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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.

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

Council v.

ENERGY FACILITY SITING COUNCIL; THE APPLICANT IBERDROLA RENEWABLES, INC., and SITE CERTIFICATE HOLDER HELIX WINDPOWER FACILITY, LLC,
Renewables
Windpower
Respondents.

EXPEDITED JUDICIAL REVIEW UNDER ORS 469.403

S060803

PETITIONERS' OPENING BRIEF AND EXCERPT OF RECORD

Appeal from an August 24, 2012 Final Order Denying a Contested Case Proceeding and Approving Amendment #2
Rendered by the Energy Facility Siting Council
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Over ...

November 2012

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STATEMENT OF THE CASE

Nature of the Proceeding and Relief Sought:

This appeal seeks judicial review of a quasi-judicial Final Order rendered by the Energy Facility Siting Council (EFSC) approving a second amendment (Amendment #2) that was requested by the site certificate holder, Helix Wind Power Facility LLC, and denying a contested case proceeding, that was requested by petitioners. Amendment #2 amends two conditions of the underlying site certificate (Conditions 24 & 25), with the practical effect of extending the start of construction from August 5, 2012 to August 5, 2014 and the construction completion date from August 5, 2015 to August 5, 2017. The underlying site certificate allows the construction of a wind energy facility in unincorporated Umatilla County, with up to 134 wind turbines.

Relevant to this appeal, EFSC's Final Order also included the following legal rulings in response to arguments and requests presented by petitioners:

1) In its Final Order, EFSC denied petitioners' request to apply ORS 469.401(2) and impose conditions or otherwise require the applicant to abide by health and safety ordinances adopted by Umatilla County. Most notably, Umatilla County had adopted a 2-mile buffer requirement separating wind turbines and rural residences to protect rural residents from the noise impacts of wind turbines. Instead, EFSC concluded that the 2-mile buffer was a land use regulation, and as

such, it was precluded from applying such a regulation on the site certificate holder pursuant to ORS 469.504(1)(A).[1]

2) EFSC's Final Order also denied petitioners' request that this Amendment #2 decision include a condition of approval, pursuant to ORS 469.401(2), that requires the operator to comply with any after-adopted health and safety regulations, such as the County's 2-mile noise buffer, to avoid a "significant threat" to the public health and safety posed by excessive low frequency noise from operating wind turbines.

3) Finally, in its Final Order EFSC denied petitioners' request for a contested case hearing pursuant to OAR 345-027-0070(7)&(8)[2] in which they sought to establish that Umatilla County's new 2-mile buffer requirement for separating wind turbines from rural residences was a health and safety regulation that ORS 469.401(2) required to be included as a condition of approval.

Basis for Appellate Jurisdiction:

This court has exclusive jurisdiction to hear and decide this appeal of a

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1 Adopted as Ordinance 2012-04 and codified as Umatilla County Code §152.616(HHH). AR 1057.

2 OAR 345-027-0070(8) requires EFSC to determine if a contested case hearing on a proposed site certificate amendment is warranted, which means that "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." OAR 345-027-0070(7).

Final Order of the Energy Facility Siting Council pursuant to ORS 469.403(3).

Effective Date for Appeal:

EFSC executed its Final Order in this matter on August 24, 2012. Petitioners sought reconsideration on August 24, 2012, to which EFSC did not respond, and it was therefore deemed denied on September 28, 2012. Petitioners filed their Petition for Judicial Review on October 22, 2012 – within 60 days of EFSC's Final Order and within 30 days of when petitioners' request for reconsideration was deemed denied.

Questions Presented on Appeal:

1. **ORS 469.401(2) versus ORS 469.504(1)(b)(A):** Does ORS 469.401(2) by its plain text and context require EFSC to attach a condition to an amended site certificate requiring the applicant to comply with all locally adopted health and safety ordinances, such as Umatilla County's 2-mile noise buffer, that are in effect at the time the amended site certificate is executed? And, does this statute operate independently of and in addition to the "goal post" rule in ORS 469.504(1)(b)(A) that limits the applicability of local land use regulations?

2. **ORS 469.401(2) "significant threat:"** Given the petitioners' voluminous and focused testimony on wind turbine noise impacts on citizens, the credible scientific studies documenting those impacts and Umatilla County's lengthy deliberation and final adoption of a 2-mile noise buffer between wind turbines and

residences, did petitioners make a clear showing of a significant threat to public health and safety sufficient for EFSC to require compliance with later-adopted health and safety ordinances, such as the County's 2-mile noise buffer requirement.

3. **OAR 345-027-0070, contested case:** Did petitioners raise "significant issues of law and fact" affecting the Council's determination of whether the amendment meets an applicable standard when they asserted that ORS 469.401(2) requires EFSC to attach a condition to the amended site certificate requiring compliance with all locally adopted health and safety ordinances, including Umatilla County's 2-mile noise buffer, that ORS 469.504(1)(b)(A) does not conflict with this obligation, that Umatilla County's 2-mile noise buffer is a public health and safety ordinance, and that DEQ's noise regulations are not an adequate or protective substitute for Umatilla County's noise buffer. When presented with focused public comment on these legal and factual issues, EFSC was obligated to provide a contested case proceeding to fully consider such "significant issues."

Summary of Petitioners' Arguments:

1. **EFSC misconstrued ORS 469.401 and 469.504 in concluding that these statutes were competing comparable "goal post" rules, when in fact ORS 469.401(2) required EFSC to require compliance with all locally adopted health and safety regulations in effect on the date the site certificate amendment is executed. Umatilla County's 2-mile buffer is a health and safety regulation designed to protect rural residents from wind turbine noise, that was in effect when Amendment #2 was**

executed. As such, EFSC violated ORS 469.401(2) and erred in failing to require the applicant to comply with the 2-mile buffer.

EFSC misinterpreted and misapplied the applicable law when it concluded that ORS 469.401(2) is a "goal post" rule comparable to ORS 469.504. In fact, the text and context of ORS 469.401(2) demonstrates it does not establish the universe of applicable approval criteria for a site certificate or amendment, but instead applies independently and requires EFSC to attach conditions to a site certificate or amendment requiring compliance with the local government's health and safety regulations that exist on the date the amendment is executed. EFSC compounded this error in concluding that Umatilla's recently adopted 2-mile buffer requirement – an ordinance designed to protect rural residents from wind turbine noise – was strictly a land use regulation that could not be applied to this amendment pursuant to ORS 469.504 because it was adopted after the Amendment #2 application was submitted. In fact, the 2-mile buffer requirement is a health and safety regulation – a fact acknowledged elsewhere in the Final order – designed to protect rural residents from wind turbine noise.

Granted, ORS 469.504 precludes EFSC's application of true land use ordinances as approval standards if they were not in effect on the date the Amendment #2 application was submitted, but that misses the point. Umatilla County's 2-mile noise buffer ordinance is clearly a health and safety regulation

intended and designed to protect rural residents from wind turbine noise. In that light, ORS 469.401(2) expressly requires EFSC to impose a condition requiring the applicant to comply with this and all other health and safety regulations adopted by Umatilla County and in effect on the date the site certificate amendment is executed (signed). The Court should reverse and remand EFSC's Final Order directing the Council to impose a condition on this amendment requiring the certificate holder to comply with all local health and safety ordinances, including Umatilla County's 2-mile noise buffer.

2. EFSC abused its discretion, misapplied and misinterpreted ORS 469.401(2), and rendered a decision not supported by substantial evidence in the whole record when it concluded that the health and safety evidence related to noise impacts of wind turbines did not constitute a "significant threat" to public health and safety that warranted the application of later-adopted laws, such as Umatilla County's 2-mile noise buffer.

ORS 469.401(2) limits the applicability of local health and safety ordinances to regulations in effect on the date the amended site certificate is executed. It also provides an exception that allows EFSC to require compliance with later-adopted health and safety regulations upon a "clear showing of a significant threat to the public health, safety or the environment." Numerous opponents to the Helix project commented that wind turbine noise is a significant threat to public health and safety, so compelling that Umatilla County adopted a 2-mile buffer to protect rural residents. This testimony also documented that the low

frequency and sub-audible nature of wind turbine noise and its impacts on humans is different than the impacts of audible (loud) noise sources, which DEQ standards regulate.[3]

This testimony and the documentation and reports that petitioners submitted to EFSC during open comment periods (EFSC erroneously refused to provide a contested case proceeding in this matter), demonstrates that turbine noise can and in many cases does constitute a significant threat to public health and safety, at least to those most directly affected. AR 562-612 & 910-1043. EFSC abused its discretion, misinterpreted ORS 469.401(2), and committed legal error in failing to conclude that noise was a significant threat and requiring the applicant to comply with later-adopted local health and safety regulations, such as Umatilla County's 2-mile noise buffer in Ordinance 2012-04 (AR 1057).

3. **EFSC abused its discretion, misinterpreted OAR 345-027-0070(7), committed a procedural error that prejudiced the petitioners' substantial right to a full and fair hearing, and rendered a decision not supported by substantial evidence in the whole record when it concluded that the health and safety issue addressed by Umatilla County's 2-mile buffer and EFSC's misinterpretation of ORS**

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3 *See e.g.,* The Bruce McPherson Infrasound and Low Frequency Noise Study, Adverse Health Effects Produced by Large Industrial Wind Turbines Confirmed, December 14, 2011 (AR 562-612); The Dirty Secret Behind Clean Jobs, Nick Sibilla and Todd Wynn, August 2011, Cascade Policy Institute (AR 613-631); and Strategic Health Impact Assessment on Wind Energy Development in Oregon, Public Comment Release, January 3, 2012, Research and Education Services, Office of Environmental Public Health Public Health Division, Oregon Health Authority (AR 910-1043).

469.401(2) did not constitute a significant issue of fact or law affecting the Council's determination that the facility meets the applicable standards. In fact, the legal and factual issues raised by petitioners presented significant issues that directly affected EFSC's determination of compliance with ORS 469.401(2), and by implication the locally adopted health and safety ordinance that required a 2-mile buffer. Petitioners were entitled to a contested case hearing as the appropriate process for demonstrating that wind turbine noise presented a significant threat and which was addressed by Umatilla County's 2-mile noise buffer requirement.

Under its administrative rules, EFSC provides a contested case process for site certificate amendments when EFSC finds 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." OAR 345-027-0070(7). EFSC received seven requests for a contested case proceeding and voluminous, focused public testimony on the following issues of law and fact:[4]

(1) The requirement in ORS 469.401(2) that EFSC impose conditions requiring the applicant to comply with all then-applicable local health and safety ordinances, most notably Umatilla County's 2-mile noise buffer;

(2) The argument advanced and analyzed by EFSC staff that ORS 469.504(1) conflicts with ORS 469.401(2), and therefore ORS 469.401(2) has no effect,

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4 *See* Attachment B to EFSC Final Order, wherein ODOE staff analyzes all comments on the project and Attachment C (AR 2071 & 2072) where ODOE staff specifically address the contested case requests.

certainly not as a mechanism to require compliance with the Umatilla County's 2-mile noise buffer; and

(3) The legal question, adopted by EFSC one direction in Attachment C, that Umatilla County's 2-mile buffer is strictly a land use regulation, and that as a local health and safety ordinance, it is arbitrary and, as a factual matter, noise impacts of wind turbines are adequately addressed by DEQ's noise regulations.

Collectively and individually, the public testimony and legal issues identified by EFSC staff raised a significant issue of fact and law with regard to the meaning and applicability ORS 465.401(2), ORS 465.504(1)(b)(A), Umatilla County's 2-mile noise buffer as a locally adopted health and safety ordinance, and the applicant's compliance with it. In response, EFSC staff devoted a substantial amount of effort in its 12-page August 8, 2012 memorandum (Attachment C to the Final Order – AR 2062-2073) analyzing ORS 465.401(2), ORS 469.504(1)(b)(A) and Umatilla County's 2-mile buffer ordinance as a local health and safety regulation, and EFSC received voluminous focused public testimony on all of these issues. And yet, EFSC denied petitioners the opportunity to respond to its staff's erroneous legal and factual conclusions, denied multiple requests for a contested case proceeding, and adopted the EFSC staff memo in support.

The standard under OAR 345-027-0070(7) for granting a contested case is <u>not</u> that EFSC agrees with the legal and factual arguments raised by the requestors,

but whether the requestors raise a significant legal or factual issue that may affect the Council's determination that the facility meets an applicable standard. The significance of the legal and factual issues raised by the requestors is evidenced by the 12-page EFSC memo consisting primarily of a legal analysis of ORS 469.401, 469.504 and Umatilla County's 2-mile noise buffer. After EFSC staff, and by adoption EFSC, devoted so much time and attention to this testimony and the attendant legal and factual issues, EFSC abused its discretion in then declaring that, in fact, this testimony did not raise a significant issue of fact and law with regard to any standard applicable to this matter. At a minimum, the legal conflict between ORS 469.504(1) and ORS 469.401(2) was clearly a significant issue of law. Similarly, the question of whether the 2-mile noise buffer was a health and safety ordinance, was arbitrary and unnecessary in light of DEQ noise regulations, and whether wind turbine noise was a "significant threat" to health and safety were all significant factual issues that justified a contested case. For these reasons, the record amply supported a contested case under OAR 345-027-0070(7).

Summary of Material Facts:

Facts relevant to this appeal involve the procedural history of the Helix site certificate and amendments thereto as processed by EFSC,[5] and the history of Umatilla County's adoption of wind turbine regulations, especially health and safety regulations related to the effect of wind turbine noise on county residents.

1. Helix Procedural History: The applicant Ibderola Renewables, Inc. obtained a site certificate for the Helix Wind Power Facility from EFSC on July 31, 2009 that allowed up to 60 wind turbines on 7,586 acres in unincorporated Umatilla County approximately 9 miles northwest of the town of Helix, Oregon, entirely on private land. AR 1-200. The site certificate included conditions (Conditions 24 & 25) requiring the applicant to begin construction within 3 years (by August 5, 2012) and to complete construction 3 years after that, or no later than August 5, 2015. AR 152. The applicant applied for Amendment #1 to its site certificate on August 12, 2010 seeking to expand the wind farm up to 134 turbines in a total project area of 20,613 acres. EFSC approved Amendment #1 on February 9, 2010. AR 227-4116.

The applicant applied for Amendment #2 on February 3, 2012 seeking to extend by 2 years the start and completion dates specified in Conditions 24 & 25

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5 *See* the Helix Project website and all decisional documents at: http://www.oregon.gov/energy/Siting/Pages/HWP.aspx

of the site certificate. AR 443-475. In response, ODOE staff issue notice of the Amendment #2 proposal to the public, affected agencies and the Special Advisory Group, consisting of the Umatilla County Board of Commissioners. EFSC held a public "listening session" on the proposal in Hermiston on May 10, 2012 (AR 1664-1723), and discussed it at its meetings in Boardman on June 29, 2012 (AR 1724-1739) and Pendleton on August 24, 2012 (AR 1740-1754). EFSC received seven requests for a contested case hearing on Amendment #2, which EFSC considered at its two meetings on the proposal. Petitioners and other members of the public testified about Umatilla County's recent adoption of a noise regulation (now Ordinance 2012-04) requiring a 2-mile buffer between wind turbines and rural residences (discussed in the next section), and urged EFSC to comply with ORS 469.401(2) by imposing a condition on Amendment #2 requiring compliance with this local health and safety measure. ORS 469.401(2) requires EFSC to mandate compliance with local health and safety regulations that are in effect on the date a site certificate or amendment is executed.

EFSC received an August 8, 2012 memorandum from EFSC staff analyzing the petitioners' requested condition on the 2-mile buffer (Attachment C to the Final Order – AR 1945-1956), which concluded that Umatilla County's 2-mile buffer was a land use regulation and was therefore subject to the "goal post" rule in ORS 469.504(1)(b)(A), which fixed in place the applicable local land use

standards in effect on the date the amendment application was submitted. While the County's 2-mile buffer was in effect on the date Amendment #2 was adopted, it was not in effect on the date the Amendment #2 application was submitted, and therefore was not applicable under ORS 469.504, according to the staff memo. Nonetheless, EFSC staff analyzed the County's 2-mile buffer as a health and safety noise regulation akin to DEQ's noise regulations.

2. History of Umatilla County's 2-mile buffer between turbines and residences: Umatilla County has been subject to mounting public pressure over the past 7 years to tighten regulations of wind turbine energy facilities to better protect county residents and natural resources from these projects. As a subsection (2) use in ORS 215.283,[6] local governments are authorized to adopt their own siting standards for wind energy facilities in addition to those in ORS 215.296.[7] In 2003, Umatilla County adopted siting standards that required a 3,250 foot setback between wind energy facilities and residential property. Then in 2009, the County undertook a review of those regulations, with an eye toward making them more protective of rural residents. The process culminated in the Board of County Commissioners adopting a set of three ordinances that, among

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[6] ORS 215.283(2)(g) allows the Helix Wind Facility as conditional use on EFU land, subject to compliance with ORS 215.296 as a "Commercial utility facility[y] for the purpose of generating power for public use by sale."

other things, imposed a 2-mile buffer between wind turbines and any "rural residence" unless a land owner grants a waiver allowing a lesser setback.[8] In particular, the County adopted the following amendment to its County Code:

> Setbacks. The minimum setback [from a wind facility] shall be a distance of not less than the following.
>
> * * *
>
> (3) From a turbine tower to a rural residence shall be 2 miles, unless the landowner of the rural residence authorizes by written waiver of a lesser setback and the waiver is recorded with the county deed records. For purposes of this section, a 'rural residence' is defined as a legal, conforming dwelling existing on the parcel at the time an application is deemed complete. The measurement of the setback is from the centerline of the turbine tower to the centerpoint of the residence."

AR 1057.

All three of the 2011 ordinances were appealed to LUBA, which adopted the following summary of the operative facts:

> Commercial Wind power generation facilities (wind facilities) are allowed as conditional uses in the county's exclusive farm use zones pursuant to ORS 215.283(2)(g). ... In 2003, the county adopted conditional use standards for wind facilities. The 2003 conditional use standards required that such facilities be set back a minimum 3,250 feet from property zoned for residential use. In 2009, the county undertook a lengthy review of those regulations, in part to address complaints regarding noise from existing facilities. In 2011, after conducting a number of hearings before the

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7 *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995).

8 Ordinances 2011-05, 2011-06 & 2011-07, adopted June 28, 2011, amending Umatilla County Code (UCC) §152.616(HHH).

> planning commission and county commissioners, the county adopted three ordinances amending its conditional use standards.
>
> In relevant part, Ordinance 2011-05 provides for a two-mile setback from any urban growth boundary, unless the city council of the affected city authorizes a lesser setback. Ordinance 2011-06 amends the conditional use standards to impose a two-mile setback from any "rural residence," unless the landowner records a written waiver for a lesser setback. ... Finally, Ordinance 2011-07 adopts additional regulations protecting the Walla Walla watershed, and prohibits construction related to wind facilities, including access roads, on erodible soils or within two miles of streams or tributaries that contain federally listed species. Petitioners challenge these provisions as being unconstitutional or inconsistent with applicable statutes and statewide planning goals.[9]

LUBA remanded the County's Ordinances on three grounds, including the private property owner waiver provision; however, LUBA rejected petitioners' facial challenge to the 2-mile buffer with the following holding:

> FOURTH ASSIGNMENT OF ERROR
>
> Petitioners next argue that the two-mile setback from rural residences and urban growth boundaries lacks the adequate factual base required under Goal 2. According to petitioners, there is no evidence or justification in the record to support a two-mile setback, as opposed to a lesser setback.
>
> The county responds that the county chose to expand the existing 3,250-foot setback from residential zones to a two-mile setback from rural residences and urban growth boundaries, based on voluminous testimony regarding noise impacts up to two miles from wind facilities. Based on the testimony cited to us by the county, we agree with the county that the record provides an adequate factual base supporting the county's choice to impose a two-mile setback from wind facilities.

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[9] *Cosner v. Umatilla County*, __ Or LUBA __ (LUBA Nos. 2011-70, 71 & 72, slip op at 3-4, Jan 12, 2012) (footnotes and citations omitted, emphasis added).

> Petitioners also argue that there are no findings or other explanation in the record supporting imposition of the two-mile setback, sufficient to demonstrate that applicable criteria were applied and required considerations in fact considered. ... However, petitioners do not identify any applicable criteria the county failed to apply or required considerations that the county failed to consider in choosing to adopt the two-mile setback. The record is abundantly clear that the commissioners believed, based on the testimony before them, that the existing 3,250-foot setback was inadequate, and that a larger setback was necessary to protect residences from the noise impacts of wind facilities. As discussed more fully below, the county has authority to adopt additional approval standards for uses conditionally allowed under ORS 215.283(2), beyond those listed in the statute. ... Petitioners have not demonstrated that additional findings are necessary in the present case to explain the county's choice to impose a two-mile setback.[10]

On remand, Umatilla County removed the landowner waiver provision and adopted essentially the same 2-mile buffer provision in Ordinances 2012-04 and 2012-05 on February 28, 2012.[11] The same opponents appealed the 2012 ordinances, and LUBA affirmed the County on October 4, 2012.[12]

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10 *Cosner v. Umatilla County*, *supra*, slip op at 21-22 (citations omitted, emphasis added), found at: http://www.oregon.gov/LUBA/docs/opinions/2012/01-12/11070.pdf

11 Ordinances 2012-04 & 2012-05, adopted February 28, 2012, amending UCC §152.616(HHH) and was adopted by Ordinance 2012-04 (AR 1057). Petitioners ask that the Court take judicial notice of Umatilla County Ordinance 2012-04 pursuant to OEC 201 and 202(7).

12 *Hatley v. Umatilla County*, __ Or LUBA __ (LUBA Nos. 2012-17, 18 & 30, slip op, Oct 4, 2012), found at: http://www.oregon.gov/LUBA/docs/Opinions/2012/10-12/12017.pdf. Petitioners in *Hatley* appealed LUBA's Final Opinion and Order to the Court of Appeals on October 26, 2012, and the appeal is pending at this time.

3. EFSC's Final Order: The order challenged in this appeal approves Amendment #2, denies petitioners' request for a contested case hearing, and concludes, among other things, that Umatilla County's 2-mile buffer in Ordinance 2012-04 is a land use regulation subject to the goal post rule ORS 469.504(1)(b)(A) and not a local health and safety regulation that is subject to ORS 469.401(2). The detailed analysis on this issue is set forth in ODOE's August 8, 2012 memo, which EFSC incorporated by reference as Attachment C.[13] EFSC staff, and thereafter EFSC, interpreted ORS 469.504(1)(b)(A) and ORS 469.401(2) as two competing "goal post" rules, and it used the interpretational guides in ORS 174.040 to decide that Umatilla County's 2-mile buffer ordinance did not apply and could be ignored. EFSC staff, and also EFSC, concluded in pertinent part:

> In summary, the provisions originally adopted by Ordinance 2011-06, including the residential 2-mile setback requirement, were neither acknowledged nor "in effect" at the time Iberdrola submitted the Request for Amendment #2 on February 3, 2012. Therefore, two of the required factors were not satisfied, and ODOE believes that the residential 2-mile setback should not be considered an "applicable substantive criterion" for

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[13] At the time ODOE staff issued its August 8, 2012 memo on ORS 469.401(2) versus ORS 469.504(1)(b)(A), the 2011 Umatilla County Ordinances had been remanded by LUBA, and the Board of County Commissioners had readopted the 2-mile setback in 2012-04, which was then on appeal to LUBA. ODOE staff acknowledged the legal reality that if LUBA affirmed the County, Ordinance 2012-04 would be in effect on the date Amendment #2 was executed. *See* AR 2066, fn 2.

> the purposes of EFSC's determination of compliance with the Land Use Standard under OAR 345-022-0030 and ORS 469.504(1).
>
> * * *
>
> Umatilla County's 2-mile residential setback is a land use ordinance, and it is therefore subject to the requirements of ORS 469.504. ORS 469.504 governs how EFSC shall determine land use compliance ...

AR 2068.

Petitioners argued that, even if EFSC was not going to apply the 2-mile buffer under ORS 469.401(2), the Council should consider the noise impacts that the buffer addresses as a "significant threat" to public health and safety and require compliance with the 2-mile buffer as a later-adopted health and safety regulation under ORS 469.401(2). EFSC staff, and then EFSC, rejected this argument with the following findings:

> Some comments requesting a contested case suggest that ORS 469.401(2) could be used by EFSC to amend the site certificate and apply a 2-mile residential setback to the HWPF—even if the standard is not an applicable substantive criterion—because the setback is intended to remedy a significant threat to public health or safety. As discussed above, the legislative history suggests that ORS 469.401(2) was intended to allow EFSC to reopen a site certificate to require compliance with later-adopted laws or rules "upon a clear showing of a significant threat to the public health, safety, or the environment." Therefore, it is within EFSC's authority to impose conditions applying a 2-mile setback standard to the HWPF project. However, EFSC would have to make an express finding that there is a significant threat to public health or safety when turbines are located closer than 2-miles from a residence, and that finding would need to be supported by evidence in the record.

> Such a finding would be a significant departure from the minimum safety setback of ¼ mile from residences that EFSC adopted in the *Final Order on the Shepherds Flat Wind Farm* (July 25, 2008) and has since applied to other wind energy facilities. Such a finding would also be a departure from the public health setback (which may exceed ¼ 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 HWPF, that would almost certainly set a precedent for other wind energy facilities in Umatilla County and throughout the state.

AR 2070.

On the question of whether to grant a contested case hearing, EFSC staff, and by extension EFSC, analyzed these and all such issues in a table in Attachment C. AR 2071-2072. While staff and EFSC expressly analyzed the County's 2-mile buffer requirement as a health and safety noise regulation comparable to DEQ's noise regulations, they found that none of petitioners' arguments presented a significant issue of fact or law that "may affect EFSC's determination that the facility, with the change proposed by the amendment, meets an applicable standard." AR 2073.

For purposes of whether to apply the County's 2-mile buffer, EFSC summarily stated it was a land use regulation (AR 2068), and because it was not in effect on the date the Amendment #2 application was filed, ORS 469.504(1)(b)(A) precluded its application to this site certificate amendment. Neither staff nor EFSC reconciled the fact that staff's August 8, 2012 memo and the final order

analyzes the 2-mile buffer as a health and safety regulation that should be applicable and required as a condition of approval pursuant to ORS 469.401(2) because it was in effect on the date the site certificate amendment is executed. EFSC also declined to view wind turbine noise impacts as a "significant threat" to public health and safety or to require compliance with it under the significant threat provision of ORS 469.401(2).

PETITIONERS' FIRST ASSIGNMENT OF ERROR

EFSC misinterpreted and misapplied ORS 469.401(2) in failing to impose a condition requiring the site certificate holder to comply with local health and safety ordinances in effect on the date of the Amendment #2 execution, including Umatilla County's 2-mile noise buffer between wind turbines and residences. EFSC was arbitrary and capricious in analyzing the County's 2-mile noise buffer as a health and safety regulation comparable to DEQ's noise standards, but then summarily labeling it a land use regulation not in effect on the date the Amendment #2 application was filed.

Standard of Review: This Court reviews the final orders of EFSC for errors of law, abuse of discretion and lack of substantial evidence in the whole record. ORS 469.403(6), ORS 183.482(7) & (8). *Save Our Rural Oregon v. EFSC*, 339 Or. 353, 356, 121 P.3d 1141, (2005); *Friends of Parrett Mountain v. Northwest Natural,* 336 Or. 93, 96, 79 P.3d 869 (2003). The determination of the meaning of a statute such as ORS 469.401(2) is one of law, ultimately for the court to decide. *Springfield Educ. Ass'n v. Springfield School Dist. No. 19*, 290 Or. 217, 224, 621 P.2d 547 (1980). A court's deference to the agency's interpretation of a statute is

not automatic, but depends upon whether the legislature delegated specific authority to the agency to flesh out the statutory term. *Id.* The statutory policies here are not delegative terms, and therefore, the Court does not defer to the agency's interpretation. *Friends of Bradbury v. Department of Justice*, 219 Or.App. 395, 409, 182 P.3d 303 (2008). To accord any deference to the agency interpretation, however, it is necessary for the agency to express in its order, to the degree appropriate to the magnitude or complexity of the contested case, its reasoning demonstrating the tendency of the order to advance the policy embodied in the words of the statute. Explicit reasoning will enable the court on judicial review to give an appropriate degree of credence to the agency interpretation. *Dickinson v. Davis*, 277 Or. 665, 561 P.2d 1019 (1977); *see also Home Plate, Inc. v. OLCC*, 20 Or.App. 188, 190, 530 P.2d 862 (1975). Any such deference also presumes that the agency's interpretation is embodied in a contested case final order, which did not happen here. In fact, EFSC's refusal to provide a contested case proceeding when asked to do so is an issue in this appeal. In any event, this court shall accord no deference to EFSC's interpretation of the operative statutes in this case, but instead, decide such issues of law de novo.

Preservation of Error: Petitioners urged EFSC in oral and written testimony, to comply with ORS 469.401(2) and require the site certificate holder to comply with Umatilla County's 2-mile buffer, as a health and safety regulation designed to

protect rural residents from wind turbine noise. AR 1914, 1916, 1918, 1920, 1921, 1925, 1927, 1930, 1933, 1937 & 1939.

Argument: As a starting point, petitioners agree that the applicable EFSC "goal post" rule for establishing the local land use regulations applicable as approval standards is ORS 469.504.[14] It must also be understood, however, that valid land use regulations are rooted in the local government's police power to regulate for the benefit of the public health, safety and welfare.[15] Thus valid land use regulations may be seen as a subset of applicable health and safety regulations. Umatilla County's resource land use regulations clearly state their public health and safety purposes:

> §150.02 PURPOSE AND INTENT.
> (A) It is the purpose of this chapter to protect resource-based economically productive activities of the county in order to assure the continued health, safety and prosperity of its residents. Resource uses sometimes offend, annoy, interfere with or otherwise affect others located on or near resource lands. The county has concluded that persons located on or near resource

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[14] ORS 469.504(1)(b)(A) is similar to ORS 215.427(3), which provides in pertinent part that when a county reviews a permit or land use application "approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

[15] *Nectow v. City of Cambridge*, 277 U.S. 183, 188, 48 S.Ct. 447, 448 (1928), citing, *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303 (1926) ("The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.").

lands must accept the conditions commonly associated with accepted resource uses.

§152.002 PURPOSE.
The intent of purpose of this chapter is to promote the public health, safety and general welfare and to carry out the County Comprehensive Plan, the provisions of ORS Chapters 92 and 215 and the Statewide Planning Goals adopted pursuant to ORS Chapter 197. ...

Noise regulations, especially those designed to limit excessive and potentially harmful noise levels on sensitive receptors such as workers and residences, are health and safety regulations, as declared by the Legislature and the Department of Environmental Quality:

467.010 Legislative findings and policy. The Legislative Assembly finds that the increasing incidence of noise emissions in this state at unreasonable levels is as much a threat to the environmental quality of life in this state and the health, safety and welfare of the people of this state as is pollution of the air and waters of this state. To provide protection of the health, safety and welfare of Oregon citizens from the hazards and deterioration of the quality of life imposed by excessive noise emissions, it is hereby declared that the State of Oregon has an interest in the control of such pollution, and that a program of protection should be initiated. To carry out this purpose, it is desirable to centralize in the Environmental Quality Commission the authority to adopt reasonable statewide standards for noise emissions permitted within this state and to implement and enforce compliance with such standards. (emphasis added)

340-035-0005 Policy. In the interest of public health and welfare, and in accordance with ORS 467.010, it is declared to be the public policy of the State of Oregon:

(1) To provide a coordinated state-wide program of noise control to protect the health, safety, and welfare of Oregon citizens from the hazards and deterioration of the quality of life imposed by excessive noise emissions;

(2) To facilitate cooperation among units of state and local governments in establishing and supporting noise control programs consistent with the state program and to encourage the enforcement of viable local noise control regulations by the appropriate local jurisdiction;

(3) To develop a program for the control of excessive noise sources which shall be undertaken in a progressive manner, and each of its objectives shall be accomplished by cooperation among all parties concerned. (emphasis added)

There should be no dispute that Umatilla County's 2-mile buffer requirement, first adopted by Ord. 2011-06 and 2012-05 and then again by Ord. 2012-04, is a noise regulation, albeit more protective than DEQ's regulations. Umatilla County's noise regulations, like the State of Oregon's, are legitimate health and safety regulations that are lawfully applied to uses allowed on EFU land pursuant to ORS 215.283(2). *See Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995). This fact was acknowledged by EFSC staff in its detailed 12-page memo on the issue (Attachment B), in which it analyzed the 2-mile buffer requirement (Umatilla County Ordinance 2012-04) as a noise regulation and compared it (unfavorably) to DEQ's noise regulations. EFSC adopted and incorporated by reference staff's analysis and conclusions. Thus, the health and safety basis of Umatilla County's 2-mile buffer is expressly stated in the Final Order. AR 1937 & 2071.

In response to petitioners' request that EFSC adopt a condition pursuant to ORS 469.401(2) and require the applicant to comply with the 2-mile buffer, EFSC

staff acknowledged the health and safety basis for Umatilla County's 2-mile buffer. However, EFSC staff recommended that EFSC ignore Umatilla County's local noise regulation and follow its own (unappealed) administrative precedent and DEQ regulations:

> EFSC should follow its own precedent on public health and safety and require a setback sufficient to comply with the DEQ noise regulations or ¼-mile safety setback, whichever is greater. EFSC declined to adopt a 2-mile setback when the question was raised last year in contested case requests on Amendment #1. *See further discussion above under "Analysis of 469.401(2)."*

AR 2071 (footnotes omitted)

EFSC staff dismissed Umatilla County's 2-mile buffer because, in staff's view, it was "an arbitrary distance," and they recommended EFSC simply ignore it, which EFSC did.[16] As a matter of law, the opinion of EFSC staff, or even that of EFSC, about the wisdom or scientific credibility of a local health and safety ordinance is not a material consideration under ORS 465.401(2), which requires EFSC to require compliance with local health and safety ordinances in effect on the date the amended site certificate is executed.

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16 In response to numerous public comments that EFSC require compliance with Umatilla County's 2-mile setback pursuant to ORS 469.401(2), ODOE staff responded:

> "The suggested 2-mile setback of turbines from rural residences is an arbitrary distance. It is not based on the compliance of the facility with the applicable noise control regulations. Condition 101 already requires the

A plain text reading of ORS 469.401(2) shows that the statute is not a goal post rule, as EFSC staff and EFSC erroneously concluded, nor does it establish the local land use approval standards:[17]

> **469.401 Energy facility site certificate; conditions; effect of issuance on state and local government agencies.** (1) Upon approval, the site certificate or any amended site certificate with any conditions prescribed by the Energy Facility Siting Council shall be executed by the chairperson of the council and by the applicant. The certificate or amended certificate shall authorize the applicant to construct, operate and retire the facility subject to the conditions set forth in the site certificate or amended site certificate. The duration of the site certificate or amended site certificate shall be the life of the facility.
>
> (2) The site certificate or amended site certificate shall contain conditions for the protection of the public health and safety, for the time for completion of construction, and to ensure compliance with the standards, statutes and rules described in ORS 469.501 and 469.503. The site certificate or amended site certificate **shall require** both parties to abide by local ordinances and state law and the rules of the council in effect on the date the site certificate or amended site certificate is executed, 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. For a permit addressed in the site certificate or amended site certificate, the site certificate or amended site certificate shall provide for facility compliance with applicable state and federal laws adopted in the future to the extent that such compliance is required under the respective state agency statutes and rules.

ORS 469.401 (emphasis added).

The text and context of ORS 469.401(2) shows that it pertains to, among

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facility to comply with applicable Oregon noise regulations adopted by DEQ to protect public health." AR 1937.

other things, local health and safety regulations adopted by ordinance. The text and context of the statute also reveals a mandatory requirement that EFSC impose one or more conditions on a site certificate or amendment thereto requiring compliance with local health and safety regulations adopted by ordinance and in effect on the date the certificate or amendment is executed. The 2-mile noise buffer, adopted most recently by Ord. 2012-04, is one such regulation, and EFSC misconstrued and violated ORS 469.401(2) in failing to do so.

In following ODOE's recommendation, EFSC violated and ignored the mandatory requirement of ORS 469.401(2) that the site certificate or amendment require compliance with local health and safety regulations in effect on the date of execution, including Umatilla County's 2-mile buffer. EFSC established a false dichotomy by interpreting ORS 469.401(2) to be a goal post rule comparable to ORS 469.504(1)(b)(A), going through a complicated exercise of statutory interpretation, and then concluding that ORS 469.504 prevails in this conflict and that ORS 469.401(2) effectively is ignored. In fact, the two statutes address two different subjects and impose entirely different requirements on EFSC's decision making function.

The express terms of ORS 469.504(1)(b)(A) identifies the scope of local land use regulations that can be applied as approval standards to a site certificate

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17 ORS 469.504(1)(b)(A) does that.

or amendment. ORS 469.401(2) is not a competing statute by which EFSC identifies approval standards, but instead implicates state and local health and safety regulations that have been adopted by ordinance and are in effect on the date of execution of the amended site certificate. This statute expressly requires EFSC to include conditions that require compliance with these health and safety regulations. Thus, both statutes apply to this matter; both address different subjects, and EFSC is legally obligated to comply with both statutes. EFSC failed to comply with ORS 469.401(2) by refusing to impose a condition requiring the certificate holder to comply with Umatilla County's local health and safety regulations, adopted by ordinance, which were in effect on the date the amended site certificate was executed.

EFSC erroneously concluded that Umatilla County's 2-mile buffer was a land use regulation. While it is true that this health and safety regulation imposes limitations on where wind turbines can be located, that does not make it exclusively a land use regulation which EFSC can then ignore pursuant to ORS 469.504(1)(b)(A). County Ordinance 2012-04 is first and foremost a health and safety ordinance and is therefore subject to ORS 469.401(2).

PETITIONERS' SECOND ASSIGNMENT OF ERROR

EFSC abused its discretion, interpreted ORS 469.401(2) inconsistently with its terms and rendered a decision not supported by substantial evidence in the whole record when it concluded that the health and

safety evidence related to noise impacts of wind turbines did not constitute a "significant threat" to public health and safety that warranted the application of later-adopted laws, such as Umatilla County's 2-mile noise buffer.

Standard of Review: This Court reviews EFSC final orders for errors of law, abuse of discretion and lack of substantial evidence in the whole record. ORS 469.403(6), ORS 183.482(7) & (8). The determination of the meaning of a statute such as ORS 469.401(2) is one of law, ultimately for the court to decide. *Springfield Educ. Ass'n v. Springfield School Dist. No. 19, supra.* In this case, the Court accords no deference to the agency's interpretation of the statute or its operative terms because the policies contained in ORS 469.401(2) are not delegative terms, and the "interpretation" rendered by EFSC here was not the product of a contested case proceeding with the attendant procedural safeguards.

Preservation of Error: Petitioners asserted that the noise impacts of wind turbines addressed by Umatilla County's 2-mile buffer ordinance posed a significant threat to public health and safety that justified the exception set forth in ORS 469.401(2) allowing imposition of later-adopted health and safety laws. AR 1914, 1916, 1918, 1920, 1921, 1925, 1927, 1930, 1933, 1937 & 1939.

Argument: ORS 469.401(2) requires EFSC to require the applicant to comply with all health and safety regulations in effect at the time the amended site certificate is executed. The statute also provides that EFSC can require

compliance with later-adopted health and safety regulations upon a "clear showing of a significant threat to the public health, safety or the environment that requires application of later-adopted laws..." Petitioners argued at length during the comment period that noise was one such issue, that DEQ noise regulations were not adequate to address wind turbine noise, and that Umatilla County's 2-mile noise buffer in UCC §152.616(HHH) was one such later-adopted regulation.[18] Petitioners supported their argument with several published studies.[19] Among other things, these studies include the following conclusions about the adverse public health effects of wind turbine noise:

> The investigators were surprised to experience the same adverse health symptoms described by neighbors living in this house and near other large industrial wind turbine sites. The onset of adverse health effects was swift, within twenty minutes, and persisted for some time after leaving the study area. The dBA and dBC levels and modulations did not correlate to the health effects experienced. However, the strength and modulation of the un-weighted and dBG-weighted levels increased indoors consistent with worsened health effects experienced indoors. The dBG-weighted level

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18 This argument is an alternative to the argument asserted in the First Assignment of Error in the event that this Court or EFSC concluded that Ordinance 2012-04 was a later-adopted health and safety regulation. AR 1057.

19 *See e.g.,* The Bruce McPherson Infrasound and Low Frequency Noise Study, Adverse Health Effects Produced by Large Industrial Wind Turbines Confirmed, December 14, 2011 (AR 562-612); The Dirty Secret Behind Clean Jobs, Nick Sibilla and Todd Wynn, August 2011, Cascade Policy Institute (AR 613-631); and Strategic Health Impact Assessment on Wind Energy Development in Oregon, Public Comment Release, January 3, 2012, Research and Education Services, Office of Environmental Public Health Public Health Division, Oregon Health Authority (AR 910-1043).

appeared to be controlled by in-flow turbulence and exceeded physiological thresholds for response to low-frequency and infrasonic acoustic energy as theorized by Salt. The wind turbine tone at 22.9 Hz was not audible yet the modulated amplitudes regularly exceeded vestibular detection thresholds. The 22.9 Hz tone lies in the brain's "high Beta" wave range (associated with alert state, anxiety, and "fight or flight" stress reactions). The brain's frequency following response (FFR) could be involved in maintaining an alert state during sleeping hours, which could lead to health effects. Sleep was disturbed during the study when the wind turbine operated with hub height wind speeds above 10 m/s. It took about a week to recover from the adverse health effects experienced during the study, with lingering recurring nausea and vertigo for almost seven weeks for one of the investigators.

Further epidemiological and laboratory research needed

The research is more than just suggestive. Our experience of the adverse health effects reported by others confirms that industrial wind turbines can produce real discomfort and adverse health impacts. Further research could confirm that these ill effects are caused by pressure pulsations exceeding vestibular thresholds, unrelated to the audible frequency spectrum but are instead related to the response of the vestibular system to the low frequency noise emissions. The vestibular system appears to be stimulated by responding to these pressure pulsations rather than by motion or disease, especially at low ambient sound levels. Dysfunctions in the vestibular system can cause disequilibrium, nausea, vertigo, anxiety, and panic attacks, which have been reported near a number of industrial wind turbine facilities. The study emphasizes the need for epidemiological and laboratory research conducted by medical health professionals and acousticians working together who are concerned with public health and well-being. This study underscores the need for more effective and precautionary setback distances for industrial wind turbines. It is especially important to include a margin of safety sufficient to prevent inaudible low-frequency wind turbine noise from being detected by the human vestibular system.

AR 564-565 (emphasis added).

EFSC's Final Order does not address petitioners' "significant threat"

argument, except to incorporate by reference Attachment C, in which EFSC staff recommended the following:

> B. Significant Threat
>
> Some comments requesting a contested case suggest that ORS 469.401(2) could be used by EFSC to amend the site certificate and apply a 2-mile residential setback to the HWPF—even if the standard is not an applicable substantive criterion—because the setback is intended to remedy a significant threat to public health or safety. As discussed above, the legislative history suggests that ORS 469.401(2) was intended to allow EFSC to reopen a site certificate to require compliance with later-adopted laws or rules "upon a clear showing of a significant threat to the public health, safety, or the environment." Therefore, it is within EFSC's authority to impose conditions applying a 2-mile setback standard to the HWPF project. However, EFSC would have to make an express finding that there is a significant threat to public health or safety when turbines are located closer than 2-miles from a residence, and that finding would need to be supported by evidence in the record.
>
> Such a finding would be a significant departure from the minimum safety setback of ¼ mile from residences that EFSC adopted in the *Final Order on the Shepherds Flat Wind Farm* (July 25, 2008) and has since applied to other wind energy facilities. Such a finding would also be a departure from the public health setback (which may exceed ¼ 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 HWPF, that would almost certainly set a precedent for other wind energy facilities in Umatilla County and throughout the state.

AR 2070.

To the extent this is a finding or conclusion by EFSC, it misses the mark in ORS 469.401(2) because it does not address whether or not the noise issue constitutes a "significant threat" to public health and safety. Instead of addressing

this general standard in the statute, this finding fixates on the precedential effect of imposing Umatilla County's 2-mile noise buffer requirement. There is no discussion or conclusion of whether petitioners made (or did not make) a "clear showing"[20] or whether they failed to make any level of showing of a significant threat to public health and safety. The adequacy of DEQ noise standards is nonresponsive to the statute. The possible precedential effect of requiring compliance with a 2-mile buffer is nonresponsive to the statute. Whether EFSC has imposed a setback greater than DEQ's standards in this or any other wind farm site certificates is nonresponsive to the statute. Given the significance of the issue fairly raised and documented by petitioners, they were entitled to a decision that addresses the "significant threat" standard in ORS 469.401(2). Again, the fact that EFSC failed to provide a response, finding or conclusion that addresses the standard may be due to the fact that EFSC failed to provide a contested case proceeding.

To the extent that petitioners' arguments and evidence about wind turbine noise fall short of the "substantial threat" standard, they could have made that demonstration had EFSC granted a contested case proceeding. This argument, in

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20 Indeed, as argued below in the Third Assignment, petitioners were precluded from making such a showing because EFSC erroneously failed to allow a contested case proceeding within which petitioners and other members of the public could develop a factual record.

addition to those discussed in the Third Assignment of Error, should have justified a contested case hearing under OAR 345-027-0070(7). At a minimum, EFSC abused its discretion, misinterpreted and misapplied ORS 469.401(2) and rendered a decision unsupported by substantial evidence when it concluded that wind turbine noise was not a "significant threat" to public health and safety.

This Court should reverse and remand EFSC's decision on the "significant threat" issue (to the extent EFSC made one at all), and declare that the substantial evidence in the whole record supports a conclusion that noise constitutes a significant threat to public health and safety that warrants compliance with later-adopted local health and safety ordinances, such as Umatilla County's 2-mile noise buffer.[21] Alternatively, this Court should reverse and remand with direction that the Council provide a contested case proceeding in which to address the issue.

PETITIONERS' THIRD ASSIGNMENT OF ERROR

EFSC abused its discretion, misinterpreted OAR 345-027-0070(7), committed a procedural error that prejudiced the petitioners' substantial right to a full and fair hearing, and rendered a decision not supported by substantial evidence in the whole record when it concluded that the health and safety issue addressed by Umatilla

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21 Petitioners assert this alternative argument because ORS 469.401(2) gives EFSC express authority to require compliance with later-adopted health and safety regulations, and EFSC staff characterized Umatilla County's 2-mile noise buffer as being adopted after the date the Amendment #2 application was submitted. In fact, it was not "later-adopted" relative to the date of execution of the amended site certificate in this case. Nonetheless, EFSC has the authority, in fact, the obligation to require compliance with this health and safety regulation.

County's 2-mile noise buffer and EFSC's misinterpretation of ORS 469.401(2) did not constitute a significant issue of fact or law affecting the Council's determination that the facility meets the applicable standards. In fact, the legal and factual issues raised by petitioners presented significant issues that directly affected EFSC's determination of compliance with ORS 469.401(2), and by implication the locally adopted health and safety ordinance that required a 2-mile buffer. Petitioners were entitled to a contested case hearing as the means of demonstrating that wind turbine noise presented a significant threat, which was addressed by Umatilla County's 2-mile buffer ordinance.

Standard of Review: This Court reviews an agency interpretation and application of its administrative rules for errors of law, abuse of discretion and lack of substantial evidence in the whole record. ORS 469.403(6), ORS 183.482(7) & (8). *Save Our Rural Oregon v. EFSC, supra*; *Friends of Parrett Mountain v. Northwest Natural, supra.*

Preservation of Error: EFSC received seven requests for contest case hearings and denied those requests in its Final Order. AR 1913-1934.

Argument: An application to amend a site certificate is not processed as a contested case proceeding unless EFSC is requested to do so, and 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." OAR 345-027-0070(7). In this case, petitioners and others requested a contested case hearing to allow them to testify, put on evidence and rebut the applicant's and ODOE's arguments on the adverse health effects of

wind turbine noise, the efficacy and applicability of Umatilla County's 2-mile noise buffer and the inadequacy of less protective standards. In response, EFSC staff stated that EFSC was not required to apply the 2-mile buffer requirement because it is a land use regulation that was not in effect when this application was submitted (AR 2068), that the County's 2-mile setback was "arbitrary" (AR 1937), that DEQ standards were sufficiently protective (AR 2071), and to conclude otherwise was inconsistent with past EFSC decisions (AR 2072).[22] Nonetheless, EFSC staff also analyzed the 2-mile buffer as a health and safety regulation and compared it to DEQ's noise regulations which are also expressly health and safety regulations (AR 2071). In all, EFSC staff addressed and provided detailed legal and factual analysis to these arguments in its response to comments (Attachments A and B to the Final Order) and devoted a 12-page memo (Attachment C to the Final Order) to a detailed legal and factual analysis of petitioners' arguments regarding ORS 469.401(2) and the 2-mile buffer to support its recommendation that EFSC need not concern itself with the County's 2-mile buffer. EFSC took staff's advice, adopted its analysis and conclusions and said the following about the contested case requests in its Final Order:

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[22] In a moment of candor, EFSC staff stated that "The suggested 2-mile setback of turbines from rural residences is an arbitrary distance. It is not based on the compliance of the facility with the applicable noise control regulations. Condition 101 already requires the facility to comply with the applicable Oregon noise

> Under OAR 345-027-0070(7), to determine that an issue justifies a contested case proceeding, "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." The Council considered all requests for a contested case proceeding. The Council found that the requests for a contested case proceeding raised the issues that are summarized in the table on pages 10-11 of Attachment C. The Council voted to deny a contested case proceeding and adopted ODOE's analysis and recommended findings in the August 8 memorandum as the basis for the denial. At the meeting on August 24, 2012, the Council voted to approve the amendment request, subject to the revisions discussed herein.

AR 1962.

It is preposterous for EFSC to conclude that these focused legal and factual issues raised by petitioners, addressed in long and detailed analysis by staff that were adopted by EFSC did not constitute a significant issue of fact or law (or both) that "may affect the Council's determination that the facility ... meets an applicable standard." The standard in OAR 345-027-0070(7) is not that EFSC or EFSC staff agree with petitioners' factual and legal arguments, only that these arguments raise a significant issue of fact or law. In this case, these issues were significant because, if EFSC was obligated to require compliance with the 2-mile buffer, the proposed wind facility would be significantly affected. Again, petitioners may not have convinced EFSC they would prevail in their legal or factual arguments, but that's not the standard in OAR 345-027-0070(7) for

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regulations adopted by DEQ to protect public health." AR 1937.

obtaining a contested case hearing. Petitioners met the relatively low standard in OAR 345-027-0070(7) for obtaining a contested case by raising significant issues of law and fact the related directly to EFSC's determination of compliance with applicable standards.

The presumed purpose of a contested case hearing under EFSC's rule is to provide a fair adjudicative-type proceeding in which petitioners could present evidence and testimony, cross examine witnesses and rebut evidence against them in an effort to build a record and hopefully convince EFSC of the correctness of their position. Instead EFSC staff and EFSC took petitioner's arguments and evidence, provided their own rebutting arguments and legal analysis and declared that petitioners: (1) lose the noise argument on the merits and (2) their legal and factual arguments do not even rise to the level of being "significant issues" of fact or law and (3) their legal and factual arguments do not and could not affect the Council's determination that the facility meets an applicable standard.

EFSC staff's and EFSC's detailed and lengthy response to the statutory construction and noise issues prove, in fact, that they <u>are</u> significant. By any measure and by any interpretation of the Council's record and response, petitioners' arguments raised significant issues of fact and law. Moreover, if they were to prevail in these arguments, the result would affect the Council's determination that the applicant does or can meet an applicable standard, *i.e.,* ORS

469.401(2) and by implication Umatilla County's 2-mile buffer from residences.[23] In any event, the prospect of requiring compliance with UCC §152.616(HHH) and its 2-mile buffer between wind turbines and rural residences, is material and affects a finding that the applicant can meet all of the standards. In that light, EFSC should have required a contested case proceeding and abused its discretion and committed legal error in denying petitioners' requests.

CONCLUSION

For the foregoing reasons, the Court should reverse and remand EFSC's Final Order and direct the Council to comply with ORS 469.401(2) by including a condition requiring the applicant to comply with all locally adopted health and safety ordinances, including Umatilla County's 2-mile buffer requirement (Ordinance 2012-04). In the alternative, the Court should direct EFSC that noise qualifies as a "significant threat" to the public health and safety that warrants a condition pursuant to ORS 469.401(2) requiring compliance with Umatilla County's 2-mile noise buffer as a later-adopted ordinance. And, at a minimum, the Court should direct EFSC to conduct a contested case proceeding pursuant to

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[23] The applicant's and ODOE's response to petitioners' noise and 2-mile setback arguments was strong and negative, which indicates that both had concerns about the applicant's ability to comply with the setback. However, Amendment #1 authorized up to 134 wind turbines in a 20,613-acre area. It seems likely that somewhere within that area, the applicant could site 134 wind turbines and comply with the 2-mile setback requirement from all rural residences.

OAR 345-027-0070 to address the health and safety (noise) arguments raised by petitioners.

Respectfully submitted Monday November 5, 2012.

REEVE KEARNS, PC

By:_
Daniel Kearns, OSB #89395
Attorney for Petitioners

CERTIFICATE OF SERVICE AND FILING
and Certificate of Word Count

I hereby certify that on the date indicated below, I caused to be filed the original and 15 copies of the foregoing PETITIONERS' OPENING BRIEF AND EXCERPT OF RECORD in Supreme Court Case No. S060803 with the:

State Court Administrator
Supreme Court Building
1163 State Street
Salem, OR 97301-2563

by first class U.S mail, postage prepaid. On the same date I caused to be served 2 true, complete and correct copies of the same document by first class U.S mail, postage prepaid, on the following parties or attorneys:

Denise G. Fjordbeck and
Ellen Rosenblum
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I further certify that PETITIONERS' OPENING BRIEF is proportionately typed with 14-point font and contains 10,139 words.

DATED Monday November 5, 2012.

REEVE KEARNS PC

By: _
Daniel Kearns, OSB #89395
Attorney for Petitioners