

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Request for
Amendment #2 of the Site Certificate
for the Helix Wind Power Facility.

SC S060803

THE BLUE MOUNTAIN
ALLIANCE; NORM KRALMAN;
RICHARD JOLLY; DAVE PRICE;
ROBIN SEVERE; and CINDY
SEVERE,

Petitioners,

v.

ENERGY FACILITY SITING
COUNCIL; and SITE CERTIFICATE
HOLDER HELIX WINDPOWER
FACILITY, LLC,

Respondents.

**EXPEDITED JUDICIAL REVIEW
UNDER ORS 469.403**

Judicial Review of the Final Order of the
Energy Facility Siting Council
Dated August 24, 2012

RESPONDENT ENERGY FACILITY SITING COUNCIL'S
ANSWERING BRIEF

Continued...

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RESPONDENTS' ANSWERING BRIEF

STATEMENT OF THE CASE

With the exception of the Nature of the Proceeding and Relief Sought, Questions Presented and the Statement of Material Facts, the Energy Facility Siting Council (“EFSC” or “the council”) accepts petitioners’ statement of the case as adequate for appellate review.

Nature of the Proceeding

Petitioner’s first paragraph is accurate and sufficient. The remainder of petitioner’s statement mischaracterizes EFSC’s decisions. In particular, EFSC did not deny any request to apply ORS 469.401, and did not conclude that it was precluded from applying Umatilla County Ordinance 152.616 as amended after the application was filed. EFSC did conclude that it was not appropriate to do so.

Questions Presented

ORS 469.504(1)(b)(A) provides that the land use regulations that apply to a proposed facility are those that are “in effect on the date the application is submitted.” Does that statute apply to the amendment of the site application at issue in this case?

Does ORS 469.401(2) nevertheless require that EFSC apply a later-adopted county land use regulation to the application for amendment of the site certificate?

Did EFSC's rules require that it offer a contested case hearing?

Summary of Argument

ORS 469.504(1)(b)(A) provides that an application for a cite certificate is governed by the land use regulations in effect at the time the application is filed. That statute is more specific than ORS 469.401, and is applicable to the application at issue. EFSC did not err in deciding that a later adopted county setback regulation was not applicable.

EFSC does have the authority to apply later adopted health and safety regulations if there is clear evidence of a significant threat to human health. EFSC was not required to exercise that authority in this case for a variety of reasons. The site certificate is conditioned on compliance with noise regulations adopted by the Department of Environmental Quality, the state agency with jurisdiction over that issue, just as all other wind energy site certificates are. Further, scientific opinion is divided over the health effects of wind turbines; while petitioners presented studies supporting their view, there is also support for a contrary view. And EFSC was entitled to decline to apply a standard that is not applicable to similarly situated applicants.

EFSC was not required to offer a contested case hearing. It is authorized by statute to adopt rules governing contested cases, and it has done so. The rule that EFSC adopted gives it considerable discretion to determine when a contested case will be helpful in deciding legal or factual issues. In this case, the only issue before EFSC was whether to allow a two-year extension of time to begin and complete construction of the facility; no other permit conditions were at issue. Nonetheless, opponents of the extension were allowed to fully present their legal position and their factual contentions, and EFSC considered their arguments in making its decision. EFSC's exercise of discretion was lawful. Further, even if a contested case hearing should have been granted, petitioners have failed to identify how that omission affected either the fairness or the outcome of the proceeding. In the absence of such a showing, this court should not remand for a contested case hearing.

EFSC did not err in granting the application for a two-year extension of the construction deadlines, and its decision should therefore be affirmed.

Statement of Material Facts

This case concerns an application to amend a site certificate to extend the time to start and complete construction of a wind energy facility. The facts that are relevant to the questions presented by this case are undisputed and straightforward. EFSC offers the following statement.

In July 2009, EFSC approved a site certificate for the Helix Wind Power Facility.¹ Rec 1960. The site certificate was first amended in June 2011. *Id.* The site certificate contained 106 conditions of approval. Conditions 24 and 25 required that construction on the facility begin by August 5, 2012, and be completed by August 5, 2015.

After the first amendment of the site certificate in June 2011, Umatilla County adopted a land use regulation that, as pertinent here, required a two-mile setback between a wind power facility and any rural residence, unless the owner of the residence agreed to waive that requirement. On January 12, 2012, the Land Use Board of Appeals held that regulation was invalid because it allowed a private landowner to determine whether it applied, and because the county failed to adopt findings demonstrating consistency with the existing acknowledged comprehensive plan. *Cosner v. Umatilla County*, 2012 WL 344889 (2012). On February 28, 2012, after the filing of the application at issue, Umatilla County adopted a new regulation that again imposed a two-mile setback between wind power facilities and rural residences. Umatilla County Development Code 152.616 (2012).

On February 3, 2012, several weeks before Umatilla County adopted the amended setback standard, Helix filed an application for amendment of

¹ The holder of the site certificate is referred to hereafter as “Helix” for the sake of simplicity.

conditions 24 and 25, proposing to extend the time to begin and to complete construction by two years. Rec 445 *et seq.*

EFSC's procedures provided multiple opportunities for public comment. Notice of the proposed amendment was given to the public and to reviewing agencies, including the county, on February 17; that comment period closed on March 19, 2012. Rec 476. The Department of Energy then issued a proposed order, Rec 1592, which triggered a second public comment period ending June 15, 2012. During this period, requests for contested case could also be made. OAR 345-027-0070(5). Numerous comments, including several requests for contested case hearing, were received. Rec 503. Further, EFSC held a listening session on the proposal in Hermiston on May 10, 2012. Rec 1664-1722. The council then convened on June 29 to consider the requests for contested case hearing and the proposed amendment. Rec 1724. The agenda item was tabled to allow additional time to review voluminous materials submitted by commenters and to consider the legal issues that had been raised. Rec 1756-1758.

On August 24, 2012, EFSC issued—and on August 31, 2012, EFSC served—an order denying the requests for contested case hearing and granting the amendment of the site certificate. Rec 1957-1998. One commenter filed a timely request for rehearing. Rec 2103. A petition for judicial review was timely filed on October 22, 2012.

**COMBINED ANSWER TO FIRST AND SECOND
ASSIGNMENTS OF ERROR²**

EFSC did not err in determining that ORS 469.504(1)(b)(A) established the land use criteria that were applicable to the application, and that EFSC was not required by ORS 469.401(2) to apply the setback regulation.

Preservation of Error

EFSC agrees that petitioners preserved the issues they raise in this appeal.

Standard of Review

The standard of review for an order granting an application for amendment of a site certificate is provided by ORS 183.482. ORS 469.405(1); ORS 469.403(6). As relevant to these assignments of error, this court reviews the agency's interpretation of the relevant statutes for errors of law. To the extent that EFSC exercised its discretion, this court reviews under ORS 183.482(8)(b). Finally, EFSC's factual determinations are reviewed for substantial evidence in the whole record. ORS 183.482(8)(c).

² Error is properly assigned to rulings and not to the agency's analysis. Both the first and second assignment of error relate to EFSC's decision that the later-adopted Umatilla County setback regulation was not applicable to Helix's application for amendment to its site certificate. EFSC therefore treats these assignments as a single assignment of error.

COMBINED ARGUMENT

The question presented is whether EFSC was correct in applying the land use standards that were in effect when the application for amendment of the site certificate was filed, or whether EFSC was instead required to apply the land use standards that were in effect when it made its decision. The council properly concluded that the former standards applied, and its decision should be affirmed.

A. Standards Applicable to Amendment of Site Certificates

Energy facilities may not be constructed or expanded without a site certificate. ORS 469.320(1). The site certificate authorizes the holder to construct, operate, and eventually retire an energy facility. The contents of the site certificate include “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.” ORS 469.401(2). EFSC is the entity with authority to issue and to amend site certificates for most energy facilities located within the state. *See* ORS 469.300(11) (defining “energy facility”).

ORS 469.501(1) provides that EFSC may adopt standards in a number of specified categories, encompassing “[p]rotection of public health and safety, including necessary safety devices and procedures,” ORS 469.501(1)(g), and “[c]ompliance with the statewide planning goals adopted by the Land

Conservation and Development Commission *as specified by ORS 469.503.*”

ORS 469.501(1)(m). That statute thus distinguishes between health and safety standards in general and land use criteria. Before issuing a site certificate, EFSC must determine, based on a preponderance of the evidence, that the proposed facility does comply with the statewide land use planning goals established by the Land Conservation and Development Commission.

ORS 469.503(4).

Whether a proposed facility complies with the statewide land use planning goals is determined under ORS 469.504. As a general rule, the conditions in an initial or amended site certificate are governed by the law in effect on the date that the site certificate is executed. ORS 469.401(2) thus provides, in relevant part:

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*, except that upon a clear showing of a significant threat to the public health, safety or the environment that requires application of later-adopted laws or rules, the council *may* require compliance with such later-adopted laws or rules.

(Emphasis added). A somewhat different rule, however, applies with respect to land use regulations and the statewide planning goals. For statewide land use planning goals, the applicable criteria are determined not as of the time site certificate is executed, but as of the time that the application for site certificate is submitted:

(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 * * *.

ORS 469.504(1) (emphasis added).

The same timing rule applies to amendments of site certificates as well — the applicable criteria demonstrating compliance with the statewide planning goals are determined as of the time that the application for the amended site certificate is made. OAR 345-027-0070(10). ORS 469.504(1) and OAR 345-027-0070(10) thus establish the regulatory goal posts with respect to the applicable land use standards: the goal line is established as of the time of the application. Subsequently adopted local land use regulations are inapplicable.

B. EFSC was not required to include compliance with Umatilla's new setback regulation as a condition of approval in the site certificate.

In this case, EFSC properly applied the land use standards in effect at the time that Helix submitted its application when it determined that Helix complied with statewide planning standards. In arguing to the contrary,

petitioners contend that ORS 469.401(2) required EFSC, as a matter of law, to impose Umatilla County's new setback regulation on the Helix facility, i.e., the law that was in effect at the time that the application was granted. Petitioners are mistaken. As explained in more detail below, Umatilla County's two-mile setback requirement is a land use regulation. Quite literally, it is a regulation that relates to the use of land. Because the county regulation is a land use regulation, the timing rule in ORS 469.504(1)(b)(A) applies.

As noted above, ORS 469.401(2) provides that, in general, an amended site certificate is conditioned on the law in effect at the time that EFSC grants an application for amendment and issues an amended site certificate. But ORS 469.504(3) provides for an exception to that general rule where land use regulations are concerned. As the more specific provision, ORS 469.504(3) controls, and mandates that the law in effect at the time of the application controls.

Nor can it reasonably be disputed that the setback regulation, Umatilla Development Code Section 152.616, is a land use regulation. It is contained within the county's land use code, and regulates the use of land for wind energy. The ordinance adopting that provision was a "land use decision" as that term is defined by ORS 197.015(10), and is subject to review by the Land Use Board of Appeals. ORS 107.825(1). Because the county regulation is a land use regulation, ORS 469.504(1)(b)(A) applies.

Under ORS 469.504(1)(b)(A), Helix's proposed facility was in compliance with statewide planning goals if it was in compliance with the applicable land use regulations at the time that Helix submitted the application for the amended site certificate. In this case, Helix submitted the application for a second amended site certificate on February 3, 2012. The revised setback regulation did not go into effect until February 28, 2012. Because the setback regulation was not in effect, EFSC correctly declined to include the setback as a condition in the site certificate.

C. EFSC did not abuse its discretion in declining to include the setback regulation as a condition in the site certificate.

For the reasons explained above, EFSC is not required to include as conditions of a site certificate land use regulations that became effective after the application for the certificate was submitted. That does not mean, however, that ORS 469.401(2) is meaningless when it comes to land use regulations. For land use regulations affecting public safety, health and the environment, the council has discretion under ORS 469.401(2) ("may require compliance") to require that an amended site certificate comply with land use adopted after the amendment application is made in defined circumstances.

In this case, the council implicitly decided not to require compliance. That decision was well within the board's discretion. The amendment before the council was merely for an extension of time to begin and complete

construction of the facility. It did not enlarge the size of the permitted facility, nor did it propose any substantive changes to the facility. Further, EFSC had approved a substantive amendment in June 2011; the order from that proceeding is in the record and reveals that the petitioners here participated in that proceeding, Rec 233-234, and that the petitioners raised many of the same issues, including the contentions they now make regarding the effects of noise. Rec 241-246. The council considered specific information regarding noise, and concluded that the facility would comply with the applicable noise standards established by the Department of Environmental Quality. Rec 330-336. That order was not appealed.

The record before EFSC on the second application for amendment of the site certificate contains substantial information both supporting and refuting petitioners' contention regarding the health effects of wind turbines. Petitioners submitted *The Bruce McPherson Infrasound and Low Frequency Noise Study*, Rec 562-612; *Strategic Health Impact Assessment on Wind Energy Development in Oregon*, Health Impact Assessment Program, Oregon Health Authority (Draft, January 2012) (Rec 910-1043); *Wind Turbine Health Impact Study: Report of Independent Expert Panel*, Massachusetts Department of Environmental Protection and Massachusetts Department of Public Health (January 2012). Rec 1177-1340. The latter study in particular noted the lack of empirical and epidemiological evidence to support anecdotal reports of adverse

effects. This record demonstrates that there is substantial disagreement within the scientific community as to whether any such effects exist. ORS 469.401(2) provides that the council may apply recently enacted land use regulations “upon a *clear* showing of a significant threat to the public health, safety or the environment that requires application of later-adopted laws or rules.”

(Emphasis added.) No such showing was made, nor is there any likelihood that such a showing could be made. Rather, any evidentiary hearing would merely generate more confirmation that no scientific consensus exists.

Finally, it is within EFSC’s discretion to determine whether the evidence of a significant threat to public health “requires” the application of newly adopted standards to an already-approved site certificate. As the council noted, application of the two-mile setback would be a significant departure from the setback applied by the council to all other wind facilities and to that adopted by the responsible state agency, DEQ, for all energy facilities. Rec 2070. Thus, as a matter of fairness and consistent application of law, EFSC declined to exercise its discretion to order the application of the new setback requirement to an already-approved wind facility. That decision was well within the discretion granted to EFSC by law.

D. Umatilla County did not recommend that its regulation be applied.

EFSC’s decision not to apply the setback regulation is also supported by the county’s advice that the regulation was inapplicable to the Helix facility.

EFSC is required to designate a special advisory group consisting of the governing body of the local government within whose jurisdiction the proposed facility will be located. ORS 469.480. In the case of the Helix facility, that body is the Umatilla County Board of Commissioners. As required by ORS 469.504(5), EFSC requested that the county commissioners recommend the applicable substantive criteria to be applied to the application for amendment. Rec 477. If the special advisory group recommends substantive criteria, EFSC must apply those criteria. *Id.*

The county commissioners did not respond to EFSC's request for a recommendation of the applicable substantive criteria. Rec 1972. The commissioners did express their view that a reasonable timeframe for an extension to develop a conditional use is one year. Rec 525. The county Department of Land Use Planning did respond to the request for a recommendation of the applicable substantive criteria; it confirmed that "the applicable substantive criteria in effect February 3, 2012, are the same as the substantive criteria in effect for the approval of the Helix Wind Power Facility Site Certificate and the Site Certificate Amendment #1." Rec 517. Thus, the county did not assert that its newly adopted regulation was applicable, and did not recommend or request that it be applied to the amended site certificate. Nor did the county assert that application of its regulation was necessary for public health and safety.

Under these circumstances, EFSC's decision to apply the substantive land use criteria in effect at the time the application was made is unremarkable. EFSC was not required to apply the new regulation, and to the extent that it had discretion to do so, did not abuse that discretion.

The first and second assignments of error are meritless.

ANSWER TO THIRD ASSIGNMENT OF ERROR

EFSC did not err in denying the request for a contested case proceeding.

Preservation of Error

EFSC agrees that petitioners raised this issue before it and hence error is preserved.

Standard of Review

Petitioners do not appear to contend that a contested case hearing is required by due process; rather, it is their position that EFSC misinterpreted its own rule and was required to hold a contested case hearing. EFSC's plausible interpretation of its own rules is entitled to deference. *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994). Under the applicable rule, EFSC has discretion to hold a contested case when it deems it proper. That discretionary decision is reviewed under ORS 18.482(1)(b). Whether EFSC has committed a procedural error requiring remand is reviewed under ORS 193.482(7); this court remand the agency order only if it finds that

there has been a procedural err and that that error materially impaired the fairness of the proceedings or the correctness of the agency action.

ARGUMENT

Petitioners contend that EFSC was required to hold a contested case hearing on the application to amend the site certificate. EFSC's rules give it wide discretion to determine whether a contested case would be useful in deciding an application for amendment of a site certificate that come before it. That discretion was not overstepped under the circumstances of this case. Further, neither the fairness of the proceeding or the correctness of the outcome was impeded by the failure to hold a contested case. The council's decision that a contested case was not needed should be affirmed by this court.

The legislature has delegated to EFSC the determination of when a contested case proceeding is appropriate in deciding whether a site certificate should be amended: "The council may establish by rule the type of amendment that must be considered in a contested case proceeding." ORS 469.405(1). OAR 345-027-0070 establishes both the criteria and procedure for amendment of a site certificate; section 7 of that rule provides when a contested case is required:

To determine that an issue justifies a contested case proceeding under section (8), the Council must find that the request raises a significant issue of fact or law that may affect the Council's determination that the facility, with the change proposed by the amendment, meets an applicable standard. If the Council finds that

the request would not affect the Council's determination if the alleged facts were found to be true but that those facts could affect a site certificate condition, the Council may deny the request and may adopt appropriate conditions. If the Council does not have jurisdiction over the issue raised in the request, the Council must deny the request.

Thus, before an application for amendment justifies a contested case, EFSC must make the following findings:

- that the request raises a significant issue of fact or law;
- that the issue may affect EFSC's decision;
- that the issue is relevant to the change proposed by the amendment; and
- that the issue is relevant to an applicable standard.

Petitioner's argument addresses only the one of these factors, the significance of the issues presented.

The rule grants EFSC considerable discretion to hold a contested case or to decline to do so when an application for amendment is made. The exercise of that discretion is reviewed under ORS 183.482(8)(b) to determine whether the agency's decision is outside the range of discretion delegated by law; is inconsistent with its own rules or practices, or otherwise violates the law. In this instance, for the reasons that follow, EFSC did not violate those standards.

Under EFSC's rule, the context of the proposed amendment is important when it considers the relevance of petitioner's contentions to the change proposed by the amendment. The amendment here sought a two-year extension

of time to construct a facility that had already been approved. Further, EFSC had considered an amendment under the same applicable land use criteria only a year before, and approved a substantive amendment at that time. The same petitioners opposed the first amendment on the same grounds. And the issue raised by petitioners is unrelated to the timing of the development, which is the subject of the second proposed amendment.

Because EFSC had recently considered the issue, it was entitled to find that a contested case proceeding would not affect its decision to amend the timing of construction in the site certificate. That decision was not made without deliberation. EFSC held a public listening session on May 10, 2012, at which interested individuals could speak on the application. Rec 1664 *et seq.* EFSC met again on June 29, 2012 to consider the amendment request. Rec 1724 *et seq.* At that meeting, members of the Council expressed concern that they had received voluminous public comment materials that they had not yet had an opportunity to review. Rec 1732. Another wanted additional time to review the legal issue, and requested a memorandum from staff. Rec 1733. The council therefore tabled the issue until a later meeting. Rec 1739.

Ultimately, EFSC's rule allows it to order a contested case proceeding on a proposed amendment when such a proceeding would be helpful in deciding the legal or factual issues before it. It did not err in deciding that a contested case would not be helpful here.

However, even if it had erred, that omission would not be grounds for reversal. Pursuant to ORS 183.482(7), a procedural error, such as the denial of a contested case under an agency rule, is grounds for reversal only if that procedural error impairs the fairness of the proceedings or the correctness of the agency action. The council understood petitioners' point that ORS 469.401 applies and required that the county regulation be applied. The council determined that ORS 469.503(4) applied, and declined to exercise its discretion to use a newly adopted land use scheme. A contested case hearing would not have been helpful in delineating the legal issue.

To be sure, there is disagreement as to the effects of wind turbines on human health. The Department of Environmental Quality, the state agency that has been delegated the authority to adopt noise regulations, has promulgated rules that are specific to wind facilities, and the Helix facility is required by its site certificate to comply with those regulations. Petitioners believe that DEQ's regulations should be more stringent. Again, however, that is an issue as to which further factual development beyond the already voluminous materials submitted to the council would not have made a difference.

In sum, petitioners have not established that EFSC's procedures were in any way unfair or that a contested case proceeding would have made a difference in the outcome. Petitioners were allowed to present their legal and factual arguments, and those issues and arguments were considered by the

council. The council simply came to a different conclusion than that desired by petitioners.

CONCLUSION

EFSC's order granting a two-year extension of time to initiate and complete constructions is consistent with the applicable legal standards and should be affirmed.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on November 19, 2012, I directed the original Respondent Energy Facility Siting Council's Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon James N. Westwood, attorney for respondent Site Certificate Holder Helix Windpower Facility LLC, by using the court's electronic filing system.

I further certify that on November 19, 2012, I directed the Respondent Energy Facility Siting Council's Answering Brief to be served upon Daniel H. Kearns, attorney for petitioners and upon Jeffrey B. Durocher, attorney for respondent Site Certificate Holder Helix Windpower Facility LLC, by mailing two copies, with postage prepaid, in an envelope addressed to:

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Continued...

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 4,369 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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