s Request for Clarification and Response to Irene Gilbert’s Offer of Proof at 2-4.

²⁸ Ruling on Gilbert’s Request to Rescind Ruling Denying Request to Amend List of Testimony and Exhibits and Response to Idaho Power Company’s Request for Clarification at 4 (Feb. 25, 2022).

²⁹ Ruling on Gilbert’s Request to Rescind Ruling Denying Request to Amend List of Testimony and Exhibits and Response to Idaho Power Company’s Request for Clarification at 4.

1 determination on a particular identified issue do not carry over to the evidentiary record of the
2 contested case and/or to other identified issues to be adjudicated that were not subject to summary
3 determination.”³⁰

4 Although the Hartell Transcript was excluded from the evidentiary record for LU-7 and
5 LU-8, the Hearing Officer nonetheless stated that she reviewed the Hartell Transcript in connection
6 with LU-7 and LU-8, and nothing contained therein would have changed her conclusions:

7 The ALJ has reviewed the Hartell deposition transcript (as offered in by Ms. Gilbert
8 on June 25, 2021 in opposition to Idaho Power’s Motion for Summary
9 Determination on Issue LU-5, without deposition exhibits attached). In the
10 deposition, Mr. Hartell explained Union County’s process for determining
11 predominant use of land parcels and identifying forest land in the Timber-Grazing
12 zone. He also explained that Union County’s review of Idaho Power’s predominant
13 use analysis did not result in any adjustments to the predominant use value that
14 Idaho Power initially assigned to parcels in the Timber-Grazing zone. The ALJ
15 confirms that nothing in the Hartell deposition transcript would change her
16 conclusions and determinations on Issues LU-7 and LU-8.³¹

17 **2. Background Regarding Forest Lands in the Timber-Grazing Zone in Union**
18 **County**

19 As Idaho Power explained in its Closing Arguments,³² the two counties with forestland in
20 the project area for the Boardman to Hemingway transmission line project (“B2H” or the
21 “Project”) are Umatilla County and Union County, and in those counties, the relevant zoning is a
22 hybrid farm-forest zone.³³ Because the forestland in the Project area occurs in a hybrid farm-forest
23 zone, the counties may allow uses that are permissible in *either* Exclusive Farm Use (“EFU”) zones

³⁰ Ruling on Gilbert’s Request to Rescind Ruling Denying Request to Amend List of Testimony and Exhibits and Response to Idaho Power Company’s Request for Clarification at 4.

³¹ Proposed Contested Case Order at 179, n. 174.

³² Idaho Power’s Closing Arguments for Contested Case Issues LU-4, LU-7, LU-8, LU-9, and LU-11 at 53-55 (Feb. 28, 2022).

³³ ASC Exhibit K at K-129, K-204 (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28. Page 138, 213 of 614) (Table K-12 for Umatilla County and Table K-16 for Union County).

1 or in Goal 4 forestlands, consistent with the applicable requirements for those uses.³⁴ In other
2 words, the statewide regulations grant each county discretion to determine whether to permit
3 agricultural uses, forest uses, or a combination of the two uses in hybrid farm-forest zones.³⁵ Both
4 Union County and Umatilla County required Idaho Power to perform a predominant use analysis
5 to determine whether the parcels crossed by the Project are predominantly agricultural or
6 forestland.³⁶ The counties then relied on this predominant use analysis to determine whether the
7 development standards for Goal 3 or Goal 4 apply—in other words, whether the transmission line
8 would be analyzed as a use subject to an alternatives analysis in accordance with ORS 215.275
9 (Goal 3) or a conditional use in accordance with OAR 660-006-0025(4)(q) (Goal 4).³⁷

10 As Idaho Power explained in its Closing Arguments, in Union County, the zone containing
11 forest lands is called the Timber-Grazing Zone, which is a hybrid zone and includes both farm and
12 forestlands.³⁸ Union County requires that Timber-Grazing zoned land be evaluated as agriculture
13 or forestland based on the predominant use of the parcels.³⁹ To make that determination in this
14 case, Idaho Power worked closely with Union County to analyze the predominant use on each of
15 the 61 parcels within the Site Boundary that are located wholly or partially within the Timber-

³⁴ OAR 660-006-0050(2).

³⁵ OAR 660-006-0050(2).

³⁶ ASC, Exhibit K at K-154, K-229 (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28. Page 163, 238 of 614).

³⁷ ASC, Exhibit K at K-154, K-229 (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28. Page 163, 238 of 614).

³⁸ Idaho Power's Closing Arguments for Contested Case Issues LU-4, LU-7, LU-8, LU-9, and LU-11 at 54.

³⁹ UCZPSO 1.08 defines predominant use as “the most common use of a parcel when differentiating between farmland and forest land. In determining predominant use NRCS Soil Conservation Service soil maps will be used to determine soil designations and capabilities. The results of this process will be the most important method in determining the predominant use of the parcel. Other factors which may contribute to determining predominant use include parcel characteristics such as a commercial stand of timber, and the current use of the property. Removing a commercial stand of timber from a property will not result in a conversion of predominant use unless the property is disqualified as forest land by the Oregon Department of Forestry * * *.” See ASC, Exhibit K at K-229 (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28. Page 238 of 614).

1 Grazing Zone.⁴⁰ To determine the predominant use on each parcel, the first step is to analyze data
2 from the Natural Resources Conservation Service (“NRCS”) Soil Survey Geographic Database
3 (“SSURGO”) along with the Union County tax lot data (parcel data) and aerial photography.⁴¹
4 Using geographic information system (“GIS”) mapping software and the SSURGO database,
5 Idaho Power determined which SSURGO soil type comprised the most acres within each parcel.⁴²
6 This analysis resulted in a preliminary predominant use value for each parcel within the Site
7 Boundary based on SSURGO soils data.⁴³

8 For the second step of the analysis, Union County then reviewed each parcel’s preliminary
9 predominant use value against 2011 aerial photography and tax lot records and analyzed the
10 predominant use in comparison with the current land use.⁴⁴ Importantly, however, in the Timber-
11 Grazing Zone, Union County did not adjust any of the preliminary predominant use values through
12 its review process.⁴⁵ Accordingly, the soil type/soil capability was the deciding factor in
13 determining whether a parcel should be considered farm or forestland. It should be noted that for
14 18 of 61 parcels, SSURGO data was not available, and therefore the above analysis could not be
15 performed.⁴⁶ However, these 18 parcels are located in the vicinity of the Wallowa-Whitman
16 National Forest and Idaho Power conservatively assumed that all 18 parcels should be analyzed as

⁴⁰ ASC, Exhibit K at K-229 (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28. Page 238 of 614).
⁴¹ ASC, Exhibit K at K-229 (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28. Page 238 of 614).
⁴² ASC, Exhibit K at K-229 (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28. Page 238 of 614).
⁴³ ASC, Exhibit K at K-229 (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28. Page 238 of 614).
⁴⁴ ASC, Exhibit K at K-229-230 (ODOE – B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28. Page 238-239 of 614).
⁴⁵ ASC, Exhibit K at K-230 (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28. Page 239 of 614).
⁴⁶ ASC, Exhibit K at K-230 (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28. Page 239 of 614).

1 forestlands.⁴⁷ In summary, in Union County, Idaho Power relied primarily on the soil data to
2 determine predominant use, validated the soil data through review by Union County, and to the
3 extent that the soil data was not available, Idaho Power made conservative assumptions that the
4 land should be classified as forestland.

5 **3. Irene Gilbert, LU-5, Exception 1 (Issue Statement)**

6 Ms. Gilbert did not number her exceptions, so for the reader’s convenience, Idaho Power
7 has numbered each of her arguments as a separate exception.

8 In her Exception 1, Ms. Gilbert states her issue as: “The applicant relied upon Union
9 County Administrative Rules UZPSO as stated on Page 148 of the Draft Proposed Order. This
10 resulted in the incorrect identification of forest land relying upon the predominant use rather than
11 the soil class to identify forest [l]and in Union County.”⁴⁸ To the extent that Ms. Gilbert is
12 challenging the statement of her issue for LU-5 (or LU-7 or LU-8), that challenge is untimely—
13 and in fact is late by over a year and eight months.

14 The Hearing Officer issued her order identifying the limited parties’ contested case issues
15 on October 29, 2020.⁴⁹ Pursuant to OAR 345-015-0016(6), any party or limited party had seven
16 days to appeal the Hearing Officer’s determinations.⁵⁰ Any determination in the Hearing Officer’s

⁴⁷ ASC, Exhibit K at K-230 (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28. Page 239 of 614). Idaho Power’s calculations and conclusions regarding the predominant use of lands within the A-4 zone are summarized in ASC, Table K-20 (Timber-Grazing Zone Predominant Uses); and Table LU-5: Union County Timber-Grazing Zone Predominant Uses. See Proposed Order at 160-161 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 167-168 of 10016).

⁴⁸ Irene Gilbert Exception for LU-5 at 1.

⁴⁹ Order on Petitions for Party Status, Authorized Representatives and Issues for Contested Case at 46 (Oct. 29, 2020) (finding that Ms. Gilbert had properly raised an issue asking “Whether the Draft Noxious Weed Plan (Proposed Order Attachment P1-5) adequately ensures compliance with the weed control laws, ORS 569.390 (owner or occupant to eradicate weeds) ORS 569.400 (enforcement), and ORS 569.445 (duty to clean machinery).”).

⁵⁰ See Order on Petitions for Party Status, Authorized Representatives and Issues for Contested Case at 85 (explaining parties’ appeal rights).

1 order became final if the limited party failed to appeal within that time.⁵¹ Ms. Gilbert filed an
2 appeal with the Council challenging several aspects of the Hearing Officer’s order, but she did not
3 appeal the issue statement of LU-5, LU-7, or LU-8.⁵² After the issues were identified in the
4 Hearing Officer’s Order on Party Status, Authorized Representatives and Issues for Contested
5 Case, the parties and limited parties engaged in over 20 months of litigation—including discovery,
6 motions for summary determination, multiple rounds of testimony, cross-examination hearing, and
7 briefing—addressing the issue statements identified in this ruling. Ms. Gilbert would have the
8 Council ignore the significant amount of effort that has been put into addressing these issues to
9 date, and instead seek to re-start the proceeding from scratch—even though she had the opportunity
10 to appeal the statement of her issue but did not do so.

11 Additionally, the Council has already addressed a related argument and determined that the
12 Hearing Officer’s issue statements are final at this point and cannot be revised. Specifically, earlier
13 in this contested case, limited party Michael McAllister filed an interlocutory appeal of the Hearing
14 Officer’s ruling that had initially granted summary determination of R-2, arguing that the issue he
15 had raised in his comments on the Draft Proposed Order (“DPO Comments”) was broader than the
16 issue stated in the Hearing Officer’s Order on Case Management.⁵³ In its order on
17 Mr. McAllister’s appeal, the Council rejected Mr. McAllister’s argument because the “issue
18 statement has been ruled upon by the ALJ and is therefore final.”⁵⁴ Similarly, the issue statements

⁵¹ OAR 345-015-0016(6) (“The hearing officer’s determination on a request to participate as a party or limited party is final unless the requesting person submits an appeal to the Council within seven days after the date of service of the hearing officer’s determination.”).

⁵² Irene Gilbert Appeal of Denial of Full Party Status (Nov. 5, 2020).

⁵³ Michael McAllister’s Interlocutory Appeal of the Ruling and Order on Motions for Summary Determination of Contested Case Issues FW-13, R-2, and SP-2 at 3 (Aug. 10, 2021).

⁵⁴ EFSC Order on Interlocutory Appeal of Administrative Law Judge’s Ruling on MSD for Limited Party McAllister’s Issues FW-13, SP-2, and R-2 at 12-13 (Sept. 17, 2021).

1 for LU-5, LU-7, and LU-8 are final and the Council should reject Ms. Gilbert’s attempts to redefine
2 the issue.

3 For these reasons, Ms. Gilbert’s exception has not identified any error in the Hearing
4 Officer’s findings of fact or conclusions of law and Idaho Power requests that the Council adopt
5 without modification the Hearing Officer’s findings and conclusions of law relevant to LU-5,
6 LU-7, and LU-8.

7 **4. Irene Gilbert, LU-5, Exception 2 (Use of County Procedures)**

8 In her Exception 2, Irene Gilbert asserts that she is relying on previously submitted
9 documents and legal references which “preclude the use of the county procedures[.]”⁵⁵ As an
10 initial matter, Ms. Gilbert’s argument is not tied to any specific exceptions to the Proposed
11 Contested Case Order as required by OAR 345-015-0085(5), and her claim should therefore be
12 rejected.⁵⁶ Nevertheless, should the Council wish to consider Ms. Gilbert’s argument, Idaho
13 Power addresses her claim below.

14 Ms. Gilbert provides no specific citation, and as Ms. Gilbert did not file any testimony on
15 this issue, Idaho Power understands she is likely referring to arguments in her briefing that there
16 was a change in state land use law that would preclude the use of the Union County Zoning,
17 Partition, and Subdivision Ordinance (“UCZPSO”). Idaho Power addressed this issue in its
18 briefing, and repeats that discussion for the reader’s convenience.

19 In her Closing Arguments, Ms. Gilbert repeatedly argued that the Council cannot apply the
20 UCZPSO because it has not been updated to comply with changes in state law that occurred in

⁵⁵ Irene Gilbert Exception for LU-5 at 1.

⁵⁶ 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.”).

1 2008 and 2011.⁵⁷ However, Ms. Gilbert did not specifically identify what portions of the state law
2 changed in 2008 and 2011, nor the substance of those changes, nor did Ms. Gilbert identify which
3 portions of the UCZPSO she alleged are inconsistent with those changes. Instead, Ms. Gilbert
4 referenced the dates of the Union County Comprehensive Plan (1978) and Pilot Program Chart
5 (1993) as predating some unspecified 2008 and 2011 changes in state law.⁵⁸ Because Ms. Gilbert
6 failed to provide a cogent argument to which Idaho Power could respond, Idaho Power requested
7 that the Hearing Officer conclude that her arguments regarding the UCZPSO were unpersuasive
8 and should be rejected.⁵⁹ The Hearing Officer agreed that Ms. Gilbert’s contentions were without
9 merit, and Idaho Power did not err in applying the UCZPSO to identify the amount of forestland
10 in Union County potentially impacted by the proposed facility.⁶⁰ Idaho Power asks that the
11 Council affirm the Hearing Officer’s conclusion on this issue.

12 For these reasons, Ms. Gilbert’s exception has not identified any error in the Hearing
13 Officer’s findings of fact or conclusions of law and Idaho Power requests that the Council adopt
14 without modification the Hearing Officer’s findings and conclusions of law relevant to LU-5,
15 LU-7, and LU-8.

16 **5. Irene Gilbert, LU-5, Exception 3 (Threshold for Identifying Forest Lands)**

17 In her Exception 3, Irene Gilbert asserts that she is relying on previously submitted
18 documents and legal references which “require evaluation of soil types with timber production

⁵⁷ Irene Gilbert’s Closing Brief LU-7 and LU-8 at 7, 13, 22, 24, 25, 29

⁵⁸ Irene Gilbert’s Closing Brief LU-7 and LU-8 at 29.

⁵⁹ ⁵⁹ Second Order on Case Management 7 (“A party or limited party challenging a finding or conclusion in the Proposed Order must provide factual testimony or evidence to substantiate the claim asserted. Unsubstantiated factual argument(s) or legal conclusions are insufficient to demonstrate the Applicant’s failure to establish compliance with any applicable standard.”); 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.”).

⁶⁰ Proposed Contested Case Order at 175.

1 capacity of 20 cubic feet per acre (“cf/ac/yr”) to be considered as forest land absent other
2 limitation.”⁶¹ As an initial matter, Ms. Gilbert’s argument is not tied to any specific exceptions to
3 the Proposed Contested Case Order as required by OAR 345-015-0085(5), and her claim should
4 therefore be rejected.⁶² Nevertheless, should the Council wish to consider Ms. Gilbert’s argument,
5 Idaho Power addresses her claim below.

6 Idaho Power fully responded to this issue in its briefing, and repeats that discussion for the
7 reader’s convenience. In her briefing, Ms. Gilbert did not cite any statute or administrative rule
8 that would require all lands consisting of soil capable of producing at least 20 cf/ac/yr of timber to
9 be designated as forestlands. The one rule cited by Ms. Gilbert, OAR 660-033-0130(4)(c)(B)(iii),
10 relates to the siting of a non-farm dwelling in land zoned for *agricultural* use and is not applicable
11 to the predominant use analysis in the Timber-Grazing zone.⁶³ Additionally, although the Land
12 Use Board of Appeals (“LUBA”) has not addressed this specific issue regarding the predominant
13 use of parcels in agriculture/forest zones, LUBA has determined that in the context of an
14 amendment to forest inventories included in the applicable land use plan, the Land Conservation
15 Development Commission (“LCDC”) rules do not include “bright-line” thresholds.⁶⁴ Specifically,
16 LUBA has determined that the LCDC “has not established a threshold or thresholds for the level
17 of cf/ac/yr productivity that qualifies land as suitable for commercial forest use.”⁶⁵ Therefore,

⁶¹ Irene Gilbert Exception for LU-5 at 1.

⁶² 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.”).

⁶³ As discussed below, Ms. Gilbert cites only a rule governing siting non-farm dwellings in *agricultural* lands.

⁶⁴ *Just v. Linn County*, LUBA No. 2009-068 at 10 (Nov. 9, 2009).

⁶⁵ *Just v. Linn County*, LUBA No. 2009-068 at 10 (rejecting the assertion that LCDC rules have a “bright-line” requirement that lands with a productivity of over 20 cf/ac/yr be treated as forestlands, even though the EFU statutes provide “some indication” that the legislature may view such lands as suitable for commercial forest use). In *Just*, a landowner sought an amendment to the comprehensive plan changing the zoning for the property in question from an

1 even if the LUBA opinions that Ms. Gilbert cites were relevant to the predominant use analyses at
2 issue in this case, those opinions still would not support Ms. Gilbert’s assertions that any parcel
3 consisting of soil capable of producing at least 20 cf/ac/yr of timber must be designated as
4 forestlands.

5 For these reasons, Ms. Gilbert’s exception has not identified any error in the Hearing
6 Officer’s findings of fact or conclusions of law and Idaho Power requests that the Council adopt
7 without modification the Hearing Officer’s findings and conclusions of law relevant to LU-5,
8 LU-7, and LU-8.

9 **6. Irene Gilbert, LU-5, Exception 4 (Forest Impacts and Landowner**
10 **Compensation)**

11 In her Exception 4, Irene Gilbert asserts that she is relying on previously submitted
12 documents and legal references which show that “failing to address actual forest impacts in other
13 rule decisions and failing to require landowner compensation to be consistent with the mitigation
14 credited to the developer on forest lands.”⁶⁶ As an initial matter, Ms. Gilbert’s argument is not
15 tied to any specific exceptions to the Proposed Contested Case Order as required by
16 OAR 345-015-0085(5), and her claim should therefore be rejected.⁶⁷ Nevertheless, should the
17 Council wish to consider Ms. Gilbert’s argument, Idaho Power addresses her claim below.

agriculture/forest zone to a non-resource zone, meaning that the property would be neither agricultural nor forestlands. *Id.* at 2-3. A petitioner challenged that proposed amendment, relying on OAR 660-006-0010 to argue that the property must be inventoried as Goal 4 forestlands because the parcel consisted of soils capable of producing 57 cf/ac/yr. *Id.* at 8. LUBA concluded that neither LCDC rules nor LUBA case law established bright-line productivity standards for identifying forest lands. *Id.* at 10.

⁶⁶ Irene Gilbert Exception for LU-5 at 1.

⁶⁷ 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.”).

1 Idaho Power fully responded to this issue in its briefing, and repeats that discussion for the
2 reader’s convenience. In her briefing, Ms. Gilbert questioned whether there was a determination
3 of the increased cost or required changes in forest practices on forestlands. Idaho Power described
4 the possible changes in forest practices in the Right-of-Way Clearing Assessment, as well as the
5 ways in which costs may increase or mitigation may be required.⁶⁸ For example, Idaho Power
6 evaluated the potential impacts to surrounding lands, including potential impacts to future timber
7 harvest operations, which may include (among other examples) the need for Idaho Power to
8 provide timber harvesting assistance for removal of trees in areas with “minimum approach
9 distances”⁶⁹ on the edge of the right-of-way (“ROW”) during operations,⁷⁰ and impacts to the
10 growth of future vegetation such as potential loss in tree volume along the new edges of the ROW
11 due to exposure from tree removal in the ROW.⁷¹ On the other hand, Idaho Power *has not* provided
12 a calculation of the potential increased costs for each parcel resulting from potential changes in
13 forest practices, because this inquiry is necessarily parcel-specific and will be determined as part
14 of the easement acquisition process—which occurs outside of the Council’s site certificate review
15 process.⁷² However, it appeared from Ms. Gilbert’s briefing that she may have conflated the

⁶⁸ Proposed Order, Attachment K-2: Right of Way Clearing Assessment at 13-15 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9093 of 10016).

⁶⁹ Vegetation management practices along the ROW will be conducted in accordance with the Transmission Vegetation Management Program in Appendix A of Exhibit P1, Attachment P1-4. Minimum approach distances are the distances that a qualified line-clearance arborists or line clearance arborist trainees may be stationed from an energized transmission line during tree removal. *See* Proposed Order, Attachment P1-4, Appendix A at 92 (ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9266 of 10016).

⁷⁰ Proposed Order, Attachment K-2: Right of Way Clearing Assessment at 14 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9094 of 10016).

⁷¹ Proposed Order, Attachment K-2 at 15 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9095 of 10016).

⁷² Proposed Order at 232 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 239 of 10016) (“The applicant notes that the actual value of a particular landowner’s timber would be valued based on a timber appraisal completed at the time of land acquisition. As further described below, in addition to the land acquisition process, which would provide compensation for the economic loss of timber harvest area, the applicant proposes mitigation measures to minimize potential impacts to, and the cost of, accepted forest practices.”)

1 compensation to be paid to landowners as part of the easement acquisition process with the
2 calculation of the impact of the potential economic revenue loss for Umatilla County and Union
3 County as a result of the permanent conversion of the acreage dedicated to the right-of-way to a
4 non-forest use.⁷³

5 As explained in the Proposed Order, the analysis regarding economic impacts at the
6 county-scale were provided as context for the significance of the removal of land from timber
7 harvest potential at a county level in Union and Umatilla Counties, respectively.⁷⁴ Thus, the
8 calculation of potential revenue loss *is not* a calculation of mitigation or potential compensation
9 to landowners. The Proposed Order acknowledges this fact in the following statement describing
10 the process for determining compensation to landowners:

11 In addition [to Recommended Land Use Condition 16, requiring implementation of
12 the Right-of-Way Clearing Assessment], the applicant would compensate
13 underlying landowners for the loss of land and timber production opportunity, for
14 the life of the facility, based on a certified appraisal of the land value. Compensation
15 would be implemented via private easement agreement or through negotiated
16 settlement. Because this would occur during landowner negotiation or
17 condemnation proceedings under the Oregon Public Utilities Commission, it is not
18 specifically imposed as a site certificate condition or mitigation plan requirement.
19 The Department recommends, however, that Council consider these processes,
20 which would be outside of EFSC jurisdiction, to also provide mitigation consistent
21 with OAR 345-010-0010(33) and would reduce potential impacts to accepted forest
22 practices.⁷⁵

23 Accordingly, Ms. Gilbert’s assertion in her exception that Idaho Power failed “to address
24 actual forest impacts in other rule decisions and failing to require landowner compensation to be

⁷³ Irene Gilbert Closing Brief LU-7 and LU-8 at 9.
⁷⁴ Proposed Order at 232-233 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 239 of 10016); *see also* Hearing Officer’s Ruling and Order on MSD for LU-2, LU-3, LU-5 and LU-6 at 15-16.
⁷⁵ Proposed Order at 235 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 242 of 10016).

1 consistent with the mitigation credited to the developer on forest land,” is incorrect, and should be
2 rejected.

3 For these reasons, Ms. Gilbert’s exception has not identified any error in the Hearing
4 Officer’s findings of fact or conclusions of law and Idaho Power requests that the Council adopt
5 without modification the Hearing Officer’s findings and conclusions of law relevant to LU-5,
6 LU-7, and LU-8.

7 **7. Irene Gilbert, LU-5, Exception 5 (Excluded Evidence)**

8 In her Exception 5 Irene Gilbert asserts that she is relying on previously submitted
9 documents and legal references which she asserts demonstrate that the Hearing Officer erred by
10 “failing [sic] to allow the use of exhibits and arguments in this case to be used in other contested
11 cases including LU-7 and LU-8.”⁷⁶ While Ms. Gilbert did not specify the particular portion of the
12 Proposed Contested Case Order that is the basis for exception, Idaho Power understands she is
13 likely objecting to the Hearing Officer’s determination to exclude the Hartell Transcript from
14 consideration in connection with LU-7 and LU-8.

15 As explained above, Ms. Gilbert did not file testimony or evidence regarding LU-7 and
16 LU-8 in this proceeding. However, on February 14, 2022, Ms. Gilbert requested that the Hearing
17 Officer amend the List of Testimony and Exhibits Admitted into the Contested Case Hearing
18 Record (“Exhibit List”) to include the Hartell Transcript.⁷⁷ The Hearing Officer denied
19 Ms. Gilbert’s request,⁷⁸ and Ms. Gilbert subsequently submitted an offer of proof requesting that

⁷⁶ Irene Gilbert Exception for LU-5 at 1.

⁷⁷ Email from Irene Gilbert to B2H Service List Re: Second Amended List of Testimony and Exhibits Admitted into the Contested Case Hearing Record - In the Matter of Boardman to Hemingway Transmission Line - OAH Case No. 2019-ABC-02833 (Feb. 14, 2022 at 5:51 p m.).

⁷⁸ See Response to Irene Gilbert’s Request to Amend List of Testimony and Exhibits (Feb. 16, 2022).

1 the Hearing Officer reconsider.⁷⁹ Idaho Power filed a request for clarification, stating that the
2 Company did not oppose Ms. Gilbert’s request to include the Hartell Transcript in the Exhibit List,
3 and also requested that the Hearing Officer clarify the basis for excluding the Hartell Transcript.⁸⁰
4 Idaho Power also requested that, in the event the Hearing Officer determines that the Hartell
5 Transcript may not appropriately be considered in connection with LU-7 and LU-8, that the
6 Hearing Officer nonetheless review the Hartell Transcript and include an assessment of whether
7 her findings would be changed had she considered the excluded document.⁸¹ The Hearing Officer
8 ultimately denied Ms. Gilbert’s request to amend the Exhibit List and determined that Ms. Gilbert
9 may not rely on the Hartell Transcript (or the exhibits referenced in the transcript) to support her
10 position on LU-7, LU-8, or LU-11 because she did not timely submit the Hartell Transcript as
11 evidence in support of her position on these issues.⁸² The Hearing Officer explained that the
12 Hartell Transcript (and other materials filed in support of or in opposition to MSDs) are not subject
13 to the evidentiary standards set forth in ORS 183.450 or OAR 137-003-0050, and in light of the
14 context in which such documents are offered, they are not weighed or evaluated for reliability.⁸³

15 In the Proposed Contested Case Order, the Hearing Officer affirmed her prior ruling.
16 Importantly, however, although the Hartell Transcript was excluded from the evidentiary record,
17 the Hearing Officer nonetheless stated that she reviewed the Hartell Transcript in connection with
18 LU-7 and LU-8, and nothing contained therein would have changed her conclusions:

⁷⁹ See Gilbert Offer of Proof (Feb. 19, 2022).

⁸⁰ Idaho Power’s Request for Clarification and Response to Irene Gilbert’s Offer of Proof at 3-4 (Feb. 24, 2022).

⁸¹ Idaho Power Company’s Request for Clarification and Response to Irene Gilbert’s Offer of Proof at 2-4.

⁸² Ruling on Gilbert’s Request to Rescind Ruling Denying Request to Amend List of Testimony and Exhibits and Response to Idaho Power’s Request for Clarification at 5 (Feb. 25, 2022).

⁸³ Ruling on Gilbert’s Request to Rescind Ruling Denying Request to Amend List of Testimony and Exhibits and Response to Idaho Power’s Request for Clarification at 4.

1 The ALJ has reviewed the Hartell deposition transcript (as offered in by Ms. Gilbert
2 on June 25, 2021 in opposition to Idaho Power’s Motion for Summary
3 Determination on Issue LU-5, without deposition exhibits attached). In the
4 deposition, Mr. Hartell explained Union County’s process for determining
5 predominant use of land parcels and identifying forest land in the Timber-Grazing
6 zone. He also explained that Union County’s review of Idaho Power’s predominant
7 use analysis did not result in any adjustments to the predominant use value that
8 Idaho Power initially assigned to parcels in the Timber-Grazing zone. The ALJ
9 confirms that nothing in the Hartell deposition transcript would change her
10 conclusions and determinations on Issues LU-7 and LU-8.⁸⁴

11 Thus, even if the Hearing Officer would have allowed the Hartell Transcript as evidence, it would
12 not have impacted the Hearing Officer’s conclusions.

13 For these reasons, Ms. Gilbert’s exception has not identified any error in the Hearing
14 Officer’s findings of fact or conclusions of law and Idaho Power requests that the Council adopt
15 without modification the Hearing Officer’s findings and conclusions of law relevant to LU-5,
16 LU-7, and LU-8.

17 **8. Irene Gilbert, LU-5, Exception 6 (Unspecific Reference to Soils Testimony)**

18 In her Exception 6, Irene Gilbert asserts that she is “also incorporating material from the
19 soils testimony and contested cases which relate to this issue.”⁸⁵ As an initial matter, Ms. Gilbert’s
20 statement is not tied to any specific exception to the Proposed Contested Case Order as required
21 by OAR 345-015-0085(5), and her claim should therefore be rejected.⁸⁶ Nevertheless, should the
22 Council wish to consider Ms. Gilbert’s assertion, Idaho Power responds below.

23 Ms. Gilbert does not have standing on any of the Soil Protection Standard issues in this
24 case, and moreover, in her exception, did not make any specific reference to the soils testimony or

⁸⁴ Proposed Contested Case Order at 179, n. 174.

⁸⁵ Irene Gilbert Exception for LU-5 at 1.

⁸⁶ 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.”).

1 include a citation to any specific page. Because Ms. Gilbert did not provide a specific page
2 reference, Idaho Power cannot respond. Thus, any exception that Ms. Gilbert may wish to make
3 that is based on evidence provided in connection with the Soil Protection Standard issues is both
4 improper and insufficiently specific, and should be rejected.

5 For these reasons, Ms. Gilbert’s exception has not identified any error in the Hearing
6 Officer’s findings of fact or conclusions of law and Idaho Power requests that the Council adopt
7 without modification the Hearing Officer’s findings and conclusions of law relevant to LU-5,
8 LU-7, and LU-8.

9 **9. Irene Gilbert, LU-5, Exception 7 (LUBA Cases)**

10 In her Exception 7, Ms. Gilbert asserts “Court decisions regarding the definition of Forest
11 Land: Provided to support the need to allow an exception to the Proposed Contested Case Order
12 regarding Forest Land Issues.”⁸⁷ Ms. Gilbert then lists a series of LUBA cases that she asserts
13 support her position that Oregon law requires that parcels containing soil types with a timber
14 production capacity of 20 cf/ac/yr to be considered as forest land.⁸⁸ Idaho Power will address
15 these cases in turn.

16 Ms. Gilbert first cites *Potts v. Clackamas County*⁸⁹ for the proposition that:

17 Whether property is “suitable for commercial forest uses under Goal 4 definition
18 depends upon the properties capacity for production of commercial tree species,
19 not necessarily the past or current level of production, or whether the property is or
20 could be part of a commercial-scale timber business.”⁹⁰

⁸⁷ Irene Gilbert Exception for LU-5 at 1.

⁸⁸ Irene Gilbert Exception for LU-5 at 1-2.

⁸⁹ LUBA No. 2001-201 (Apr. 1, 2002).

⁹⁰ Irene Gilbert Exception for LU-5 at 2.

1 However, the issue in *Potts* was a comprehensive plan amendment, and not a predominant
2 use analysis,⁹¹ and in any event Ms. Gilbert has not explained how Idaho Power’s predominant
3 use analyses are inconsistent with the underlying rationale in *Potts*. An analysis of the soils data—
4 which Idaho Power performed⁹²—would address, in part, the capability for production of tree
5 species. Ms. Gilbert seemingly ignores the fact that Idaho Power’s predominant use
6 determinations *were based on the soil class*.

7 Ms. Gilbert next cites *Rogue Advocates v. Josephine County*⁹³ and provides the following
8 description of the case:

9 This case decision also states “Because the Goal 4 rule was amended in 2008 and
10 2011 to provide a 8)(sforest [sic] land subject to Goal 4, the county cannot simply
11 apply its acknowledged comprehensive plan standards for identifying forest land--
12 ----” Because OAR 660-006-0010 provides a set of prioritized, mandatory
13 sources of data and a prescribed alternative method that must be used to determine
14 whether land is forest land subject to Goal 4, the applicability of OAR 660-006-
15 0010 cannot be avoided by concluding, based on different data or different
16 methodology, that land is not forest land subject to Goal 4”⁹⁴

17 Ms. Gilbert cites *Rogue Advocates* for the proposition that a county cannot apply its
18 comprehensive plan if it inconsistent with Goal 4.⁹⁵ *Rogue Advocates* considered a post-
19 acknowledgment amendment to a land use plan, and concluded that the plan amendment must be
20 consistent with amended statewide land use requirements.⁹⁶ This case has limited relevance as it
21 applies to a plan amendment rather than a predominant use determination. Specifically, the plan
22 amendment applies OAR 660-006-0010(2) to discuss the process of identifying Goal 4

⁹¹ LUBA No. 2001-201 at 2.
⁹² ASC, Exhibit K at K-229 – K-230 (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28. Page 238-39 of 614).
⁹³ LUBA No. 2011-037 (July 26, 2012).
⁹⁴ Irene Gilbert Exception for LU-5 at 2.
⁹⁵ Gilbert LU-5 Exception at 2.
⁹⁶ LUBA No. 2011-037 at 51.

1 forestland.⁹⁷ However, those provisions are relevant to identifying “lands suitable for commercial
2 uses” in OAR 660-006-0010(2) apply only “where a plan amendment is proposed.” Here, there is
3 no plan amendment to Union County’s comprehensive plan at issue. Rather, consistent with the
4 existing plan, Idaho Power has assessed each impacted parcel as the hybrid Timber-Grazing Zone.

5 Ms. Gilbert next cites *Rogue Advocates v. Jackson County*⁹⁸ for the proposition that:

6 Local government decisions which verify or alter non-conforming uses of property
7 must apply the appropriate statutory framework, which includes ORS 197.763
8 (notice and hearing requirements), ORS 215.130 (state requirements for
9 nonconforming use statutes), and the applicable local land development
10 ordinance.⁹⁹

11 Ms. Gilbert appears to cite *Rogue Advocates v. Jackson County* for the proposition that a county
12 must comply with the applicable procedural requirements when verifying a non-conforming use.
13 However, Ms. Gilbert’s assertion is not relevant to resolution of LU-5 for two reasons. *First*, the
14 Project is not a non-conforming use.¹⁰⁰ Rather, it is permissible in forest lands as a conditional
15 use.¹⁰¹ Therefore, there is no basis to assert that ORS 215.130 applies. *Second*, Ms. Gilbert has
16 not identified any basis to assert that Union County or EFSC failed to follow any procedural
17 requirements when reviewing the Project. For these reasons, Ms. Gilbert’s reference to *Rogue*
18 *Advocates v. Jackson County* has failed to identify any error in the Hearing Officer’s Proposed
19 Contested Case Order.

⁹⁷ LUBA No. 2011-037 at 51-52.

⁹⁸ LUBA Nos. 2015-097/2016-009 (July 14, 2016). Ms. Gilbert refers to this case as “*Rogue Advocates v. Josephine County*” in her exception, but based on the quoted text and LUBA Opinion number reference, it appears the case Ms. Gilbert intends to reference is actually *Rogue Advocates v. Jackson County*. To avoid confusion with *Rogue Advocates*, discussed above, Idaho Power refers to this order by its full title.

⁹⁹ Irene Gilbert Exception for LU-5 at 2.

¹⁰⁰ A nonconforming use is an existing use or development that was lawful at the time it was established, but no longer complies with the zoning ordinance as a result of changes to the ordinance. *City of Mosier v. Hood River Sand, Gravel & Ready-Mix, Inc.*, 206 Or App 292, 303 (2006).

¹⁰¹ OAR 660-006-0025(4)(q).

1 Ms. Gilbert next cites *Wetherell v. Douglas County* for the proposition that: “Goal 4 does
2 not permit local governments to determine whether land is ‘forest land’ subject to the goal based
3 on the absence of timber productivity ratings for soils or the assumption that unrated soils cannot
4 produce timber.”¹⁰² Like *Potts*, discussed above, *Wetherell* related to a landowner’s proposal to
5 amend the county’s comprehensive plan.¹⁰³ The county relied on an expert witness, who relied
6 heavily on the fact that the NRCS categorizations for the soil types found within the parcel do not
7 provide any measure of timber productivity to conclude that the parcel should not be zoned as
8 forest land.¹⁰⁴ LUBA determined that this was inconsistent with OAR 660-006-0010, which
9 requires a county to rely on site productivity data to determine whether lands should be zoned as
10 forest land.¹⁰⁵ Similar to the discussion of *Potts* above, *Wetherell* is inapplicable to this case
11 because there is no plan amendment at issue in this contested case. Idaho Power does not challenge
12 that the parcels in question are zoned hybrid Timber-Grazing and the Company followed the
13 county’s guidance regarding the application of the predominant use analysis in the hybrid zone.

14 Finally, Ms. Gilbert cites *Cattoche v. Lane County*¹⁰⁶ for the proposition that: “A county
15 errs by determining that land is not forest land simply because it is not predominantly forested.”¹⁰⁷
16 As an initial matter, this holding is not relevant to the predominant use analysis in Union County,
17 because Idaho Power did not base its predominant use determinations on whether a parcel was

¹⁰² Irene Gilbert Exception for LU-5 at 2.

¹⁰³ LUBA No. 2005-045 at 3 (Sept. 8, 2005).

¹⁰⁴ LUBA No. 2005-045 at 31.

¹⁰⁵ LUBA No. 2005-045 at 31.

¹⁰⁶ LUBA No. 2018-109 (May 22, 2019).

¹⁰⁷ Irene Gilbert Exception for LU-5 at 2.

1 forested. Rather, as discussed above, consistent with the UCZPSO, Idaho Power based its
2 predominant use determinations on the soil types present within the parcel.¹⁰⁸

3 Moreover, in *Cattoche*, LUBA was considering whether the county had satisfied its burden
4 to demonstrate that a parcel could be rezoned because it was no longer needed to protect identified
5 forest resources.¹⁰⁹ The fact that predominant use cannot be relied upon as the sole determining
6 factor when rezoning forest lands is not relevant to the analysis under OAR 660-006-0050(2),
7 which gives counties discretion to allow EFU uses, forest land uses, or both in hybrid zones. Union
8 County expressly requires an applicant to consider the predominant use of the parcel when
9 determining whether development in a hybrid agriculture/forest zone is subject to the Goal 3 or
10 the Goal 4 requirements.¹¹⁰ Therefore, Idaho Power did not err by considering the predominant
11 use of a parcel—based on the soil types present within the parcel—when determining whether to
12 apply the Goal 3 or Goal 4 analysis.

13 In sum, none of the cases cited by Ms. Gilbert supports her exception. For the reasons
14 discussed above, Ms. Gilbert’s exception has not identified any error in the Hearing Officer’s
15 findings of fact or conclusions of law and Idaho Power requests that the Council adopt without
16 modification the Hearing Officer’s findings and conclusions of law relevant to LU-5, LU-7, and
17 LU-8.

¹⁰⁸ ASC, Exhibit K at K-229 (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28. Page 238 of 614).

¹⁰⁹ LUBA No. 2018-109 at 34-35.

¹¹⁰ ASC, Exhibit K at K-229 (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28. Page 238 of 614) (quoting UCZPSO 5.03).

1 **10. Irene Gilbert, LU-5, Exception 8 (Oregon Statutes)**

2 Ms. Gilbert cites three statutes which she claims support her exceptions: ORS 469.504,
3 ORS 527.722, and ORS 197.250. As an initial matter, Ms. Gilbert’s references to these statutes
4 are not tied to any specific exception to the Proposed Contested Case Order as required by
5 OAR 345-015-0085(5), and her claim should therefore be rejected.¹¹¹ Nevertheless, should the
6 Council wish to consider Ms. Gilbert’s assertions, Idaho Power responds below.

7 Ms. Gilbert cites ORS 469.504 for the proposition that compliance with statewide planning
8 goals is required.¹¹² This is a correct reference to ORS 469.504, though Idaho Power would also
9 note that this same statute allows the Council to determine compliance with the statewide planning
10 goals by directly applying the statewide planning goals, or applying the applicable local
11 substantive criteria implementing the statewide planning goals. Additionally, ORS 469.504(2)
12 provides the Council with authority to take an exception to the statewide planning goals. Finally,
13 Ms. Gilbert has not provided any evidence demonstrating that Idaho Power failed to comply with
14 any statewide planning goals.

15 Ms. Gilbert next cites ORS 527.722 for the proposition that local governments cannot
16 “adopt any rules, regulations or ordinances or take any other actions that prohibit, limit, regulate,
17 subject to approval or in any other way affect forest practices on forestlands located outside of the
18 acknowledged urban growth boundary.”¹¹³ Ms. Gilbert is correct that the statute restricts local
19 governments from restricting forest practices on certain forestlands. However, to the extent that

¹¹¹ 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.”).

¹¹² Irene Gilbert Exception for LU-5 at 2.

¹¹³ Irene Gilbert Exception for LU-5 at 2.

1 Ms. Gilbert may be asserting that this statute forms a basis for invalidating the UCZPSO,
2 Ms. Gilbert has not articulated any portion of the UCZPSO that is contrary to the statute.
3 Specifically, as discussed above, the state regulations authorize local governments to allow either
4 farm or forest uses in hybrid farm-forest zones.¹¹⁴ Therefore, Union County’s rules authorizing
5 farm uses in parcels where the predominant use is agricultural. and forest uses in parcels where
6 the predominant use is forest land, is entirely consistent with the state regulations, and would not
7 operate to restrict forest practices.

8 Finally, Ms. Gilbert cites ORS 197.250 for the proposition that: “all comprehensive plans
9 and land use regulations adopted by a local government to carry out those comprehensive plans
10 and all plans, programs, rules or regulations affecting land use adopted by a state agency or special
11 district shall be in compliance with the goals within one year after the date those goals are approved
12 by the Land Conservation and Development Commission.”¹¹⁵ Again, Ms. Gilbert has correctly
13 captured the language in the statute, but has not articulated any portion of the UCZPSO that is
14 contrary to the statute or the statewide planning goals.

15 For these reasons, Ms. Gilbert’s exception has not identified any error in the Hearing
16 Officer’s findings of fact or conclusions of law and Idaho Power requests that the Council adopt
17 without modification the Hearing Officer’s findings of fact and conclusions of law relevant to LU-
18 5, LU-7, and LU-8.

¹¹⁴ OAR 660-006-0050(2).
¹¹⁵ Irene Gilbert Exception for LU-5 at 2.

1 **11. Irene Gilbert, LU-5, Exception 9 (Gilbert’s “Facts”)**

2 In her Exception 9, Ms. Gilbert provides a list of “facts” that she claims support her position
3 that the “Order on Summary Determination failed to address the Contested Case Issue which was
4 that the Developer and the Council are precluded by law and court decisions from using the Union
5 County Administrative Rules in identifying Forest Land for Goal 4 Compliance.”¹¹⁶ As an initial
6 matter, Ms. Gilbert’s references to statements are not tied to any specific exception to the Proposed
7 Contested Case Order as required by OAR 345-015-0085(5), and her claims should therefore be
8 rejected.¹¹⁷ Additionally, Ms. Gilbert misstates the issue. Issue LU-5 asked: “Whether calculation
9 of forest lands must be based on soil class or whether it is sufficient to consider acreage where
10 forest is predominant use.” Issue LU-5 did not specifically challenge any Union County ordinance,
11 and Ms. Gilbert’s collateral challenge to the UCZPSO is outside the scope of LU-5. Nevertheless,
12 should the Council wish to consider Ms. Gilbert’s assertions, Idaho Power responds below.

13 Ms. Gilbert did not provide specific page references to information in the record to support
14 her statements. Thus, any exception that Ms. Gilbert may wish to make that is based on these
15 statements is unsupported and should be rejected. Nonetheless, Idaho Power understands
16 Ms. Gilbert is likely referring to the Hartell Transcript. Because the Hartell Transcript was offered
17 in connection with LU-5 but not provided in connection with LU-7 and LU-8, the Council’s
18 consideration of the “facts” offered by Ms. Gilbert should be limited to the Council’s consideration
19 of LU-5. Ms. Gilbert’s factual assertions are listed below in **bold**, and Idaho Power’s responses
20 follow immediately after each assertion.

¹¹⁶ Irene Gilbert Exception for LU-5 at 2-3.

¹¹⁷ 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.”).

1 **1. The Planning Director, Scott Hartell, stated that he based the information he**
2 **provided to Idaho Power entirely upon the Local Rules.**¹¹⁸

3 Ms. Gilbert does not provide a specific reference to the Hartell Transcript. Nonetheless,
4 Idaho Power notes that in the June 10, 2021 deposition, Mr. Hartell also indicated that he provided
5 Excel files and GIS data to Idaho Power.¹¹⁹ Additionally, Mr. Hartell specifically stated that Idaho
6 Power “also had access to the soils database from the USDA, which has multiple tables with all
7 kinds of different information in them.”¹²⁰ As described in the ASC, Exhibit K, Idaho Power relied
8 on that data from the USDA—specifically the SSURGO database—when determining the
9 predominant use of the affected parcels.¹²¹

10 **2. He confirmed that the only document that he provided and which the decisions**
11 **regarding the cubic feet per acre per year of timber production based upon Soil**
12 **Type was Exhibit 1 entitled, “Pilot Program Soil Ratings for Union County, March**
13 **16, 1993”**¹²²

14 This statement is incorrect. In the deposition, Mr. Hartell also indicated that he provided
15 Excel files and GIS data to Idaho Power.¹²³ Additionally, the document that Ms. Gilbert refers to
16 here—Pilot Program Soil Ratings for Union County, March 16, 1993 (“Pilot Program Table”)—
17 was discussed at the June 10, 2021 deposition of Scott Hartell, but has *not* been offered into the
18 record in this case. Although this document was discussed at Mr. Hartell’s deposition, Ms. Gilbert
19 did not offer it as evidence in the testimony phase and, accordingly, Idaho Power has not had the
20 opportunity to provide testimony or analysis regarding this document, or to cross-examine
21 Ms. Gilbert or any other witness regarding the contents of the Pilot Program Table. Thus,

¹¹⁸ Irene Gilbert Exception for LU-5 at 3.

¹¹⁹ Hartell Transcript at 23-24.

¹²⁰ Hartell Transcript at 55-56.

¹²¹ ASC, Exhibit K at K-229 (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28. Page 238 of 614).

¹²² Irene Gilbert Exception for LU-5 at 3.

¹²³ Hartell Transcript at 23-24.

1 Ms. Gilbert’s reliance on the Pilot Program Table is highly prejudicial to Idaho Power. The
2 Hearing Officer did not consider the Pilot Program Table because it was not offered in the record
3 in this case.¹²⁴

4 Moreover, as discussed above, Ms. Gilbert’s assertion that Idaho Power’s determinations
5 were based solely on a table that Mr. Hartell provided is false. Idaho Power relied primarily on
6 SSURGO data to determine predominant use.¹²⁵

7 **3. He confirmed that he had identified three types of land use in the Timber/Grazing**
8 **Zone designation in Union County, and that the information in Exhibit 1 was**
9 **overlayed with the soil types from the GIS for the parcels being crossed by the**
10 **transmission line, resulting in a determination that the soil was primarily either**
11 **forest, Range or Agricultural land.**¹²⁶

12 Idaho Power understands this summary to be an accurate representation of Mr. Hartell’s
13 statements in the Hartell Transcript. However, because Idaho Power did not have an opportunity
14 to provide testimony or analysis responding to Mr. Hartell’s deposition, the Council should not
15 give weight to Ms. Gilbert’s factual assertions that rely on the Hartell Transcript. Moreover,
16 Ms. Gilbert has not explained how this factual assertion evidences any error in the Hearing
17 Officer’s analysis.

18 **4. Mr. Hartell stated that there was no determination of the annual cubic feet per year**
19 **of timber production for the soils that were identified on his chart as range or**
20 **agricultural land.**¹²⁷

21 This statement is incorrect. In the transcript at page 83, Ms. Gilbert notes that she is
22 confused about whether the agricultural or range lands have a soil capacity rating in the Pilot
23 Program Table, and Mr. Hartell indicates that he was not employed by Union County at the time

¹²⁴ Proposed Contested Case Order at 178.

¹²⁵ ASC, Exhibit K at K-229 (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28. Page 238 of 614).

¹²⁶ Gilbert LU-5 Exception at 3.

¹²⁷ Gilbert LU-5 Exception at 3.

1 that the county prepared the Pilot Program Table, and could not speak to whether the table
2 contained any specific thresholds.¹²⁸ Moreover, regardless of whether the Pilot Program Table
3 included productivity measurements for those soils, the SSURGO data that Idaho Power relied
4 upon included that data for many of the soils present.¹²⁹

5 **5. Scott Hartell confirmed in his deposition that the Union County rules were used to**
6 **determine Forest Land and that the only land with a timber production capacity**
7 **that was identified as “forest land” was that with a capacity of 63 cfay or greater**
8 **and that soil capacity was not determined for any land identified as Range or**
9 **Grazing land in the grazing/forest zone.**¹³⁰

10 Ms. Gilbert’s statement is incorrect and should be rejected for several reasons: (1)
11 Ms. Gilbert failed to raise this concern with specificity in her DPO Comments; (2) Ms. Gilbert
12 failed to produce any evidence during the testimony phase of this proceeding on this topic, and
13 Ms. Gilbert instead relies the Hartell Transcript; and (3) even if the Hearing Officer were to
14 consider the transcript of the Hartell Transcript, it is not clear from the record of that deposition
15 that Union County applied a 63 cf/ac/yr threshold.

16 *First*, Ms. Gilbert failed to raise this concern with specificity in her DPO Comments, and
17 the Hearing Officer concluded during the MSD phase that Ms. Gilbert failed to raise this issue in
18 her DPO Comments or petition.¹³¹ Accordingly, this issue may not properly be considered as part
19 of this contested case in accordance with ORS 469.370(5)(b) and OAR 345-015-0016(3).¹³²

20 *Second*, Ms. Gilbert failed to provide any testimony or evidence on this issue during the
21 testimony phase of this proceeding. By failing to provide testimony articulating the factual basis

¹²⁸ Hartell Transcript at 83-84.

¹²⁹ Hartell Transcript at 55-56.

¹³⁰ Irene Gilbert Exception for LU-5 at 3.

¹³¹ Ruling and Order on Motion for Summary Determination on Contested Case Issues LU-2, LU-3, LU-5, and LU-6 at 22.

¹³² Ruling and Order on Motion for Summary Determination on Contested Case Issues LU-2, LU-3, LU-5, and LU-6 at 22.

1 for her position, Idaho Power was deprived of the opportunity to introduce additional evidence
2 addressing this point. Indeed, the Hearing Officer noted this fact in a prior ruling, commenting
3 that, “[b]ecause Ms. Gilbert has waived her opportunity to submit any new evidence in support of
4 her position on Issues LU-7 and LU-8, Idaho Power and/or the Department have no direct
5 testimony or evidence to rebut on these two issues.”¹³³ There is no requirement in the Council’s
6 rules or the applicable substantive criteria from Union County that would require Idaho Power to
7 provide parcel-specific soil data in its ASC. Ms. Gilbert did not raise this issue in her DPO
8 Comments, and thus Idaho Power did not have an opportunity to address this issue before the
9 issuance of the Proposed Order. Ms. Gilbert failed to provide any testimony on this matter. Simply
10 put, Ms. Gilbert has failed to carry her burden to produce evidence,¹³⁴ and her approach of raising
11 this issue late in the proceeding—after the contested case has ended—is prejudicial to Idaho
12 Power.

13 *Third*, even if the Council were to consider the content from the Hartell Transcript, it is not
14 clear from the transcript whether Union County did in fact apply a 63 cf/ac/yr threshold in the
15 predominant use analysis in the Timber-Grazing zone,¹³⁵ or *even if they did*, whether it would have
16 made a difference with respect to the parcels analyzed.

17 **6. The Hearings Officer ignored the contested case issue and argued that the decisions**
18 **were consistent with the County rules including quoting multiple pages of the**
19 **Proposed Order which is the subject of the Contested Case request as supporting**
20 **her denial.**¹³⁶

¹³³ 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 10.

¹³⁴ OAR 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.”).

¹³⁵ See Transcript of Deposition of Scott Hartell page 82, line 20 – page 84, line 7 (June 10, 2021) (explaining that Mr. Hartell was not employed by Union County at the time that the county prepared the Pilot Program Table, and could not speak to whether the table contained any specific thresholds).

¹³⁶ Irene Gilbert Exception for LU-5 at 3.

1 Ms. Gilbert’s assertion is not sufficiently specific for Idaho Power to respond, nonetheless
2 Idaho Power comments that it is not improper for the Hearing Officer to quote from the Proposed
3 Order, particularly when, as here, the limited party did not file any evidence or testimony in support
4 of their position on an issue. As the Hearing Officer explained, the limited parties challenging
5 findings in the Proposed Order “must show how the Applicant failed to meet its burden with regard
6 to the siting standards and/or how the Department erred in its findings, conclusions and/or
7 recommended site certificate conditions.”¹³⁷ The Hearing Officer issued a ruling providing, where
8 a limited party failed to provide any testimony or evidence, only the evidence already in the ODOE
9 administrative record could be cited in support of the limited parties’ position on the issue.¹³⁸ With
10 these considerations in mind, because Ms. Gilbert failed to provide any evidence challenging
11 ODOE’s analysis in the Proposed Order, the Hearing Officer did not err when she quoted the
12 Proposed Order in her ruling on Idaho Power’s MSD of LU-5.

13 For these reasons, Ms. Gilbert’s exception has not identified any error in the Hearing
14 Officer’s findings of fact or conclusions of law and Idaho Power requests that the Council adopt
15 without modification the Hearing Officer’s findings of fact and conclusions of law relevant to
16 LU-5, LU-7, and LU-8.

¹³⁷ Second Order on Case Management at 7.

¹³⁸ 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 10 (Nov. 2, 2021) (“Because Ms. Gilbert has waived her opportunity to submit any new evidence in support of her position on Issues LU-7 and LU-8, Idaho Power and/or the Department have no direct testimony or evidence to rebut on these two issues. With regard to the proposed facility’s compliance with the Land Use standard, the B2H Project Record and the findings, conclusions, and/or recommended site certificate conditions in the Proposed Order speak for themselves.”).

1 **B. Issue LU-9**

2 The Hearing Officer granted limited party status to Sam Myers regarding LU-9, which
3 asks:

4 *Whether Applicant adequately analyzed the risk of wildfires from operation of the*
5 *proposed transmission lines, especially during “red flag” warning weather*
6 *conditions, and the impact the proposed transmission lines will have on Mr.*
7 *Myers’s ability to use an aerial applicator on his farmland.*¹³⁹

8 Issue LU-9 asks two questions 1) whether Idaho Power adequately analyzed the risk of
9 wildfires from operation of the proposed transmission lines, especially during “red flag” warning
10 weather conditions, and 2) whether Idaho Power adequately analyzed the impact the proposed
11 transmission lines will have on Mr. Myers’ ability to use an aerial applicator on his farmland.

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

13 Idaho Power adequately analyzed the risk of wildfires from operation of the proposed
14 transmission lines, especially during “red flag” warning weather conditions and the
15 impact the proposed transmission line may have on Mr. Myers’ ability to utilize aerial
16 application on his farmland.¹⁴⁰

17 Mr. Myers filed five exceptions to the Proposed Contested Case Order. For the reasons
18 discussed below, Mr. Myers’ exceptions do not identify any incorrect finding of fact or conclusion
19 of law, and for that reason Idaho Power requests that the Council adopt without modification the
20 Hearing Officer’s findings of fact and conclusions of law relevant to LU-9.

21 **12. Sam Myers, LU-9, Exception 1**

22 Mr. Myers takes exception to the following finding of fact in the Proposed Contested Case
23 Order:

¹³⁹ Second Order on Case Management at 5.

¹⁴⁰ Proposed Contested Case Order at 140.

1 Contrary to Mr. Myers’ contentions, Idaho Power adequately analyzed the risk of
2 project-related wildfire during Red Flag warning weather conditions. Although the
3 proposed facility is not yet under construction, Idaho Power analyzed the potential
4 fire risk zones along the proposed route in its 2022 Wildfire Mitigation Plan.¹⁴¹

5 Mr. Myers disputes the Hearing Officer’s conclusion because Idaho Power’s 2022 Public
6 Safety Power Shutoff (“PSPS”) Plan lists several different Oregon and Idaho Fire Zones that are
7 monitored for red flag weather warnings,¹⁴² however, Idaho Power’s PSPS Plan does not
8 incorporate Oregon Zone 641, which he asserts comprises about 25 percent of the B2H route.¹⁴³
9 Mr. Myers further asserts that Oregon Zone 641 had the most documented Red Flag Warnings in
10 comparison with the potential risk zones included in the PSPS.¹⁴⁴

11 As an initial matter, Mr. Myers’ exception takes the Hearing Officer’s conclusion in the
12 Proposed Contested Case Order out of context. In the Proposed Contested Case Order, the Hearing
13 Officer is referring to the Wildfire Mitigation Plan, and not expressly referring to the PSPS Plan.¹⁴⁵
14 Idaho Power’s analysis of risk zones in the 2022 Wildfire Mitigation Plan includes the B2H
15 corridor, and Section 5 of the 2022 Wildfire Mitigation Plan details the Company’s tool for
16 evaluating fire weather conditions through a “Fire Potential Index” that will be used to inform
17 situational awareness across Idaho Power’s service territory, as well as the field mitigation and
18 operations practices and fire response plans described in Section 6, 7, 8 and 9 of the 2022 Wildfire
19 Mitigation Plan.¹⁴⁶

¹⁴¹ Proposed Contested Case Order at 184.

¹⁴² The PSPS provides that “These zones are shown on this NWS webpage: Fire Weather. RFWs for Idaho Power’s service territory include Idaho Zones (IDZ) 401, 402, 403, 413, 420 and 422; and Oregon Zones (OR) 636, 637, 642, 634, 644, 645 and 6466; and are monitored and are factored into Idaho Power’s determination of whether to initiate a PSPS.”

¹⁴³ Sam Myers Exception for LU-9 at 2-3.

¹⁴⁴ Sam Myers Exception for LU-9 at 3.

¹⁴⁵ Proposed Contested Case Order at 184.

¹⁴⁶ Idaho Power / Sur-sur-rebuttal Testimony of Douglas J. Dockter / Issue PS-4 / Exhibit B, Idaho Power’s 2022 Wildfire Mitigation Plan (December 2021), pp. 18, 22-24 of 95.

1 However, Idaho Power’s PSPS Plan, which is included as an attachment to the Wildfire
2 Mitigation Plan, includes protocols for Red Flag weather warnings. A Red Flag weather warning
3 means that either (1) weather conditions consisting of high winds combined with low relative
4 humidity are present; or (2) dry lightning is occurring.¹⁴⁷ In the Company’s 2022 Wildfire
5 Mitigation Plan, Idaho Power promulgated a PSPS Plan that requires Idaho Power to consider Red
6 Flag warnings.¹⁴⁸ A PSPS is “[a] proactive de-energization of a portion of an Electric Utility’s
7 electrical network, based on the forecasting of and measurement of extreme wildfire weather
8 conditions.”¹⁴⁹ In the PSPS Plan, Idaho Power states that Red Flag warnings “are monitored and
9 are factored into Idaho Power’s determination of whether to initiate a PSPS.”¹⁵⁰ Accordingly,
10 Idaho Power has already submitted a plan demonstrating circumstances in which the Company
11 will proactively de-energize its transmission and distribution facilities, and that plan specifically
12 considers Red Flag warnings when determining whether a PSPS is necessary.

13 As to Mr. Myers’ specific criticism that the PSPS Plan does not include Oregon Risk Zone
14 641, Exception 1 is the first time he has raised a specific concern about the inclusion of “Oregon
15 Zone 641” in the PSPS Plan, and there is no evidence in the record specifically addressing Oregon
16 Zone 641 or its location or characteristics; and for that reason alone, the Council should reject that
17 argument. Nonetheless, Idaho Power understands Oregon Zone 641 to include Morrow County
18 and Umatilla County. Idaho Power’s witness, Douglas Dockter, explained in oral Sur-Sur-

¹⁴⁷ Idaho Power / Rebuttal Testimony of Christopher W. Lautenberger / Issues PS-2, PS-3, PS-4, PS-10 and LU-9, p. 38 of 81.

¹⁴⁸ Idaho Power / Sur-sur-rebuttal Testimony of Douglas J. Dockter / Issue PS-4, Exhibit B, Idaho Power’s 2022 Wildfire Mitigation Plan (December 2021) (filed Jan. 5, 2022), p. 65 of 95.

¹⁴⁹ Idaho Power / Sur-sur-rebuttal Testimony of Douglas J. Dockter / Issue PS-4, Exhibit B, Idaho Power’s 2022 Wildfire Mitigation Plan (December 2021) (filed Jan. 5, 2022), p. 73 of 95.

¹⁵⁰ Idaho Power / Sur-sur-rebuttal Testimony of Douglas J. Dockter / Issue PS-4, Exhibit B, Idaho Power’s 2022 Wildfire Mitigation Plan (December 2021) (filed Jan. 5, 2022), p. 75 of 95.

1 Rebuttal Testimony at the hearing that the PSPS Plan is presently intended to apply only to Idaho
2 Power’s service territory (for Idaho Power’s existing facilities), and will apply to B2H once it is
3 constructed.¹⁵¹ As such, Mr. Dockter explained that the Wildfire Mitigation Plan and PSPS are
4 “living” documents, which will be updated to further consider B2H after the Project is
5 constructed.¹⁵² As it relates to the PSPS Plan, it would not make sense to apply the PSPS Plan to
6 the Project before the Project is constructed—the PSPS relates to plans to de-energize facilities,
7 and if the Project is not yet built, there is nothing to de-energize.

8 Moreover, beyond the information presented in the Wildfire Mitigation Plan and the PSPS
9 Plan, the Hearing Officer’s above-referenced Finding of Fact—that "Idaho Power adequately
10 analyzed the risk of project-related wildfire during Red Flag warning weather conditions”—is
11 supported by a preponderance of evidence in the record as it would relate to Morrow County and
12 Umatilla County.

13 Idaho Power worked with an expert witness for wildfire-related issues, Dr.
14 Christopher Lautenberger with Reax Engineering, who is a licensed Fire Protection Engineer with
15 expertise in fire science, fire dynamics, fire modelling, and forensic fire reconstruction and
16 experience in applying fire dynamics and combustion principles to analyze various aspects of fire
17 and combustion processes, ranging from small-scale smoldering combustion to large-scale
18 wildland fire dynamics.¹⁵³ Dr. Lautenberger provided a detailed analysis of wildfire risk in the
19 entire B2H project area—including Morrow County and Umatilla County—in his Rebuttal

¹⁵¹ Dockter Testimony, Cross-Examination Hearing Day 3, January 13, 2022 (Tr. Day 3), page 23, lines 5-14.

¹⁵² Dockter Testimony, Cross-Examination Hearing Day 3, January 13, 2022 (Tr. Day 3), page 23, lines 5-14.

¹⁵³ Idaho Power / Direct Testimony of Christopher W. Lautenberger (Sept. 17, 2021) / Issues PS-8 and PS-9, pp. 1-2 of 67.

1 Testimony.¹⁵⁴ Additionally, Dr. Lautenberger provided analysis regarding the fire weather
2 conditions in his Rebuttal Testimony for the entire Project area.

3 For these reasons, Mr. Myers’ exception has not identified any error in the Hearing
4 Officer’s findings of fact or conclusions of law and Idaho Power requests that the Council adopt
5 without modification the Hearing Officer’s findings of fact and conclusions of law relevant to
6 LU-9.

7 **13. Sam Myers, LU-9, Exception 2**

8 Mr. Myers takes exception to the following finding of fact in the Proposed Contested Case
9 Order: “The evidence also demonstrates that the risk of a project-related fire is very low even
10 during Red Flag Warning conditions and/or gusty wind conditions.”¹⁵⁵

11 Mr. Myers argues that the Hearing Officer did not adequately consider the evidence
12 regarding California wildfires, the work of Joseph Mitchell regarding transmission line faults
13 igniting wildfires, and then asserts—without any specific support or reference—that the “facts are
14 500 kV transmission lines have ignited fires in comparable landscapes.”¹⁵⁶

15 Idaho Power filed extensive testimony on this issue from Dr. Lautenberger. In his Direct
16 Testimony, Dr. Lautenberger explained that a 500-kV transmission line like the Project, is not
17 likely to cause wildfires, and therefore the risk of a Project-related fire during operation is
18 extremely low.¹⁵⁷ Additionally, Idaho Power fully briefed this issue, and for the reader’s
19 convenience, that discussion is set forth below.

¹⁵⁴ Idaho Power / Rebuttal Testimony of Christopher W. Lautenberger (Nov. 12, 2021) / Issues PS-2, PS-3, PS-4, PS-10 and LU-9, pp. 4-23 of 81.

¹⁵⁵ Proposed Contested Case Order at 184.

¹⁵⁶ Sam Myers Exception for LU-9 at 3-4.

¹⁵⁷ Idaho Power / Direct Testimony of Christopher W. Lautenberger / Issues PS-8 and PS-9, p. 41 of 67.

1 As Idaho Power explained in its briefing, compared to distribution lines and lower voltage
2 transmission lines, extra high voltage (“EHV”) transmission lines, such as B2H, are much less
3 likely to cause fires because EHV lines are subject to stricter engineering and safety
4 requirements.¹⁵⁸ Specifically, for EHV transmission lines, tower heights are increased and ROWs,
5 usually between 150 feet and 250 feet, are wider relative to distribution and lower-voltage
6 transmission lines.¹⁵⁹ These requirements reduce the potential for vegetation contacting the
7 transmission line, which is a common cause of powerline fires.¹⁶⁰ Idaho Power has also developed
8 a Vegetation Management Plan, which identifies the regular maintenance actions Idaho Power will
9 take to ensure that no vegetation near the Project violates the clearance threshold necessary to
10 avoid vegetative contact.¹⁶¹ Additionally, the increased height of EHV transmission towers
11 reduces the likelihood of conductors clashing with each other and potentially causing fires, because
12 aluminum particles resulting from conductor clash are likely to burn to completion before
13 contacting the ground.¹⁶² Finally, 500-kV lines are typically mounted on steel towers which are
14 stronger than the single-pole steel or wooden poles used for lower voltages and less likely to
15 burn.¹⁶³

16 These stricter requirements make EHV transmission lines like the Project substantially less
17 likely to cause wildfires compared to lower voltage lines that are not subject to these requirements.

¹⁵⁸ Generally speaking, EHV transmission lines are lines with voltages between 231-765 kV. Idaho Power / Direct Testimony of Christopher W. Lautenberger / Issues PS-8 and PS-9, pp. 41-42 of 67.

¹⁵⁹ Idaho Power / Direct Testimony of Christopher W. Lautenberger / Issues PS-8 and PS-9, p. 46 of 67.

¹⁶⁰ Proposed Order, Attachment U-3: Draft Fire Prevention and Suppression Plan at 6 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9786 of 10016).

¹⁶¹ Proposed Order, Attachment P1-4: Vegetation Management Plan at 3-5 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9165-9167 of 10016).

¹⁶² Idaho Power / Direct Testimony of Christopher W. Lautenberger / Issues PS-8 and PS-9, pp. 46-47 of 67.

¹⁶³ Idaho Power / Direct Testimony of Christopher W. Lautenberger / Issues PS-8 and PS-9, pp. 46-47 of 67. Idaho Power will construct the Project using steel towers. ASC, Exhibit B at B-50 – B-51 (ODOE - B2HAPPDoc3-3 ASC 02a_Exhibit_B_Project Description_ASC 2018-09-28. Page 56-57 of 96).

1 In fact, in a 2008 ruling, the California Public Utilities Commission (“CPUC”) found that “230 kV
2 or 500 kV lines placed on steel towers are highly unlikely to ignite fires[.]”¹⁶⁴ At that time, the
3 CPUC could find evidence of only one ignition relating to a 500-kV transmission line anywhere
4 in the United States.¹⁶⁵ Idaho Power conducted its own review of nationwide fire databases to
5 assess the history of 500-kV transmission lines causing fires. To date, although there are
6 approximately 26,900 linear miles of 500-kV transmission lines in the country;¹⁶⁶ there have been
7 only five confirmed instances of a 500-kV transmission line starting a fire and one instance in
8 which such allegations were made but which was not formally confirmed.¹⁶⁷ These data
9 demonstrate that the risk of a 500-kV transmission line, like the Project, igniting a fire is very low.

10 Finally, in his Sur-sur-rebuttal Testimony, Dr. Lautenberger specifically analyzed the fire
11 history in the vicinity of Mr. Myers’ farm and concluded that the fire history in that area indicated
12 that the fire occurrences from the available databases, overlaid with the transmission line locations,
13 indicate that fire ignitions had not been caused by transmission lines.¹⁶⁸ Thus, even assuming
14 Mr. Myers’ concern about that area being windy or gusty or were true, the evidence in the record
15 demonstrates that such conditions have not resulted in transmission line fires in that area, despite
16 the presence of 400 miles of transmission lines, including 90 miles of 500-kV transmission lines.

¹⁶⁴ Idaho Power / Direct Testimony of Christopher W. Lautenberger / Issues PS-8 and PS-9 / Exhibit B, *In re Application of San Diego Gas & Electric Company (U 902 E) for a Certificate of Public Convenience and Necessity for the Sunrise Powerlink Transmission Project*, A.06-08-010, D.08-12-058 (Dec. 24, 2008), p. 225 of 326.

¹⁶⁵ Idaho Power / Direct Testimony of Christopher W. Lautenberger / Issues PS-8 and PS-9 / Exhibit C, *In re Application of San Diego Gas & Electric Company (U 902 E) for a Certificate of Public Convenience and Necessity for the Sunrise Powerlink Transmission Project*, A.06-08-010, D.08-12-058, Appendix C (Dec. 24, 2008), p. 5 of 7.

¹⁶⁶ Idaho Power / Direct Testimony of Christopher W. Lautenberger / Issues PS-8 and PS-9, pp. 46-53 of 67.

¹⁶⁷ Idaho Power / Direct Testimony of Christopher W. Lautenberger / Issues PS-8 and PS-9, pp. 46-53 of 67. When Idaho Power filed its direct testimony, there had been only two confirmed instances of a 500-kV transmission line causing a fire. *Id.* However, after Idaho Power filed its direct testimony, a utility in California filed with the CPUC its 2020 Fire Incident Report, which document three additional examples. Idaho Power / Rebuttal Testimony of Christopher W. Lautenberger / Issues PS-2, PS-3, PS-4, PS-10 and LU-9, p. 33 of 81.

¹⁶⁸ Testimony, Cross-Examination Hearing Day 3, January 13, 2022 (Tr. Day 3), page 43, line 23 – page 44, line 18.

1 As to Mr. Myers’ exception that the Hearing Officer did not discuss the evidence he
2 provided in the Proposed Contested Case Order, that criticism is unavailing. Although Mr. Myers
3 filed testimony challenging Idaho Power’s testimony and evidence, where there are multiple
4 opinions filed as evidence, the Hearing Officer is not required to explain why all other opinions
5 than the ones she relied on are less persuasive.¹⁶⁹ The fact that the Hearing Officer found Idaho
6 Power’s evidence persuasive and cited that evidence to support her factual findings does not
7 support Mr. Myers’ assertion that her findings are incorrect. Therefore, the fact that the Hearing
8 Officer did not reference all Mr. Myers’ evidence does not affect the validity of the Hearing
9 Officer’s findings, because the findings are supported by evidence that Idaho Power filed.

10 For these reasons, Mr. Myers’ exception has not identified any error in the Hearing
11 Officer’s findings of fact or conclusions of law and Idaho Power requests that the Council adopt
12 without modification the Hearing Officer’s findings of fact and conclusions of law relevant to
13 LU-9.

14 **14. Sam Myers, LU-9, Exception 3**

15 Mr. Myers takes exception to the following finding of fact in the Proposed Contested Case
16 Order:

17 Furthermore, a preponderance of the evidence also demonstrates that, if a fire were
18 to occur at or near Mr. Myers’ agricultural operations, the fire would most likely
19 result in minimal damage to soils.¹⁷⁰

¹⁶⁹ See, e.g., *Noble v. Or. Water Res. Dep’t*, 264 Or App 110, 123 (2014) (“[I]n a case in which expert opinions have been offered on both sides of an issue, it is usually clear that a factfinder has found one or the other more persuasive, and substantial evidence and reason will exist to support the finding, without further explanation.”) (quoting *Castro v. Board of Parole*, 232 Or App 75, 84 (2009) (citing *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988))).

¹⁷⁰ Proposed Contested Case Order at 185.

1 In his Exception 3, Mr. Myers argues that the Hearing Officer erred by finding that if a fire
2 were to occur on Mr. Myers’ farm, that it would have minimal soil impact, and further that due to
3 the extremely remote likelihood of a fire and minimal potential impacts to soil, there is no need
4 for Idaho Power to prepare a soil rehabilitation plan for soils that may be damaged by a fire.¹⁷¹
5 Mr. Myers points to the unsworn “testimony” of Roger Morter describing an incident related to a
6 vehicle farm on a farm in Morrow County, and states that the Hearing Officer failed to consider
7 this testimony.¹⁷²

8 First, contrary to Mr. Myers’ assertion, Mr. Morter did not provide testimony in this
9 proceeding. There is no sworn statement from Mr. Morter, and he was not made available for
10 cross-examination. Instead, Mr. Myers included an excerpt of what he claims was an email from
11 Mr. Morter in the body of Mr. Myers’ Declaration, which he filed as Direct Testimony on
12 September 17, 2021.¹⁷³ Thus the “evidence” that Mr. Myers asks the Hearing Officer and Council
13 to consider is unsworn hearsay testimony.

14 Second, even if the Council were to consider this as evidence, the preponderance of the
15 evidence in the record demonstrates that (1) the risk of a transmission line-related fire impacting
16 Mr. Myers’ farm is exceedingly low, and (2) even if a fire were to occur on Mr. Myers’ farm, the
17 impacts to the soils would be relatively minor. As discussed above in response to Exceptions 1
18 and 2, Idaho Power provided expert witness testimony from Dr. Lautenberger studying the Morrow
19 County area and concluding that the risk of a fire resulting from a transmission line ignition is
20 extremely low.

¹⁷¹ Sam Myers Exception for LU-9 at 4-5.
¹⁷² Sam Myers Exception for LU-9 at 5.
¹⁷³ Sam Myers / Direct Testimony of Petitioner Sam Myers (Sept. 17, 2021) / Issue LU-9, pp. 4-5 of 6.

1 Additionally, Idaho Power provided expert witness testimony from Mark Madison, a
2 licensed Agricultural, Environmental, Civil Engineer employed by Jacobs Engineering with over
3 39 years of experience in site investigation, data collection, modeling, model calibration, design,
4 construction, management, operations, and monitoring and maintenance of irrigation, reuse
5 systems, wetlands and uplands phytoremediation systems.¹⁷⁴ In response to Mr. Myers’ concern,
6 Mr. Madison provided rebuttal testimony, which is excerpted below for the reader’s convenience:

7 **Q. Please describe the type of impacts that a wildfire may have on soils.**

8 A. The effects of fire on soils are a function of the amount of heat released from
9 combusting biomass—the fire severity—and the duration of combustion. The
10 impact of these factors on the physical, chemical, and biological properties of the
11 soil is measured as severity.¹⁷⁵

12 **Q. Please define fire severity.**

13 A. Fire severity is used to indicate the effects of fire on the different ecosystem
14 components, and is defined in terms of: 1) the length of time fuel accumulates
15 between fires and the amount of the accumulated fuels; 2) properties of the fuels,
16 such as size, flammability, and moisture or mineral content; 3) how the fuels impact
17 fire location and behavior (causing crown, surface, or ground fires); and 4) heat
18 transfer in the soil during the combustion of above-ground fuels and surface organic
19 layers.¹⁷⁶

20 Fire intensity is used to describe the rate of energy released above ground.¹⁷⁷ High
21 intensity fires, those that reach 1,200 degrees Celsius or more, do not always result
22 in high severity impacts in the soil if their duration is short, but low intensity fires
23 of just 300 degrees Celsius that smolder for a long time in roots or organic matter
24 can produce large changes in the nearby soil.¹⁷⁸

¹⁷⁴ Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, pp. 1-2 of 93.
¹⁷⁵ Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit M, United States Department of Agriculture, Wildland Fire in Ecosystems (Sept. 2005), p. 23 of 262.
¹⁷⁶ Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit M, United States Department of Agriculture, Wildland Fire in Ecosystems (Sept. 2005), p. 34 of 262.
¹⁷⁷ Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit M, United States Department of Agriculture, Wildland Fire in Ecosystems (Sept. 2005), p. 17 of 262.
¹⁷⁸ Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit M, United States Department of Agriculture, Wildland Fire in Ecosystems (Sept. 2005), p. 18-19 of 262.

1 **Q. Based on that information, please describe what soil impacts are**
2 **relevant to Mr. Myer’s concerns for his parcel?**

3 A. Should a fire occur in the vicinity of Mr. Myers property, the fuel source
4 will be mostly herbaceous, grass and grain vegetation. The timing of the fire will
5 determine the fire conditions. The most likely time of year for a fire to successfully
6 move through this property is later in the growing season when fuels are quite dry.
7 This may result in a high intensity fire, but it would most likely move through the
8 fields quickly due to the presence of higher winds in that area as Mr. Myers
9 mentions. A quickly moving fire would most likely result in minimal damage to
10 soils.¹⁷⁹ A fast-moving fire may have other benefits to the burned area including
11 reduction of viable weed seed and reduction of disease, insect, and rodent
12 incidence.¹⁸⁰ In addition, burning releases nitrogen (N), potassium (K), phosphorus
13 (P), and other nutrients from undecomposed organic matter to the soil.¹⁸¹

14 While it appears that Mr. Myers disagrees with Mr. Madison’s conclusions about the
15 potential impacts of a fire on soils, Mr. Myers never provided any sur-rebuttal evidence to rebut
16 Mr. Madison’s testimony—even though Mr. Myers *did* submit sur-rebuttal testimony addressing
17 testimony from other witnesses.¹⁸² Further, Mr. Myers did not seek to cross-examine Mr.
18 Madison. Thus, the Council should rely on the testimony of Mr. Madison and should uphold the
19 Hearing Officer’s ultimate conclusion that the preponderance of the evidence supports the finding
20 that, if a fire were to occur at or near Mr. Myers’ agricultural operations, the fire would most likely
21 result in minimal damage to soils.

22 Mr. Myers’ Exception 3 does not identify any incorrect finding of fact or conclusion of
23 law, and for that reason Idaho Power requests that the Council adopt without modification the
24 Hearing Officer’s findings of fact and conclusions of law relevant to LU-9.

¹⁷⁹ Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit M, United States Department of Agriculture, Wildland Fire in Ecosystems (Sept. 2005), p. 47 of 262.

¹⁸⁰ Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1 / Exhibit N, Michael Goodchild, Benefits of Prescribed Burning (Aug. 2, 2013), p. 2 of 3.

¹⁸¹ Idaho Power / Rebuttal Testimony of Mark Madison / Issues LU-9 and SP-1, pp. 91-92 of 93.

¹⁸² Sam Myers / Sur-Rebuttal Testimony to IPC Rebuttal Testimony / Issue LU-9.

1 **15. Sam Myers, LU-9, Exception 4**

2 Mr. Myers takes exception to the following finding of fact in the Proposed Contested Case
3 Order: “Idaho Power has shown that the project complies with the Land Use standard
4 notwithstanding the impact the project may have on Mr. Myers’ farm practices.”¹⁸³

5 In his Exception 4, Mr. Myers “refuses to accept” the Hearing Officer’s finding and argues
6 that the Hearing Officer overlooked the impacts to Mr. Myers’ farm, and requests that the Council
7 remand the application to ODOE for further analysis of methods to “eliminate impacts on
8 Mr. Myers’ farming practices.”¹⁸⁴ Mr. Myers’ assertions are incorrect and should be rejected.

9 First, Mr. Myers misstates the applicable standard. Neither ORS 215.275 nor the Land Use
10 Standard require complete elimination or avoidance of impacts. Indeed, if there was a “no impact
11 standard,” it would be impossible to develop any project, which is contrary to the statutory
12 framework establishing a utility facility necessary for public service as a use permitted subject to
13 an alternatives analysis in EFU lands. As Idaho Power explained in its briefing, although ORS
14 215.275(5) requires the county to impose conditions on an application for locating a utility facility
15 to “mitigate and minimize impact” of the proposed facility, the statute does not require “the
16 absolute avoidance or elimination” of impacts; rather, the statute requires only “the general
17 reduction in the intensity and frequency of an impact.”¹⁸⁵

18 Second, as noted by Mr. Myers, Idaho Power agreed that there would be certain impacts to
19 Mr. Myers’ farm, and in particular on his ability to use aerial spraying. Idaho Power disclosed
20 those potential impacts and potential mitigation for same to reduce the impacts. In the Agricultural

¹⁸³ Proposed Contested Case Order at 186.

¹⁸⁴ Sam Myers Exception for LU-9 at 5-6.

¹⁸⁵ *Friends of Parrett Mt. v. Nw. Nat. Gas Co.*, 336 Or 93, 114-15 (2003).

1 Lands Assessment, Idaho Power identified aerial agricultural operations as one of the accepted
2 farm practices on surrounding farmlands that could be impacted by the Project.¹⁸⁶ Idaho Power
3 determined that the presence of transmission lines prevents aerial access to crops directly beneath
4 the lines may potentially decrease crop yields, and may indirectly impede aerial application of
5 chemicals to other portions of the field depending on orientation, wind direction, and other
6 factors.¹⁸⁷ Idaho Power will minimize potential impacts to aerial spraying by siting the
7 transmission lines as much as possible along the edges of fields, existing roadways, or natural
8 boundaries, rather than through existing fields, which will result in less risk to the applicator and
9 more efficiency to the producer.¹⁸⁸ Through these actions, Idaho Power has reduced the intensity
10 and frequency of impacts to farmlands, consistent with ORS 215.275(5).

11 Idaho Power also acknowledged in its Closing Arguments that the presence of the
12 transmission line may impact Mr. Myers' ability to use aerial applications.¹⁸⁹ However, as Idaho
13 Power finalizes the exact location of Project components within the EFSC-approved site, the
14 Company will attempt to further reduce potential impacts to active agricultural fields through
15 micrositing.¹⁹⁰ Additionally, Idaho Power must negotiate an easement for any portion of the ROW
16 located on the land in which Mr. Myers conducts his agricultural operations. When negotiating
17 that easement the Company, will work with the landowners of the parcel on which Mr. Myers

¹⁸⁶ Proposed Order, Attachment K-1 at 23-24 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8904-05 of 10016).

¹⁸⁷ Proposed Order, Attachment K-1 at 23 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8904 of 10016).

¹⁸⁸ Proposed Order, Attachment K-1 at 24 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8905 of 10016).

¹⁸⁹ Idaho Power's Closing Arguments for LU-4, LU-7, LU-8, LU-9, and LU-11 at 44-46.

¹⁹⁰ Proposed Order, Attachment K-1 at 25 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8906 of 10016).

1 conducts his farming operations,¹⁹¹ and will seek to minimize impacts to the extent practicable and
2 will negotiate fair market rate compensation for any damages and/or impacts resulting from the
3 Project to agricultural operations, including impacts resulting from reduced aerial applications.¹⁹²
4 However, it is important to note that those negotiations will occur outside the Council’s site
5 certificate process.¹⁹³ Through these actions, Idaho Power will minimize and/or mitigate the
6 impacts to Mr. Myers’ aerial agricultural operations sufficient to avoid a significant change to the
7 accepted farm practices. Contrary to Mr. Myers’ assertion, the Hearing Officer did consider those
8 potential impacts to Mr. Myers’ farm in the Proposed Contested Case Order, as discussed in detail
9 in the Proposed Contested Case Order.¹⁹⁴

10 For these reasons, Mr. Myers’ exception has not identified any error in the Hearing
11 Officer’s findings of fact or conclusions of law and Idaho Power requests that the Council adopt
12 without modification the Hearing Officer’s findings of fact and conclusions of law relevant to
13 LU-9.

¹⁹¹ ASC, Exhibit F, Attachment F-1: Property Owners of Record (ODOE - B2HAPPDoc3-12 ASC 06_Exhibit F_Property_Owners_of_Record_ASC 2018-09-28. Page 18 of 165) (showing owners of record of Mr. Myers’ farming operations as Jeffrey and Nancy Myers).

¹⁹² Proposed Order, Attachment K-1 at 37 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8918 of 10016).

¹⁹³ Proposed Order at 2 n.5 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9 of 10016).

¹⁹⁴ Proposed Contested Case Order at 185. (“In its Agricultural Lands Assessment, Idaho Power identified aerial agricultural operations as one of the accepted farm practices on surrounding farmlands that the project may impact. Idaho Power acknowledged that the presence of transmission lines prevents aerial access to crops directly beneath the lines, may potentially decrease crop yields, and may indirectly impede aerial application of chemicals to other portions of the field depending on orientation, wind direction, and other factors. Idaho Power has committed to minimize potential impacts to aerial spraying by siting the transmission lines as much as possible along the edges of fields, existing roadways, or natural boundaries, rather than through existing fields, which will result in less risk to the applicator and more efficiency to the producer. Through these actions, Idaho Power will reduce the intensity and frequency of impacts to farmlands, consistent with ORS 215.275(5). As to Mr. Myers’ farmland in particular, Idaho Power acknowledged that the proposed transmission line may impact Mr. Myers’ ability to use aerial applications. As discussed above, the Company will attempt to reduce potential impacts to active agricultural fields through micrositing facility components. Moreover, although such negotiations are outside the Council’s site certificate approval process, the Company will work with the landowner(s) to negotiate an easement for the right-of-way, and will minimize impacts to the extent practicable.”).

1 **16. Sam Myers, LU-9, Exception 5**

2 Mr. Myers takes exception to the Hearing Officer’s ruling excluding certain evidence that
3 was untimely filed:

4 Because Mr. Myers did not timely offer testimony from the *Sunrise Powerlink*
5 matter or the article by Zhaolin Gu into the hearing record, he may not rely on this
6 evidence in his closing argument.¹⁹⁵

7 Mr. Myers asserts the Hearing Officer’s conclusion is in error because Mr. Myers
8 introduced and used the Zhaolin Gu article in his September 17, 2021 Declaration and again in
9 Mr. Myers’ Closing Brief.¹⁹⁶

10 First, Mr. Myers is correct that he included an excerpt of the article in his testimony,¹⁹⁷ but
11 the Council should uphold the Hearing Officer’s conclusion because Mr. Myers never provided
12 the whole article in the record in this proceeding. Without providing the whole article, Idaho
13 Power was not afforded an opportunity to evaluate the context for the quoted statements or provide
14 a complete response.

15 Second, even if the Council were to consider the statements in the Gu article as evidence,
16 it would not support any modification to the Hearing Officer’s conclusions regarding LU-9. As
17 Idaho Power explained in its Response Brief, the premise of the quoted material from the Gu article
18 is that electric fields in windblown sand storms can create a flashover or electric sparks.¹⁹⁸
19 However, even if the Council were to consider this source, Idaho Power’s expert witness
20 Dr. Lautenberger responded to this issue in detail in his Rebuttal Testimony as well as in his Sur-

¹⁹⁵ Proposed Contested Case Order at 187.

¹⁹⁶ Sam Myers Exception for LU-9 at 6-7.

¹⁹⁷ See Closing Brief of Sam Myers on Issue LU-9 at 9.

¹⁹⁸ Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues LU-4, LU-7, LU-8, LU-9, and LU-11 at 56-57 (Mar. 30, 2022).

1 sur-rebuttal Testimony at the January 2022 hearing. Specifically, Dr. Lautenberger performed an
2 analysis of this issue by reviewing a database of all wildfires in Morrow County dating back to
3 1992, and cross-referenced it with a database of all transmission lines currently located in Morrow
4 County.¹⁹⁹ Dr. Lautenberger analyzed these databases and demonstrated that, although there are
5 400 miles of transmission lines in Morrow County, none of those transmission lines has caused a
6 powerline fire.²⁰⁰ Therefore, even if the Gu article were to be considered as support for Mr. Myers’
7 claim that electric fields in windblown sands storms can create a flashover or electric sparks, Idaho
8 Power has provided evidence in the record focusing on the area of concern for Mr. Myers—
9 Morrow County—demonstrating that this type of event has never occurred during the time period
10 studied.²⁰¹ Thus, even if the Council were to consider the Gu article, the preponderance of the
11 evidence in the record nonetheless demonstrates that, even assuming the whirlwind phenomenon
12 does occur in Morrow County, it has not historically resulted in a powerline ignition,²⁰² and the
13 Hearing Officer’s findings for LU-9 should be upheld.

14 For these reasons, Mr. Myers’ exception has not identified any error in the Hearing
15 Officer’s findings of fact or conclusions of law and Idaho Power requests that the Council adopt
16 without modification the Hearing Officer’s findings of fact and conclusions of law relevant to
17 LU-9.

¹⁹⁹ Lautenberger Testimony, Cross-Examination Hearing Day 3, January 13, 2022 (Tr. Day 3), at page 43, line 25 through page 44, line 5.

²⁰⁰ Lautenberger Testimony, Cross-Examination Hearing Day 3, January 13, 2022 (Tr. Day 3), at page 44, lines 9-14.

²⁰¹ Lautenberger Testimony, Cross-Examination Hearing Day 3, January 13, 2022 (Tr. Day 3), at page 44, lines 15-18.

²⁰² Idaho Power’s Closing Arguments for LU-4, LU-7, LU-8, LU-9 and LU-11 at 43-44.

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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 LU-5, LU-7, LU-8, and LU-9.

DATED: July 15, 2022

MCDOWELL RACKNER GIBSON PC



Lisa F. Rackner, OSB No. 873844
lisa@mrg-law.com
Jocelyn Pease, OSB No. 102065
jocelyn@mrg-law.com
419 SW 11th Avenue, Suite 400
Portland, Oregon 97205
Telephone: (503) 595-3925
Facsimile: (503) 595-3928

David Stanish
dstanish@idahopower.com
Idaho Power Company

Attorneys for Idaho Power Company

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 LU-5, LU-7, LU-8, AND LU-9** 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 ISSUES LU-5, LU-7, LU-8, AND LU-9** was served by First Class Mail or electronic mail as indicated below:

By: First Class Mail:

John C. Williams
PO Box 1384
La Grande, OR 97850

By: Electronic Mail:

David Stanish
Attorney at Law
Idaho Power Company
dstanish@idahopower.com

Lisa Rackner
Attorney at Law
Idaho Power Company
lisa@mrg-law.com

Jocelyn Pease
Idaho Power Company
Attorney at Law
jocelyn@mrg-law.com

Alisha Till
alisha@mrg-law.com

Joseph Stippel
Agency Representative

Idaho Power Company
jstippel@idahopower.com

Mike Sargetakis
Attorney at La
Oxbow Law Group, LLC
mike@oxbowlaw.com

Karl G. Anuta
Attorney at Law
Law Office of Karl G. Anuta
kg@integra.net

Kellen Tardaewether
Agency Representative
Kellen.tardaewether@oregon.gov

Sarah Esterson
Oregon Department of Energy
Sarah.Esterson@oregon.gov

Patrick Rowe
Assistant Attorney General
Patrick.g.rowe@doj.state.or.us

Emma Borg
emma.t.borg@doj.state.or.us

Jesse Ratcliffe
Assistant Attorney General
jesse.d.ratcliffe@doj.state.or.us

Jeffery R. Seeley
jeff.seeley@doj.state.or.us

Svetlana Gulevkin
svetlana.m.gulevkin@doj.state.or.us

Stop B2H Coalition
fujj@stopb2h.org

Stop B2H Coalition
Jim Kreider
jkreider@campblackdog.org

Colin Andrew

candrew@eou.edu

Kathryn Andrew
lkathrynandrew@gmail.com

Susan Badger-Jones
sbadgerjones@eoni.com

Lois Barry
loisbarry31@gmail.com

Peter Barry
petebarry99@yahoo.com

Gail Carbiener
mcgcarb@bendbroadband.com

Matt Cooper
mcooperpiano@gmail.com

Whit Deschner
deschnerwhit@yahoo.com

Jim and Kaye Foss
onthehoof1@gmail.com

Suzanne Fouty
suzannefouty2004@gmail.com

Susan Geer
susanmgeer@gmail.com

Irene Gilbert
ott.irene@frontier.com

Dianne B. Gray
diannebgray@gmail.com

Joe Horst and Ann Cavinato
joehorst@eoni.com

Charles A Lyons
marvinroadman@gmail.com

Virginia and Dale Mammen
dmammen@eoni.com

Anne March
amarch@eoni.com

Kevin March
kmarch1961@gmail.com

JoAnn Marlette
garymarlette@yahoo.com

Michael McAllister
wildlandmm@netscape.net

Jennifer Miller
rutnut@eoni.com

Sam Myers
sam.myers84@gmail.com

Louise Squire
squirrel@eoni.com

Stacia Jo Webster
staciajwebster@gmail.com

Jonathan White
jondwhite418@gmail.com

John Winters
wintersnd@gmail.com

/s/ Suzanne Prinsen

Suzanne Prinsen
Legal Assistant