

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Request for
Amendment #2 to a Site Certificate by Helix
Wind Power Facility LLC

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

Petitioners,

v.

ENERGY FACILITY SITING COUNCIL,

Respondent,

HELIX WIND POWER FACILITY LLC,

Applicant-Respondent.

Supreme Court
No. S 060803

**EXPEDITED JUDICIAL
REVIEW UNDER
ORS 469.403**

**ANSWERING BRIEF OF
HELIX WIND POWER FACILITY LLC**

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**ANSWERING BRIEF OF
HELIX WIND POWER FACILITY LLC**

STATEMENT OF THE CASE

1. Nature of the Proceeding and Relief Sought

Helix Wind Power Facility LLC (“Helix”) agrees that Petitioners have accurately described Amendment #2 and their objections (Petitioners’ Brief (“Pet Br”) pp. 1-2). However, Petitioners mischaracterize rulings of the Energy Facility Siting Council (“EFSC” or “the Council”). EFSC did not deny any request to apply ORS 469.401(2), but rather applied the statute and declined to impose a two-mile wind turbine setback from rural residences as a condition of approval.

2. Nature of the Order on Review

The 117-page EFSC Final Order Denying a Contested Case Proceeding and Approving Amendment #2 (Aug. 24, 2012), which comprises Petitioners’ Excerpt of Record, examines in detail each issue raised below by Petitioners and others. The first 41 pages– EFSC’s discussion and its Findings and Conclusions–are the heart of the order. The three Attachments (ER-43 – ER-117) include everything raised below by Petitioners regarding the Amendment Request and the Contested Case Requests, responded to by Department of Energy Staff. The Final Order is based also on a record which in

total runs to 2183 pages. In this Answering Brief, citations to the record below will appear as “Rec ____.”

3. Appellate Jurisdiction and Timeliness of Petition for Judicial Review

This Court’s jurisdiction is based on ORS 469.403(3) (jurisdiction for judicial review of EFSC approval or rejection of original or amended site certificate), and ORS 469.405(1) (judicial review of an amendment to a site certificate). Helix agrees that Petitioners have filed timely for review and that this Court has sole jurisdiction of the review.

4. Jurisdiction Below

Jurisdiction of the EFSC amendment proceeding below was based on ORS 469.405(1) (amendment of site certificate; delegation of authority to determine when to apply contested case process).

QUESTIONS PRESENTED ON REVIEW

1. Whether ORS 469.401(2) required EFSC as a matter of law to include a two-mile rural residential setback as a condition of the second amendment.
2. Whether EFSC properly applied ORS 469.401(2), under its delegated discretionary authority and on the record before it, in granting the request

for a second site certificate amendment without adding a two-mile rural residence setback condition.

3. Whether EFSC properly determined that its consideration of the second amendment request did not call for a contested case proceeding.

SUMMARY OF ANSWERING ARGUMENT

Petitioners' First and Second Assignments of Error are combined for answer in this Brief. Helix commends the Answering Brief of EFSC to the Court and offers these additional points: The conditions required by ORS 469.401(2), to protect public health and safety and to comply with all applicable state and local laws, rules, and ordinances, all are embodied in the Second Amended Site Certificate as approved and issued by EFSC. Umatilla County's land use standard calling for a two-mile setback is not an existing "local ordinance," under the general provision of ORS 469.401(2), but rather is governed by the later-enacted and specific land use provision of ORS 469.504(1)(b)(A). And to the extent the County's rural residence setback *could* be viewed as "later-adopted law[] or rule[]" under ORS 469.401(2), EFSC properly exercised its discretion when deciding not to impose the land use setback as a condition of approval.

As for Petitioners' Third Assignment of Error (denial of contested case requests), the Court reviews for substantial evidence and gives "extremely high" deference to EFSC's application of a rule it has promulgated by express legislative delegation. EFSC was correct to conclude that nothing Petitioners presented demonstrated clearly the existence of an issue of significance to the requested amendment, such as to warrant a contested case.

On every ground, the EFSC Final Order is soundly based. It should be affirmed.

STATEMENT OF FACTS

Helix provides the following to simplify and clarify Petitioners' statement.

1. The Site Certificate and Its Amendments

- In July 2009, EFSC approved the original site certificate for the Helix Wind Power Facility ("Facility"), a commercial-scale wind energy facility in Umatilla County. Rec 1960.
- EFSC approved Helix's first site certificate amendment request on June 24, 2011. It was a substantive amendment which, among other modifications, allowed Helix to expand the Facility and increase its power output. *Id.*

- On February 3, 2012, Helix submitted its second site certificate amendment request to the Oregon Department of Energy (“ODOE”).¹ The second amendment request was not substantive, but procedural in nature. It sought EFSC approval for two changes: extension of the construction start deadline in Condition 24 from August 5, 2012 to August 5, 2014, and extension of the construction stop deadline in Condition 25 from August 5, 2015 to August 5, 2017. Rec 446 - 447.
- ODOE issued a public notice seeking comments on the Proposed Order on Request for Amendment #2, and on May 10, 2012, EFSC held its first of several meetings on the request. Rec 483, 1664. Following the third meeting on the amendment request, EFSC issued its Final Order Denying a Contested Case Proceeding and Approving Amendment #2. Rec 1958. On August 24, 2012, EFSC approved the Second Amended Site Certificate. Rec 2077.

2. Land Use Proceedings in Umatilla County

Over the past several years, in light of increased wind energy development within Umatilla County, the government of Umatilla County

¹ The amendment request was timely, submitted more than six months in advance of the construction commencement date. See OAR 345-027-0030.

("the County") has been considering amendments to the Umatilla County Development Code ("UCDC") to address additional wind energy development. *See Cosner v. Umatilla County*, ____ Or LUBA ____ (LUBA Nos. 2011-070/071/072, Jan 12, 2012), slip op at 3-4. On June 28, 2011, the County adopted amendments to the UCDC that imposed new and revised siting standards for wind energy generation facilities. Rec 1973, 2062. These siting standards included, among many other requirements, a prerequisite that a wind turbine be two miles from a rural residence unless the rural residence owner agrees in writing to a lesser distance. *Id.* The ordinances that adopted the UCDC code amendments were appealed to the Oregon Land Use Board of Appeals ("LUBA") (Rec 2062), and on January 12, 2012, LUBA remanded the ordinances to the County. Rec 2063. *See Cosner v. Umatilla County, supra.*

In response to LUBA's remand, the County initiated another land use proceeding. On February 28, 2012, while ODOE was processing Helix's second amendment request,² the County again adopted amendments to the UCDC, revising in part the remanded 2011 standards. Rec 2063. The revised amendments, among other things, struck the landowner waiver provision but

² On February 17, 2012, ODOE issued public notice and request for comments for Helix's second amendment request. Rec 476.

reaffirmed the two-mile rural residence setback. *Id.* The new code amendments were appealed again to LUBA. Rec 1743-44.

The County continued with code amendments, and in August 2012, the Board of Commissioners adopted an adjustment process to allow for a setback less than two miles between wind turbines and rural residences. Rec 1740.

ANSWERING ARGUMENT

Combined Response to Assignments of Error Nos. 1 and 2: EFSC Did Not Err in Either Interpreting or Applying ORS 469.401(2).

EFSC has broad statutory authority when issuing new or amended site certificates for the design, construction, operation, and retirement of energy facilities in Oregon. *See* ORS 469.300(11) (defining EFSC-jurisdictional energy facilities). It is the policy of the State that the siting, construction and operation of energy facilities “be accomplished in a manner consistent with the protection of the public health and safety and in compliance with the energy policy and air, water, solid waste, land use and other environmental policies of this state.” ORS 469.310. This policy is implemented through EFSC’s statutory framework as well as the numerous approval standards EFSC applies when issuing new and amended site certificates.

Petitioners allege here that EFSC failed to keep the public safe by not imposing the County’s two-mile rural residence setback as a condition of

approval under ORS 469.401(2). However, EFSC paid close attention and imposed numerous conditions of approval in the second amended site certificate, as required under ORS 469.401(2). EFSC did not err when it determined that the County's two-mile rural residence setback, a siting standard from the UCDC, did not fall within the scope of ORS 469.401(2). Even if the two-mile rural residence setback could be viewed as falling within the scope of ORS 469.401(2) as a "later-adopted law[] or rule[]," EFSC exercised its discretion when opting not to impose the setback as a condition of approval because the statute states a discretionary rule, that "the council *may* require compliance with such later-adopted laws or rules," ORS 469.401(2).

1. Standard of Review

Review of an agency's interpretation of statutes is for errors of law, but agency discretion and factual determinations are reviewed much more narrowly. The Court may not substitute its judgment for that of the agency as to any issue of fact or agency discretion. *Friends of Parrett Mountain v. Northwest Natural*, 336 Or 93, 96, 79 P3d 869 (2003); ORS 183.482(7).

2. The Second Amended Site Certificate already includes conditions required under ORS 469.401(2)

EFSC has imposed over 100 conditions of approval on the Facility's design, construction, operation, and retirement. Rec 2077-2102. Under ORS 469.401(2), an amended site certificate "must contain conditions for the protection of 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 through 469.503." In addition, the amended site certificate must require that both EFSC and the certificate holder "abide by local ordinances and state law and the rules of the council in effect on the date the * * * amended site certificate is executed * * *." ORS 469.401(2). The second amended site certificate includes:

- Conditions for the protection of public health and safety, including without limitation Conditions 55-76 related to Hazardous Materials, Fire Protection and Public Safety, and Conditions 100-102 related to Noise Control (Rec 2092-95, 2100); and
- Condition 3, requiring Helix to operate the Facility "[i]n compliance with the requirements of ORS Chapter 469, the applicable Council rules, and applicable state and local laws, rules and ordinances in effect at the time the site certificate is issued" (Rec 2082).

EFSC understood and applied the requirements of ORS 469.401(2). The Second Amended Certificate complies on its face with those requirements.

3. **Local *land use* standards like the UCDC two-mile rural residence setback do not fall within the scope of ORS 469.401(2) . The later-enacted ORS 469.504(1)(b)(A), which is specific to land use, controls instead.**

Petitioners ignore general principles of statutory construction when arguing that ORS 469.401(2) requires EFSC to adopt the County's two-mile rural residence setback as a condition of approval. First, the two-mile rural residence setback in question is a siting standard from the County's recently-amended UCDC Chapter 152, the document establishing the land use standards and criteria for development in the County. Even though UCDC Chapter 152 can be considered the County's "development ordinance," it does not amount to a "local ordinance" within the meaning of ORS 469.401(2) because doing so would frustrate EFSC's statutory and regulatory framework for approving amended site certificates.

Under ORS 469.504(1)(b) and OAR 345-027-0070(10), EFSC determines whether a facility complies with applicable substantive criteria from the County's "land use regulations that are required by the statewide planning goals *and in effect on the date the application is submitted.*"

ORS 469.504(1)(b)(A) (emphasis added). The same timing requirement applies to site certificate amendments. See OAR 345-027-0070(10). If EFSC were to reverse its approach and interpret ORS 469.401(2) to require Helix to meet the County's land use regulations that were "in effect on the date * * * the amended site certificate is *executed*," as Petitioners propose, the construction would conflict directly with ORS 469.504(1)(b)(A) and render its timing requirement meaningless.

The legislature does not intend to require EFSC to disregard the timing requirement in ORS 469.504(1)(b)(A) and treat ORS 469.401(2) as a superior catch-all to require compliance with *all* local and state laws, including land use standards, in effect at the time an amended site certificate is executed. Not only would this be administratively unworkable, given the public process for reviewing and approving an amended site certificate,³ it is also inconsistent with statutory construction principles. ORS 469.504(1)(b)(A) is both later-

³ ODOE issues a proposed order on a site certificate amendment and circulates for public comment. If EFSC revises the order in making its decision, generally the revised order is recirculated for public comment before EFSC takes final action. See OAR 345-027-0080(9) (requiring EFSC to issue the order "consistent with due process").

adopted than ORS 469.401(2),⁴ and more specific to land use laws. *See* ORS 174.020(2) (when general and specific provisions are inconsistent, the latter is paramount). By statutory construction standards, the term “local ordinances” in ORS 469.401(2) does not include land use. The specificity of ORS 469.504(1)(b)(A) to land use standards controls instead.

A local ordinance that does not adopt or amend a land use regulation can fall within the scope of ORS 469.401(2). For example, a certificate holder would be bound to follow county ordinances regulating building construction, weed and vector control, and the like. Accordingly, the term “local ordinance” in ORS 469.401(2) has clear meaning, just not the meaning that Petitioners propose.

4. **To the extent local land use standards fall within the scope of ORS 469.401(2) as “later-adopted laws or rules,” EFSC did not err in refusing to impose the two-mile rural residence setback as a condition of approval.**

Even if the County’s UCDC amendments were to somehow fall within the meaning of “later-adopted laws or rules” under ORS 469.401(2), Petitioners fail to demonstrate that EFSC should have exercised its discretion as to whether

⁴ Compare original ORS 469.504(1)(b) (1997 Or Laws ch 428 § 5) with original ORS 469.401(2) (1993 Or Laws ch 569 § 11). Each was made applicable to site certificate amendments by 1999 Or Laws ch 385 §§ 2 and 10.

to require compliance with the two-mile setback as a condition of approval for the Second Amended Site Certificate.

Helix adopts EFSC's arguments presented in its combined response to the first and second assignments of error, and agrees that Petitioners have failed to make a clear showing that there existed a significant threat to public health or safety. Helix has pointed out that despite Petitioners' attempts to characterize the two-mile rural residential setback as a noise regulation, the County, in adopting the setback, hoped to address other policy and rural amenity considerations. They included aesthetics, concerns for potential property value impacts, the sharing of wealth, and greater influence over siting. Rec 1526. If the County viewed the two miles as the minimum distance between a wind turbine and rural residence for the protection of public health and safety, it would not continue to contemplate an adjustment process to allow for a lesser setback. Rec 1740.

ORS 469.401(2) provides EFSC with discretion to impose conditions stemming from later-adopted laws and rules because there are policy considerations at play. A two-mile setback here, imposed as the invariable requirement Petitioners suggest, would likely set a state-wide precedent that could all but terminate future development of wind energy in Oregon.

Department of Energy staff has made that very point. *See* page C-9

(Attachment C to EFSC Final Order), which is important enough to quote at some length:

“Such a finding [a two-mile safety setback] would be a significant departure from the minimum safety setback of 1/4 mile from residences that EFSC adopted in the *Final Order* [approving another wind project in 2008]. Such a finding would also be a departure from the public health setback (which may exceed 1/4 mile) established by the Department of Environmental Quality’s noise control regulations contained in OAR 340-035-0035, which have been applied by EFSC to all energy facilities. If EFSC were to make the “significant threat” finding for the [Helix Facility], it would almost certainly set a precedent for other wind energy facilities in Umatilla County and throughout the state.”

Rec 2070.

Hundreds of wind turbines are currently operating in Oregon—having a total capacity exceeding 2,300 megawatts—with no such setback limitation.

Rec 934. To date, EFSC has received no noise complaints for operating facilities approved through EFSC. Rec 966.

Response to Assignment of Error No. 3: Based on Substantial Evidence and Sound Reasoning, EFSC Correctly Denied Petitioners' Contested Case Requests.⁵

1. The legislative assembly's delegation of authority to EFSC.

Oregon Revised Statute ("ORS") 409.405(1) implicitly states a default rule, that EFSC's consideration of site certificate amendments is *not* done by contested case proceedings.⁶ The statute then delegates authority to EFSC to "establish by rule the type of amendment that must be considered in a contested case proceeding." Pursuant to that delegation, EFSC promulgated OAR 345-027-0070(7) and (8) (*see* Appendix to this Brief), establishing the findings on which the Council bases its determination to make the exception and conduct a contested case.

In ORS 469.405(1) the legislature gives EFSC express authority to enact rules to carry out a policy the legislature could have addressed on its own—

⁵ Not all the Petitioners here made contested case requests. Petitioners Norm Kralman and Dave Price did not ask for a contested case. Rec 1913.

⁶ ORS 469.405(1) reads in full:

"A site certificate may be amended with the approval of the Energy Facility Siting Council. The council may establish by rule the type of amendment that must be considered in a contested case proceeding. Judicial review of an amendment to a site certificate shall be as provided in ORS 469.403."

setting criteria to determine when a contested case should be held. Such language is “delegative.” When an agency like EFSC carries that authority out in a quasi-statutory rule, the agency’s interpretation and application of the rule receive a level of deference that is “extremely high.” *Ainsworth v. SAIF*, 202 Or App 708, 715, 124 P3d 616 (2005), *rev denied*, 341 Or 216 (2006). As this Court has explained:

“When the application of statutory policy to fact is entrusted to an agency, and the agency has correctly interpreted the law, then the function of the court on review is not to substitute its judgment, but to uphold any reasoned application of that interpretation to the facts.”

Springfield Education Assn. v. School Dist., 200 Or 217, 235, 621 P2d 547 (1980).

2. Standard of review.

If the EFSC decision is backed by *any substantial evidence*, if *any reasoned interpretation* of the evidence shows that Petitioners have not met the OAR 345-027-0070 criteria and overcome the presumption against a contested case, then the Court cannot second guess EFSC’s decision and must affirm the Final Order’s denial of a contested case.

Petitioners’ Assignment of Error No. 3 seems to claim the standard for reviewing EFSC’s denial of a contested case is “abuse of discretion,” but that is

mistaken. By the test set forth immediately above, the Court’s task here is simple. ORS 469.405(1) allows EFSC to make the policy choice of how and when to depart from the rule of no contested cases for site certificate amendments. EFSC has correctly interpreted that law – it has considered the contested case requests from Petitioners and others, in the light of its administrative rule. The *application* of that policy, expressly entrusted to EFSC by the legislature, receives a level of deference higher even than “abuse of discretion.”

3. Petitioners do not meet the test.

Petitioners’ argument to support their contested case request comes down to (1) diversion (it is “preposterous” for EFSC to find that Petitioners’ arguments did not clearly present a significant issue of fact or law – Pet Br p. 37) and (2) a plea for the Court to substitute its judgment for that of EFSC (Pet Br p. 38), contrary to the true standard of evidence. Petitioners say the detail and reasoning of the response to their contested case requests “prove, in fact that [the issues] are significant.” Pet Br p. 38 (emphasis in original). They are wrong, but what counts for denial of a contested case is whether EFSC plausibly concluded, from the evidence before it, that Petitioners’ points did not meet the requirements of EFSC’s contested case rule.

Petitioners' contested case argument on review raises just one issue: that wind turbine noise is a threat to health with anything less than a two-mile setback between a wind turbine and the nearest residence. *See* Pet Br pp. 37-38.⁷ They need to convince this Court that *no* substantial evidence supports EFSC's conclusion that Petitioners' newly-raised issues are not significant enough, and clearly so, to warrant EFSC's departure from its prior determination when the site certificate was first amended, that all applicable noise control standards were met. The burden for Petitioners here is insurmountable. The Comments and EFSC responses establish this:

- The few Comments dealing with noise concerns refer almost entirely to the Oregon Public Health Division's interim draft "Strategic Health Impact Assessment on Wind Energy Development in Oregon" (January 3, 2012) ("draft HIA"). *See* Rec 1922 (Robin and Cindy Severe), Rec 1928 and Rec 1929 (Greg Shannon, not a Petitioner),

⁷ Petitioners attempt to bootstrap a "question of law" statutory construction argument, positing that EFSC *had* to construe ORS 469.401(2) to require a two-mile setback in the amended site certificate, and therefore Petitioners raised a significant issue of law (that EFSC was misreading the statute). EFSC's Answering Brief correctly points out that a contested case would not have delineated the issue any better. Additionally, however, Petitioners' argument fails logically. It begs the question, by assuming its conclusion as a premise.

Rec 1931 (Blue Mountain Alliance, also alluding to unspecified “noise complaints in Morrow County”).

- The entire draft HIA is in the record. *See* Rec 910 – Rec 1043.
- EFSC’s Responses acknowledge the draft HIA and make specific points about it and the other Comments of Petitioners:
 - (1) In its unappealed order on the First Amendment, EFSC found that the Helix Facility could be build in compliance with Oregon Department of Environmental Quality noise control regulations. Rec 1928. These regulations did not change between the First and Second Amendments.
 - (2) Site certificate Condition 101 will require Helix to demonstrate that its turbine designs, including a noise analysis based on that design, will comply with applicable noise control regulations to the Department of Energy’s satisfaction, all before beginning construction. *Id.*
 - (3) Condition 102 will require Helix to maintain a noise complaint log and notify the Department of Energy of all complaints and Helix’s actions to address them. *Id.*
 - (4) Regarding the evidence of the draft HIA, and of particular importance in EFSC’s Response to Petitioners’ contested case request, the draft HIA makes no recommendation for a two-mile setback; and it

notes the subjective (i.e. unquantifiable) nature of how different individuals respond to sound. *Id.* EFSC also had in the record the *Wind Turbine Health Impact Study: Report of Independent Expert Panel*, prepared for the Massachusetts Department of Environmental Protection, Massachusetts Department of Public Health (January 2012), which found, in part: (a) insufficient evidence that noise from wind turbines is directly causing health problems or disease (Rec 1251); (b) no evidence for a set of health effects, from exposure to wind turbines, that could be characterized as ‘Wind Turbine Syndrome’ (Rec 1252); (c) no association between noise from wind turbines and measures of psychological distress or mental health problems (Rec 1190); and (d) no association between noise from wind turbines and pain and stiffness, high blood pressure, and headache/migraine (*Id.*).

(5) Petitioners’ suggested two-mile setback is an arbitrary distance, not based on any applicable noise compliance requirements. The site certificate as amended allows “micrositing” of turbines so that, among other things, their positioning will comply with the DEQ noise control regulations at residences of property owners (including Petitioners).

Rec 1937.

- Besides making no recommendation consistent with Petitioners' two-mile setback suggestion, the draft HIA Conclusions and

Recommendations make these points:

- (1) There have been no complaints to date regarding noise from large energy facilities sited through the EFSC process. Rec 966.
- (2) There is insufficient evidence to support a finding that low frequency sound from wind turbines causes any increase in annoyance or disturbance. Rec 922.⁸

Taken together, those points satisfy abundantly the EFSC conclusion that Petitioners' Comments are not sufficient to show "clearly" that they raise a "significant issue of law or fact" that might cause EFSC to deny Helix's amendment application for failure to meet an applicable standard. Subjected to the proper "substantial evidence" factual standard of review, the EFSC denial of a contested case is much like a factually-supported jury verdict. This Court's role is not to substitute its judgment, but rather to examine EFSC's rational application of its rule to the facts. *See Springfield Education Assn.*, 200 Or at

⁸ Moreover, the DEQ noise regulations include octave band criteria that may be imposed to address the low frequency sound to ensure the protection of "health, safety, or welfare." OAR 340-035-035(1)(f).

235; *see also Garcia v. Boise Cascade Corp.*, 309 Or 292, 295, 787 P2d 884 (1990) (where evidence is contradictory, or agency has found certain evidence less persuasive, court cannot substitute its own view).

CONCLUSION

The Final Order of EFSC is soundly based in all respects. Where statutory construction and application was required, EFSC followed the law. Where fact-based findings and conclusions were needed, EFSC properly based them on substantial evidence in the record. This includes EFSC's decision to deny a contested case. The Final Order should be affirmed.

Dated November 19, 2012.

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**CERTIFICATE OF COMPLIANCE WITH
BRIEF LENGTH AND TYPE SIZE REQUIREMENTS**

I certify that this brief complies with the word count limitation in ORAP 5.05(2)(b), with a count of 3,906 words.

I certify that font size in this brief is Times New Roman 14-point for both the text of the brief and footnotes, as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING AND SERVICE

I certify that on November 19, 2012, I filed the foregoing Answering
Brief of Helix Wind Power Facility LLC with

Rebecca Osborne
Appellate Court Administrator

using the Oregon Appellate Court Electronic Filing System.

I certify that on November 19, 2012, I served the foregoing Answering
Brief of Helix Wind Power Facility LLC on

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