

**Attachment 1: Nolin Hills Wind Power Project
Contested Case Order (Adopted July 19, 2023)**

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON DEPARTMENT OF ENERGY, ENERGY FACILITY SITING DIVISION**

IN THE MATTER OF:) **RULINGS ON MOTIONS FOR**
) **SUMMARY DETERMINATION AND**
APPLICATION FOR SITE) **PROPOSED CONTESTED CASE**
CERTIFICATE FOR THE NOLIN) **ORDER**
HILLS WIND POWER PROJECT)
) OAH Case No. 2022-ABC-05140

HISTORY OF THE CASE

This matter involves the Application for a Site Certificate (ASC) for Nolin Hills Wind Power Project (Project or proposed facility) submitted by Nolin Hills Wind, LLC (Applicant) to the Energy Facility Siting Council (Council or EFSC) on January 31, 2022.

On April 19, 2022, the Oregon Department of Energy (ODOE or Department) issued a draft proposed order (DPO) and public notice of a 37-day comment period on the DPO. Thereafter, on May 26, 2022, Senior Administrative Law Judge (ALJ) Kate Triana from the Office of Administrative Hearings (OAH) conducted a public hearing via a combination of in-person (at the Red Lion Hotel in Pendleton, Oregon – in the affected local jurisdiction) and video conference appearance. Members of the public had the opportunity to provide oral and written testimony at the public hearing. The Department accepted public comments on the DPO from April 19, 2022 to May 26, 2022. The ALJ held the record open until June 24, 2022, to allow the Applicant an opportunity to respond to comments made at the DPO hearing.

On August 4, 2022, the Department issued a Proposed Order and a Public Notice of the Proposed Order. The Public Notice of the Proposed Order set the deadline to request party or limited party status at 5:00 p.m. on September 6, 2022. Attorney Wendie L. Kellington filed a timely petition for party/limited party status on behalf of Umatilla County. Pursuant to a *Notice of Petitions to Request Party Status; Order Scheduling Prehearing Conference; and Prehearing Conference Agenda (Notice)* issued September 12, 2022, ALJ Triana notified the Department and Applicant of the petition for party status or limited party status received in this matter.

On October 5, 2022, ALJ Triana convened a telephone prehearing conference to address the petition for party/limited party status and the responses to the petitions from Applicant and the Department.¹ At the prehearing conference, ALJ Triana provided Umatilla County an opportunity to address whether it had satisfied the eligibility requirements for party/limited party status. The ALJ also provided Applicant and the Department the opportunity to respond.

¹ The following persons participated in the October 5, 2022, prehearing conference: for the Department, Senior Assistant Attorney General (AAG) Patrick Rowe and Department representatives Sarah Esterson and Kathleen Sloan; for Applicant, Attorney Timothy McMahan, Linnea Fossum, and Matthew Martin; for Petitioner, Attorney Wendie Kellington and Robert Walder.

Following the October 5, 2022 conference, the Department provided the OAH with the entire Decision and Administrative Project Record and Decision-Making Record for the contested case proceeding for the Nolin Hills Wind Power Project.

On November 2, 2022, ALJ Triana issued an *Order on Petitions for Party Status and Issues for Contested Case Hearing (Order on Party Status)*, granting Umatilla County limited party status and identifying all properly raised issues to be addressed in the contested case hearing. No appeals to Council were filed on the *Order on Party Status*.

On December 13, 2022, ALJ Triana held a prehearing conference to discuss the contested case process and set the contested case schedule. Assistant Attorney General Patrick Rowe participated for the Department, with Sarah Esterson and Kathleen Sloan. Attorney Timothy McMahan participated for Applicant, with Matthew Martin, Laneah Fossum, Walter Clemence and John Sohn. Attorney Wendie Kellington participated for Umatilla County, with Doug Olsen and Carol Johnson. During the conference, in consideration of the parties' input, ALJ Triana authorized motions for summary determination in this matter.

On December 14, 2022, ALJ Triana issued an Update to Council pursuant to OAR 345-015-0023(4). On December 15, 2022, ALJ Triana issued an *Order on Case Management Matters and Contested Case Schedule (Case Management Order)*, setting the schedule for discovery, motions for summary determination, and the contested case hearing, if needed.

On January 20, 2023, Umatilla County submitted discovery documents to the OAH. That same date, Applicant confirmed that, like the Department, it would rely on the Department's Decision Making Record on the ASC for purposes of the parties' summary determination motions.

On January 24, 2023, the Council issued an *Order Appointing Replacement Hearing Officer*, appointing ALJ Alison Greene Webster as the hearing officer in this matter. On February 15, 2023, ALJ Webster issued an Update to Council.

On February 23, 2023, in accordance with the Case Management Order, the parties and Umatilla County filed their motions for summary determination seeking a favorable ruling on Issues 1, 1.1 and 2. On or about March 20, 2023, the parties and limited party Umatilla County filed their respective responses to the motions for summary determination. On April 11, 2023, the parties filed replies to the responses.

On April 13, 2023, in response to an inquiry from AAG Rowe, ALJ Webster advised the parties and Umatilla County that, on or before May 12, 2023, she would issue a comprehensive Ruling on Motions for Summary Determination and Proposed Contested Case Order. The Department, Applicant, and Umatilla County concurred with this approach. On April 20, 2023, ALJ Webster issued an Update to Council.

BURDEN OF PROOF

ORS 183.450(2) and OAR 345-021-0100(2), together, identify the appropriate allocation

of the burdens applicable to EFSC contested case proceedings on an ASC. Applicant bears the burden of proving that the proposed facility complies with all applicable statutes, administrative rules, and local government ordinances. OAR 345-021-0100(2). The party/limited party raising an issue in this contested case by challenging the Department's Proposed Order bears the burden of producing evidence in support of the facts alleged and/or positions taken on any properly raised issue. ORS 183.450(2). That party/limited party also bears the burden of persuading the trier of fact that the alleged facts are true or the proffered position on the issue is correct. Neither Applicant nor the Department is required to disprove an opposing party/limited party's allegations and argument that Applicant has not met a particular statutory/regulatory requirement or Council siting standard. Rather, the party/limited party asserting a deficiency in the findings and/or conclusions in the Department's Proposed Order on the ASC bears the burden of establishing the claim or alleged facts.

Accordingly, Applicant maintains the burden to show by a preponderance of the evidence in the decision record that the proposed facility complies with Council's siting standards and other applicable statutes and rules. The Department's Proposed Order, as conditioned, determined that the decision record on the ASC indicates Applicant satisfied the requirements for issuance of the requested site certificate. That determination creates a rebuttable presumption that Applicant has satisfied its burden to show that the proposed facility will, more likely than not, comply with all applicable statutes, administrative rules, and local government ordinances. Thus, with regard to provisions of the Department's Proposed Order not challenged in this contested case, the presumption stands and Applicant is not required to make additional showings at the contested case hearing to meet its initial burden.

With regard to those provisions of the Department's Proposed Order challenged through the petitions for party status/requests for contested case hearing, the party/limited party bears the burden of producing evidence sufficient to establish the claim with regard to that issue (*i.e.*, the alleged deficiency in the Department's Proposed Order) to rebut the presumption created by the Department's Proposed Order. Applicant has no obligation to disprove unsubstantiated claims and/or allegations raised by the limited parties.

ISSUES

As set out in the *Case Management Order*, the issues for the contested case hearing are as follows:

Issue 1: Whether the County's land use regulation UCDC 152.616(HHH)(6)(a)(3) ("Criterion (3)," requiring a two-mile setback between wind turbines and rural residences on EFU-zoned land) constitutes "applicable substantive criteria" within the meaning of OAR 345-022-0030(3) that apply to the Project.

Issue 1.1: If so, whether the Project complies with Criterion (3).

Issue 2: Whether the Project is required to obtain a conditional use permit from the County.

DOCUMENTS CONSIDERED

The ALJ admitted the entire Decision-Making and Administrative Project Record for the Nolin Hills Wind Power Project into the contested case hearing record.²

The following additional exhibits were admitted and considered in ruling on the parties' motions: Exhibits 1 through 5 to Umatilla County's Motion for Summary Determination; and Exhibit 1 to Umatilla County's Response to Nolin Hills Wind LLC's Motion for Summary Determination.

FINDINGS OF FACT

1. On September 11, 2017, the Department received a Notice of Intent (NOI) from Nolin Hills Wind, LLC (Applicant), a wholly-owned subsidiary of Element Power US, LLC, to file an ASC for a proposed energy facility. The proposal included wind and solar energy generating components with a nominal generating capacity of approximately 600 megawatts (MW) (approximately 340 MW from wind and 260 MW from solar), to be located within a proposed site boundary located near the Town of Nolin in Umatilla County, Oregon. (NHWNOIDoc1 Notice of Intent 2017-09-07 at 1; NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 9.)

2. On October 19, 2017, pursuant to ORS 469.480, the Council appointed the Umatilla County Board of Commissioners as the Special Advisory Group (SAG) for the proposed facility. Council tasked the SAG with recommending applicable substantive criteria from Umatilla County's acknowledged comprehensive plan and land use regulations required by the statewide planning goals and in effect on the date the preliminary ASC (pASC) is submitted, any Land Conservation and Development Commission administrative rules and goals, and any land use statutes that apply directly to the facility under ORS 197.646. (NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 10.)

3. In November 2017, the SAG submitted a Response to Notice of Intent, identifying the standards that the County would apply to the wind energy generation facility and a transmission line if the application had been submitted to the County for land use review. The SAG identified the following criteria in the Umatilla County Development Code (UCDC) as applicable to the wind energy generation facility:

UCDC §152.060 Conditional Uses allowed on lands zoned EFU

UCDC §152.061 Standards for all Conditional Uses on EFU Lands

² In the Project Record, all documents are named using a prefix that includes references to the proposed facility, the EFSC process phase, document identification number ("Doc ID"), description of the document, and the date. The Department added "ODOE" in front of the Doc ID footer to indicate that the Department provided the document for the contested case proceeding. The Department also provided page numbers in the Doc ID footer to serve as "Bates Stamping" for consistent reference to record documents and pages.

UCDC §152.615 Additional Conditional Use Permit Restrictions

UCDC §152.616(HHH) Conditional Use Criteria for Commercial Wind Energy Generation Facilities

(NHWNOIDoc3-5 SAG Comment 2017-11-06 at 1.)

4. On January 10, 2018, and pursuant to ORS 469.370(10) and OAR 345-015-0160, the Department issued a Project Order specifying the state statutes and administrative rules, and local, state, and tribal laws, regulations, ordinances and other requirements applicable to the siting of the proposed facility. (NHWNOIDoc7 Project Order 2018-01-10.)

5. On February 27, 2020, Applicant filed its pASC for the proposed facility. On April 27, 2020, the Department determined the pASC incomplete and issued a Request for Additional Information (RAI) to Applicant. Applicant responded on June 16 and August 18, 2020, with additional facts, evidence, and analysis. (NHWAPPDoc4 through 4-4. 2020-06-17; 2020-08-28.)

6. On November 6, 2020, Applicant submitted a revised pASC to the Department. The revised pASC included a substantive change to the capacity and generation components of the proposed facility from a 350 MW wind facility to a 600 MW wind and solar facility. (NHWAPPDoc6 Revised pASC 2020-11-06 at 1.)

7. By letter dated January 20, 2021, Umatilla County provided comments on the revised pASC. As pertinent here, the County commented:

Exhibit K, Page 14 - The project does not comply with Umatilla County's standard for two-mile setback from rural residences outside the project area. The county's two-mile setback for rural residences was adopted by Umatilla County through Ordinance 2012-13. The original intent of the standard was to mitigate noise and visual impacts to rural residences caused by wind towers. Umatilla County requests that the applicant adjust the location of the turbines in order to meet the required standard.

(NHWAPPDoc3-9 pASC Umatilla County Comment 2021-01-20 at 1.)

8. On August 2, 2021, the Department issued an Amended Project Order. With regard to the Land Use standard, the Amended Project Order stated, in part:

The facility would be located on land zoned EFU in Umatilla County. In addition, the portion of the UEC Cottonwood transmission line corridor near Interstate 84 includes areas of Rural Tourist Commercial, Agri-Business, and Light Industrial zoning. As provided in ORS 469.401(3), if the Council issues a site certificate, Umatilla County would be bound to issue all required permits and other land use approvals, subject to the conditions set forth in the site certificate, that are included in and governed by the site certificate.

The applicant should discuss each applicable substantive criteria from the Umatilla County comprehensive plan and zoning ordinances, and should demonstrate how the proposed facility complies with those criteria. Umatilla County provided its initial list of applicable substantive criteria in a comment letter on the NOI, when the proposed facility was limited to wind energy generation and the specific proposed transmission corridors were unknown. The county then reviewed the revised preliminary application for site certificate Exhibit K, which included updates to the applicant's proposed facility design, and concluded that the applicant appeared to have provided a comprehensive list of the County's applicable substantive criteria. If the proposed facility does not comply with one or more of the applicable substantive criteria, the applicant must demonstrate that the facility nevertheless complies with the applicable statewide planning goals or that an exception to a goal is justified under ORS 469.504(2) and OAR 345-022-0030(4).

(NHWNOIDoc7-1 Amended Project Order 2021-08-02 at 21-22.)

9. In October 2021, the Department requested more information specific to Applicant's request for an exception to Statewide Planning Goal 3 for the proposed solar photovoltaic energy generation components, as presented in pASC, Exhibit K. In response, Applicant provided additional facts and analysis, including two landowner letters. (*See* NHWAPPDoc9 ODOE RAI on Goal 3 Exception 2021-10-06; NHWAPPDoc9-1 Goal 3 Exception Request Response 2021-12-06; NHWAPPDoc9-1 Landowner Letter 2022-01-27, NHWAPPDoc9-1 Landowner Letter 2022-01-14.)

10. On January 28, 2022, following review of the responses, the revised pASC Exhibits and supplemental information submitted by Applicant in response to the RAIs and agency comments, the Department determined the ASC for the Nolin Hills Wind Power Project to be complete. (NHWAPPDoc1 ASC Determination of Complete Application Letter_2022-01-28 at 2-3.)

11. In the ASC, and pursuant to ORS 469.504(4), Applicant elected to have Council determine whether the proposed facility complies with statewide planning goals. (NHWAPPDoc2-10 ASC Exhibit K Land Use_2022-01-31 at 8; *see also* NHWAPPDoc1 - Proposed Order on ASC 2022-08-04 at 74.)

12. The proposed facility would be located in an Exclusive Farm Use (EFU) zone, with a grid-interconnection transmission line (the proposed UEC Cottonwood transmission line) that would intersect three additional zones: Rural Tourist Commercial, Agri-Business, and Light Industrial. (NHWAPPDoc2-10 ASC Exhibit K Land Use 2022-01-31 at 8-9 of 158, and attached Figure K-2; *see also* NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 123.)

13. As required by the Amended Project Order, Applicant addressed, in ASC Exhibit K, compliance with applicable substantive criteria from the Umatilla County Development Code for the proposed wind power generation facility and solar power generation facility and related and

supporting facilities separately from the UEC Cottonwood transmission line.³ With regard to UCDC §152.616(HHH)(6)(a)(3) (Criterion (3)), which requires a two-mile setback from a turbine tower to a rural residence, the Applicant stated:

The Applicant is siting the Project to maintain the distance between turbine towers and rural residences to the maximum extent practicable. Although the turbine locations have not been finalized, some of the final locations may not ultimately meet the above setback standard for rural residences outside of the Project lease area (see Figure K-9). This may be the case for up to approximately eight rural residences. Siting of wind turbines is driven by many factors including land availability, habitat, landowner agreement, existing land uses, access, wind regime, turbine spacing requirements, and wind farm energy generation optimization. Therefore, while some micrositing of the Project is anticipated prior to construction, substantial relocations are not anticipated due to these many interacting siting factors.

Of those eight rural residences, all will be more than a mile away from a turbine tower including three residences that are over 1.9 miles and two over 1.7 miles from a turbine (Table K-2). One of the owners of these residences has executed a “Good Neighbor Agreement Waiver” with the Applicant.

Because the setback criterion is not a land use regulation required by the statewide planning goals, it does not qualify as one of the “applicable substantive criteria” defined in OAR 345-022-0030(3).

Therefore, the Project is not subject to the setback criterion. In addition, as noted in the [Project] Order, if the proposed Project does not comply with one or more of the applicable substantive criteria, the Applicant can demonstrate that the Project nevertheless complies with the applicable statewide planning goals. Sections 5.0 and 6.0 demonstrate the Project complies with all statewide planning goals, specifically applicable statewide planning goals, Goal 3 and Goal 14[.]

(NHWAPPDoc2-10 ASC Exhibit K. Land Use_2022-01-31 at 20-21, footnotes omitted.)

14. In the DPO, the Department agreed with Applicant’s analysis in Exhibit K. The Department recommended the Council find that Criterion (3) does not apply because it is not required by statewide planning Goal 3, Goal 14 nor any other statewide planning goal, therefore, Applicant need not comply with it. (NHWAPPDoc1 Draft Proposed Order with Attachments 2022-04-19 at 80-86.)

³ In Exhibit K, Applicant explained that the Project has three different transmission line components: (1) the Project substation connector line connecting two substations within the site boundary; (2) the BPA Stanfield transmission line; and (3) the UEC Cottonwood transmission line. (NHWAPPDoc2-10 ASC Exhibit K. Land Use_2022-01-31 at 14.) Applicant analyzed the UEC Cottonwood transmission line as an associated transmission line necessary for public service under ORS 215.274 and ORS 215.275 and independent of the wind facility. (*Id.* at 15.)

15. In its May 26, 2022 comments on the DPO, Umatilla County acknowledged that Criterion (3) “is not explicitly ‘required’ by the statewide planning goals.” Nevertheless, the County asserted that because Criterion (3) is part of their acknowledged comprehensive plan and land use ordinances, it constitutes “applicable substantive criteria” identified by the SAG, and that Council must, therefore, apply this criterion to the proposed facility “rather than evaluating the proposed facility against the statewide planning goals.” (NHWAPDoc3-12 DPO SAG Comment Umatilla County 2022-05-26 at 1-2.)

16. In the Proposed Order, the Department found as follows with regard to “applicable substantive criteria”:

“Applicable substantive criteria” are criteria from the affected local government’s (Umatilla County) acknowledged comprehensive plan and land use ordinance, which then must satisfy two requirements. The criteria within the acknowledged comprehensive plan and land use regulations must 1) be required by the statewide planning goals applicable to the proposed facility based on facility type or facility component and land use zone, and 2) be in effect on the date the applicant submits the preliminary application for site certificate (pASC), which in this instance occurred on February 27, 2020.

For this ASC, the applicant requests a Council determination under ORS 469.504(1)(b)(B). * * *

ORS 469.504(1)(b)(B) * * * allows for Council to find that an applicant has satisfied the requirements of the Land Use standard, even if the proposed facility cannot comply with one or more “applicable substantive criteria” if the proposed facility otherwise complies with applicable statewide planning goals or demonstrates that an exception to the applicable statewide planning goal is justified. Strict compliance with “applicable substantive criteria” is therefore not required if compliance with statewide planning goals is demonstrated or Council finds that an exception is justified.

In addition to ORS 469.504(1)(b)(B), ORS 469.504(5) applies. ORS 469.504(5) applies to proposed facilities that include components that would be located in three or more zones. The proposed facility includes a related or supporting facility that would be located in four or more zones (the proposed 230 kV UEC Cottonwood transmission line). * * *

[B]ased on a review of the ORS 469.504(5) factors in consultation with the SAG, the Department recommends Council find that the proposed facility complies with Council’s Land Use standard, by applying, as authorized in ORS 469.504(1)(b)(B), a combination of applicable substantive criteria recommended by the SAG and statewide planning goals for the evaluation of proposed wind facility components and by taking an exception to statewide planning goal 3 for the proposed solar facility components.

(NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 77-78.)

17. With regard to the County’s Criterion (3), the Department found:

Criterion (3) establishes a 2-mile setback from a turbine tower to rural residences, but does not apply to residences located on properties within the Wind Power Generating Facility project. The proposed facility would not comply with this 2-mile setback because 8 proposed wind turbine locations are less than 2 miles from approximately 16 rural residences (see ASC Exhibit 16 K Figure K-9). To address the potential issue of non-compliance with Criterion (3), the applicant requests that Council find that Criterion (3) does not meet the Council’s definition of “applicable substantive criteria” under OAR 345-022-0030(3) and therefore is not required to be satisfied to meet the Land Use standard; or, in the alternative, that non-compliance with the criterion is allowable per ORS 469.504(1)(b)(B) because the proposed facility otherwise complies with applicable statewide planning goals.

The proposed facility includes a related or supporting facility that crosses three or more zones⁴ and, depending on Council’s interpretation of whether Criterion (3) is “applicable substantive criteria” is potentially non-compliant with Criterion (3). ORS 469.504(1)(b)(B) and ORS 469.504(5) both establish a regulatory approach of evaluating a combination of criteria and statewide planning goals in order to make findings of compliance with the Land Use standard.

* * * * *

For this proposed facility, the SAG recommended applicable substantive criteria. On November 6, 2017, the SAG commented on the NOI and provided a list of relevant criteria from the UCDC and County Comprehensive Plan, which included Criterion (3). On April 15, 2020, the SAG commented on the initial pASC and reaffirmed the inclusion of Criterion (3) as part of the applicable substantive criteria and stated that the proposed facility would not comply with Criterion (3). * * * .

As authorized by ORS 469.504(1)(b)(B) and ORS 469.504(5), the Department recommends Council evaluate the proposed facility, specifically the proposed wind facility components, against a combination of the applicable substantive criteria recommended by the SAG and statewide planning goals. The Department provides the following analysis of the factors in ORS 469.504(5)(a) through (c):

⁴ While the proposed facility would almost entirely be located in the Exclusive Farm Use (EFU) zone, the proposed UEC Cottonwood transmission line route would intersect three additional zones: Rural Tourist Commercial, Agri-Business, and Light Industrial. The proposed facility would therefore pass through more than three zones in a single jurisdiction. (NHWAPPDoc2-10 ASC Exhibit K Land Use 2022-01-31, see ASC Exhibit K Figure K-2.)

For factor (a) – the number of jurisdictions and zones in question – one of the proposed 230 kV transmission line route options would intersect more than three zones. The remaining proposed facility components as well as the vast majority of the UEC Cottonwood transmission line option would be located in a single zone (EFU) in a single jurisdiction (Umatilla County).

For factor (b) - the degree to which the applicable substantive criteria reflect local government consideration of energy facilities in the planning process – the setback was adopted by Umatilla County specifically to consider the impacts of energy facilities (wind energy facilities) in the planning process. In their January 20, 2021 letter on the pASC, the SAG commented:

The county’s two-mile setback for rural residences was adopted by Umatilla County through Ordinance 2012-13. The original intent of the standard was to mitigate noise and visual impacts to rural residences caused by wind towers. Umatilla County requests that the applicant adjust the location of the turbines in order to meet the required standard.

Factor (c) requires the Council to consider the level of consistency of the applicable substantive criteria from the various zones and jurisdictions. There is only one jurisdiction – Umatilla County – Council must consider the level of consistency of the applicable substantive criteria from the various zones. The two-mile setback from rural residences required for wind turbines by UCDC 152.616(HHH)(6)(a)(3) is part of UCDC 152.616, Standards for Review of Conditional Uses and Land Use Decisions. These criteria are specific to certain types of uses, rather than specific zones, and therefore UCDC 152.616(HHH)(6)(a)(3) appears consistent from the various zones.

After consultation with the SAG and consideration of the ORS 469.504(5) factors (a) - (c), as authorized by ORS 469.504(1)(b)(B), the Department recommends that the Council evaluate the proposed facility, specifically the proposed wind facility components, against a combination of the applicable substantive criteria and statewide planning goals. Based on the applicant’s request, though, the Department first evaluates whether Criterion (3) meets the Council’s definition of “applicable substantive criteria” and then, secondly, evaluates whether the proposed facility would otherwise comply with applicable statewide planning goals.

(NHWAPPD01 Proposed Order on ASC 2022-08-04 at 93-95.)

18. In its evaluation of whether Criterion (3) meets the definition of “applicable substantive criteria,” the Department found as follows:

Question 1

The question whether or not Criterion 3 meets the Council’s definition of “applicable substantive criteria” is addressed first. ORS 469.504(1)(b)(A) and

OAR 345-022-0030(3) define “applicable substantive criteria” * * *.

ORS 469.504(5) states the SAG shall recommend the applicable substantive criteria “under section (1)(b)(A)” – i.e., criteria from the local government’s comprehensive plan and land use regulations that are “required” by the statewide planning goals. Further, ORS 469.504(1)(b)(B), authorizes Council to approve a facility that does not comply with applicable substantive criteria recommended by a SAG if it otherwise complies with applicable statewide planning goals.

Similarly, OAR 345-022-0030(3) states “applicable substantive criteria” are “criteria from the affected local government’s acknowledged comprehensive plan and land use ordinances that are required by the statewide planning goals and that are in effect on the date the applicant submits the application” (emphasis added) and OAR 345-021-0050(6)(b)(A) states that when an applicant has elected to obtain a Council determination of compliance with the Council’s land use standard under ORS 469.504(1)(b), each local government with land use jurisdiction over the proposed facility shall include in their comments or recommendations to the Department “A complete list of applicable substantive criteria from the local government’s acknowledged comprehensive plan and land use ordinances that are required by the statewide planning goals and that are in effect on the date the application was submitted” (emphasis added).

The County has not sought to explain how the 2-mile setback from rural residences is required by the statewide planning goals.

In most applications, applicants meet all of the requirements set forth in the acknowledged comprehensive plan and land use regulations that counties provide, therefore an assessment of whether or not they all constitute applicable substantive criteria is not typically done. Only when an applicant states that their proposed facility would not meet a specific comprehensive plan provision or land use regulation does the Council evaluate whether or not it constitutes applicable substantive criteria. The two clarifying provisions related to such an assessment in the statute above are whether the local comprehensive plan and land use regulations are “required by the statewide planning goals” and whether they were “in effect on the date the application was submitted.”

* * * * *

The preliminary application was submitted on February 27, 2020, so Criterion (3) was in effect on that date. That leaves whether or not it is “required by the statewide planning goals.” Oregon’s statewide program for land use planning consists of 19 goals. Each county comprehensive plan and land use regulation that is approved must be consistent with all applicable statewide planning goals and they are reviewed by the Land Conservation and Development Commission (LCDC) for consistency. LCDC had the opportunity to evaluate Criterion (3) and did not challenge its consistency with applicable statewide planning goals.

However, being consistent with applicable statewide planning goals is not the same as being “required” by them. Therefore, an evaluation of Criterion (3) against applicable statewide planning goals is necessary to determine whether or not it is required.

* * * * *

Criterion (3) was adopted by Umatilla County to meet “local concerns”, as allowed by OAR 660-033-0120 and 0130 which is consistent with Goal 3. This is further evidenced by the fact that the Department is unaware of any other county that has adopted a similar setback requirement between wind turbines and residences. The Department therefore recommends Council conclude that while Criterion (3) is both allowed by and consistent with Goal 3, it is nevertheless not “required” by Goal 3.

* * * * *

None of [LCDC’s rules to implement Goal 14 (Urbanization)] “require” specific setback distances between wind turbines and rural residences. The Department therefore recommends Council agree with the applicant’s conclusion that Criterion (3) is also not “required” by Goal 14.

The Department has evaluated the other 17 Statewide Planning Goals and concludes the specific setback distances between wind turbines and rural residences is not “required” by any of them either. The Department therefore recommends that Council agree with the applicant and conclude that Criterion (3) is not “required” by any of the 19 statewide planning goals, therefore it does not constitute applicable substantive criteria.

(NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 95-100.)

19. The Department then considered whether the proposed facility would otherwise comply with applicable statewide planning goals, based on an evaluation of a combination of applicable substantive criteria and statewide planning goals. The Department found that the Project complies with applicable statewide planning goals:

Question 2

Although the Department recommends Council find Criterion (3) is not “applicable substantive criteria required by the statewide planning goals”, because that Criterion was recommended by the SAG and the proposed facility would not comply with that Criterion, the Department recommends Council still consider the second question – whether the proposed facility would otherwise comply with applicable statewide planning goals. ORS 469.504(1)(b)(B) and ORS 469.504(5) apply to the proposed facility and authorize a finding of compliance under the Land Use standard based on an evaluation of a combination of applicable substantive criteria and statewide planning goals when a proposed facility either

does not comply with an applicable substantive criteria or is necessitated based on varying zone requirements.

* * * * *

Because the ASC presents up to 8 wind turbines that would not comply with Criterion (3), the applicant evaluates the proposed facility against all 19 Statewide Planning Goals consistent with ORS 469.504(1)(b)(B). The Department is in agreement with some but not all of the Goal Compliance evaluations provided by the applicant.

- [Goal 1, Citizen Involvement – satisfied]
- [Goal 2, Land Use Planning – not applicable as Applicant is proceeding under ORS 469.504(1)(b)(B)]
- [Goal 3, Agricultural Lands – satisfied]
- [Goal 4, Forest Lands – satisfied]
- [Goal 5, Open Spaces, Scenic, Historic and Natural Resources – satisfied]
- [Goal 6, Air, Water and Land Resources – satisfied]
- [Goal 7, Areas Subject to Natural Disasters and Hazards – satisfied]
- [Goal 8, Recreational Needs – satisfied]
- [Goal 9, Economic Development – satisfied]
- [Goal 10, Housing – satisfied]
- [Goal 11, Public Facilities and Services – satisfied]
- [Goal 12, Transportation – satisfied]
- [Goal 13, Energy Conservation – not applicable]
- [Goal 14, Urbanization – satisfied]
- [Goal 15, Willamette River Greenway – not applicable]
- [Goal 16, Estuarine Resources – not applicable]
- [Goal 17, Coastal Shorelands – not applicable]
- [Goal 18, Beaches and Dunes – not applicable]
- [Goal 19, Ocean Resources – not applicable]

Based on the above analysis and findings, the Department recommends Council conclude, as authorized under ORS 469.504(1)(b)(B), that while some wind turbine locations will not comply with Criterion (3), the entire proposed facility nevertheless complies with applicable Statewide Planning Goals.

(NHWAPDoc1 Proposed Order on ASC 2022-08-04 at 100-106.)

20. In the Proposed Order, in analyzing the standards for the proposed UEC Cottonwood transmission line, the Department explained as follows:

The proposed 230 kV UEC Cottonwood transmission line would extend approximately 25.3 miles from the proposed northern project substation to the existing UEC Cottonwood Substation. The line would include 8.4 miles of new line, 9.6 miles of replacement line, and 7.3 miles of upgraded line. Approximately

23 miles of the proposed transmission line would be located within EFU-zoned land; the remaining northern portion of the route would be located within RTC, LI and AB zoned lands.

The route of the proposed UEC Cottonwood transmission line allows for interconnection of the proposed northern project substation to two existing structures – UEC Transmission Network Junction (located on the corner of White House Road and County Road 1348) and the UEC Cottonwood Substation (north of the I-84 crossing location). The proposed northern project substation and UEC Transmission Network Junction are located within EFU-zoned lands; the existing UEC Cottonwood Substation is located in the LI zone. ASC Exhibit K Figure K-2 Zoning demonstrates that there are no non-EFU zoned lands between the wind, solar and transmission line site boundary area or within ½-mile of these areas, except for the northern 2-miles of the transmission line route which is over 23 miles from the location of proposed energy generation equipment. Because there are no non-EFU zoned lands within ½-mile of the portions of the site boundary containing the wind and solar micro siting areas or for the majority (approximately 23 miles) of the transmission line site boundary, the Department recommends Council find that there are no reasonable alternatives for the proposed 230 kV UEC Cottonwood transmission line that would be located on non-EFU zoned lands.

(NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 123.)

21. With regard to the Project’s compliance with the Land Use Standard, the Proposed Order concluded:

Based on the foregoing findings and the evidence in the record, and subject to compliance with the recommended conditions, the Department recommends the Council find an exception to Goal 3 is justified under OAR 345-022-0030(4)(c) and ORS 469.504(2)(c); therefore, the Council finds that the proposed facility complies with OAR 660-033-0130(38)(f) and complies with the applicable statewide planning goal (Goal 3). As such, subject to the recommended conditions, the Department recommends the Council find that the proposed facility complies with the Council’s Land Use standard.

(NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 172.)

CONCLUSIONS OF LAW

Issue 1: The Criterion (3) is not an applicable substantive criterion under OAR 345-022-0030(3) because it is not required by the statewide planning goals. Therefore, Criterion (3) does not apply to the Project.

Issue 1.1: The Project does not comply with Criterion (3) but otherwise complies with applicable statewide planning goals.

Issue 2: The Project is required to obtain a conditional use permit from the County, but pursuant to ORS 469.401(3), the County cannot require Applicant to comply with Criterion (3) as a requirement of the conditional use permit.

OPINION

A. *Standard of Review for Motion for Summary Determination*

As set out in the *Case Management Order*, OAR 137-003-0580 sets out requirements and the standard for granting summary determination in contested case proceedings. The rule states, in relevant part:

(6) The administrative law judge shall grant the motion for a summary determination if:

(a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

(b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

(7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.

(8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.

In *Watts v. Board of Nursing*, 282 Or App 705 (2016), the Oregon Court of Appeals clarified the standard for granting motions for summary determination in administrative proceedings, stating:

The board can grant a motion for summary determination only if the relevant documents, including affidavits, create “no genuine issue as to any material fact that is relevant to resolution of the legal issue.” OAR 137-003-0580(6)(a) * * *. 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.

282 Or App 714; emphasis in original. *See also Wolff v. Board of Psychologist Examiners*, 284 Or App 792 (2017).

Similarly, in *King v. Department of Public Safety Standards and Training*, 289 Or App 314 (2017), the court stated:

Issues may be resolved on a motion for summary determination only where the application of law to the facts requires a single, particular result. Therefore, the issues on summary determination must be purely legal.

289 Or App 321; internal citations omitted.

These cases make clear that summary determination may only be granted when there are no relevant facts in dispute and the question(s) to be resolved are purely legal. In this contested case, all parties/limited parties concede that there are no material facts in dispute and the question to be resolved, specifically, whether Council may find the Project in compliance with the Land Use standard despite the Project's lack of compliance with County Criterion (3), is a purely legal one. Therefore, this case is appropriate for resolution on summary determination.

B. *Applicable Law – Facility Compliance with Statewide Planning Goals*

1. *Council's Land Use Standard*

As pertinent here, ORS 469.503 states as follows:

In order to issue a site certificate, the Energy Facility Siting Council shall determine that the preponderance of the evidence on the record supports the following conclusions:

* * * * *

(4) The facility complies with the statewide planning goals adopted by the Land Conservation and Development Commission.

ORS 469.504 addresses facility compliance with statewide planning goals and the exceptions thereto, and provides in pertinent part:

(1) A proposed facility shall be found in compliance with the statewide planning goals under ORS 469.503 (4) if:

(a) The facility has received local land use approval under the acknowledged comprehensive plan and land use regulations of the affected local government; or

(b) The Energy Facility Siting Council determines that:

(A) The facility complies with applicable substantive criteria from the affected local government's acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals and in effect on the date the application is submitted, and with any Land Conservation and Development

Commission administrative rules and goals and any land use statutes that apply directly to the facility under ORS 197.646;

(B) For an energy facility or a related or supporting facility that must be evaluated against the applicable substantive criteria pursuant to subsection (5) of this section, that the proposed facility does not comply with one or more of the applicable substantive criteria but does otherwise comply with the applicable statewide planning goals, or that an exception to any applicable statewide planning goal is justified under subsection (2) of this section; or

(C) For a facility that the council elects to evaluate against the statewide planning goals pursuant to subsection (5) of this section, that the proposed facility complies with the applicable statewide planning goals or that an exception to any applicable statewide planning goal is justified under subsection (2) of this section.

* * * * *

(5) Upon request by the State Department of Energy, the special advisory group established under ORS 469.480 shall recommend to the council, within the time stated in the request, the applicable substantive criteria under subsection (1)(b)(A) of this section. * * * If the special advisory group recommends applicable substantive criteria for an energy facility described in ORS 469.300 or a related or supporting facility that does not pass through more than one local government jurisdiction or more than three zones in any one jurisdiction, the council shall apply the criteria recommended by the special advisory group. If the special advisory group recommends applicable substantive criteria for an energy facility as defined in ORS 469.300 (11)(a)(C) to (E) or a related or supporting facility that passes through more than one jurisdiction or more than three zones in any one jurisdiction, the council shall review the recommended criteria and determine whether to evaluate the proposed facility against the applicable substantive criteria recommended by the special advisory group, against the statewide planning goals or against a combination of the applicable substantive criteria and statewide planning goals. In making its determination, the council shall consult with the special advisory group and shall consider:

- (a) The number of jurisdictions and zones in question;
- (b) The degree to which the applicable substantive criteria reflect local government consideration of energy facilities in the planning process; and
- (c) The level of consistency of the applicable substantive criteria from the various zones and jurisdictions.

(Emphasis added.)

To implement the requirements of ORS 469.503(4) and 469.504, the Council adopted

OAR 345-022-0030, the Land Use standard:

(1) To issue a site certificate, the Council must find that *the proposed facility complies with the statewide planning goals adopted by the Land Conservation and Development Commission.*

(2) The Council shall find that a proposed facility complies with section (1) if:

(a) The applicant elects to obtain local land use approvals under ORS 469.504(1)(a) and the Council finds that the facility has received local land use approval under the acknowledged comprehensive plan and land use regulations of the affected local government; or

(b) *The applicant elects to obtain a Council determination under ORS 469.504(1)(b) and the Council determines that:*

(A) *The proposed facility complies with applicable substantive criteria as described in section (3) and the facility complies with any Land Conservation and Development Commission administrative rules and goals and any land use statutes directly applicable to the facility under ORS 197.646(3);*

(B) *For a proposed facility that does not comply with one or more of the applicable substantive criteria as described in section (3), the facility otherwise complies with the statewide planning goals or an exception to any applicable statewide planning goal is justified under section (4); or*

(C) For a proposed facility that the Council decides, under sections (3) or (6), to evaluate against the statewide planning goals, the proposed facility complies with the applicable statewide planning goals or that an exception to any applicable statewide planning goal is justified under section (4).

(3) *As used in this rule, the “applicable substantive criteria” are criteria from the affected local government’s acknowledged comprehensive plan and land use ordinances that are required by the statewide planning goals and that are in effect on the date the applicant submits the application. If the special advisory group recommends applicable substantive criteria, as described under OAR 345-021-0050,⁵ the Council shall apply them. If the special advisory group does not recommend applicable substantive criteria, the Council shall decide either to make its own determination of the applicable substantive criteria and apply them or to evaluate the proposed facility against the statewide planning goals.*

* * * * *

⁵ OAR 345-021-0050 addresses distribution of a preliminary ASC and reviewing agency comments or recommendations. For purposes of this rule, the term “applicable substantive criteria” means “the criteria and standards that the local government would apply in making all land use decisions necessary to site the proposed facility in the absence of a Council proceeding[.]” OAR 345-021-0050(6)(b)(A).

(5) If the Council finds that applicable substantive local criteria and applicable statutes and state administrative rules would impose conflicting requirements, the Council shall resolve the conflict consistent with the public interest. In resolving the conflict, the Council cannot waive any applicable state statute.

(6) If the special advisory group recommends applicable substantive criteria for an energy facility described in ORS 469.300(11)(a)(C) to (E) or for a related or supporting facility that does not pass through more than one local government jurisdiction or more than three zones in any one jurisdiction, the Council shall apply the criteria recommended by the special advisory group. If the special advisory group recommends applicable substantive criteria for an energy facility described in ORS 469.300(11)(a)(C) to (E) or a related or supporting facility that passes through more than one jurisdiction or more than three zones in any one jurisdiction, the Council shall review the recommended criteria and decide whether to evaluate the proposed facility against the applicable substantive criteria recommended by the special advisory group, against the statewide planning goals or against a combination of the applicable substantive criteria and statewide planning goals. In making the decision, the Council shall consult with the special advisory group, and shall consider:

- (a) The number of jurisdictions and zones in question;
- (b) The degree to which the applicable substantive criteria reflect local government consideration of energy facilities in the planning process; and
- (c) The level of consistence of the applicable substantive criteria from the various zones and jurisdictions.

Emphasis added.

2. The Umatilla County Development Code

The UCDC implements Umatilla County’s Comprehensive Plan. UCDC §152.002.

UCDC Section §152.616 sets out the standards for review of conditional uses and land use decisions. The standards for review of a “Commercial Wind Power Generation Facility” are set out in §152.616(HHH). As pertinent here, UCDC §152.616(HHH)(6) provides:

(6) Standards/Criteria of Approval

The following requirements and restrictions apply to the siting of a Wind Power Generation Facility:

- (a) Setbacks. The minimum setback shall be a distance of not less than the following:

(1) From a turbine tower to a city urban growth boundary (UGB) shall be two miles. The measurement of the setback is from the centerline of a turbine tower to the edge of the UGB that was adopted by the city as of the date the application was deemed complete. (2) From turbine tower to land zoned Unincorporated Community (UC) shall be 1 mile. (3) From a turbine tower to a rural residence shall be 2 miles.

(2) From turbine tower to land zoned Unincorporated Community (UC) shall be 1 mile.

(3) From a turbine tower to a rural residence shall be 2 miles.

For purposes of this section, “rural residence” is defined as a legal, existing single family dwelling meeting the standards of UCDC §152.058 (F) (1)-(4), or a rural residence not yet in existence but for which a zoning permit has been issued, on a unit of land not a part of the Wind Power Generation Facility, on the date a Wind Power Generation Facility application is submitted. * * * The measurement of the setback is from the centerline of the turbine tower to the center point of the rural residence.

Emphasis added.

C. The Parties’ Cross-Motions

Umatilla County requested a contested case challenging the Department’s recommendation that Council find the proposed facility in compliance with the Land Use standard, OAR 345-022-0030. All three parties filed motions for summary determination in this matter seeking favorable rulings on the issues set out above. In its motion, Umatilla County argues that the Project does not comply with the Land Use standard because:

(1) Criterion (3) constitutes “applicable substantive criteria” within the meaning of OAR 345-022-0030(3) applicable to the Project;

(2) The Project does not comply with Criterion (3); and

(3) The Project is required to obtain a conditional use permit from the County, and must demonstrate compliance with Criterion (3) to obtain the permit.

UC Amended Motion at 5-30.

The Department and Applicant, on the other hand, argue in their respective motions that:

(1) Criterion (3) does not meet the definition of “applicable substantive criteria” within the meaning of OAR 345-022-0030(3) because the applicable statewide planning goals do not require this setback;

(2) Even if Criterion (3) constitutes an applicable substantive criterion within the meaning of OAR 345-022-0030(3), Council is not obligated to require that Applicant comply with it; and

(3) Although the Project is required to obtain a conditional use permit from the County, the County cannot predicate issuance of the conditional use permit on the Project's compliance with Criterion (3).

ODOE Motion at 9-16; Applicant's Motion at 3-8. The parties' respective arguments are addressed below.

1. Issue 1: Whether Criterion (3) constitutes applicable substantive criteria within the meaning of OAR 345-022-0030(3).

As set out above, Applicant elected to obtain land use approval for the Project from the Council under ORS 469.504(1)(b). Under ORS 469.504(1)(b) there are three different methods for the Council to determine a proposed facility's compliance with statewide planning goals. The methods are described in ORS 469.504(1)(b), subparagraphs (A), (B), and (C), respectively:

- Under ORS 469.504(1)(b)(A), the Council must find that the Project "complies with applicable substantive criteria from the affected local government's acknowledged comprehensive plan and land use regulations that are *required by the statewide planning goals and in effect on the date the application is submitted.*"
- Under ORS 469.504(1)(b)(B), if the Project does not comply with the local government's applicable substantive criteria, then the Council must find that the Project "*otherwise compl[ies] with the applicable statewide planning goals, or that an exception to any applicable statewide planning goal is justified.*"
- And finally, under ORS 469.504(1)(b)(C), for a facility that Council elects to evaluate against the statewide planning goals in consultation with a special advisory group, the Council must find that the proposed facility complies with the applicable statewide planning goals or that an exception to any applicable statewide planning goal is justified.

Emphasis added.

The Land Use standard, OAR 345-022-0030(3), similarly provides:

As used in this rule, the "applicable substantive criteria" are criteria from the affected local government's acknowledged comprehensive plan and land use ordinances *that are required by the statewide planning goals and that are in effect on the date the applicant submits the application.*

Emphasis added.

In the Proposed Order, the Department evaluated the Project's compliance with statewide planning goals under ORS 469.504(1)(b)(A) and, alternatively, subparagraph (B). In its analysis under ORS 469.504(1)(b)(A), the Department recommended that Council find the Project complies with all applicable substantive criteria from Umatilla County's acknowledged comprehensive plan and land use regulations that are required by statewide planning goals.⁶ The Department recommended the Council find that because specific setback distances between turbines and rural residences is not "required" by any statewide planning goal, Criterion (3) does not constitute applicable substantive criteria for purposes of ORS 469.504(1)(b)(A) and OAR 345-022-0030(3).⁷

In its alternative analysis under ORS 469.504(1)(b)(B) and (5), the Department acknowledged that the proposed locations for a few of the wind turbines would be less than two miles from a rural residence. Therefore, if Council were to evaluate the Project against the SAG's recommended criteria, the Project would not comply with Criterion (3). However, the Department recommended that Council find the Project's noncompliance with Criterion (3) is allowable under ORS 469.504(1)(b)(B) because the proposed facility otherwise complies with the applicable statewide planning goals.⁸

In its motion, Umatilla County argues that Criterion (3) constitutes "applicable substantive criteria" under OAR 345-022-0030(3) because the County SAG identified it as such. The County asserts that Council has no authority to review and/or overrule the SAG's determination, and therefore the Department erred by recommending that Council find the Project in compliance with all applicable substantive criteria. UC Amended Motion at 13-14. In addition, the County argues that, even if Council had jurisdiction to review and reject the SAG's identification of applicable substantive criteria, the Department erred by recommending that Council find Criterion (3) is not required by statewide planning goals. *Id.* at 14. The County maintains that Goal 2 (Land Use Planning) requires that the Project comply with Criterion (3). *Id.*

Applicant and the Department, on the other hand, argue that while the two-mile residential setback is part of the local substantive criteria, Criterion (3) is not "required" by any statewide planning goal, and therefore does not constitute applicable substantive criteria under OAR 345-022-0030(3). Both parties cite to the Proposed Order's analysis of Question 1,⁹ where the Department found that although Criterion (3) is allowed by, and consistent with, Goal

⁶ See NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 95-100 (the analysis under Question 1).

⁷ NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 100.

⁸ See NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 93 and 100-106 (the analysis under Question 2).

⁹ NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 95-100.

3,¹⁰ it is not required by Goal 3 or any of the 18 other statewide planning goals.¹¹ ODOE Motion at 9-14; Applicant Motion at 6. The Department maintains that because Criterion (3) is not required by any statewide planning goal, the Council is not required to find that the Project complies with Criterion (3) to establish compliance with statewide planning goals as required by ORS 469.503(4) and ORS 469.504(1)(b)(A).

For the reasons that follow, I agree with the Department and Applicant. I find that, as a matter of law, Criterion (3) is not an applicable substantive criterion under ORS 469.504 and OAR 345-022-0030(3) because it is not required by the statewide planning goals. And, because Criterion (3)'s two-mile setback does not constitute "applicable substantive criteria" under OAR 345-022-0030(3) it is not applicable to the Project and does not preclude Council from finding that the Project complies with statewide planning goals and approving a site certificate. I also agree with the Department and Applicant that, even if Criterion (3) were applicable to the Project, the Project otherwise complies with statewide planning goals under ORS 469.504(1)(b)(B).

a. *Meaning of "applicable substantive criteria"*

In ORS 469.504(1)(b)(A), the legislature described "applicable substantive criteria" as local land use regulations that are "required by the statewide planning goals and in effect on the date the application is submitted." The first sentence of OAR 345-022-0030(3) tracks the language in ORS 469.504(1)(b)(A) in describing "applicable substantive criteria." The second sentence of OAR 345-022-0030(3) then states "[i]f the special advisory group recommends applicable substantive criteria, as described under OAR 345-021-0050, the Council shall apply them."¹² The second sentence of OAR 345-022-0030(3) appears to address the provisions of

¹⁰ Statewide Planning Goal 3: Agricultural Lands states:

Agricultural lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space and with the state's agricultural land use policy expressed in ORS 215.243 and 215.700.

OAR 660-015-0000(3).

¹¹ The 19 statewide planning goals established by the Land Conservation and Development Commission are listed in Finding of Fact no. 19.

¹² As noted previously, OAR 345-021-0050 discusses the distribution of a preliminary ASC to reviewing agencies for the proposed facility. In OAR 345-021-0050(6)(b)(A), the Department requires each local government with land use jurisdiction over the proposed facility to submit comments or recommendations including "a complete list of all applicable substantive criteria * * * that are required by statewide planning goals and that are in effect" when the application was submitted. The rule then states, "'Applicable substantive criteria' means the criteria and standards that the local government would apply in making all land use decisions necessary to site the proposed facility in the absence of a Council proceeding." (Emphasis added.) However, to construe this definition of "applicable substantive criteria" in OAR 345-021-0050(6)(b)(A) broadly, *i.e.*, as including local land use regulations and standards in compliance with, but not necessarily required by, the statewide planning goals, would be inconsistent with the language in 469.504(1)(b)(A), OAR 345-022-0030(3), and the first sentence in subparagraph (6)(b)(A). Because the term "applicable substantive criteria" should be given the same meaning

ORS 469.504(5).

Because nothing in ORS Chapter 469 suggests otherwise, the term “applicable substantive criteria” should have the same meaning throughout ORS 469.504 and in OAR 345-022-0030. ORS 174.010; *see e.g., Pete’s Mountain Homeowners Association v. OWRD*, 236 Or App. 507, 518 (2010) (“It is a longstanding principle of statutory construction that words may be assumed to be used consistently throughout a statute.”); *see also Scott v. State Farm Mutual Auto. Ins.*, 345 Or. 146, 153, (2008) (“The legislature’s use of the same term, ‘proof of loss,’ in all three of the statute’s subsections indicates that the legislature intended the term to have the same meaning throughout the statute.”). If the legislature intended “applicable substantive criteria” to mean something other than local comprehensive plans and land use standards that are “required by the statewide planning goals and in effect on the date the application is submitted,” as stated in ORS 469.504(1)(b)(A), then it could and would have so indicated. *See State v. Gaines*, 346 Or 160, 171 (2009) (“[A]s this court and other authorities have long observed, there is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes.”)

Insofar as the County argues that the term “applicable substantive criteria” as used in OAR 345-022-0030(3) should be construed to require Council to apply local land use criteria and standards that are more restrictive than what the statewide planning goals require, such a reading of the rule is contrary to the provisions of ORS 469.504(1)(b)(A). A rule is not valid if it conflicts with the statutory policy directive. *See Planned Parenthood Assn. v. Dep’t of Human Services*, 297 Or 562 (1984). Consequently, “applicable substantive criteria” means the same thing throughout ORS 469.504 and in OAR 345-022-0030(3): local comprehensive plans and land use standards that are “required by the statewide planning goals and in effect on the date the application is submitted.”

In addition to principles of statutory construction, two Oregon Supreme Court decisions support this determination. First, in *Save Our Rural Oregon v. EFSC*, 339 Or 353 (2005), the court analyzed the intricacies of ORS 469.504, subparagraphs (1)(b) and (5), and the methods that Council may use to evaluate a proposed facility’s compliance with planning goals. There, as here, the applicant opted to have Council determine the proposed facility’s compliance with statewide planning goals. There, as here, Council designated a special advisory group (Klamath County) to recommend applicable substantive criteria for Council to use in making its determination. However, there, unlike here, the special advisory group did not make any recommendations.

In the absence of any recommendations from the special advisory group, Council evaluated the proposed facility under ORS 469.504(1)(b)(A) and (B), approving certain aspects under subparagraph (1)(b)(A) and others under subparagraph (1)(b)(B). Council found that the proposed facility met most of the local criteria but there were certain aspects of the proposed facility that did not conform. Council also found that the nonconforming aspects of the proposed facility did not meet statewide planning goals, but the proposed facility nevertheless qualified for

throughout the EFSC statutes and rules, a broad reading of OAR 345-021-0050(6)(b)(A) should be rejected.

exceptions to those goals under ORS 469.504(2). Petitioners sought review of Council’s final order approving a site certificate.

On review, the court found that Council erred in interpreting paragraph ORS 469.504 (1)(b) to permit it to determine compliance with the applicable substantive criteria under subparagraph (1)(b)(A), and then, as to aspects of the facility that did not comply with those criteria, evaluate the facility under subparagraph (1)(b)(B). The court explained that Council “may choose to determine compliance with statewide planning goals by evaluating a facility under subparagraph (A) or (B) or (C), but that it may not combine elements or methods from more than one subparagraph, except to the extent that the chosen subparagraph itself permits.” However, the court also found that Council’s review was substantially the same as that contemplated in ORS 469.504(1)(b)(B), and therefore, Council’s review of the proposed facility satisfied the requirements of ORS 469.504.

In affirming Council’s order, the court explained:

[W]e conclude that the council’s review of the proposed facility met ORS 469.504’s requirements.

That conclusion is consistent with the legislature’s intention, apparent from the text and structure of ORS 469.504 as outlined above, to permit the council to review proposed energy facilities for compliance with both local land use regulations and statewide planning goals. The statewide planning goals are umbrella regulations establishing state policy in land use planning. ORS 197.225 — 197.250. State agencies, special districts, and local governments all are subject to the goals; local government plans and implementing regulations must comply with the goals. * * *. In short, the statewide land use planning goals establish broad policy objectives, while the “applicable substantive criteria” provide specific ways of implementing those objectives through local regulation. Because the local criteria often are more specific than the goals, an ASC may fail to meet the local criteria but still meet the goals. ORS 469.504(1)(b)(B) allows a comprehensive inquiry that requires the council to determine compliance with the most specific criteria that it can: local “applicable substantive criteria” where possible; findings of compliance with the statewide planning goals in the alternative; and exceptions to the goals if necessary. That scheme is consistent with the overall land use planning structure in Oregon.

339 Or at 363, citations omitted.

The *Save Our Rural Oregon* decision is pertinent here in that the court addresses the meaning of the phrase “applicable substantive criteria” in ORS 469.504(1)(b):

The phrase “applicable substantive criteria” also is used in ORS 469.504(1)(b)(A) and (1)(b)(B). Subparagraph (1)(b)(A) clarifies that the legislature understood that phrase to denote criteria “from the affected local government’s acknowledged comprehensive plan and land use regulations that are required by the statewide

planning goals and in effect on the date the application is submitted[.]” Because “use of the same term throughout a statute indicates that the term has the same meaning throughout the statute,” *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P.2d 1143 (1993), we determine that the references to “applicable substantive criteria” in ORS 469.504(1)(b)(B) and (5) also denote those local regulations. *See also Columbia Steel Castings, Co. v. City of Portland*, 314 Or 424, 430, 840 P.2d 71 (1992) (“Generally, and in the absence of some specific indication of a contrary intent, terms are read consistently throughout a statute.”).

339 Or at 364, n. 7.

The other case that informs the compliance with statewide planning goals review under ORS 469.504(1)(b) is *Blue Mountain Alliance v. EFSC*, 353 Or 465 (2013). In *Blue Mountain Alliance*, the petitioners challenged a Council final order that approved an amended site certificate for the Helix Wind Power Facility in Umatilla County. Council approved a site certificate for the facility in 2009. Then, in 2012, Helix applied for an amendment, seeking to extend the construction start and completion dates for the facility. In the weeks following Helix’s amendment application, Umatilla County adopted Ordinance 2012-4 (Criterion (3) herein), requiring the two-mile setback between wind turbines and rural residences.¹³ In challenging the site certificate amendment, the petitioners argued that Council should require Helix to comply with the two-mile setback pursuant to ORS 469.401(2).¹⁴ In approving the amendment, Council determined that the ordinance did not apply to the determination whether the facility complied with statewide planning goals under ORS 469.504(1). Council also found that because the ordinance constituted a “land use regulation” for purposes of ORS 469.504(1), it fell outside the scope of the “abide by local ordinances” clause of ORS 469.401(2).

In affirming Council’s final order, the court found that Council correctly characterized the two-mile setback requirement as a “land use regulation” subject to consideration under ORS 469.504(1)(b). The court also found that, under ORS 469.504(1)(b)(A), Council properly declined to apply the setback requirement to the facility because the criterion was not “in effect” on the amendment application date. The court explained:

Under the first part of ORS 469.504(1)(b)(A), the council must determine that the

¹³ The setback provision in Ordinance 2012-4 was later codified as UCDC §152.616(HHH)(6)(a)(3).

¹⁴ ORS 469.401(2) states, in pertinent part:

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 * * * [.]

In *Blue Mountain Alliance*, the petitioners contended that Umatilla County adopted the ordinance (Criterion (3)) as a public health and safety measure to protect against turbine noise. 353 Or at 468.

facility complies with substantive criteria—derived from the local government’s “acknowledged comprehensive plan and land use regulations”—that are (1) required by statewide planning goals; and (2) “in effect” on the certificate or amendment application date. * * * We agree with the council and Helix that the council was not required to consider the ordinance in its determination whether the facility complied with statewide planning goals because the ordinance was not “in effect” on the Amendment # 2 application date.

353 Or at 473-74. The court later summarized its determination as follows:

As previously explained, we agree with the council that (1) Ordinance 12-04 qualifies as a “land use regulation []” within the meaning of ORS 469.504(1)(b)(A); and, (2) because the ordinance was not “in effect” on the Amendment # 2 application date, it should not be considered as part of the substantive criteria assessment set out under that statute. The council did not err in applying ORS 469.504(1)(b)(A) in that manner.

353 Or at 487.

The *Blue Mountain Alliance* opinion establishes that Criterion (3) is properly characterized as a “land use regulation”¹⁵ subject to consideration under ORS 469.504(1)(b)(A) and OAR 345-022-0030. Because Criterion (3) was not in effect when Helix submitted its amendment application, it was not applicable to the wind energy facility. The court did not need to address whether the two-mile setback is “required by statewide planning goals.”

b. Whether Criterion (3) is required by the statewide planning goals

As discussed above, Oregon’s LCDC has established 19 statewide goals for land use planning. In the Proposed Order, the Department analyzed Criterion (3) under the pertinent goals applicable to the Project, *i.e.*, Goal 3, Agriculture and Goal 14, Urbanization. With regard to Goal 3, the Department explained:

Criterion (3) was adopted by Umatilla County to meet “local concerns,” as allowed by OAR 660-033-0120 and 0130 which is consistent with Goal 3. This is further evidenced by the fact that the Department is unaware of any other county that has adopted a similar setback requirement between wind turbines and residences. The Department therefore recommends Council conclude that while Criterion (3) is both allowed by and consistent with Goal 3, it is nevertheless not “required” by Goal 3.

NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 98.

¹⁵ “Land use regulation” is defined in ORS 197.010(11) as “any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan.”

With regard to Goal 14, the Department noted that LCDC has adopted numerous rules in OAR Chapter 660 to implement the urbanization goal, including rules relating to public facilities planning, transportation planning, urban growth boundaries, and periodic review. The Department noted, however, that none of these urban planning rules requires specific setback distances between wind turbines and rural residences. Thus, the Department recommended that Council conclude that Criterion (3) is also not required by Goal 14. NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 100.

The Department also considered Criterion (3) in light of the remaining 17 statewide goals and determined that none of these goals requires specific setback distances between wind turbines and rural residences. Accordingly, in the Proposed Order, the Department recommended that Council conclude that Criterion (3) is not an applicable substantive criterion that is required by any statewide planning goal. *Id.*

In challenging the Proposed Order, Umatilla County bears the burden of establishing that Criterion (3) is required by the statewide planning goals. The County does not contest the Department's analysis of Criterion (3) under Goal 3 or Goal 14. Rather, in its motion and response, the County asserts that Criterion (3) is required by Goal 2, Land Use Planning. The County argues that the two-mile setback from rural residences is the County's "expression of statewide planning goal requirements," and is acknowledged by LCDC as such. UC Amended Motion at 15. The County adds that, "Goal 2 reflects the foundational premise underpinning the Oregon land use planning program (viz.), that the requirements of the state planning goals are expressed by, and reflected in, acknowledged local land use rules." UC Response at 2.

Other than arguing that LCDC has acknowledged Umatilla County's comprehensive plan, the County offers no explanation or analysis as to how Goal 2 requires that the County adopt a two-mile setback between wind turbines and rural residences. Indeed, Goal 2 requires cities and counties to adopt comprehensive plans and to enact land use regulations to implement those plans. Goal 2 further requires that all comprehensive plans and adopted land use regulations comply with the statewide planning goals. ORS 197.175; 197.250, 215.050. While Goal 2 requires that comprehensive plans and local land use regulations be consistent with statewide goals, nothing in Goal 2 specifically requires a local government to enact regulations establishing setbacks for wind turbines. Thus, while Criterion (3) is a land use regulation enacted to implement Umatilla County's acknowledged comprehensive plan, and the County's plan is consistent with and in compliance with Goal 2, the County has not shown that Criterion (3) is required by Goal 2.

Moreover, as the Department notes, the fact that the County adopted the two-mile setback to mitigate turbine noise, visual impacts, and lost residential property values¹⁶ rather than in response to any statewide planning goal further demonstrates that Criterion (3) is not an applicable substantive criterion that is required by statewide planning goals.

¹⁶ See NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 97; see also *Blue Mountain Alliance*, 353 Or at 468 (petitioners argued that a setback of less than two miles would not adequately protect against turbine noise) and Umatilla County's Response to Nolin Hills Wind LLC's MSD, Exhibit 1.

Because Criterion (3) is not a land use regulation that is required by the statewide planning goals, it is not an applicable substantive criterion within the meaning of ORS 469.504(1)(b)(A) and OAR 345-022-0030(3) that applies to the Project. Consequently, Issue 1 herein must be answered in the negative. The Department did not err in recommending that Council find that the Project need not comply with Criterion (3) to satisfy the Land Use Standard.

c. Evaluation under ORS 469.504(1)(b)(B) and (5)

In the Proposed Order, the Department addressed whether Council must nevertheless consider Criterion (3) as part of the substantive criteria assessment under ORS 469.504(1)(b)(B) and (5), because the SAG identified it as applicable, even though it is not required by the statewide planning goals. The Department determined that the proposed facility or a related or supporting facility (the proposed UEC Cottonwood transmission line) will pass through more than three zones in the county, and as authorized by ORS 469.504(5), evaluated the Project against the statewide planning goals. The Department further determined that, although some wind turbine locations will not comply with Criterion (3), the entire proposed facility complies with applicable statewide planning goals and therefore the Project's non-compliance with Criterion (3) is authorized under ORS 469.504(1)(b)(B). NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 100.

In challenging this determination, the County argues that because the SAG identified Criterion (3) as applicable to the Project, the Council must apply it under ORS 469.504(1)(b)(B) and (5).¹⁷ The County relies on the second scenario in ORS 469.504(5), which states:

If the special advisory group recommends applicable substantive criteria for an energy facility described in ORS 469.300 or a related or supporting facility that does not pass through more than one local government jurisdiction or more than three zones in any one jurisdiction, the council shall apply the criteria recommended by the special advisory group.

The County also asserts that the Department erred in characterizing the UEC Cottonwood transmission line as a related or supporting facility, and erred in concluding that the proposed facility or a related or supporting facility would pass through more than three zones. UC Amended Motion at 6. The County argues that because the wind generation facility is limited to the EFU zone, the third scenario of ORS 469.504(5) is inapplicable and, under the second scenario, Council must apply the substantive criteria identified by the SAG. *Id.* at 20.

The County's contentions are not persuasive. First, as discussed above, "applicable substantive criteria" must be given the same meaning throughout the statute. Because Criterion (3) is not required by statewide planning goals, it is not an applicable criterion under ORS 469.504(1)(b) and (5), even though the SAG recommended it as such. I reject the County's

¹⁷ The County does not contest the Department's finding that "while some wind turbine locations will not comply with Criterion (3), the entire proposed facility nevertheless complies with applicable Statewide Planning Goals." NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 106.

claim that the Department and Council have no jurisdiction to review or reverse the SAG’s identification of Criterion (3) as an applicable substantive criterion. The legislature, in ORS 469.504(1)(b), set the standard for applicable substantive criteria for purposes of Council review for compliance with statewide planning goals. To the extent the local government/special advisory group recommends local criteria not required by statewide planning goals, Council has no obligation to apply the criteria under ORS 469.504(5).

Second, the County has not established that the Department erred evaluating the Project against the statewide planning goals under the third scenario of ORS 469.504(5). The County’s contention that the UEC Cottonwood transmission line is not a related or supporting facility is untenable. As set out in ORS 469.300(24) “related or supporting facilities” means:

*[A]ny structure, proposed by the applicant, to be constructed or substantially modified in connection with the construction of an energy facility, including associated transmission lines,¹⁸ reservoirs, storage facilities, intake structures, road and rail access, pipelines, barge basins, office or public buildings, and commercial and industrial structures. * * **

Emphasis added. In OAR 345-001-0010(27), the Department explained as follows:

“Related or supporting facilities” as defined in ORS 469.300. The Council interprets the terms “proposed to be constructed in connection with” to mean that *a structure is a related or supporting facility if it would not be built but for construction or operation of the energy facility.* “Related or supporting facilities” does not include any structure existing prior to construction of the energy facility, unless such structure must be substantially modified solely to serve the energy facility.

Emphasis added.

In the Proposed Order, the Department found that although the proposed facility will almost entirely be located in the EFU zone, the proposed UEC Cottonwood transmission line route would pass through more than three zones. NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 93, n. 30. In its motion, the County argues that the UEC Cottonwood transmission line is not a “related or supporting facility” because it will be upgraded regardless of the Project and will serve a variety of energy facilities and projects. UC Amended Motion at 7. However, the County has not presented evidence to support this contention. Further, the County does not dispute the Proposed Order’s findings that the proposed UEC Cottonwood route would include construction of a new segment and substantial modifications to existing

¹⁸ “Associated transmission lines” is defined in ORS 469.300(3) as “new transmission lines constructed to connect an energy facility to the first point of junction of such transmission line or lines with either a power distribution system or an interconnected primary transmission system or both or to the Northwest Power Grid.”

segments.¹⁹ Therefore, the County has not established that the Department erred in evaluating the UEC Cottonwood transmission line as a related or supporting facility, or that the Department erred in finding that the proposed facility or a related or supporting facility will pass through more than three zones within Umatilla County.

In summary, the County has not sustained its burden on Issue 1. The County has not demonstrated that Criterion (3) is an “applicable substantive criterion” within the meaning of OAR 345-022-0030(3) that applies to Council’s evaluation of the Project under ORS 469.504(1)(b). Moreover, even if Criterion (3) was applicable to Council’s evaluation, the County has not established that the Department erred in its evaluation under ORS 469.504(1)(b)(B) and (5). Council has no obligation to require that the Project comply with Criterion (3), because the Project otherwise complies with the applicable statewide planning goals. For these reasons, the County is not entitled to a favorable ruling on Issue 1.

On the other hand, because Criterion (3) is not an applicable substantive criterion within the meaning of ORS 469.504 and the Land Use standard, and Applicant has demonstrated that the Project complies with statewide planning goals (or is entitled to an exception), the Department and Applicant are entitled to favorable rulings on Issue 1.

Issue 1.1: Whether the Project complies with Criterion (3).

It is undisputed that the Project, as proposed, would not comply with Criterion (3).²⁰ However, for the reasons discussed above, the Project need not comply with Criterion (3) because the two-mile setback is not required by the statewide planning goals. The Project complies with all applicable statewide planning goals and all applicable local land use regulations that are required by the statewide planning goals.

Because it is immaterial to Council’s review under the Land Use standard whether the Project complies with Criterion (3), the County is not entitled to a favorable ruling on Issue 1.1.

Issue 2: Whether the Project requires a conditional use permit from the County.

All parties agree that the Project requires a conditional use permit from the County. Indeed, in the Proposed Order, the Department included, as Recommended Land Use Condition 1, the requirement that, prior to construction, Applicant obtain conditional use permits and zoning permits from the County. NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 80.

¹⁹ As set out in the Proposed Order, the UEC Cottonwood route alternative would be approximately 25.3 miles in length, and consist of approximately 8.4 miles of new single-circuit 230-kV transmission line, approximately 9.6 miles of replacing an existing 12.47-kV with a 230-kV line, and approximately 7.3 miles of upgrading an existing 115-kV line to a double-circuit 230/115-kV line. NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 29.

²⁰ See NHWAPPDoc1 Proposed Order on ASC 2022-08-04 at 93 (“The proposed facility would not comply with this 2-mile setback because 8 proposed wind turbine locations are less than 2 miles from approximately 16 rural residences.”)

Pursuant to ORS 469.401(3),²¹ once the Council issues a site certificate, the County must issue the conditional use permit (and all other county permits contemplated by the site certificate) without further hearings or other proceedings and subject only to the conditions set out in the site certificate. *See also Save Our Rural Oregon*, 339 Or at 356-57 (recognizing that “council’s decision to issue a site certificate binds state, county, and city governments in accordance with the council’s determination and requires state agencies and local governments to issue any permits specified in the site certificate without further proceedings.”)

Where the parties disagree is whether, in obtaining the conditional use permit, Applicant must demonstrate compliance with Criterion (3). In its motion, the County acknowledges that it is bound by Council’s determination on the applicability of Criterion (3) and therefore this question “will be answered under the first and second issues above.” UC Amended Motion at 4.

As explained in Issues 1 and 1.1 above, Applicant is not required to demonstrate compliance with Criterion (3) because: (1) the two-mile setback for wind turbines and rural residences is not an applicable substantive criterion under ORS 469.504 and OAR 345-022-0030(3); and (2) the Project otherwise complies with the applicable statewide planning goals. Therefore, the County is not entitled to a favorable ruling on Issue 2.

RULINGS ON MOTIONS

Umatilla County’s Amended Motion for Summary Determination is DENIED.

The Department’s Motion for Summary Determination is GRANTED.

Nolin Hills LLC’s Motion and Legal Argument for Summary Determination is GRANTED.

ORDER

I propose the Oregon Department of Energy, Energy Facility Siting Council issue a Final Order granting the requested site certificate consistent with the Department’s Proposed Order dated August 4, 2022, including the recommended site certificate conditions.

²¹ ORS 469.401(3) states, in pertinent part:

(3) Subject to the conditions set forth in the site certificate or amended site certificate, 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. After issuance of the site certificate or amended site certificate, any affected state agency, county, city and political subdivision shall, upon submission by the applicant of the proper applications and payment of the proper fees, but without hearings or other proceedings, promptly issue the permits, licenses and certificates addressed in the site certificate or amended site certificate, subject only to conditions set forth in the site certificate or amended site certificate. * * *

Alison Greene Webster
Senior Administrative Law Judge
Office of Administrative Hearings

Exceptions to the Administrative Law Judge's Proposed Order

EXCEPTIONS. Pursuant to OAR 345-015-0085(5) parties and limited parties may file exceptions to this proposed contested case order. Any party or limited party filing an exception must: a) in the exception(s) specifically identify the finding of fact, conclusion of law or recommended site certificate conditions to which the party excepts and state the basis for the exception; and b) email the exception(s) to Jesse Ratcliffe, legal counsel to EFSC in this contested case at Jesse.D.Ratcliffe@state.or.us and to the other parties/limited parties and the Office of Administrative Hearings no later than 5:00 p.m. Pacific Time on **June 12, 2023**.

RESPONSES. Pursuant to OAR 345-015-0085(6), parties and limited parties may file responses to exceptions. All responses must be emailed to Mr. Ratcliffe, the other parties/limited parties and the Office of Administrative Hearings no later than 5:00 p.m. Pacific Time on **June 27, 2023**.

EFSC HEARING ON PROPOSED CONTESTED CASE ORDER AND EXCEPTIONS. The Council will conduct a hearing to review the Proposed Contested Case Order and the parties' and limited parties' exceptions and responses. Parties and limited parties will be provided notice of that hearing once scheduled.

CERTIFICATE OF MAILING

On May 12, 2023, I mailed the foregoing RULING ON MOTIONS FOR SUMMARY DETERMINATION AND PROPOSED CONTESTED CASE ORDER issued on this date in OAH Case No. 2022-ABC-05140.

By: Electronic Mail

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