

W. T. d.

AGENDA COVER MEMO

DATE: October 27, 2004 Board Meeting Date

TO: BOARD OF COUNTY COMMISSIONERS

FROM: KENT HOWE, PLANNING DIRECTOR
LAND MANAGEMENT DIVISION

AGENDA ITEM TITLE: Discussion/Direction – West Cascade Energy Facility

I. MOTION:

No motion necessary. This is an information item only and designed primarily for staff to receive direction on the process the Board wishes to utilize for soliciting public input.

II. ISSUE OR PROBLEM

On August 19, 2004, Director Michael Grainey of the Oregon Department of Energy responded to the June 9, 2004 letter from the Lane County Board of Commissioners (DOE letter attached). The Department of Energy extended the time to December 15, 2004, for the Board to provide the Energy Facility Siting Council (EFSC) with the local land use ordinances and criteria that the Siting Council should apply to the proposed West Cascade Energy Facility.

On March 31, 2004, the West Cascade Energy Facility submitted land use applications to Lane County for a special use permit to locate a new energy facility and a temporary use permit for an area east of the main facility. On April 28, 2004, the Planning Director responded with a letter specifically identifying deficiencies in the applications and specifically describing what additional information was needed in order for Lane County to conduct the review that would develop the list of applicable substantive land use criteria to send to the EFSC.

On July 27, 2004, the applicant provided the Planning Director with a response to the deficiencies that had been identified in the permit applications previously submitted to Lane County. Please refer to your packet materials for your meeting on July 28, 2004, for copies of documents previously provided.

As the appointed Special Advisory Group (SAG), the Lane County Board of Commissioners expressed a desire to involve affected citizens in developing the list of applicable substantive criteria. The Board has until December 15, 2004 to conduct whatever public involvement process the Board determines to be appropriate and provide the EFSC with the applicable county substantive land use criteria they should apply to the proposed West Cascade Energy Facility. Staff needs direction on the process the Board would like to use for public involvement.

III. DISCUSSION

A. BACKGROUND

The proposed West Cascade Energy Facility is located approximately 2 miles north of the City of Coburg in the Exclusive Farm Use Zone (E-40/RCP) of the Lane County Rural Comprehensive

Plan. The primary applicable substantive land use criteria for the proposed use are governed by the Exclusive Farm Use Zone regulations found in Lane Code Chapter 16.212(4)(j-j).

The letter of April 28, 2004, provided the usual completeness review as if Lane County was the land use decision maker and specifically identified deficiencies in the submitted applications and what additional information was needed in order for the Lane County SAG to complete the review that would develop the list of applicable substantive land use criteria. The focus of that review and the letter was an effort to determine the exact nature of the proposed use and related facilities to determine a complete list of criteria. On July 27, 2004, the applicant submitted a response to the list of deficiencies identified in the application by the Planning Director letter. The following Analysis section addresses the adequacy of the response to each of the deficiencies that were identified.

B. ANALYSIS

The following sections review 1) the applicant's response to the identified deficiencies in the March 31st application submitted to Lane County; 2) Draft applicable county substantive land use criteria; 3) the process and timeline for public involvement; and 4) funding.

1. The following applicant responses to deficiencies identified in the letter of April 28th are listed below:

a. Reasons Exception Required by LC 16.212(4)(j-i).

In order to allow the Energy Facility Siting Council (EFSC) to determine if compliance with ORS 469.504(1)(b)(A) has been achieved, the applicant needs to provide to EFSC and Lane County a complete "Reasons Exception" application, per OAR 660 Division 4, that will address the applicable criteria, including the need to amend the Lane County Rural Comprehensive Plan to adopt that exception. That is what LC 16.212(4)(j-j)(ii) requires. Any plan amendment, including one submitted for EFSC review under ORS 469.504(1)(b)(A), (B), and (C), will also require a full response to all of the statewide goals, not just Goal 3. Without such an exception and plan amendment application in the record, the SAG may be unable to determine if compliance with ORS 469.504(1)(b)(A) has been achieved and subsequently, EFSC may be unable to proceed onward to ORS 469.504(1)(b)(B) or (C). See attached copy of ORS 469.504.

The applicant does not feel they have to address the Lane County Code requirements for a Plan amendment and reasons exception for the proposed energy facility, because the use is a conditional use that is permitted within the EFU zone and ORS 469.504(2) allows a separate process for the EFSC when the local standard requiring an exception to one or more of the statewide planning goals cannot be met. The applicant disagrees with the staff interpretation of LC 16.212(4)(j-j) and contends sufficient information exists in the application to EFSC addressing all the criteria applicable to a reasons exception.

Because the applicant has not submitted a complete application that includes analysis of plan amendment criteria and specifically addresses all the reasons exception requirements, the SAG may be unable to conclude that the applicant meets the requirements of LC 16.212(4)(j-j). A complete list of applicable criteria based on the information submitted by the applicant, however, should be possible with an appropriate caution that indicates potential additional criteria that could apply in the event the nature of the facility changes and triggers the need for additional review.

b. A Complete List of the Tax Lots on Which the Entire Project Occurs, Including an Accurate Plot Plan.

The applicant has provided an all inclusive listing of tax lots on which the entire project occurs, including plot plans for the entire project.

c. Accurate description of the “laydown area” for the Temporary Use Permit.

The applicant has provided a detailed description of the “laydown area” for the Temporary Use Permit.

d. Tax lot and ownership listings for transmission line corridors, proposed substation, extensions for connection with the Muddy Creek Irrigation Project (MCIP) and copies of easements allowing use of those extensions/areas.

The applicant has provided tax lot and ownership information along with copies of the easements for use of the transmission line corridors, proposed substation and proposed connections to the MCIP creeks, canals and areas.

e. A plot plan for the proposed changes to the MCIP intake pump facility; Riparian Modification Permit and FEMA flood hazard Special Use Permit.

The applicant has provided plot plans for the proposed changes to the MCIP. They reveal that while apparently no Riparian Modification will be needed, a Floodhazard Special Use Permit will be required for the new pump facility housing.

f. Evidence of authority to use and make improvements to the MCIP facilities.

The applicant has provided a conveyance agreement for use of the MCIP facilities and a copy of the water right for 10 cfs of McKenzie River water for an industrial use.

While most of the documentation/information deficiencies identified in the April 28, 2004 letter have been addressed, there remains a disagreement over the necessity of submitting a formal application for a reasons exception plan amendment. That difference should not preclude submittal of substantive land use criteria to EFSC. The EFSC application provided to Lane County describes the project and several various related permutations. That may provide enough information to develop a list of substantive land use criteria based on what is known about the project. A formal application to Lane County may have to wait until a decision on the site certificate is made by EFSC. In the event of approval by EFSC, Lane County will be bound to issue land use approvals specified in the site certificate upon submission of the proper applications and payment of the proper fees by the applicant. See attached copy of ORS 469.401.

2. Draft Lane County Applicable Substantive Land Use Criteria for Review of Proposed Energy Facility in the Exclusive Farm Use Zone (E-30/RCP) (See Attachment 2).

a. Lane Code 16.212(4)(j-i). Criteria for commercial utility facility in the EFU zone.

The main facility is located on land zoned for Exclusive Farm Use and will require a Special Use Permit. Because the land is considered High Value Farmland and the proposal is for a commercial utility facility that exceeds 12 acres, an exception pursuant to OAR Chapter 660, Division 4 is required and must be adopted as part of the Lane County Rural Comprehensive Plan pursuant to LC 16.400.

b. Lane Code 16.212(4)(f). Criteria for transmission lines and towers through EFU zone.

The two transmission lines through EFU zoned land will need Special Use Permit approval under this provision.

c. Lane Code 16.244(7)(a). Criteria for structures within flood hazard zone.

The proposed housing for the existing pump intake structure is within the FEMA regulated 100 year flood hazard area. A Flood hazard Special Use permit will be required.

d. Lane Code 16.255. Criteria for Temporary Use Permit.

The temporary "laydown area" east of the proposed plant will require approval of a Temporary Use permit.

e. Lane Code 16.212(10)(c) and (d); 16.253. Criteria applicable to riparian areas.

Changes to structures located in the riparian area may require review and approval under these provisions, depending on the nature of the changes. The current proposal may not require any review or approval under these provisions but they are included in case modifications to the proposed facilities are made that would require review or approval under these provisions.

f. Lane Code 16.212(3)(i), (v) or (4)(o)(vii). Criteria for placement of utility lines in right-of-way or on adjacent property with consent of owners.

Two options for transmitting water to the facility are described in the application and either one may require review and approval under one or more of these provisions.

The applicant has prepared a draft letter representing a possible response to the EFSC from the Lane County SAG with substantive land use criteria. The draft letter was included in a letter sent to Governor Kulongoski in response to the Board letter of September 24, 2004. Both letters are attached. The draft criteria provided by the applicant may be included in the process described below.

3. Process and Timeline for Public Involvement

As the appointed Special Advisory Group (SAG), the Lane County Board of Commissioners expressed a desire to involve affected citizens in developing the list of applicable substantive land use criteria. The Board has until December 15, 2004 to conduct whatever public involvement process the Board determines to be appropriate and provide the EFSC with the applicable county substantive land use criteria that should apply to the proposed West Cascade Energy Facility.

The Board could conduct a public hearing/s in November on the list of applicable substantive land use criteria that the EFSC should use in considering the West Cascade Energy Facility application for site certification. This would allow the Board time for deliberations in early December in order to meet the December 15th date to respond to the EFSC.

Subsequent public hearings could be conducted next year to determine if the applicant has met the applicable substantive criteria, or these public hearings could be consolidated with the public hearing/s identifying the applicable substantive criteria.

4. Funding

The applicable fee for a Plan Amendment to adopt an exception for a use not allowed in the zone is \$10,000 for a Major Amendment to the Rural Comprehensive Plan. To date, the Land Management

Division has only received application fees of \$1,042 for a Special Use Permit in the Exclusive Farm Use zone and \$2,590 for a Temporary Use Permit. Additional fees would be necessary to process Riparian Modification or Flood Hazard Special Use Permits.

While the applicant chose to have the EFSC make the ultimate land use compliance determination under ORS 469.504(1)(b)(A), staff have already spent significant resources in working with the applicant and the Department of Energy in an effort to get complete application information and review the proposal. Conducting public hearings and further staff time spent processing the submittal will exceed the revenues we have received to process the land use applications submitted.

Funding may be provided in a couple of ways. First, the EFSC may provide funding for county review under either ORS 469.350, 469.360 or 469.480, if requested or if the EFSC determines such assistance is necessary. See attached copies of ORS. Second, if a site certificate is issued by the EFSC and it identifies the county land use approvals, ORS 469.401 directs county issuance of those approvals without a hearing or other proceedings upon submission of the proper application and payment of the proper fees by the applicant. Either of those options could provide some of the necessary funding for county efforts as the SAG to the EFSC.

C. ALTERNATIVE/OPTIONS

1. Conduct a Public Hearing in November in order to create a comprehensive listing of the substantive county land use standards.
2. Don't conduct a Public Hearing in November on identification of the applicable substantive county land use criteria. Send in the applicable substantive criteria identified by staff. Conduct a Public Hearing next year on whether or not the application meets the applicable substantive criteria.
3. Conduct a consolidated Public Hearing in November on both the identification of the applicable substantive criteria and on whether or not the application meets them.
4. Take no action and let the EFSC apply the statutory provisions when a SAG does not recommend applicable substantive criteria.

RECOMMENDATION

Alternative 1.

IV. ATTACHMENTS:

1. Oregon Department of Energy letter, dated August 19, 2004.
2. Lane Code excerpts.
3. Board of Commissioners letter, dated September 24, 2004.
4. West Cascade Energy, LLC letter, dated October 5, 2004.
5. Copies of ORS 469.350, 469.360, 469.401, 469.480 and 469.504.



Oregon

Theodore R. Kulongoski, Governor



OREGON DEPARTMENT
OF ENERGY

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Salem, OR 97301-3737
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August 19, 2004

AUG 23 2004

Commissioner Bobby Green, Chair
Lane County Board of Commissioners
125 East 8th Avenue
Eugene OR 97401

Re: Site certificate application for the proposed West Cascade Energy Facility

Dear Commissioner Green:

This is to let you know that Lane County has more time to provide information regarding the proposed West Cascade Energy Facility. I also wish to clarify the state siting process and the opportunity which Lane County has for input in reviewing this application.

We have extended until December 15, 2004 the time for Lane County to provide the Energy Facility Siting Council (Siting Council) with the land use ordinances and criteria you wish the Siting Council to apply to the proposed West Cascade Energy Facility. We are able to provide this time extension because of the time we estimate it will take for the applicant to provide additional information requested by staff of the Oregon Department of Energy (Department). If at that time the Department determines that the application is complete, state law requires that the Siting Council must complete its review nine months after the application has been found complete.

Lane County land use codes and ordinances, the applicable substantive criteria, will help the Siting Council frame its decision. Under state law, the Siting Council must apply local county criteria in making their decision. If the county does not provide the criteria, then state law provides that the Siting Council must either determine itself what applicable local criteria to use or apply statewide planning goals in evaluating the application. Lane County has until December 15 to submit the criteria and any related comments you wish to provide.

Let me also clarify the review process conducted by the Department on behalf of the Siting Council. Under state law the applicant has the option to choose whether the Siting Council or the county commission makes the determination of compliance with state land use laws. Even though the applicant has elected to have the Siting Council make the land use determination, the Siting Council's process includes multiple opportunities for participation by the public and by the applicable local government, which in this case is the Lane County Commission. Our request that Lane County provide us a list of applicable land use criteria is only the beginning of that process.

Commissioner Bobby Green
August 19, 2004
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For example, Lane County may provide additional comments to the Siting Council when you identify the applicable land use criteria, including comments about the proposed facility's compliance with those criteria. In fact, the Siting Council's rules specifically direct ODOE to request this input from local government (OAR 345-015-0200(5)).

The Siting Council's process also includes a formal period of public comment open to all interested persons and organizations, a public hearing on the recommendations which will be made by the Department to the Siting Council regarding the proposed facility and a contested case on-the-record adjudicatory hearing.

For the proposed West Cascade facility, we will hold any public hearing in Lane County. We will also accept and consider public comment at any time before the beginning of the formal comment period and public hearing, which will likely be scheduled next year. Certain legal procedures must be followed in order for issues raised at the public hearing stage to be considered in the contested case proceeding or ultimate appeal of the Siting Council's decision. My staff can provide guidance to members of the public on how to follow those procedures.

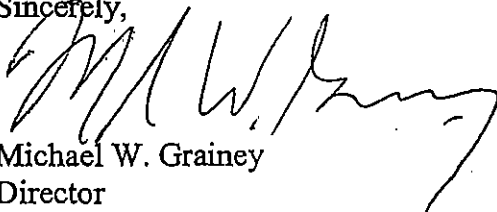
The seven members of the Siting Council are citizen volunteers who work hard to make very difficult decisions, knowing those decisions affect communities where energy facilities are proposed. The Siting Council conducts its business in public, and the Siting Council's decision must be based solely on the record developed through this administrative process.

The Department has not yet made any recommendations to the Siting Council regarding the proposed West Cascade facility, nor will we do so until after the application is found complete. We are still in the very early stages of the site certificate review process.

Lane County has an important role in the siting process by identifying the substantive land use criteria that are applicable to the proposed facility and providing other comments on the proposal. Let me assure you that we need and want your input and comments on this application.

If you have any questions regarding this project or the siting process, please call me at 503-378-5489 or Dave Stewart-Smith, Assistant Director in charge of our energy facility siting review process. His number is 503-378-6469.

Sincerely,



Michael W. Grainey
Director

Cc: Commissioner Ann Morrison
Commissioner Bill Dwyer
Commissioner Don Hampton
Commissioner Peter Sorenson

LANE CODE EXCERPTS AND APPLICABLE CRITERIA

a. Special Use Permit for main plant under LC 16.212(4)(j-j):

Commercial utility facilities for the purpose of generating power for public use by sale that comply with these requirements:

(i) LC 16.212(10)(f) through (g) below;

(ii) On high value farm land, the power generation facility shall not preclude more than 12 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to OAR Chapter 660, Division 4;

(iii) On land that is not high value farm land, a power generation facility shall not preclude more than 20 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to OAR Chapter 660, Division 4; and

(iv) Notwithstanding LC 16.212(4) (the requirements for a special use permit and to provide notice and opportunity for appeal or to conduct a hearing) above, uses described by LC 16.212(4)(j-j) above are allowed subject to compliance with ORS 469.504.

LC 16.212(10)(f)-(g):

(f) Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm and forest use.

(g) Will not significantly increase the cost of accepted farm or forest practices on lands devoted to farm or forest use.

See LC 16.212(10)(b), (c) and (e) for setback and sign regulations.

See ORS 197.732, OAR Chapter 660, Division 4 and LC 16.400 exception and Lane County Rural Comprehensive Plan (RCP) amendment process and criteria.

b. Special Use Permit for transmission towers and lines under LC 16.212(4)(f):

(f) A transmission tower over 200 feet in height, not including a telecommunication facility defined by LC 16.264(2), that complies with LC 16.212(10)(f) through (g) below

LC 16.212(10)(f)-(g):

(f) Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm and forest use.

(g) Will not significantly increase the cost of accepted farm or forest practices on lands devoted to farm or forest use.

See LC 16.212(10)(b), (c) and (e) for setback and sign regulations.

c. Floodhazard permit for pump housing structure under LC 16.244:

(a) Unnumbered "A" Zones, where base flood elevation data cannot be supplied.

(i) Anchoring.

(aa) All new construction and substantial improvements shall be anchored to prevent flotation, collapse or lateral movement of the structure.

(bb) All manufactured homes must likewise be anchored to prevent flotation, collapse or lateral movement, in accordance with standards of the State of Oregon, Building Codes Agency, Manufactured Structures Division.

- (ii) *Construction Materials and Methods.*
 - (aa) *All new construction and substantial improvements shall be constructed with approved materials and utility equipment resistant to flood damage.*
 - (bb) *All new construction and substantial improvements shall be constructed using methods and practices that minimize flood damage.*
 - (cc) *Electrical, heating, ventilation, plumbing and air-conditioning equipment and other service facilities shall be designed and/or otherwise elevated or located so as to prevent water from entering or accumulating within the components during conditions of flooding.*
- (iii) *Utilities.*
 - (aa) *All new and replacement water supply systems shall be designed to minimize or eliminate infiltration of flood waters into the system.*
 - (bb) *New and replacement sanitary systems shall be designed to minimize or eliminate infiltration of flood waters into the systems and discharge from the systems into flood waters; and*
 - (cc) *On-site waste disposal systems shall be located to avoid impairment to them or contamination from them during flooding.*
- (iv) *Subdivision Proposals.*
 - (aa) *All subdivision proposals shall be consistent with the need to minimize flood damage;*
 - (bb) *All subdivision proposals shall have public utilities and facilities such as gas, electrical and water systems located and constructed to minimize flood damage;*
 - (cc) *All subdivision proposals shall have adequate drainage provided to reduce exposure to flood damage; and*
 - (dd) *Where base flood elevation data has not been provided or is not available from another authoritative source, it shall be generated for subdivision proposals and other proposed developments which contain at least 50 lots or five acres (whichever is less).*
- (v) *Review of Building Permits.* *Where elevation data is not available either through the Flood Insurance Study or from another authoritative source, applications for building and manufactured home placement permits shall be reviewed to assure that proposed construction will be reasonably safe from flooding. The test of reasonableness shall include the use of historical data, high water marks, photographs of past flooding, etc., where available.*
- (vi) *Elevation.*
 - (aa) *Residential Construction: new construction and substantial improvement of any residential structure shall have the lowest floor, including basement, elevated two feet above grade.*
 - (bb) *Nonresidential Construction: new construction and substantial improvement of any commercial, industrial or other nonresidential structure shall either have the lowest floor, including basement, elevated two feet above grade; or, together with attendant utility and sanitary facilities, shall be flood-proofed to a level two feet above grade, so the structure is watertight with walls substantially impermeable to the passage of water.*
 - (cc) *Manufactured Home Placement: All manufactured homes not in an existing manufactured home park or existing manufactured home subdivision shall have the lowest floor elevated two feet above grade.*
- (vii) *Enclosed Areas.* *Fully enclosed areas below the lowest floor that are subject to flooding are prohibited, or shall be designed to automatically equalize hydrostatic flood forces on exterior walls by allowing for the entry and exit of*

floodwaters. Designs for meeting this requirement must either be certified by a registered professional engineer or architect, or must meet or exceed the following minimum criteria:

- A minimum of two openings having a total net area of not less than one square inch for every square foot of enclosed area subject to flooding shall be provided. The bottom of all openings shall be no higher than one foot above grade.*
- Openings shall be located to allow unrestricted cross-flow of floodwaters through the enclosed area from one side to the other.*
- Openings may be equipped with screens, louvers, or other coverings or devices provided that they permit the automatic entry and exit of floodwaters.*
- (viii) Roads. Adequate provisions shall be made for accessibility during a 100-year flood, so as to ensure ingress and egress for ordinary and emergency vehicles and services during potential future flooding.*

d. Temporary Permit for laydown area under LC 16.255:

(1) Purpose. The purpose of the Temporary Permit procedure is to allow on an interim basis:

- (a) Temporary uses in undeveloped areas of the County not otherwise allowable in the applicable zone.*
- (b) Use of existing structures designed and intended for a use not allowable in a zone and not otherwise a nonconforming use, and*
- (c) Erection of Temporary structures for activities necessary for the general welfare of an area; provided such uses and activities are consistent with the intent of this Chapter.*

No Temporary Permit can be granted which would have the effect of permanently rezoning and granting a special privilege not shared by other property in the same zone.

(2) Allowable Temporary Uses, Criteria and Limitations.

- (a) The following are allowable Temporary Uses and may be permitted in any zone, subject to the following criteria and limitations:*
 - (i) A different use for existing structures or structures and premises in a combination which are occupied or have been occupied by a nonconforming use; provided it is determined by the Hearings Official that the character and nature of the proposed use will be less incompatible to the surrounding vicinity than the existing or previous nonconforming use.*
 - (ii) Use of existing structures and premises which are designed and intended for a use which is not allowable in the applicable zone and new structures and premises and use thereof necessary for the physical and economic welfare of an area; provided it is determined by the Hearings Official that the location, size, design and operating characteristics of the proposed use and new structure, if applicable:
 - (aa) Will be compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding vicinity; and*
 - (bb) Will not be adversely affected by the development of abutting properties and the surrounding vicinity.**
 - (iii) Open land uses which do not involve structures with a combined value in excess of \$1,000; provided it is determined by the Hearings Official that the location, size, design and operating characteristics of the proposed use:
 - (aa) Will be compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding vicinity, and**

(bb) Will not be adversely affected by the development of abutting properties and the surrounding vicinity.

(b) In applying the criteria for allowable temporary uses provided in LC 16.255(2)(a)(i) and (ii) above, consideration may be given to harmony in scale, bulk, coverage and density; to the availability of public facilities and utilities; to the harmful effect, if any, upon desirable neighborhood character; to the generation of traffic and the capacity of surrounding streets and roads; and to any other relevant impact of the use.

(c) No structural alterations may be made to a nonconforming structure to be utilized by a temporary use which would materially prolong the economic life of the structure.

(d) Where new structures and use thereof and new open land uses are permitted, the premises shall be required to be restored to the prior state within three months of the termination of the permit. A performance bond shall be required, if determined necessary by the Hearings Official, at the time of approval in sufficient amount to cover the estimated cost such restoration.

(e) Temporary Permits for any one permit shall be approved for a maximum of five years.

(3) Conditions. Reasonable conditions may be imposed in this section. Guarantees and evidence may be required that such conditions will be or are being complied with. Such conditions may include, but are not limited to, requiring:

(a) Special yards and spaces.

(b) Fences and walls.

(c) Control of points of vehicular ingress and egress.

(d) Special provisions on signs.

(e) Landscaping and maintenance thereof.

(f) Maintenance of the grounds.

(g) Control of noise, vibrations, odors or other similar nuisances.

(h) Limitation of time for certain activities.

(i) A time period within which the proposed use shall be developed.

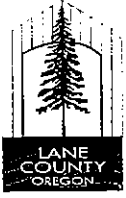
(j) A limit on total duration of use.

(4) Application. Application for a Temporary Permit shall be made as provided by LC 14.050.

(5) Review Procedure. Applications for Temporary Permits shall be reviewed by the Hearings Official pursuant to LC 14.300.

e. Riparian Permit for certain activities within the riparian areas under LC 16.212(10)(c) or (d) and 16.253.

f. Authority for placement of utility lines or transmitting water under LC 16.212(3)(i), (v) or (4)(o)(vii).



Lane County Board of Commissioners

Bill Dwyer
Bobby Green, Sr.
Don Hampton
Anna Morrison
Peter Sorenson

September 24 , 2004
WD bc/bg/04019/T

The Honorable Ted Kulongoski, Governor
Oregon State Capitol
160 State Capitol
900 Court Street
Salem, OR 974301-4047

Dear Governor:

Before the state's Energy Facility Siting Council (EFSC) is a decision of vital importance to the quality of life in the southern Willamette Valley. We want to make sure the perspective and sensitivities of our citizens - reflected and conveyed through local government - are given due consideration and weight by the Council.

The West Cascade Energy Facility (a gas-fired power plant) is proposed for a site north of Coburg, near Harrisburg. The applicant has elected to have the EFSC review and determine if its development complies with statewide planning goals, applicable state statute and applicable substantive criteria from the local jurisdiction, or in this case, the Lane Code. Our Board has been appointed as a Special Advisory Group to the Council, and asked to provide a list of recommended applicable substantive criteria from our comprehensive plan.

Unfortunately, despite our repeated requests, the applicant has failed to provide complete information on their development plan so that our analysis of applicable substantive criteria will be thorough and accurate. The deficiencies in their submittals have thwarted our best efforts to complete in a timely fashion the list required by statute and requested by the Siting Council.

We have been informed that the Department of Energy on behalf of the Siting Council intends to give Lane County, in its role as SAG, until the end of the year to provide a list of applicable substantive criteria. Governor, we ask that you instruct the Department of Energy to reinforce with the applicant the importance of correcting the deficiencies in their submittal.

Whatever the ultimate decision of the Siting Council with regard to the West Cascade Energy Facility, it must reflect the complete and faithful participation by local and state government. That participation validates the final outcome and reinforces confidence by citizens in the role and integrity of government.

We trust you will agree that the interests of the State and the County strongly overlap in that regard.

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At your convenience, we would welcome the opportunity to discuss this issue in greater depth with you or your designated representative.

Sincerely,

A handwritten signature in black ink, appearing to read "Bobby Green, Sr.", written in a cursive style.

Bobby Green, Sr., Chair
Lane County Board of Commissioners

c: Ray Naff/Office of the Governor
John White/D.O.E.
Paul Vaughn/West Cascade Energy Facility
Representative Brown
Representative Beyer
Representative Ackerman
Representative Barnhart
Representative Holvey
Representative Hanna
Representative Farr
Senator Morrisette
Senator Messerle
Senator Prozanski
Senator Walker

West Cascade Energy, LLC

October 5, 2004

The Honorable Ted Kulongoski
Office of the Governor
State Capitol, Room 160
900 Court Street NE
Salem, OR 97301-4047

COPY

Dear Governor Kulongoski:

I am the managing member of West Cascade Energy, LLC (West Cascade). West Cascade is the developer of the proposed West Cascade Energy Facility located north of the city of Coburg in Lane County.

I recently learned that Commissioner Bobby Green, acting on behalf of the Lane County Board of Commissioners, sent a letter to you complaining that West Cascade has failed to respond to the county's "repeated requests" for information regarding the proposed energy facility. Commissioner Green claims that because requested information has not been provided by West Cascade, the county is unable to meet its statutory responsibility to provide the Energy Facility Siting Council (Council) with a list of the county's land use criteria applicable to the proposed project. Commissioner Green's assertions are without merit. For the reasons discussed below, West Cascade has submitted more than adequate information to enable the county to identify the sections of the county's land use code applicable to the siting of the proposed energy facility in the county's Exclusive Farm Use (EFU) zone.

In December, 2003, West Cascade sent to Lane County Planning Director Kent Howe a complete copy of the three-volume Site Certificate Application that West Cascade had submitted to the Oregon Department of Energy. A UPS receipt proving that the copy was shipped to Mr. Howe on December 10, 2003 is attached. The application contains approximately 4,000 pages of information and includes as "Exhibit K" an approximately 65 page section that addresses compliance with the applicable land use criteria. The application contains all of the information necessary to enable the county to provide to the Council a list of the county's land use criteria that apply to the proposed project. Indeed, Exhibit K to the application sets out those land use criteria verbatim.¹

¹ To the extent the county is unsure whether any specific land use criterion applies, the county need only identify the criterion and explain why the county is unsure whether or not the criterion is applicable to the project. For example, the county has stated that it needs more information regarding the exact location of the pumping facility that will be used to appropriate water from the McKenzie River so it can determine whether a permit for a riparian setback modification is required. Assuming (without agreeing) that is true, it is easy for the county to fulfill its statutory duty with a response to the Council stating that (1) the applicable riparian setback is "x" feet and (2) we are unable to determine whether the proposed pumping facility is within the setback; however, if it is, the criteria for a Riparian Modification Permit are spelled out in Lane Code Sections 16.253(3)(a), (b) and (c).

The Honorable Ted Kulongoski

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As stated above, it is the county's responsibility is to provide to the Council a list of the county's land use criteria that pertain to the siting of a commercial power generating facility in the EFU zone. By reviewing the application's Table of Contents, one can readily discover that Exhibit K addresses land use compliance. That exhibit contains all of the information necessary to enable the county to identify the applicable criteria from the county's land use code, a code with respect to which the county's Planning Department should be intimately familiar. Identifying the applicable criteria should have taken the county's planning staff only two or three hours to complete. I have also attached to this letter a draft letter, which took me only several hours to write, that is an example of what the county should have sent to the Oregon Office of Energy (ODOE) identifying the criteria. I respectfully request that you encourage the county to comply with the law and send a similar letter to the ODOE.

The foregoing briefly responds to Commissioner Green's letter. The following discussion responds to Commissioner Green's letter in more detail.

Background

The statutes and rules that apply to siting energy facilities in Oregon were designed to ensure a complete review of the project by all affected agencies and the public. The statutes and rules were also designed to ensure that the review process is orderly and that a final decision on a site certificate application is based on the facts and a finding of compliance with the applicable laws, rules and regulations. The review process involves a number of phases and for the purpose of this discussion, it is important to understand the current review phase and the phases that follow.

The Site Certificate Application submitted by West Cascade to the ODOE is presently in the "completeness" review phase. During this phase, the Department of Energy reviews the application to determine if it is complete. The application is circulated to various agencies and stakeholders for review and comment. The ODOE determines whether the application contains enough information to support findings by the Council that the facility meets the applicable standards. If necessary to find the application complete, the ODOE will request additional information. During this "completeness" review phase, there usually are changes or additions to the application, either in response to Department of Energy questions (which are often prompted by comments from other agencies or stakeholders) or as the result of changes in the applicant's plans. During this phase, all affected agencies and stakeholders have responded appropriately to the Department of Energy except Lane County.

In order for the Council to issue a Site Certificate, West Cascade must show (among other things) that the project complies with the Council's "land use standard." The land use standard ensures that the proposed facility will comply with Oregon's land use statutes and planning goals adopted by LCDC. West Cascade has chosen to have the Council, and not Lane County, make the land use determination. West Cascade is

entitled by statute to make that election. When that election is made, the Council appoints the local governing body of the city or county where the proposed facility is to be located (in this case, the Lane County Board of Commissioners) as a Special Advisory Group to assist the Council in identifying the applicable substantive criteria from the county's comprehensive plan and land use regulations. During the completeness review phase, it is the Special Advisory Group's responsibility to provide to the ODOE a description of the applicable land use criteria from the county's code and comprehensive plan that the county believes the Council should apply. (See OAR 345-015-0180(5)). Instead of endeavoring in good faith to provide that information, the county has seemingly done everything in its power to concoct reasons why it cannot perform its role.

The energy plant and the majority of its supporting and related facilities are proposed to be located on approximately 107 acres of EFU zoned land. Under the Lane Code and consistent with state law (ORS 215.213(2)(g)), commercial power generating facilities are conditionally permitted on EFU land if certain criteria are satisfied. Lane Code 16.212(4)(m-m) sets forth the applicable criteria for the required conditional use permit. It is not difficult to locate or identify those criteria within the Lane Code. Other criteria addressing such issues as required building setbacks are just as easily identified. However, instead of simply identifying such criteria, the county wants us to believe, for example, that unless the exact distances between all improvements comprising the proposed facilities and the property boundaries are shown in the application, the county simply is not able to identify the sections of its code that set forth required building setbacks. The county's assertion that it is not able to identify the land use criteria that pertain to the project without more information is simply nonsense.

Substantive Review

The "completeness" review phase of the process ends when the ODOE determines that the application is complete, at which point the application is deemed "filed." At that point, the application moves into the "substantive" review phase. That phase consists of a number of steps.

First, the ODOE conducts a thorough review of the filed application. The ODOE consults with other state and local government agencies and requests their comments and proposed site certificate conditions. The review concludes when the ODOE issues a draft proposed order, as provided under ORS 469.370. The draft proposed order includes proposed findings of fact, recommended conclusions on compliance with Council standards and recommended site certificate conditions for construction, operation and retirement of the facility.

Next, a public hearing is held on the proposed order, during which the public may raise issues and otherwise comment on the proposed facility. After the public hearing, the Council reviews the draft proposed order and makes comments. Based on the comments

of the Council, public comment on the record of the public hearing and consultation with other governmental agencies, the ODOE then issues a proposed order.

After the proposed order is issued, the matter moves into the "contested case" phase. A mandatory contested case hearing is held before an independent hearing officer appointed by the Council. The applicant and the Department of Energy are parties to that proceeding. In addition, persons who have an interest in the outcome of the proceeding or who represent a public interest in such result may request to participate as parties or limited parties. At the end of the contested case proceeding, the hearing officer issues a proposed contested case order. The Council then makes the final decision on whether or not to approve a final administrative order as amended by the hearing officer. The site certificate will then be issued as part of that order.²

I apologize for describing the process in this much detail. However, I felt it was necessary to do so to make one very important point: there will be ample opportunity for full public participation (including county participation) in the review process after the "completeness" review phase is finished.

It appears that county commissioners want to conduct a substantive review of the project during the completeness phase and before the application submitted to the ODOE is even deemed "filed" and ready for the substantive review phase. Substantive review by the county is not required at this time, nor is it appropriate since the project undergoes changes in the completeness phase so there is no point in commenting on aspects of the project which may or may not exist after the project is fully described in the "filed" application.

It also appears that for at least one Commissioner, Peter Sorenson, is interested in delaying or denying the project rather than addressing its merits. Commissioner Sorenson indicates his desire to use mechanism of government for the primary purpose of delay as can be seen from this excerpt of an article published on September 23 in the Eugene Weekly.

Commissioner Peter Sorenson suggests that even if local government will not deny the proposed plant outright, enough concerns abound that agencies may delay approval of permits. "Government that is timid about approving a project often continues to process until the project dies," he says. "They just keep considering it, considering it, considering it — but they never do deny it. They just keep asking more and more questions."

Instead of conducting a substantive review, the county commissioners, in their capacity as the Special Advisory Group to the Council, should follow the law and provide to the

² Judicial review of the Council's decision on the site certificate application is taken directly to the Oregon Supreme Court.

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Council a description of the local land use criteria applicable to the proposed energy facility. The Special Advisory Group will have ample opportunity to comment on the substance of the project during the substantive review phase.

Conclusion

By December 2003, Lane County had adequate information regarding the proposed energy facility to enable it to comply with ORS 469.504(5) and provide its land use criteria recommendations to the Council. The county commissioners, acting in their capacity as the Special Advisory Group to the Council, should forthwith submit to the ODOE a list of the applicable land use criteria from the county's land use code and comprehensive plan. The attached letter is an example of the kind of letter the Special Advisory Group should have sent to the Council.

If the county needs clarification regarding the applicable laws and regulations or feels it needs additional information regarding the project, those questions should be addressed to the ODOE or the lawyer in the Attorney General's office assigned to energy facility siting issues.

Respectfully,



Gary P. Marcus, Manager
West Cascade Energy, LLC

Attachments: 3

c: Ray Naff, Office of the Governor
John White, ODOE
Paul Vaughan, Hershner Hunter et al; counsel for West Cascade Energy, LLC
Representative Brown
Representative Beyer
Representative Ackerman
Representative Barnhart
Representative Holvey
Representative Hanna
Representative Farr
Senator Morrisette
Senator Messerle
Senator Prozanski
Senator Walker



Invoice date **December 13, 2003**

Invoice number **000012Y4R6503**

Shipper number **12Y4R6**

Page 4 of 11

Outbound

UPS Internet Shipping (continued)

Pickup Date	Tracking Number	Service	ZIP Code	Zone	Weight	Billed Charge
12/10	1Z12Y4R60390489104	Ground Commercial	97301	2	25	9.05
		Fuel Surcharge				0.14
		Total				9.19
UserID : DianeMoore						
Sender : Diane Moore		Receiver: Jerry Murray				
West Cascade Energy, LLC		Oregon Public Utility Commission				
1580 Valley River Drive		550 Capitol St, NE				
Eugene OR 97401		SALEM OR 97301				
	1Z12Y4R60390685259	Ground Commercial	97380	2	25	9.05
		Fuel Surcharge				0.14
		Total				9.19
UserID : DianeMoore						
Sender : Diane Moore		Receiver: Robert Kentta, Cultu				
West Cascade Energy, LLC		Confederated Tribes of Siletz				
1580 Valley River Drive		201 SE Swan				
Eugene OR 97401		SILETZ OR 97380				
	1Z12Y4R60390775081	Ground Commercial	97401	2	25	9.05
		Fuel Surcharge				0.14
		Total				9.19
UserID : DianeMoore						
Sender : Diana Moore		Receiver: Kent Howe				
West Cascade Energy, LLC		Lane Co. Land Mgmt Planning Prog.				
1580 Valley River Drive		125 East 8th Avenue				
Eugene OR 97401		EUGENE OR 97401				
	1Z12Y4R60390880190	Ground Commercial	97477	2	25	9.05
		Fuel Surcharge				0.14
		Total				9.19
UserID : DianeMoore						
Sender : Diane Moore		Receiver: Kristina Deschaine				
West Cascade Energy, LLC		Office of State Fire Marshal				
1580 Valley River Drive		3620 Gateway Street				
Eugene OR 97401		SPRINGFIELD OR 97477				
	1Z12Y4R60391086065	Ground Commercial	97333	2	25	9.05
		Fuel Surcharge				0.14
		Total				9.19
UserID : DianeMoore						
Sender : Diane Moore		Receiver:				
West Cascade Energy, LLC		Benton Co. Board of Commissioners				
1580 Valley River Drive		408 SW Monroe Avenue				
Eugene OR 97401		CORVALLIS OR 97333				
	1Z12Y4R60391245508	Ground Commercial	97408	2	25	9.05
		Fuel Surcharge				0.14
		Total				9.19
UserID : DianeMoore						
Sender : Diane Moore		Receiver: Anita Yap				
West Cascade Energy, LLC		City of Coburg, City Planner				
1580 Valley River Drive		91069 N. Willamette				
Eugene OR 97401		COBURG OR 97408				
	1Z12Y4R60391279571	Ground Commercial	97309	2	25	9.05
		Fuel Surcharge				0.14
		Total				9.19
UserID : DianeMoore						
Sender : Diane Moore		Receiver: Jim Hanson				
West Cascade Energy, LLC		Building Codes Division				
1580 Valley River Drive		P.O. Box 14470				
Eugene OR 97401		SALEM OR 97309				



Delivery Service Invoice

Invoice date **January 10, 2004**

Invoice number **000012Y4R6024**

Shipper number **12Y4R6**

Page 1 of 3



#BWN CWNG#
#0083A000012Y4R61# 77373200015045
AT 01 038141 56142H123 A**3DGT



**FRONTIER TECHNOLOGY INC
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1580 VALLEY RIVER DR RM 290
EUGENE, OR 97401-2116**

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Weekly Payment Plan**

Amount Due This Period	\$ 25.65
Amount Outstanding (prior invoices)	\$ 614.31
Total Amount Outstanding	\$ 639.96

Please include the Return Portion of each outstanding invoice with your payment. See Account Status for details.

Thank you for using UPS.

Summary of Charges

Page	Fees	Charge
3		\$ 25.65
Amount due this period		\$ 25.65

UPS payment terms require payment of this invoice by January 21, 2004.

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Note: This invoice may contain a fuel surcharge as described at ups.com. The current fuel surcharge is 4.50%. For more information, visit ups.com.



SAMPLE LETTER FROM SPECIAL ADVISORY GROUP TO
OREGON ENERGY FACILITY SITING COUNCIL

Lane County Board of Commissioners
Acting as the Special Advisory Group to the Oregon Energy Facility Siting Council
Concerning the Proposed West Cascade Energy Facility

Mr. John White
Oregon Department of Energy
625 Marion St. N.E.
Salem, Oregon 97301

Re: West Cascade Energy Facility

Dear Mr. White:

Pursuant to ORS 469.480, the Lane County Board of Commissioners has been designated as the Special Advisory Group to the Energy Facility Siting Council (the Council) in connection with the proposed West Cascade Energy Facility. In our capacity as the Special Advisory Group, we hereby recommend to the Council the following applicable substantive criteria from Lane County's acknowledged comprehensive plan and land use regulations as required by ORS 469.504(1)(b)(A). We reserve the right to recommend additional criteria to the Council if there are changes to the project described in the application filed in December, 2003.

Special Use Permit Requirements.

It appears from the application that the proposed energy facility (including supporting facilities) will be located entirely within Lane County. The energy facility site is designated for farm use in the county's comprehensive plan and is within the county's Exclusive Farm Use (EFU) zoning district. "Commercial utility facilities for the purpose of generating power for public use by sale" are conditionally permitted within the county's EFU zoning district provided that the criteria for obtaining a Special Use Permit are satisfied. Those criteria are spelled out in Lane Code 16.212 as follows:

“(4) Special Uses – Director Approval. These uses are allowed after submittal of an application pursuant to LC 14.050 and after review and approval of the application pursuant to LC 14.100 with the options for the Director to elect to conduct a hearing or to provide written notice of the decision and opportunity for appeal.

* * * * *

SAMPLE LETTER FROM SAG TO EFSC

Mr. John White

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“(m-m) Commercial utility facilities for the purpose of generating power for public use by sale that comply with these requirements:

“(i) LC 16.212(10)(f) through (g) below;

“(ii) On high value farm land, the power generation facility shall not preclude more than 12 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to OAR Chapter 660, Division 4;

“(iii) On land that is not high value farm land, a power generation facility shall not preclude more than 20 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to OAR Chapter 660, Division 4; and

“(iv) Notwithstanding LC 16.212(4) (the requirements for a special use permit and to provide notice and opportunity for appeal or to conduct a hearing) above, uses described by LC 16.212(4)(m-m) above are allowed subject to compliance with ORS 469.504.”

“(10) Development Requirements. Use or activities allowed by LC 16.212(3) through (9) above, except farm use, shall comply with the requirements in LC 16.212(10)(a) thorough (d) below. Uses or activities allowed by LC 16.212(4) through (9) above shall comply with the development requirements in LC 16.212(10)(f) through (h) below when compliance is expressly required by LC 16.212(4) through (9) above.

“(a) For approval of a use or activity allowed by LC 16.212(4) through (9) above that requires notice and the opportunity for appeal or a hearing, the Approval Authority shall balance the setback requirements of LC 16.212(10)(a) below with the applicable special use approval requirements in LC 16.212(4) through (9) in order to minimize adverse impacts upon nearby farm and forest uses or to assure optimal siting of proposed dwellings to minimize adverse impacts on nearby farm and forest lands.

* * * * *

[Omitted sections 16.212(10)(a)(i) and (ii) relate only to the siting of dwellings.]

SAMPLE LETTER FROM SAG TO EFSC

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“(b) Property Line Setbacks. No structure other than a fence or sign shall be located closer than:

“(i) 20 feet from the planned right-of-way of a State road, County road or local access public road specified in LC Chapter 15;

“(ii) 20 feet from an existing right-of-way of a State road, County road or a local access public road; and

“(iii) 10 feet from all other property lines except as provided below.

“(c) Class I Stream Riparian Setback Area. The riparian setback area shall be the area between a line 100 feet above and parallel to the ordinary high water of a Class I stream designated for riparian vegetation protection in the Rural Comprehensive Plan. No structure other than a fence shall be located closer than 100 feet from the ordinary high water of a Class I stream designated for riparian vegetation protection by the Rural Comprehensive Plan. A modification to the riparian setback standard for a structure may be allowed provided the requirements of LC 16.253(3) are met.

“(d) Maintenance Removal and Replacement of Indigenous Vegetation within the Riparian Setback Area. Maintenance, removal and replacement of indigenous vegetation within the riparian setback area along Class I streams designated for riparian vegetation protection by the Rural Comprehensive Plan must comply with the provisions of LC 16.253(2).

* * * * *

“(f) Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use.

“(g) Will not significantly increase the cost of accepted farm or forest practices on lands devoted to farm or forest use.”

Creation of Wetlands.

In addition to the foregoing criteria, it appears that the proposed energy facility will include the creation of a sizeable wetland mitigation area. The criteria for the creation of

SAMPLE LETTER FROM SAG TO EFSC

Mr. John White

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wetlands in the EFU zone are set forth in Lane Code 16.212(3)(f) which provides as follows:

“(3) Permitted Uses. In the E-RCP Zone, the following uses and activities are allowed without notice and the opportunity for appeal subject to compliance with the general provisions and exceptions set forth by this chapter. A determination by the director for whether or not a use fits within the classification of uses listed in LC 16.212(3) below may constitute a “permit” as defined by ORS 215.402(4), “...discretionary approval of a proposed development of land...” For such a determination, an owner of land where the use would occur may apply in writing to the Director to provide mailed notice of the determination to nearby owners pursuant to LC 14.100(3) and (4) with the opportunity for appeal pursuant to LC 14.500. The burden of proof in the application shall be upon the owner of the land to demonstrate that the proposed use fits within the classification. The Director shall provide a disclosure statement regarding this option for notice and the opportunity for appeal to owners and land applying for land use compatibility statements or permits with Lane County for the uses listed in LC 16.212(3) below.

* * * * *

“(f) Creation of, restoration of, or enhancement of wetlands.

Site Review Not Required.

Although Lane County has site review criteria and procedures for some types of development, the proposed energy facility is not subject to the county’s site review procedures because the proposed energy facility use is permitted within the EFU zone subject to the Special Use Permit requirement. Lane Code 16.257 addresses site review procedures, including as follows:

“(1) Purpose. It is the purpose of this section to establish a Site Review Permit procedure for specified uses or applications requiring comprehensive review of proposed site development in order to encourage the most appropriate development of the site compatible with the neighborhood, to prevent undue traffic and pedestrian hazards or congestion, to reduce adverse impacts on public facilities and services, and to provide a healthful, stable, efficient and pleasant on-site environment.

SAMPLE LETTER FROM SAG TO EFSC

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* * * * *

“(3) Site Review Permits Not Required. It is not necessary to require a Site Review Permit when:

* * * * *

“(b) A Conditional Use Permit or Special Use Permit is required for the purposed uses or improvements.”

Temporary Use Permit Criteria.

It appears that the proposed energy facility requires a temporary construction “laydown” area for a supporting electrical substation. Lane Code § 16.255 addresses temporary permit procedures, including as follows:

“(1) Purpose. The purpose of this Temporary Permit procedure is to allow on an interim basis:

“(a) Temporary uses in undeveloped areas of the County not otherwise allowable in the applicable zone.

“No Temporary Permit can be granted which would have the effect of permanently rezoning and granting a special privilege not shared by other property in the same zone.

“(2) Allowable Temporary Uses, Criteria and Limitations.

“(a) The following are allowable Temporary Uses and may be permitted in any zone, subject to the following criteria and limitations:

(iii) Open land uses which do not involve structures with a combined value in excess of \$1,000; provided it is determined by the Hearings Official that the location, size, design and operating characteristics of the proposed use:

(aa) Will be compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding vicinity, and

SAMPLE LETTER FROM SAG TO EFSC

Mr. John White

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(bb) Will not be adversely affected by the development of abutting properties and the surrounding vicinity.

“(b) In applying the criteria for allowable temporary uses provided in LC 16.255(2)(a)(i) and (ii) above, consideration may be given to harmony in scale, bulk, coverage and density; to the availability of public facilities and utilities; to the harmful effect, if any, upon desirable neighborhood character; to the generation of traffic and the capacity of surrounding streets and roads; and to any other relevant impact of the use.

“(e) Temporary Permits for any one permit shall be approved for a maximum of five years.

“(3) Conditions. Reasonable conditions may be imposed in this section. Guarantees and evidence may be required that such conditions will be or are being complied with. Such conditions may include, but are not limited to, requiring:

“(a) Special yards and spaces.

“(b) Fences and walls.

“(c) Control of points of vehicular ingress and egress.

“(d) Special provisions on signs.

“(e) Landscaping and maintenance thereof.

“(f) Maintenance of the grounds.

“(g) Control of noise, vibrations, odors or other similar nuisances.

“(h) Limitation of time for certain activities.

“(i) A time period within which the proposed use shall be developed.

“(j) A limit on total duration of use.”

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Stream Riparian Regulations.

It appears that certain supporting facilities may be located within riparian areas that are subject to development regulations and the need for a riparian special use permit. The county's regulations pertaining to riparian areas are set out in Lane Code § 16.253. A copy of that section is enclosed with this letter.

Floodplain/Floodway Issues.

It appears that the proposed McKenzie River water appropriation facility (including the pump house) may be located within a floodplain or floodway and may require a flood hazard permit. The county's criteria pertaining to development within a floodplain and/or floodway are set out in Lane Code § 16.244. A copy of that section is also enclosed with this letter.

Facility Permits.

It appears that certain transmission lines may cross county right of ways. Also, we understand that the applicant may propose to install water lines within the right of way of a county road. Such uses require a facility permit. The county's requirements pertaining to facility permits are set out in Lane Code § 15.200 to § 15.210. A copy of those code sections is also enclosed with this letter.

Thank you for allowing us to participate as the Special Advisory Group to the Council.

Yours truly,

Bobby Green, Sr.
Chair, Lane County Board of Commissioners

From: <GaryMarcus1@aol.com>
To: <stephen.vorhes@co.lane.or.us>, <kent.howe@co.lane.or.us>
Date: 8/11/2004 4:11:24 PM
Subject: Thank You

Dear Kent and Steve,

Thank you for meeting with Paul and me this morning. I think we had a frank exchange of views and I hope we can proceed in areas that I believe we agreed upon.

What I say below is not a legal opinion, nor do I presume to speak for the State of Oregon's or anyone else, it is my personal interpretation of the meeting and its implications. Specifically:

1. At this point the county should let EFSC know all of the criteria that it believes would apply to the West Cascade Energy Facility. In the event there are "edges" or areas where the county is not sure, then the county should either assume the most cautious interpretation for itself, or reserve its right to submit additional criteria.
2. This is not the time for the county to apply its criteria to the project to make substantive review. EFSC's board will make the substantive review using the County's criteria and the information submitted in our site certificate application.
3. I have briefly reviewed Division 4 of 660 and it seems to me that the Site Certificate process takes into account the same criteria, or essentially the same criteria as Division 4 of 660 and tailors that criteria to meet requirements for power plants. We have responded with information in Exhibit K, as well as many other parts of our application. The fundamental question both the county and state are seeking to answer is: "is this one of the best places to locate a power plant".
4. Since West Cascade has chosen to let the state make the land use decision, it is the state's process that holds when the State's process and the county's process differ. For example, West Cascade will be applying for two options for water delivery, the state allows us to review two options, the county says we must choose first, but in this case West Cascade has the right to look at both options.
5. Should the county's staff or County Commissioners wish to advise the state further on substantive issues, then I strongly recommend they first read relevant parts of our site certificate application and make whatever comments they choose to make.
6. There are several venues in which the county can make its views known. One is through the public hearings process which will be held a few months after our application has been deemed complete by the state, and the other is through the contested case hearings process. In that case those who submit testimony will be under oath and subject to cross-examination to insure that the final record of decision is based on facts, law and the merits of the case.
7. As a rule, I think it is best that all further questions on substance and procedure be directed to the state. This does not mean that the county and West Cascade can't communicate directly, we should just make use of the state

process to help clarify issues of substance and procedure.

8. Along those lines, perhaps the county should ask the state to clarify the role of the Special Advisory Group (SAG) and ask how that group has performed in other jurisdictions. There seems to be some confusion on the part of the county as to what issues are germane to the SAG.

Thank you again for meeting with me and Paul.

Best regards,

Gary Marcus
Manager
West Cascade Energy, LLC

CC: <pvaughan@hershnerhunter.com>, <DMoore@frontier-technology.com>

469.330 Notice of intent to file application for site certificate; public notice; standards, application requirements and study requirements; project order. (1) Each applicant for a site certificate shall submit to the Energy Facility Siting Council a notice of intent to file an application for a site certificate. The notice of intent must provide information about the proposed site and the characteristics of the facility sufficient for the preparation of the State Department of Energy's project order.

(2) The council shall cause public notice to be given upon receipt of a notice of intent by the council. The public notice shall provide a description of the proposed site and facility in sufficient detail to inform the public of the location and proposed use of the site.

(3) Following review of the notice of intent and any public comments received in response to the notice of intent, the department may hold a preapplication conference with state agencies and local governments that have regulatory or advisory responsibility with respect to the facility. After the preapplication conference, the department shall issue a project order establishing the statutes, administrative rules, council standards, local ordinances, application requirements and study requirements for the site certificate application. A project order is not a final order.

(4) A project order issued under subsection (3) of this section may be amended at any time by either the department or the council. [Formerly 453.335; 1977 c.794 §9; 1989 c.88 §1; 1993 c.569 §5; 1995 c.505 §8]

469.340 [1975 c.552 §37; 1975 c.606 §26a; repealed by 1981 c.629 §3]

469.350 Application for site certificate; comment and recommendation. (1) Applications for site certificates shall be made to the Energy Facility Siting Council in a form prescribed by the council and accompanied by the fee required by ORS 469.421.

(2) Copies of the notice of intent and of the application shall be sent for comment and recommendation within specified deadlines established by the council to the Department of Environmental Quality, the Water Resources Commission, the State Fish and Wildlife Commission, the Water Resources Director, the State Geologist, the State Forestry Department, the Public Utility Commission of Oregon, the State Department of Agriculture, the Department of Land Conservation and Development, any other state agency that has regulatory or advisory responsibility with respect to the facility and any city or county affected by the application.

(3) Any state agency, city or county that is requested by the council to comment and make recommendations under this section shall respond to the council by the specified deadline. If a state agency, city or county determines that it cannot respond to the council by the specified deadline because the state agency, city or county lacks sufficient resources to review and comment on the application, the state agency, city or county shall contract with another entity to assist in preparing a response. A state agency, city or county that enters into a contract to assist in preparing a response may request funding to pay for that contract from the council pursuant to ORS 469.360.

(4) The State Department of Energy shall notify the applicant whether the application is complete. When the department determines an application is complete, the department shall notify the applicant and provide notice to the public. [Formerly 453.345; 1977 c.794 §10; 1989 c.88 §2; 1993 c.569 §6; 1995 c.505 §9; 2001 c.683 §10]

469.360 Evaluation of site applications; costs; payment. (1) The Energy Facility Siting Council shall evaluate each site certificate application. As part of its evaluation, the council may commission an independent study by an independent contractor, state agency, local government or any other person, of any aspect of the proposed facility within its statutory authority to review. The council may compensate a state agency or local government for expenses related to:

(a) Review of the notice of intent, the application or a request for an expedited review;

(b) The state agency's or local government's participation in a council proceeding; and

(c) The performance of specific studies necessary to complete the council's statutory evaluation of the application.

(2) The council may enter into a contract under subsection (1) of this section only after the council makes a determination that the council is unable to fully evaluate the application without assistance and identifies specific issues to be addressed and only pursuant to a written contract or agreement with the independent contractor, state agency, local government or other person. The council shall compensate the independent contractor, state agency, local government or other person only to the extent the costs are directly related to issues identified by the council.

(3) The council shall provide funding to state agencies, cities or counties required to contract with another entity to complete

comments and recommendations pursuant to ORS 469.350.

(4) In addition to compensating state agencies and local governments pursuant to subsection (1) of this section, the council may provide funding to the Department of Environmental Quality for the department to conduct modeling and provide technical assistance to expedite preparation, submission and review of applications for permits under ORS 468A.040 required for energy facilities. [Formerly 453.355; 1987 c.450 §1; 1989 c.88 §3; 1993 c.569 §7; 1995 c.505 §10; 2001 c.683 §11]

469.370 Draft proposed order for hearing; issues raised; final order; expedited processing. (1) Based on its review of the application and the comments and recommendations on the application from state agencies and local governments, the State Department of Energy shall prepare and issue a draft proposed order on the application.

(2) Following issuance of the draft proposed order, the Energy Facility Siting Council shall hold one or more public hearings on the application for a site certificate in the affected area and elsewhere, as the council considers necessary. Notice of the hearing shall be mailed at least 20 days before the hearing. The notice shall, at a minimum:

(a) Comply with the requirements of ORS 197.763 (2), with respect to the persons notified;

(b) Include a description of the facility and the facility's general location;

(c) Include the name of an agency representative to contact and the telephone number where additional information may be obtained;

(d) State that copies of the application and draft proposed order are available for inspection at no cost and will be provided at a reasonable cost; and

(e) State that failure to raise an issue in person or in writing prior to the close of the record of the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue precludes consideration of the issue in a contested case.

(3) Any issue that may be the basis for a contested case shall be raised not later than the close of the record at or following the final public hearing prior to issuance of the department's proposed order. Such issues shall be raised with sufficient specificity to afford the council, the department and the applicant an adequate opportunity to respond to each issue. A statement of this requirement shall be made at the commencement of any public hearing on the application.

(4) After reviewing the application, the draft proposed order and any testimony given at the public hearing and after consulting with other agencies, the department shall issue a proposed order recommending approval or rejection of the application. The department shall issue public notice of the proposed order, that shall include notice of a contested case hearing specifying a deadline for requests to participate as a party or limited party and a date for the prehearing conference.

(5) Following receipt of the proposed order from the department, the council shall conduct a contested case hearing on the application for a site certificate in accordance with the applicable provisions of ORS chapter 183 and any procedures adopted by the council. The applicant shall be a party to the contested case. The council may permit any other person to become a party to the contested case in support of or in opposition to the application only if the person appeared in person or in writing at the public hearing on the site certificate application. Issues that may be the basis for a contested case shall be limited to those raised on the record of the public hearing under subsection (3) of this section, unless:

(a) The department failed to follow the requirements of subsection (2) or (3) of this section; or

(b) The action recommended in the proposed order, including any recommended conditions of the approval, differs materially from that described in the draft proposed order, in which case only new issues related to such differences may be raised.

(6) If no person requests party status to challenge the department's proposed order, the proposed order shall be forwarded to the council and the contested case hearing shall be concluded.

(7) At the conclusion of the contested case, the council shall issue a final order, either approving or rejecting the application based upon the standards adopted under ORS 469.501 and any additional statutes, rules or local ordinances determined to be applicable to the facility by the project order, as amended. The council shall make its decision by the affirmative vote of at least four members approving or rejecting any application for a site certificate. The council may amend or reject the proposed order, so long as the council provides public notice of its hearing to adopt a final order, and provides an opportunity for the applicant and any party to the contested case to comment on material changes to the proposed order, including material changes to conditions of approval resulting from the council's review.

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.

(3) Subject to the conditions set forth in the site certificate or amended site certificate, any certificate or amended certificate signed by the chairperson of the council shall bind the state and all counties and cities and political subdivisions in this state as to the approval of the site and the construction and operation of the facility. After issuance of the site certificate or amended site certificate, any affected state agency, county, city and political subdivision shall, upon submission by the applicant of the proper applications and payment of the proper fees, but without hearings or other proceedings, promptly issue the permits, licenses and certificates addressed in the site certificate or amended site certificate, subject only to conditions set forth in the site certificate or amended site certificate. After the site certificate or amended site certificate is issued, the only issue to be decided in an administrative or judicial review of a state agency or local government permit for which compliance with governing law was considered

and determined in the site certificate or amended site certificate proceeding shall be whether the permit is consistent with the terms of the site certificate or amended site certificate. Each state or local government agency that issues a permit, license or certificate shall continue to exercise enforcement authority over the permit, license or certificate.

(4) Nothing in ORS chapter 469 shall be construed to preempt the jurisdiction of any state agency or local government over matters that are not included in and governed by the site certificate or amended site certificate. Such matters include but are not limited to employee health and safety, building code compliance, wage and hour or other labor regulations, local government fees and charges or other design or operational issues that do not relate to siting the facility. [1993 c.569 §11 (469.401 and 469.403 enacted in lieu of 469.400); 1995 c.505 §12; 1999 c.385 §2]

469.402 Delegation of review of future action required by site certificate. If the Energy Facility Siting Council elects to impose conditions on a site certificate or an amended site certificate, that require subsequent review and approval of a future action, the council may delegate the future review and approval to the State Department of Energy if, in the council's discretion, the delegation is warranted under the circumstances of the case. [1995 c.505 §27; 1999 c.385 §3]

Note: 469.402 was added to and made a part of 469.300 to 469.563 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

469.403 Rehearing on approval or rejection of application for site certificate or amendment; appeal; judicial review vested in Supreme Court; stay of order. (1) Any party to a contested case proceeding may apply for rehearing within 30 days from the date the approval or rejection is served. The date of service shall be the date on which the Energy Facility Siting Council delivered or mailed its approval or rejection in accordance with ORS 183.470. The application for rehearing shall set forth specifically the ground upon which the application is based. No objection to the council's approval or rejection of an application for a site certificate or a site certificate amendment shall be considered on rehearing without good cause shown unless the basis for the objection is urged with reasonable specificity before the council in the site certificate or amended site certificate process. Upon such application, the council shall have the power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the council acts upon the application for rehearing within 30 days after the application is filed, the application shall be con-

the council imposes in accordance with ORS 469.300 to 469.563, 469.590 to 469.619, 469.930 and 469.992. The council may meet as often as it requires at a time and place determined by the council. Five members constitute a quorum. The Governor or the chairperson of the council may call a special meeting, to be held at any place in this state designated by the person calling the meeting, upon 24 hours' notice to each member and to the public.

(2) Council members shall be entitled to compensation and expenses as provided in ORS 292.495. [Formerly 453.445]

469.470 Powers and duties; rules. The Energy Facility Siting Council shall:

(1) Conduct and prepare, independently or in cooperation with others, studies, investigations, research and programs relating to all aspects of site selection.

(2) In accordance with the applicable provisions of ORS chapter 183, and subject to the provisions of ORS 469.501 (3), adopt standards and rules to perform the functions vested by law in the council including the adoption of standards and rules for the siting of energy facilities pursuant to ORS 469.501, and implementation of the energy policy of the State of Oregon set forth in ORS 469.010 and 469.310.

(3) Encourage voluntary cooperation by the people, municipalities, counties, industries, agriculture, and other pursuits, in performing the functions vested by law in the council.

(4) Advise, consult, and cooperate with other agencies of the state, political subdivisions, industries, other states, the federal government and affected groups, in furtherance of the purposes of ORS 469.300 to 469.563, 469.590 to 469.619, 469.930 and 469.992.

(5) Consult with the Water Resources Commission on the need for power and other areas within the expertise of the council when the Water Resources Commission is determining whether to allocate water for hydroelectric development.

(6) Perform such other and further acts as may be necessary, proper or desirable to carry out effectively the duties, powers and responsibilities of the council described in ORS 469.300 to 469.563, 469.590 to 469.619, 469.930 and 469.992. [Formerly 453.455; 1991 c.480 §7; 1993 c.544 §5; 1993 c.569 §19; 1995 c.505 §18]

469.480 Local government advisory group; special advisory groups; compensation and expenses; Electric and Magnetic Field Committee. (1) The Energy Facility Siting Council shall designate as a special advisory group the governing body of

any local government within whose jurisdiction the facility is proposed to be located.

(2) In addition to advisory groups required by subsection (1) of this section the council may establish such special advisory groups as are considered necessary. Such advisory groups shall include membership as determined by the council to represent interests and disciplines as needed to carry out the responsibility assigned to such advisory groups, which shall report findings, recommendations and decisions to the council.

(3) Subject to applicable laws regulating travel and other expenses of state officers and employees, members of any advisory committee appointed under subsection (1) of this section shall receive no compensation but may receive their actual and necessary travel and other expenses incurred in the performance of their official duties.

(4) The council by rule shall form an Electric and Magnetic Field Committee which shall meet at the call of the council chair. The committee shall include representatives of the public, utilities, manufacturers and state agencies. The committee shall monitor information being developed on electric and magnetic fields and report the committee's findings to the council. The council shall report the findings of the Electric and Magnetic Field Committee to the Legislative Assembly. [Formerly 453.475; 1991 c.491 §1; 1993 c.569 §20; 1995 c.551 §17]

(Rules; Standards; Compliance)

469.490 Adoption of rules; determination of validity. All rules adopted by the Energy Facility Siting Council pursuant to ORS 469.300 to 469.563, 469.590 to 469.619, 469.930 and 469.992 shall be adopted in the manner required by ORS chapter 183. The validity of any rule adopted by the council may be determined only upon a petition by any person to the Supreme Court. The petition must be filed within 60 days after the date the rule becomes effective under ORS 183.355. The review by the Supreme Court of the validity of any rule adopted by the council shall otherwise be according to ORS 183.400. The Supreme Court shall give priority on its docket to such a petition for review. [Formerly 453.495; 1995 c.505 §19]

469.500 [Formerly 453.505; repealed by 1993 c.569 §21 (469.501, 469.503, 469.505 and 469.507 enacted in lieu of 469.500 and 469.510)]

469.501 Energy facility siting, construction, operation and retirement standards; exemptions. (1) The Energy Facility Siting Council shall adopt standards for the siting, construction, operation and retirement of facilities. The standards may address but need not be limited to the following subjects:

or through the qualified organization to avoid, sequester or displace emissions of carbon dioxide.

(J) "Offset funds" means the amount of funds determined by the council to satisfy the applicable carbon dioxide emissions standard pursuant to paragraph (c)(C) of this subsection.

(K) "Qualified organization" means an entity that:

(i) Is exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code as amended and in effect on December 31, 1996;

(ii) Either is incorporated in the State of Oregon or is a foreign corporation authorized to do business in the State of Oregon;

(iii) Has in effect articles of incorporation that require that offset funds received pursuant to this section are used for offsets that will result in the direct reduction, elimination, sequestration or avoidance of carbon dioxide emissions, that require that decisions on the use of such funds are made by a body composed of seven voting members of which three are appointed by the council, three are Oregon residents appointed by the Bullitt Foundation or an alternative environmental nonprofit organization named by the body, and one is appointed by the applicants for site certificates that are subject to paragraph (d) of this subsection and the holders of such site certificates, and that require nonvoting membership on the decision-making body for holders of site certificates that have provided funds not yet disbursed under paragraph (d)(A) of this subsection;

(iv) Has made available on an annual basis, beginning after the first year of operation, a signed opinion of an independent certified public accountant stating that the qualified organization's use of funds pursuant to this statute conforms with generally accepted accounting procedures except that the qualified organization shall have one year to conform with generally accepted accounting principles in the event of a nonconforming audit;

(v) Has to the extent applicable, except for good cause, entered into contracts obligating at least 60 percent of the offset funds to implement offsets within two years after the commencement of construction of the facility; and

(vi) Has to the extent applicable, except for good cause, complied with paragraph (d)(A)(i) of this subsection.

(3) Except as provided in ORS 469.504 for land use compliance and except for those statutes and rules for which the decision on compliance has been delegated by the federal

government to a state agency other than the council, the facility complies with all other Oregon statutes and administrative rules identified in the project order, as amended, as applicable to the issuance of a site certificate for the proposed facility. If compliance with applicable Oregon statutes and administrative rules, other than those involving federally delegated programs, would result in conflicting conditions in the site certificate, the council may resolve the conflict consistent with the public interest. A resolution may not result in the waiver of any applicable state statute.

(4) The facility complies with the statewide planning goals adopted by the Land Conservation and Development Commission. [1993 c.569 §23 (469.501, 469.503, 469.505 and 469.507 enacted in lieu of 469.500 and 469.510); 1995 c.505 §21; 1997 c.428 §4; 1999 c.365 §11; 2001 c.134 §10; 2003 c.186 §78]

469.504 Finding that facility complies with statewide planning goals; amendment of local plan and land use regulations; conflicts; technical assistance to local governments. (1) A proposed facility shall be found in compliance with the statewide planning goals under ORS 469.503 (4) if:

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

(b) The Energy Facility Siting Council determines that:

(A) The facility complies with applicable substantive criteria from the affected local government's acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals and in effect on the date the application is submitted, and with any Land Conservation and Development Commission administrative rules and goals and any land use statutes directly applicable to the facility under ORS 197.646 (3);

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

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

(2) The council may find goal compliance for a facility that does not otherwise comply with one or more statewide planning goals by taking an exception to the applicable goal. Notwithstanding the requirements of ORS 197.732, the statewide planning goal pertaining to the exception process or any rules of the Land Conservation and Development Commission pertaining to an exception process goal, the council may take an exception to a goal if the council finds:

(a) The land subject to the exception is physically developed to the extent that the land is no longer available for uses allowed by the applicable goal;

(b) The land subject to the exception is irrevocably committed as described by the rules of the Land Conservation and Development Commission to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable; or

(c) The following standards are met:

(A) Reasons justify why the state policy embodied in the applicable goal should not apply;

(B) The significant environmental, economic, social and energy consequences anticipated as a result of the proposed facility have been identified and adverse impacts will be mitigated in accordance with rules of the council applicable to the siting of the proposed facility; and

(C) The proposed facility is compatible with other adjacent uses or will be made compatible through measures designed to reduce adverse impacts.

(3) If compliance with applicable substantive local criteria and applicable statutes and state administrative rules would result in conflicting conditions in the site certificate or amended site certificate, the council shall resolve the conflict consistent with the public interest. A resolution may not result in a waiver of any applicable state statute.

(4) An applicant for a site certificate shall elect whether to demonstrate compliance with the statewide planning goals under subsection (1)(a) or (b) of this section. The applicant shall make the election on or before the date specified by the council by rule.

(5) Upon request by the State Department of Energy, the special advisory group established under ORS 469.480 shall recommend to the council, within the time stated in the request, the applicable substantive criteria under subsection (1)(b)(A) of this section. If the special advisory group does not recommend applicable substantive criteria within the time established in the department's request, the council may either

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

(a) The number of jurisdictions and zones in question;

(b) The degree to which the applicable substantive criteria reflect local government consideration of energy facilities in the planning process; and

(c) The level of consistency of the applicable substantive criteria from the various zones and jurisdictions.

(6) The council is not subject to ORS 197.180 and a state agency may not require an applicant for a site certificate to comply with any rules or programs adopted under ORS 197.180.

(7) On or before its next periodic review, each affected local government shall amend its comprehensive plan and land use regulations as necessary to reflect the decision of the council pertaining to a site certificate or amended site certificate.

(8) Notwithstanding ORS 34.020 or 197.825 or any other provision of law, the affected local government's land use approval of a proposed facility under subsection (1)(a) of this section and the special advisory group's recommendation of applicable substantive criteria under subsection (5) of this section shall be subject to judicial review only as provided in ORS 469.403. If the applicant elects to comply with subsection (1)(a) of this section, the provisions of this subsection shall apply only to proposed projects for which the land use approval of the local government occurs after the date a no-

tice of intent or an application for expedited processing is submitted to the State Department of Energy.

(9) The State Department of Energy, in cooperation with other state agencies, shall provide, to the extent possible, technical assistance and information about the siting process to local governments that request such assistance or that anticipate having a facility proposed in their jurisdiction. [1997 c.428 §5; 1999 c.385 §10; 2001 c.134 §11; 2003 c.186 §79]

Note: 469.504 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 469 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

469.505 Consultation with other agencies. (1) In making a determination regarding compliance with statutes, rules and ordinances administered by another agency or compliance with requirements of ORS 469.300 to 469.563 and 469.590 to 469.619 where another agency has special expertise, consultation with the other agency shall occur during the notice of intent and site certificate application process. Any permit application for which the permitting decision has been delegated by the federal government to a state agency other than the Energy Facility Siting Council shall be reviewed, whenever feasible, simultaneously with the council's review of the site certificate application. Any hearings required on such permit applications shall be consolidated, whenever feasible, with hearings under ORS 469.300 to 469.563 and 469.590 to 469.619.

(2) Before resolving any conflicting conditions in site certificates or amended site certificates under ORS 469.503 (3) and 469.504, the council shall notify and consult with the agencies and local governments responsible for administering the statutes, administrative rules or substantive local criteria that result in the conflicting conditions regarding potential conflict resolution. [1993 c.569 §24 (469.501, 469.503, 469.505 and 469.507 enacted in lieu of 469.500 and 469.510); 1997 c.428 §9; 1999 c.385 §11]

469.507 Monitoring environmental and ecological effects of construction and operation of energy facilities. (1) The site certificate holder shall establish programs for monitoring the environmental and ecological effects of the construction and operation of facilities subject to site certificates to assure continued compliance with the terms and conditions of the certificate. The programs shall be subject to review and approval by the Energy Facility Siting Council.

(2) The site certificate holder shall perform the testing and sampling necessary for the monitoring program or require the operator of the plant to perform the necessary

testing or sampling pursuant to guidelines established by the Energy Facility Siting Council or its designee. The council and the Director of the State Department of Energy shall have access to operating logs, records and reprints of the certificate holder, including those required by federal agencies.

(3) The monitoring program may be conducted in cooperation with any federally operated program if the information available from the federal program is acceptable to the council, but no federal program shall be substituted totally for monitoring supervised by the council or its designee.

(4) The monitoring program shall include monitoring of the transportation process for all radioactive material removed from any nuclear fueled thermal power plant or nuclear installation. [1993 c.569 §25 (469.501, 469.503, 469.505 and 469.507 enacted in lieu of 469.500 and 469.510); 1995 c.505 §22]

469.510 [Formerly 453.515; 1977 c.794 §15; repealed by 1993 c.569 §21 (469.501, 469.503, 469.505 and 469.507 enacted in lieu of 469.500 and 469.510)]

469.520 Cooperation of state governmental bodies; adoption of rules by state agencies on energy facility development. (1) Each state agency and political subdivision in this state that is concerned with energy facilities shall inform the State Department of Energy, promptly of its activities and programs relating to energy and radiation.

(2) Each state agency proposing to adopt, amend or rescind a rule relating to energy facility development first shall file a copy of its proposal with the council, which may order such changes as it considers necessary to conform to state policy as stated in ORS 469.010 and 469.310.

(3) The effective date of a rule relating to energy facility development, or an amendment or rescission thereof, shall not be sooner than 10 days subsequent to the filing of a copy of such proposal with the council. [Formerly 453.525]

(Plant Operations; Radioactive Wastes)

469.525 Radioactive waste disposal facilities prohibited; exceptions. Notwithstanding any other provision of this chapter, no waste disposal facility for any radioactive waste shall be established, operated or licensed within this state, except as follows:

(1) Wastes generated before June 1, 1981, through industrial or manufacturing processes which contain only naturally occurring radioactive isotopes which are disposed of at sites approved by the Energy Facility Siting Council in accordance with ORS 469.375.

(2) Medical, industrial and research laboratory wastes contained in small, sealed, dis-