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, v. ENERGY FACILITY SITING COUNCIL; and SITE CERTIFICATE HOLDER HELIX WINDPOWER FACILITY, LLC, Respondents.	SC S060803 **EXPEDITED JUDICIAL REVIEW UNDER ORS 469.403**

BRIEF OF *AMICI CURIAE* RENEWABLE NORTHWEST PROJECT AND AMERICAN WIND ENERGY ASSOCIATION

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I. STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amici Curiae, Renewable Northwest Project ("RNP") and American Wind Energy Association ("AWEA"), adopt Respondents' Statements of the Case and Statements of the Facts.

II. QUESTIONS PRESENTED

When an applicant requests to delay construction deadlines under an existing energy project site certificate, do the relevant statutes and rules generally direct the Oregon Energy Facility Siting Council ("EFSC") to maintain the substantive land use regulations in place at the time of the original project application?

Did EFSC reasonably conclude that the sounds associated with wind turbines did not constitute a "significant threat" to public health and safety that warranted the application of a two-mile rural residence setback as a condition of approval, where the Petitioners made no "clear showing of a significant threat"?

Was EFSC required to grant a contested case where the primary new evidence—the Draft Strategic Health Impact Assessment on Wind Energy Development ("Draft HIA")—did not identify health or safety problems nor recommend a two-mile setback?

III. ARGUMENT

RNP and AWEA urge the Court to uphold EFSC's soundly reasoned decision (1) granting the request for a site certificate amendment without requiring the imposition of a two-mile rural residence setback and (2) denying a contested case for an amendment application. Affirming EFSC's order affirms several important policies. First, maintaining the settled rule that substantive land use criteria remain consistent throughout project review is necessary to retain a rational decision-making process at EFSC. Second, for the statewide siting process to maintain its efficiency, EFSC must retain the authority to determine minimum health and safety standards for energy projects statewide. Here, EFSC properly declined to equate the land use preferences of a particular county with standards necessary to preserve public health and safety. Upsetting EFSC's conclusion that a two-mile rural residence setback should not be a condition of approval would create a damaging and erroneous precedent with far-reaching implications for wind energy development.

A. EFSC Correctly Determined that Substantive Land Use Criteria, Like Setbacks, Remain Consistent From the Time of Application.

In this case, EFSC maintained the settled principle that substantive land use criteria are fixed at the time of the original application. *See* ORS 469.504(1)(b). Likewise, the substantive land use criteria do not change upon

amendment to an issued site certificate, per EFSC's rules. OAR 345-027-0080(10).

ORS 469.401(2) is not to the contrary. Its direction for EFSC to require compliance with local ordinances in effect at the time of site certificate issuance or amendment is trumped by the more specific timing provision for land use criteria in ORS 469.504(1)(b). ORS 469.401(2) controls applicability of other types of local ordinances, like building codes, weed control, etc.

If the Court were to overturn this settled principle that land use "goalposts" remain fixed, the efficiency and rationality of EFSC's decision-making process would suffer immensely. Energy projects that are intended to be sited by the state would be subject to local jurisdictions changing the rules midstream, essentially preempting EFSC's authority by adopting new land use criteria in reaction to particular applications. Such an outcome would frustrate the purpose of the siting statutes and rules, which are intended to be binding on county governments. *See* ORS §§ 469.373(4)(a); 469.401(3).

In order to be able to successfully develop energy projects, project developers and Oregon landowners who host wind energy facilities on rural lands need certainty, consistency and stability. The rule requiring compliance with local land use ordinances in effect when an application is submitted provides that certainty and enables project developers to do the necessary planning in order to comply with rules and regulations. Setbacks are a classic

land use requirement, and it is clear that the two-mile setback was a land use criterion whose adoption was motivated by typical land use planning concerns (aesthetics, property value impacts, etc.)—not specifically for the protection of public health and safety. *See* Rec. 1526. Indeed, the Umatilla County setback is fundamentally a land use buffer, and the County's primary motivation for adopting the setback was not public health and safety, but other concerns. *See id.* This type of land use criterion was intended to remain consistent throughout project review, and should not be a moving target for project developers.

B. EFSC Correctly Concluded that the Evidence Related to Sound Impacts of Wind Turbines Did Not Constitute a "Significant Threat" to Public Health and Safety.

Although substantive land use criteria generally are to be held consistent, per ORS 469.504(1)(b) and OAR 345-027-0080(10), EFSC does have discretion under ORS 469.401(2) to choose to apply later-adopted ordinances "upon a clear showing of a significant threat to the public health, safety or the environment." Petitioners unsuccessfully attempt to characterize the two-mile setback as a sound-related regulation adopted to prevent a significant threat to public health. EFSC correctly concluded that no "clear showing of a significant threat" was made here.

There is no evidence in the record supporting Petitioners' claim that the sounds associated with wind turbines constituted a "significant threat" to public

health and safety that warranted the application of Umatilla County's two-mile land use buffer. Umatilla County did not make such a finding, the Draft HIA makes no such recommendation, and the operating experience of numerous wind turbines located less than two miles from other residences in the State demonstrate that no threat exists—let alone a clear, significant threat. More than a thousand operating wind turbines in Oregon—having a capacity exceeding 2,300 megawatts (Rec. 934)—have been sited in accordance with standard setback requirements. To date, there is no evidence of complaints about operating wind projects that have been sited through the EFSC process. Rec. 924.

There is no credible scientific literature supporting Petitioners' claim that wind turbine sound is a significant threat to public health and safety that would warrant requiring an applicant at EFSC to comply with Umatilla County's two-mile rural residence setback under ORS 469.401(2). To the contrary, there is credible peer-reviewed scientific data as well as various government reports in the U.S., Canada, Australia, and the U.K. that refute the claim that wind farms cause negative public and health safety impacts. For example, in their own independent reviews of available evidence, Ontario's Chief Medical Officer of Health[1] and Australia's National Health and Medical

[1] Ontario Ministry of Health, Chief Medical Officer of Health Report: The Potential Health Impacts of Wind Turbines (2010), *available at*

Research Council[2] found that sound from wind turbines does not cause negative public health impacts. In addition, in the United States, the Massachusetts Department of Public Health recently commissioned an independent panel of experts in relevant fields—including physicians, audiologists and mechanical engineers—to analyze "the biological plausibility or basis for health effects of turbines (noise, vibration, and flicker)."[3] In a review of both peer-reviewed and non-peer reviewed literature, the panel found no evidence for health effects from exposure to wind turbines.[4]

EFSC correctly concluded that the health and safety evidence offered on the sounds associated with wind turbines did not constitute a "significant threat" to public health and safety that would warrant imposition of the setback. Upsetting this conclusion would have vastly erroneous and damaging consequences. It could suggest, without foundation, a public health basis for one of the largest wind turbine setbacks ever adopted. Indeed, one of EFSC's reasons for rejecting Petitioners' approach was that it "would almost certainly

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http://www.health.gov.on.ca/en/common/ministry/publications/reports/wind_turbine/wind_turbine.pdf.

[2] National Health & Medical Research Council, Australian Government, Wind Turbines and Health: A Rapid Review of Evidence (2010), *available at* http://www.nhmrc.gov.au/_files_nhmrc/publications/attachments/new0048_evidence_review_wind_turbines_and_health.pdf.

[3] Jeffrey M. Ellenbogen et al., Mass. Dep't of Envtl. Prot, & Mass. Dep't of Pub. Health, Wind Turbine Health Impact Study: Report of Independent Expert Panel, ES-3 (2012), *available at* http://www.mass.gov/dep/energy/wind/turbine_impact_study.pdf.

[4] *See id.* at 24, 43-44, 56.

set a precedent for other wind energy facilities in Umatilla County and throughout the state." Rec. 2070. It could also encourage other jurisdictions to promulgate unjustified standards that would make siting wind facilities prohibitively difficult, thereby eliminating an important source of pollution-free, low-cost energy or vastly increasing the cost of this resource.

C. The Draft HIA Did Not Raise Significant Health Concerns or Recommend New Setbacks, and Thus Did Not Require EFSC to Grant a Contested Case.

Recognizing that construction delays are a reality of changing economic and power market conditions, EFSC should retain wide discretion to determine how to process requests for amendments to site certificates. Simple amendments should not require contested case proceedings unless a truly significant new issue of fact or law arises. Although RNP and AWEA were not involved in the Helix Wind Project proceeding at EFSC and express no opinion about the project itself, RNP staff members were active in development and review of the Draft HIA.

The Draft HIA does not contain new findings or recommendations about public health sufficient to require EFSC to subject permitted projects to contested case proceedings in order to alter construction deadlines. Moreover, the Draft HIA cited in Petitioners' brief (p. 30) recommends no setbacks whatsoever. Rec. 967. Instead, the Draft HIA encourages site-specific analysis and public outreach—the same approach EFSC adopted in its Final

Order. EFSC properly concluded that neither the Draft HIA nor any other evidence in the record clearly showed that Petitioners had raised a new "significant issue of law or fact" such that it would warrant EFSC granting Petitioners' contested case request. As Respondent, Helix Wind Power Facility LLC, indicates in its brief, EFSC's interpretation and application of OAR 345-027-0070(7) and (8) regarding the criteria for granting a contested case is entitled to a high level of deference. Answering Brief of Helix Wind Power Facility LLC at 15-17; *see also Ainsworth v. SAIF*, 202 Or App 708, 715, 124 P3d 616 (2005), *rev denied*, 341 Or 216 (2006). In this case, the record demonstrates that EFSC properly examined the facts and correctly applied the law to those facts. Accordingly, the Court should affirm EFSC's decision to deny a contested case.

IV. CONCLUSION

RNP and AWEA urge the Court to affirm EFSC's decision, which maintains important policies related to rational decision-making processes and well-reasoned, science-based determinations of public health and safety requirements that can be applied consistently across Oregon. Adopting Petitioners' approach would set an erroneous precedent in favor of the unsubstantiated conclusion that there is a significant threat to public health and safety related to the sounds associated with wind turbines and would damage

continued responsible siting of pollution-free, stable-cost wind energy resources.

RESPECTFULLY SUBMITTED this 26th day of November, 2012.

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CERTIFICATE OF FILING AND SERVICE

I certify that on November 26, 2012, I filed the foregoing Brief of Amici Curiae Renewable Northwest Project and American Wind Energy Association with the Appellate Court Administrator.

I further certify that on November 26, 2012, I served the foregoing Brief of Amici Curiae Renewable Northwest Project and American Wind Energy Association upon the following by mailing two copies, with postage prepaid, in envelopes addressed to:

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 1,726 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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