

W. 7. b.

AGENDA COVER MEMO

DATE: June 9, 2004

TO: Lane County Board of Commissioners

DEPT.: Public Works

PRESENTED BY: Oliver P. Snowden, Public Works Director
Kent Howe, Planning Director

AGENDA ITEM TITLE: Status Report and Update on West Cascade Energy, LLC Facility
Permit for Pipelines in County Roads and Land Use
Application/Review.

I. MOTION

None – Discussion only

II. ISSUE OR PROBLEM

Should Lane County Public Works issue facility permits to West Cascade Energy LLC (West Cascade) to install water pipelines within County rights of way to serve its proposed energy facility north of Coburg?

Should Lane County send a letter to continue review of the substantive land use criteria for the proposed energy facility?

III. DISCUSSION

A. Background

Land Use Application/Review

The Board has been appointed as a Special Advisory Group (SAG) to the Oregon Energy Facility Siting Council (Council) and in the SAG role the Board is to provide the Council with a recommendation on the applicable substantive criteria on the land use application. The Council is requesting a list of applicable substantive criteria no later than June 15, 2004, yet Lane County has not received a complete application on which it can conduct a thorough review in order to develop the list of applicable substantive criteria.

West Cascade submitted a land use application for a Special Use Permit to site a commercial power generating facility on North Coburg Road about 2.3 miles north of the intersection with Coburg Road. Lane County Planning Director, Kent Howe, determined LC 16.212(4)(m-m)(ii) requires that this use will require a plan amendment to take an exception to Goal 3 to allow the facility to be sited within an Agricultural Zone. West

Cascade has elected to seek a determination by the Council that the proposed project complies with Lane County's acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals adopted by the Land Conservation and Development Commission in accordance with ORS 469.504.

Facility Permit

West Cascade concurrently applied for four facility permits to install two pipelines within portions of Funke Road, Coburg Bottom Loop Road, Coburg Road and North Coburg Road. The proposed pipelines will convey cooling water northerly from the McKenzie River via a 21" pipe, and will route used water back to the river in an 8" pipe. The total distance of the proposed line within County rights-of-way is approximately 3.7 miles.

Public Works staff evaluated the facility permit applications and prepared conditions under which the facility permits would be issued to West Cascade. Each permit includes these comments; "Prior to any construction [of the pipe lines], a set of plans, stamped by an professional engineer registered in the State of Oregon, shall be submitted to Lane County Department of Public Works for review. Lane County will not accept such plans until the Energy Facility Siting Council has issued a site certificate for the proposed Coburg Natural Gas Power Plant. Construction in the road right-of-way may not commence until written authorization is received from Lane County following plan review." Among other things, each permit includes standard provisions that will indemnify the County, will require that the applicant obtain all necessary federal, state and local permits and will authorizes work only in the public right-of-way. A copy of the additional requirements, specifications and provisions specific to North Coburg Road is attached. These standard and special conditions are intended to protect the County's investment in the roadway and rights-of-way, and to provide for public safety during and after installation of the pipes.

C. Analysis

We view the West Cascade facility permits and land use review as related, but separate processes. We touch on the land use process in the paragraphs below, but the focus of this memo is on the facility permit process.

Land Use Application

Because West Cascade has opted to have the Council determine whether the project complies with the County's acknowledged comprehensive plan, the County's role in approval of any land use permits or plan amendment is advisory. ORS 469.401 states that "...any site certificate or amended site certificate signed by the chairperson of the council shall bind the state and all counties and cities and political subdivisions in the state as to the approval of the site and the construction and operation of the facility." ORS further states that after the site certificate is issued, "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 hearing 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."

As an SAG, the Board is responsible for developing a list of applicable substantive criteria from Lane County's acknowledged comprehensive plan and land use regulations in effect when the site certificate application was submitted and providing consultation to the Council. The application was submitted to Council on December 8, 2003. On January 15, 2004, Kent Howe responded to John White (Council staff) with issues identified from a cursory review of the site certificate application and noted that for a thorough review of the proposed land use, the applicant would need to submit a complete application to Lane County. (Refer to attached email from Kent Howe, dated January 15, 2004.) That response also confirmed the expectation that the Council would seek advice from and consult with the Lane County SAG on compliance with the substantive criteria once those criteria are established.

An incomplete land use application was submitted to Lane County on March 31, 2004. On April 28, 2004, Kent Howe responded with a letter specifically identifying deficiencies in the application and specifically identifying what additional information was needed in order for Lane County to conduct the review that would develop the list of applicable substantive criteria. (Refer to attached letter to Paul Vaughn, dated April 28, 2004.)

Facility Permit

The ability to regulate the power facility siting through the County's facility permit process is limited. Oregon Revised Statutes leave the County little latitude when permitting utilities in the public right-of-way. ORS 758.101 provides that "Except within cities, any person or corporation has a right and privilege to construct, maintain and operate water, gas, electric or communication service lines, fixtures and other facilities along the public roads in the state as defined in ORS 368.001, or across rivers or over any lands belonging to the state, free of charge...." This language sometimes creates problems for Public Works, but repeated attempts by Oregon counties to change the statute -- particularly with respect to the "free of charge provision" -- have failed. In essence, the County has the ability to tell "persons or corporations" where in the right-of-way they can locate a utility appurtenance, and what provisions they must meet to protect the traveling public and the road infrastructure, but we don't have the ability to deny the permit because we don't agree with the need for the facility.

Opponents of the West Cascade facility argue that the facility permit, among other things, must determine that the power facility is in the public interest, and cite Lane Code 15.205(2) in support. We disagree. LC 15.205(2) says: "The Director of Public Works, in approving any application, may attach special terms and conditions as determined by the Director to be in the best interest of the public. Those applications which are deemed to be not in the public interest or which would jeopardize public safety or cause unnecessary damage to the road system shall be denied." We have always interpreted these "public interest" references from the point of view of the road owner (within the limitations of ORS 758.101) and the road user. The question of whether the end use that is driving the facility permit application is in the greater "public interest" is answered through the land use and building permit processes.

Opponents to the West Cascade facility argue that issuing a facility permit is a land use action. Again, we disagree. ORS 197.015(10)(b)(D) indicates that a land use decision does not include a decision which determines the final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the Comprehensive Plan and land use regulations. Because the facility permits require that West Cascade do certain things in connection with the “operation, maintenance, repair or preservation” of the involved roads, contingent on receipt of the site certificate, we believe that issuing these facility permits is not a land use decision. In addition, the facility permit decision does not involve the application of the Statewide Goals, county comprehensive plan policies or land use regulations.

West Cascade opponents further argue that the facility permit process does not allow for third party appeals of the Director’s decision to issue a permit. Technically, this is correct. LC 15.210(12) states that the “Permittee has the right of appeal with regard to rejection of an application, termination or suspension of a permit, or special conditions attached to a permit”. It does not contain any provision for third party appeals.

However, even though the Board has delegated authority to the Public Works Director to issue facility permits, in practice, the Board has the discretion to review the Director’s facility permit decisions at any time. Thus, if the Board receives third party comments about a facility permit, the Board could choose to review the issue in public session irrespective of whether the permit applicant is satisfied with the permit conditions. The Board has a legal obligation to hear an appeal only if it comes from the applicant. However, the Board has the discretion to choose to review a facility permit for any reason.

In sum, we believe that Lane County has limited authority to deny the West Cascade facility permits. We believe that the County is in a stronger position – from a roads standpoint -- by issuing the facility permits now, prior to consideration of the West Cascade site certificate by the Council.

Issuing the facility permits now, through our normal process, will allow LMD to include the permit conditions in the County’s response to the Application for Site Certificate in mid-June. We believe that this will increase the likelihood that those conditions will become part of the site certificate if it is issued. If the facility permit conditions are not made part of the site certificate, West Cascade may challenge the County’s ability to apply those conditions. We believe that we still retain that authority, but inclusion of the conditions in the site certificate will remove any opportunity for challenge.

C. Alternatives/Options
Land Use Application

1. Direct staff to send letter to EFSC stating that Lane County needs a complete land use application in order to provide a thorough review of the proposal and to identify the applicable substantive criteria.
2. Do not send above referenced letter.

Facility Permit

1. Take no action. Director will issue the facility permits with conditions.
2. Direct Director to issue the facility permits with conditions different from those proposed.
3. Direct Director not to issue the facility permits.

D. Recommendation

Land Use

Option 1.

Facility Permit

Option 1.

IV. IMPLEMENTATION/FOLLOW-UP

Conditions articulated in the facility permits will be included in the LMD response to the Council by mid-June

V. Attachments

- Additional requirements, specifications and provisions from proposed facility permit for North Coburg Road
- Draft letter to John White, with enclosures
- Two letters received from John White



Additional Requirements, specifications and provisions

- A. Any above ground structure will be constructed outside the clear zone of that road, or back to the R/W line.
- B. ROAD WILL NOT BE CUT. Driveway aprons may be cut as necessary. In addition to other requirements listed on this page, if a driveway apron is cut it is to be reconstructed to County standards. This may include culvert replacement if necessary. County will make that determination.
- C. Asphalt streets and driveways (older than 5 years)
 - a. May be cut as directed
 - b. Reconstructed with
 1. Minimum of 4" of State Level 3, 3/4" Dense Graded HMAC, edges tacked with Liquid Asphalt.
 2. Minimum of 2" of 3/4-0" crushed rock (leveling course) mechanically compacted to 95% density.
 3. Minimum of 10" of 1 1/2-0" crushed rock, mechanically compacted in 2 lifts to a relative density of 95%.
 4. Narrow trench cuts require controlled density fill (CDF).
- D. Compaction:
All backfilled areas shall be mechanically compacted (whacker, vibratory rollers or pneumatic tampers). Compaction by wheel rollers, traffic, or water settlement will not be allowed.
- E. Ditch area and/or back of ditch area reconstructed with natural material compacted to insure no settlement.
- F. Where the trench is dug with a digger or backhoe in the shoulder or road bed area, it shall be backfilled with crushed rock, with not less than 8" of (County Standards) 3/4-0" crushed rock as a top course, and mechanically compacted to a stable condition subject to Engineer's approval. Wheel rollings, etc., will not be tolerated.
- G. A 30" minimum cover will be maintained below the roadway subgrade and/or ditch area, whichever is lowest. All areas disturbed by placing of the cable, pipe or wire will be restored to a stable mechanically compacted condition.
- H. Flagger required when equipment in roadway, one lane to remain open to traffic at all times.

June 9, 2004

John White
Oregon Department of Energy
625 Marion St. NE
Salem, OR 97301-3737

Re: Lane County Special Advisory Group Review of Land Use Application for the West Cascade Energy, LLC Facility

Dear Mr. White:

This letter is a response to your letter of May 13, 2004, in which you request a list of recommended applicable substantive criteria no later than June 15, 2004.

The Lane County Board of Commissioners are aware of the appointment as a Special Advisory Group (SAG) under ORS 469.480 and understand the SAG role under ORS 469.504(5) to provide the Oregon Energy Facility Siting Council (Council) with a list of "applicable substantive criteria" from Lane County's acknowledged comprehensive plan and land use regulations and to provide consultation to the Council.

Your office received the site certificate application on December 8, 2003. Planning Director, Kent Howe, expecting the applicant to submit the required land use application to Lane County, informed you on January 15, 2004, of the results of a cursory review of the copy of the site certificate application you provided to Lane County. (Refer to the attached E-mail dated January 15, 2004.) That series of e-mails also made it clear the Council would seek the advice of the Lane County SAG in applying the identified substantive criteria. The applicant failed to address many of the applicable land use criteria in the site certificate application and as a result, Lane County was unable to conduct a thorough review of the proposal and provide the Council with a complete list of "applicable substantive criteria" at that time.

On March 31, 2004, Paul Vaughn (agent for West Cascade Energy Facility) submitted a land use application to Lane County for a Special Use Permit for a commercial utility facility for the purpose of generating power for public use by sale and a Temporary Use Permit for a temporary construction laydown area for a substation that is a related facility and part of a commercial utility facility for the purpose of generating power for public use by sale. On April 28, 2004, the Planning Director responded with a letter specifically identifying deficiencies in the application and specifying what additional information was needed in order for the Lane County SAG to conduct the review that would develop the list of applicable substantive criteria and ultimately make a recommendation on compliance with those criteria for consideration by the Council. (Refer to attached letter to Paul Vaughn, dated April 28, 2004.)

The Lane County SAG understands that the applicant has opted to utilize the Council for making the ultimate determination of whether the proposed facility complies with the applicable substantive criteria from the local jurisdiction pursuant to ORS 469.504. However, pursuant to ORS 469.504(5) the SAG is responsible to recommend to the EFSC the applicable substantive criteria from the local government's acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals 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).

Because the applicant has submitted an incomplete application, Lane County cannot conduct the thorough review necessary to meet the statutory requirements. The Lane County SAG may wish to involve affected citizens in developing the list of applicable substantive criteria and making a recommendation on compliance to the Council. When the applicant addresses the deficiencies in the application, the Lane County SAG will be able to determine the applicable Lane County acknowledged comprehensive plan and land use regulations that are relevant to this application. An effort by the SAG to provide a list of applicable substantive criteria or advice on criteria compliance without a complete application would be based on inaccurate and incomplete information at this time. The following are examples of information needed to complete the land use application:

1. In order to allow the Council to determine if compliance with ORS 469.504(1)(b)(A) has been achieved, the applicant needs to provide Lane County a complete "Reasons Exception" application, per OAR 560 Division 4. Any plan amendment, including one submitted under ORS 469.504(1)(b)(A), (B), and (C) also requires a full response to all of the statewide goals, not just Goal 3. Without such an exception in the record, the Lane County SAG and the Council will be unable to determine if compliance with ORS 469.504(1)(b)(A) has been achieved, and subsequently the Council will be unable to proceed forward to ORS 469.504(1)(b)(B) or (C).
2. We need a complete list of the tax lots (including township/range, and section) on which the entire project occurs, and also the separate "contiguous ownership" list. It is the applicant's responsibility to provide an accurate plot plan that includes the entire project.
3. We also need an accurate description of the location of the "laydown area" for the Temporary Use Permit. Tax lot #300 of Map 16-03-21 appears to have been cancelled and no longer appears to be valid.
4. The project includes more than the main power plant block and laydown area. These aspects include, at a minimum, the 500 kV and 230 kV transmission line corridors, the proposed substation, and extensions for connection with the Muddy Creek Irrigation Project (MCIP) ditch. Again, accurate tax lot and ownership listings are required. We need to see the easements allowing the applicant to use these

extensions/areas. The easements must evidence a legal interest sufficient to construct and use the facilities.

5. In addition, the application indicates work will be done on the intake pump facility located at the McKenzie River. This will include an upgrade of the existing equipment, removal of the chain link fence, and enclosure of the equipment with a structure. We need an accurate plot plan, but preliminarily, it appears that such work will require a Riparian Modification per LC 16.253(3), if the structure is located within 100' of ordinary high water of the river. Additionally, if found to be in the FEMA regulated 100-year flood hazard area, a floodhazard Special Use Permit will be required per LC 16.244, for the structure.
6. Our understanding of the purpose and facilities of the MOIP is that they were established exclusively for the transport of water for farm use irrigation. The proposed intake and discharge of more water for the power plant is an additional, industrial use, which will require land use review as well as easements for such new use, from the plant to the McKenzie River. The easements must evidence a legal interest sufficient to make improvements to the ditch needed for the use to convey industrial water for the plant on a year round basis consistent with the draft water right, and to construct and operate new headworks and related facilities at the McKenzie River. Where the water conveyance facilities cross county rights of way, we will need to see easements, permits or consents from Lane County.

In conclusion, the project application is incomplete because of the above noted deficiencies. The Lane County Board of Commissioners does not take it's its role as SAG to the Council lightly. In order for the Lane County SAG to meet the requirements of ORS 469.504(5), we need the applicant to address the deficiencies cited above. The Council is seeking the advise advice of the Lane County SAG and to that extent it is important for the Lane County SAG to ensure that the Lane Code is correctly understood and properly applied. The relevant statutes do not limit the SAG from ensuring that the applicant has addressed the applicable local land use standards.

Sincerely,

Bobby Green, Chair
Lane County Board of Commissioners

Enclosures (2)

cc. Janet Prewitt
Gary Marcus
Paul Vaughan
Kent Howe
Stephen Vorhes

HOWE Kent

From: HOWE Kent
Sent: Thursday, January 15, 2004 2:43 PM
To: WHITE John (OR)
Subject: RE: West Cascade Energy Facility

Hi John,

Consistent with the e-mail you copied me below, I had been expecting the applicant to submit a land use application to Lane County. We have yet to receive a land use application. Consequently, we have not conducted a thorough review of the application materials for a site certificate to determine completeness with respect to land use issues. However, I by chance noticed the January 15th deadline request in your cover letter and decided to quickly skim parts of the application that may have land use issues. Following are some issues I have identified in my cursory review:

- 1] As mentioned above, we have not yet received a land use application with the application fee that would allow Lane County planning staff to thoroughly review the proposed use(s). Until that happens, we cannot adequately comment on either the completeness of the application materials or undertake a substantive review of the proposed use(s).
- 2] It appears as if the site certificate application's Exhibit K does not adequately respond to the applicable land use approval criteria, Lane Code (LC) 16.212(4)(mm). Specifically, to satisfy criterion (ii) an applicant must demonstrate that a power generation facility will not preclude more than 12 acres from commercial farm use or take an exception pursuant to OAR 660, Division 4. It appears the applicant has submitted materials to support a "reasons" exception using the criteria provided by ORS 469.504(2) and not the criteria provided by OAR 660, Division 4. If the applicant wishes to demonstrate that LC 16.212.(4)(mm)(iv) is satisfied, the applicant must include materials to demonstrate that the proposal complies with all of the applicable Statewide Planning Goals. On its face, the application satisfies neither LC 16.212(4)(mm)(ii) nor (iv).
- 3] I also noted that Exhibit O, Water Resources, indicates that water from Muddy Creek will be piped to the site. That pipe will traverse property not under the ownership of the applicant. That new pipe constitutes a land use which will require an approval as well. We have processed a land use compatibility statement (LUCS) for the primary power facility, but we did not receive a (LUCS) in regards to a water rights application submitted for the power project.

As noted above, the completeness review items described above are the result of a cursory skim of the site certificate application. We would encourage the applicant to submit a land use application to the County if we are to provide you with a thorough review of the proposed use.

Kent Howe
Planning Director
Lane County

-----Original Message-----

From: WHITE John [SMTP:John.White@state.or.us]
Sent: Friday, November 21, 2003 10:31 AM
To: pvaughan@hershnerhunter.com
Cc: Kent.HOWE@co.lane.or.us; PREWITT Janet
Subject: Re: West Cascade Energy Facility

Hello Paul,
You are correct. WCE must apply to the county for a CUP.

However, Lane County may be somewhat unfamiliar with the Siting Council process. The Council seeks the advice of the county in applying the land use criteria from the local ordinances to the proposed development. This is probably easier for the county to do if they have the CUP application in front of them. The difference with an energy facility under the Siting Council's jurisdiction is that the county does not make the land use approval decision. Instead, the Siting Council makes the decision. If the Siting Council grants a site certificate for the energy facility, the county is obliged to issue the CUP without any further process or conditions.

I recommend that WCE submit a CUP application to the county at about the same time as WCE submits its site certificate application to the Department of Energy.

John G. White
Oregon Department of Energy
625 Marion St., NE, Suite 1
Salem, Oregon 97301-3742
john.white@state.or.us

>>> pvaughan@hershnerhunter.com 11/21/03 09:40AM >>>
Dear John:

As you know, our office represents West Cascade Energy in connection with its application for a site certificate.

I have a question regarding the need for a conditional use permit from Lane County. Our client has elected to have EFSC make the land use decision. However, as I read the rules, we still need to file an application with the county for any required land use permit and also pay the county's application fee. The difference between this process and the "normal" county process is that the county is bound to issue the permit as long as it is addressed in the site certificate. Please let me know if you disagree with the foregoing.

Our question concerns the timing for filing the application with the county. Should we file it on or about the time the application is filed with EFSC, or do we wait until after the site certificate is issued?

Your prompt reply would be greatly appreciated. Thanks.

Paul V. Vaughan
Hershner, Hunter, Andrews, Neill and Smith, LLP
180 East 11th Avenue
Eugene OR 97401
Phone: (541) 686-8511
Fax: (541) 344-2025
E-mail:pvaughan@hershnerhunter.com

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April 28, 2004

Mr. Paul V. Vaughan
Hershner, Hunter, Andrews, Neill & Smith, LLP
180 East 11th Ave.
Eugene, Or. 97401



LAND MANAGEMENT DIVISION
http://www.LaneCounty.org/PW_LMD/

Re: Status of applications for the West Cascade Energy Facility

Dear Mr. Vaughan:

We have reviewed your submittals for PA 04-5258, the Special Use Permit for a commercial utility facility per LC 16.212(4)(m-m), as well as PA 04-5257, the Temporary Use Permit for the layout area, per LC 16.255(2). As instructed, we utilized the three volume accompanying submittal entitled "West Cascade Energy Facility Application for Site Certificate" (December 8, 2003), and Exhibit K, "Land Use", in particular. Because the two requests are interrelated, and in order to compress processing timeframes, the applications, when complete and combined with the necessary plan amendment for an exception under Goal 2 (OAR 660-004), will be taken before a joint meeting of the Lane County Planning Commission and the County Board of Commissioners. We have the following comments on the current submittal.

1. You have elected the "Energy Facility Siting Council" review option of ORS 469.504(1)(b). We note that ORS 469.504(1)(b)(A) requires a determination of compliance with the substantive criteria of the (Lane County Rural) comprehensive plan and land use regulations required by the statewide planning goals. This provision reflects back to LC 16.212(4)(m-m), including subsection (ii), which requires that an exception be taken pursuant to OAR 660, Division 4, when the facility will utilize more than 12 acres, which is the case here.

In order to allow the Energy Facility Siting Council (EFSC) to determine if compliance with ORS 469.504(1)(b)(A) has been achieved, a "full", "Reasons Exception" application needs to be included in your proposal, per OAR 660 Division 4. Without such an exception in the record, the EFSC will be unable to determine if compliance with ORS 469.504(1)(b)(A) has been achieved, and subsequently unable to proceed onward to ORS 469.504(1)(b)(B) or (C).

A Reasons Exception per OAR 660 Division 4 is a Major Plan Amendment (see LC 16.400(8)(a)(ii)). The required processing fee is \$12,010 (this is a deposit only. Additional fees may be required). Whereas the current submittal lacks the required fee, the application has not been accepted. See LC 14.050(3). Any plan amendment, including one submitted under ORS



469.504(1)(b)(A), (B), and (C)) also requires a full response to all of the statewide goals, not just Goal 3. Please include this additional analysis.

2. An all-inclusive listing of tax lots on which the entire project occurs is required. In addition, and in order to allow us to construct a proper list of parties for purposes of notice, a listing of all contiguous property in the same ownership is required. For example, the main block of the power plant is located not only on Map 16-03-19 #100 as listed on the submitted land use application, but also on tax lot #200 of the same section, as well as on 16-03-18 #600 and #2400. This was deduced from Figure C-2, the aerial photo. Since the scale is labeled as "approximate", it is difficult for us to ascertain exactly where each part of the facility lays, especially the smaller components. We need a complete list of the tax lots (including township/range, and section) on which the entire project occurs, and also the separate "contiguous ownership" list. It is the applicant's responsibility to provide an accurate plot plan that includes the entire project. Please do so. Bulletin #1.3, a guideline for constructing an accurate plot, is enclosed. Since the project covers a wide area, some modifications to the guideline will be necessary.

In a similar manner, please ascertain the true location of the "laydown area" for the Temporary Use Permit. Tax lot #300 of Map 16-03-21 appears to have been cancelled and no longer appears to be valid.

3. The project includes more than the main power plant block and laydown area. These aspects include, at a minimum, the 500 kV and 230 kV transmission line corridors, the proposed substation, and extensions for connection with the Muddy Creek Irrigation Project (MCIP) ditch. Again, accurate tax lot and ownership listings are required. Provide the easements allowing the applicant to use these extensions/areas. The easements must evidence a legal interest sufficient to construct and use the facilities. In the alternative to easements, provide the consents of all property owners upon whose land the facilities occur.
4. We note that work will be done on the intake pump facility located at the McKenzie River. This will include an upgrade of the existing equipment, removal of the chain link fence, and enclosure of the equipment with a structure. Again, we await an accurate plot plan, but preliminarily, it appears that such work will require a Riparian Modification per LC 16.253(3) (current fee is \$1,078), if the structure is located within 100' of ordinary high water of the river. Additionally, if found to be in the FEMA regulated 100-year flood hazard area, a floodhazard Special Use Permit will be required per LC 16.244, for the structure. The application fee will depend on the type of floodhazard the structure is found to be within.
5. Our understanding of the purpose and facilities of the MCIP is that they were established exclusively for the transport of water for farm use irrigation. The

proposed intake and discharge of more water for the power plant is an additional, industrial use, which will require land use review as well as easements for such new use, from the plant to the McKenzie River. The easements must evidence a legal interest sufficient to make improvements to the ditch needed for the use, to convey industrial water for the plant on a year round basis consistent with the draft water right, and to construct and operate new headworks and related facilities at the McKenzie River. In the alternative, provide the consent of all property owners of the ditch and headworks facilities to the application submitted. Provide tax lot listings along the route (as per above). It is noted that a portion of the MCIP waterlines pass through the City of Coburg. This is a separate jurisdiction. You are advised to contact their Planning Department to learn of any of their requirements for this portion of the project.

Where the water conveyance facilities cross county rights of way, provide easements, permits or consents from Lane County

6. Lastly, we request that you submit 15 full (color) copies of the submittal and supplements. If this cannot be achieved, then five full color copies are mandated, at a minimum. The difficulty with less than the requested 15 copies is that various members of the planning commission and other staff will be without such benefit, which may lessen or interfere with a clear understanding of the project.

In conclusion, the project application has not been accepted because of the necessity for an exception and other required permits to cover the entire project. Please supplement your application by addressing all of the items above.

Please contact me at 682-3734, or by email at Kent.Howe@co.lane.or.us, if you have questions or comments concerning this letter. Please route all materials related to this application to Associate Planner Jerry Kendall, who, in addition to myself, will be the staff contact for this project.

Sincerely,



Kent Howe/Planning Director

C: Jerry Kendall/LMD
Anita Yap/Coburg Planning Director

MAY 17 2004



Oregon

Theodore R. Kulongoski, Governor



OREGON DEPARTMENT
OF ENERGY

625 Marion St. NE
Salem, OR 97301-3737
Phone: 503-378-4040
Toll Free: 1-800-221-8035
FAX: 503-373-7806
www.energy.state.or.us

May 13, 2004

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

Re: Proposed West Cascade Energy Facility
Request for applicable substantive criteria

Dear Chair Sorenson:

This letter is a follow-up to my letter of December 11, 2003, in which I described the process of review by the Oregon Energy Facility Siting Council (Siting Council) of an application for an energy facility site certificate. As I explained in that letter, the Siting Council appointed the Lane County Board of Commissioners as a "Special Advisory Group" (SAG) for the proposed West Cascade Energy Facility, as required by ORS 469.480. If you have any questions about the Siting Council's review process, you may contact me at any time during the process for more information.

In my December letter, I requested a list of "applicable substantive criteria" from Lane County's acknowledged comprehensive plan and land use regulations that were in effect on the date the site certificate application was submitted. The application was submitted on December 8, 2003, and a copy of the application was sent concurrently to the Lane County Commissioners Office and to Kent Howe, Lane County's Planning Director. We have not yet received a list of the applicable substantive criteria from Lane County. The County's response to this request would assist us in recommending findings to the Siting Council under the Council's Land Use Standard, OAR 345-022-0030.

We therefore request that you send us a list of recommended applicable substantive criteria no later than June 15, 2004. Oregon law, under ORS 469.504(5), requires the SAG to provide this information upon a request by the Oregon Department of Energy. Although we would prefer that the County supply this information, the statute provides that the Siting Council may either independently determine the applicable substantive criteria or determine compliance with the statewide land use planning goals directly, if the local jurisdiction fails to respond to the Department's request.

Kent Howe has sent to us a copy of a letter, dated April 28, that he sent to Paul Vaughan, the applicant's attorney. Mr. Howe's letter indicates that the Lane County Land Management Division has reviewed the information in the site certificate application. The letter requests additional information, such as tax lot information, an accurate plot plan and land ownership information, which may be useful to Lane County's understanding of the energy facility

Commissioner Peter Sorenson
May 13, 2004
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proposal. We also may find the information useful to our pending determination of completeness of the application. Mr. Howe's letter was very helpful in that regard. However, the letter was incorrect in suggesting that Lane County must make a Goal 2 exception determination under OAR 660, Division 4, "in order to allow the Energy Facility Siting Council (EFSC) to determine if compliance with ORS 469.504(1)(b)(A) has been achieved."

In accordance with ORS 469.504(4), the applicant has elected to demonstrate compliance with the statewide planning goals under ORS 469.504(1)(b). When an applicant elects to proceed under section (1)(b), the statute eliminates the necessity of a local land use decision. Instead, the Siting Council makes the determination whether the proposed facility complies with the applicable substantive criteria from the local jurisdiction and with any Land Conservation and Development Commission administrative rules and goals and any land use statutes that are directly applicable to the facility. It is unnecessary and inappropriate for Lane County to undertake any additional process with respect to the land use decision for the proposed West Cascade facility.

If the Siting Council determines that an exception to Goal 3 (Agricultural Lands) is required, the Council will apply the criteria listed in ORS 469.504(2) to decide whether an exception is warranted. The statute is quite specific that the criteria in section (2) apply "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." Therefore, the Goal 2 exception process and OAR 660, Division 4, do not apply in this case. Accordingly, it is unnecessary for Lane County to expend staff time, Planning Commission time and Board of Commissioners' time to make a Goal 2 exception determination.

While we will continue to appreciate Mr. Howe's input and comments on this application, we want to correct what appears to be a mistaken belief that the Siting Council "will be unable to determine if compliance with ORS 469.504(1)(b)(A) has been achieved" unless the County makes an exception determination "in the record." The Siting Council can and will proceed according to Oregon law. As a part of the Council's review process, we have requested that the SAG recommend the applicable substantive criteria. The law does not require Lane County to apply the criteria or to make an exception determination in this case.

Sincerely,



John G. White
Senior Analyst

cc: Kent Howe
Stephen Vorhes
Janet Prewitt
Gary Marcus
Paul Vaughan



Oregon

Theodore R. Kulongoski, Governor



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REC'D DEC 12 2003

December 11, 2003

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

Re: Proposed West Cascade Energy Facility
Request for comments on the completeness of the application

Dear Chair Sorenson:

I am the Oregon Department of Energy Project Officer for the proposed West Cascade Energy Facility. West Cascade Energy, LLC, (WCE) proposes to construct and operate a natural-gas-fueled power plant in Lane County near Coburg, Oregon. The proposed facility was first announced by Coburg Power, LLC, in a notice of intent submitted in July 2001. The proposed facility at that time was called the "Coburg Power Project." The new name for the proposed facility is the "West Cascade Energy Facility."

WCE must apply for and receive a site certificate from the Oregon Energy Facility Siting Council (Council) before it can proceed with construction of the proposed facility. The Oregon Department of Energy (ODOE) is the state agency that reviews site certificate applications and makes recommendations to the Council. WCE has recently submitted to us an application for a site certificate. You may already have received a copy of the application or you will receive it shortly. It is a large document consisting of three volumes.

The applicant, WCE, has elected to obtain Council determination of compliance with the Council's land use standard. This means that, although WCE will apply to Lane County for a Conditional Use Permit (CUP), the land use decision will be made by the Council rather than by Lane County.

At the end of its review process, if the Council grants a site certificate to WCE for the proposed energy facility, then Lane County would be bound by ORS 469.401(3) to issue a CUP for the facility. There could be no further hearings or other proceedings in Lane County, and the CUP could be subject only to conditions set forth in the site certificate.

However, the Council is very interested in hearing the views of local jurisdictions on land use issues. Therefore, during the review process on the site certificate application, we encourage the Commissioners or your county planning department to comment. In particular, we welcome suggested condition language that would apply to the CUP if a site certificate were granted.

The state energy facility siting law requires the Council to appoint "the governing body of any local government within whose jurisdiction the facility is proposed to be located" as a "Special Advisory Group" (SAG). The Council appointed the Lane County Board of Commissioners as the SAG for this proposed energy project on September 14, 2001. Under the siting law, the SAG is required to recommend to the Council the "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" (ORS 469.504).

In accordance with the rules of the Council's rules, we are required to ask the local government to comment on the completeness of the site certificate application. Specifically, we are requesting the following information at this time:

- (A) A complete list of applicable substantive criteria from the Lane County's acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals and that are in effect on the date the application was submitted. The "applicable substantive criteria" are substantive criteria and standards contained in local land use ordinances and the comprehensive plan that Lane County would apply in deciding whether to grant a CUP for the proposed facility in the absence of a Council proceeding.
- (B) A complete list of Land Conservation and Development Commission administrative rules, statewide planning goals and land use statutes directly applicable to the facility under ORS 197.646(3), if any. This statute makes a new or amended state goal, rule or statute directly applicable to the local government's land use decisions if the local government has not yet amended its comprehensive plan and land use regulations to implement the new provision.
- (C) Copies of the text of the criteria listed in (A) and any interpretations of ambiguous terms and matters arising from Lane County's land use regulations.
- (D) An assessment of the accuracy and completeness of the list of applicable substantive criteria that WCE has identified in the site certificate application. WCE's discussion of land use criteria appears in Exhibit K of the application.

Under the Council's rule, OAR 345-021-0050(4)(c), Lane County's recommendations, comments and interpretations should be submitted in the form of a resolution adopted by the Board of Commissioners "if possible." This is a flexible requirement. We do not require a formal resolution.

The application has been sent to other state agencies for comment. For the reviewing agencies, we have established a completeness review comment deadline of January 15, 2004. If you need more time to respond to this request, please call me at 503-378-3194 to let me know when you can provide a response.

In the following sections, I will describe briefly the Council's site certificate review process. Although there is no fixed time for completion of the process, I expect that the "completeness" phase of the review will take three to five months. Once the application is "complete," I expect the remainder of the review process will take nine months. It could take longer if there are issues that must be resolved in a contested case proceeding. During the review

process, there will be opportunity for public comment, including a public hearing on the proposed energy facility. This public hearing will be held in Lane County.

The Site Certificate Review Process

1. Review for Completeness

The purpose completeness review is to determine whether WCE needs to submit any additional information to demonstrate compliance with the Council's siting standards or with any other statutes, administrative rules or local ordinances applicable to siting the proposed energy facility. Our website at www.energy.state.or.us/siting/standard.htm describes the Council standards in detail. The application is not "complete" until WCE provides enough information to satisfy us that the information is sufficient for the Council to make findings on the standards.

2. Application Supplement

Once we have determined that the application is complete, we will ask WCE to prepare and distribute a supplement containing all additional information submitted during the completeness review. WCE will mail a copy of the supplement to the Lane County Board of Commissioners.

3. Substantive Review

When the application is complete, we will ask for Lane County's substantive review and formal recommendations for deciding whether the proposed facility complies with applicable land use requirements. The substantive review phase is the only opportunity you have to provide input on the conditions contained in the site certificate. Lane County cannot impose conditions in the CUP outside the Council process.

4. Draft Proposed Order and Public Hearing

We will consider all comments and recommendations and prepare a draft proposed order on the project. We then issue a notice of a public hearing on the draft proposed order. An independent hearing officer will conduct the public hearing. If Lane County wishes to preserve the right to participate in the later contested case proceeding as a party, limited party or interested agency and the right to appeal the Council's final decision, the County must comment in person or in writing on the record of the public hearing.

5. Proposed Order, Contested Case Proceeding and Council Consideration

We will consider the testimony received in the public hearing, all written comments and comments by the Council before we issue the proposed order. When we issue the proposed order, we also will issue notice of a formal contested case proceeding. If no one requests to participate in the proceeding, the hearing officer would close the proceeding, and the Council would then act on the proposed order on the application. However, if there were a request to participate in the contested case proceeding, then the hearing officer would conduct the proceeding and issue a proposed contested case order. The Council would then act on both the proposed contested case order and the proposed order on the application.

Commissioner Peter Sorenson
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I have provided only a brief description of the energy facility siting process in this letter. If you have any questions, please call at 503-378-3194 or contact me by e-mail. Send e-mail to john.white@state.or.us.

The role of the "Special Advisory Group" in the review process is spelled out by the Oregon statutes and rules that I have referenced in this letter. That role need be no larger than recommendation of the "applicable substantive criteria" and specific comments related to land use. Of course, if the Commissioners choose to do so, they may offer comments on any aspect of the site certificate application.

Sincerely,

John G. White
Senior Analyst

cc: Kent Howe
Gary Marcus