Land Use Considerations in Siting Small Hydroelectric Projects in Oregon
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The Oregon Water Resources Department and its Commission (OWRD) have the authority to appropriate water and approve hydroelectric projects. Local governments have the authority and responsibility to make land use decisions determining whether hydroelectric proposals within their jurisdictional boundaries are compatible with local land use standards. As a general rule, if a proposed hydroelectric project does not require a plan amendment (or in some cases a zone change), establishing conformity with governing provisions in an acknowledged plan avoids an independent statewide planning goal analysis.

The Oregon Energy Facility Siting Council (EFSC) does not have authority over hydroelectric projects.

Large and small hydroelectric projects are subject to FERC's jurisdiction. FERC has authority to issue small project exemptions from licensing including 5 mw "conduit exemptions", but will still attach conditions to those exemptions. Thus, it would be incorrect to say that FERC lacks "jurisdiction" over small projects; rather, FERC simply regulates them differently. FERC's jurisdiction extends to waters flowing from navigable rivers as well as to projects that will sell electricity to the grid. The idea on both being that federal jurisdiction is appropriate because either involve interstate commerce. FERC jurisdiction matters to the Statewide Planning Goal 5 analysis because applications for projects submitted to FERC enjoy status as "significant Goal 5 resources" per OAR 660-023-0190. This is explained in greater detail under the Goal 5 segment of this paper. However, if you have to get into it for other reasons, the legal and technical nuances to FERC's jurisdiction are mind numbing and beyond the scope of this paper. But, fortunately, the Oregon Goal 5 rule regarding significant resources simply requires an application be submitted to FERC and even an exemption requires an application. The Oregon rules do not demand a FERC jurisdictional analysis.

Irrigation projects are usually subject to the abbreviated FERC review as "conduit exemption projects" where the project is proposed to be located within an existing irrigation canal with water flowing from existing river diversions that have intake fish screens. FERC leaves land use compatibility determinations to state and local government.

Wendie L. Kellington
Attorney at Law
Lake Oswego, Or 97035
Telephone: (503) 624-7790
www.wkellington.com

Relationship Between OWRD Land Use Authority and Local Land Use Authority

All state agencies are required to ensure that their programs are consistent with the statewide planning goals and acknowledged local comprehensive plans and land use regulations. ORS 197.180; OAR 660-0030-005 et seq. As to goal compliance, this means consistency with not only with the applicable state planning goals, but also the administrative rules that implement the goals. However, it is important to keep in mind that state agencies are required to "give the goals equal weight in any matter in which the goals are required to be applied." ORS 197.340(1). Moreover, DLCD and LCDC are required to consider and recognize regional differences and diversity when applying the goals. ORS 197.340(2).

By rule, as a state agency, the OWRD is required to ensure that proposed hydroelectric projects are consistent with the statewide planning goals and local comprehensive plans "to the greatest extent possible." OAR 690-005-0020(2). If OWRD determines it is necessary "to take an action which is incompatible with" an acknowledged plan in order "to meet statutory obligations" then the OWRD is required to invoke certain dispute resolution procedures. OAR 690-005-035(5). However, OWRD places "high priority on cooperation with" local governments, making land use disputes between local and state agencies unlikely. OAR 690-005-0060(1).

Generally, goal compliance is established where OWRD determines that a proposed hydroelectric project is consistent with a local government's "specifically applicable" provisions in an acknowledged comprehensive plan or consistent with the acknowledged plan's "general provisions, purposes, or objectives which would be substantially affected" by approving (or denying) the application. OAR 690-005-0035(3) and 4(c). Where such acknowledged plan provisions exist, OWRD will generally accept a local government's finding of land use compatibility under such provisions as determinative of goal and local plan and land use regulation compliance.

OWRD will not approve a proposed hydroelectric project unless local land use approval has been provided or, "if local land use approvals are pending", approval will be conditional on obtaining land use approval from the affected local government. OAR 690-005-0030(2); OAR 690-005-0035(3) and 4(c). Where a proposed hydroelectric project is "allowed outright or does not require discretionary land use approvals under the applicable comprehensive plan", then OWRD will approve a proposed project without a specific land use approval. OAR 690-005-0035(4)(b)(B). Nevertheless, OWRD will not accept an application for a hydroelectric project without a completed local "Land Use Compatibility Statement" (LUCS) from the local government. This is the case even where the local plan states such facilities are permitted outright. The July 2010 OWRD "Application to Develop Hydroelectric Use as a Part

Wendie L. Kellington
Attorney at Law
Lake Oswego, Or 97035
Telephone: (503) 624-7790
www.wkellington.com

of an Existing Certificated Water Right" and March 2010 OWRD LUCS is attached as an appendix to these materials.

Most jurisdictions do not have acknowledged plans with specifically applicable acknowledged plan provisions and many lack general plan provisions "substantially affected" by a proposed hydroelectric project. Unless the local government amends its land use program to provide such provisions, OAR 690-005-0030(3) requires OWRD to directly determine goal compliance.

Preapplication

A good way to determine whether the affected local government has governing plan and land use regulation provisions is to establish a preapplication conference to flag standards and issues. Regardless of whether a local government has specific plan and land use regulation provisions, the applicant is still required to establish the proposal is compatible with all applicable local land use standards. Therefore, a preapplication conference is useful regardless of whether there are specific provisions that apply to hydroelectric proposals.

Special Issues

- **Federal and State Standards Generally**

Many land use codes and plans require establishing that any development proposal is consistent with applicable federal or state standards. Of course, identifying and developing strategies to comply with any potentially applicable federal or state standards early on is wise for a number of reasons. Perhaps most key among those potentially applicable state and federal rules is the practical issue that the OWRD won't accept an application for a proposed hydroelectric facility within certain federally or state protected areas (scenic waterways, parks etc.) without a lease from the regulating state or federal agency among other things. OAR 690-051-0030. Thus, determining whether there is a fatal flaw problem, early on, saves everyone time and money.

- **Particular State Land Use Standards**

a. Projects in EFU Zoning Districts // Goal 3

There is a tension between the idea of protecting energy facilities as significant Goal 5 resources per the requirements of OAR 660-023-0190 and the requirements of the EFU zoning district. ORS 215.213(1)(c) (Marginal Lands Counties – Lane and Washington Counties) and 215.283(1)(c) (all other counties) allows as an outright permitted use:

Wendie L. Kellington
Attorney at Law
Lake Oswego, Or 97035
Telephone: (503) 624-7790
www.wkellington.com

"(c) Utility facilities *necessary* for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power[1] for public use by sale or transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in ORS 215.275." (Emphasis supplied.)

Whether a small hydro project is a "commercial facility for the purpose of generating electrical power" depends on what the applicant plans to do. Not all small hydro projects will necessarily be commercial; but may well still be the provision of a public service – i.e. electricity for the end user. However, most are likely to sell power back to the grid and if such is contemplated it is likely that such projects would be considered "commercial". The provisions of ORS 215.275 regarding when it is "necessary" to site proposed noncommercial power generating utility facilities on EFU zoned land include when a facility (such as a hydroelectric facility) are "locationally dependent." It is important to pay close attention to these "necessity" factors, but hydroelectric projects should have little trouble establishing compliance with them.

Moreover, and potentially more useful and less complicated for many projects are statutory provisions for the EFU district per ORS 213.213(1)(w) and 215.283(1)(t) that allow as uses permitted outright:

" Irrigation canals, delivery lines and those structures and accessory operational facilities associated with a district as defined in ORS 540.505."

Accordingly, it is plausible that irrigation districts that propose hydroelectric facilities as a part of their canals, delivery lines and structures and accessory operational facilities "associated with" the district, are uses that are permitted outright regardless of whether the facility would also be a utility facility selling commercial power. The scope of this provision has never been tested, however, so the extent to which this provision would make hydroelectric facilities in irrigation district canals uses permitted outright, is unknown.

Two cases dance around the issue and appear promising, however. In *Keicher v. Clackamas County*, 175 Or App 633 642 (2001), the court of appeals determined that the specific allowance of a fire station in ORS 215.283(1)(w) as a permitted outright use in the EFU district,

[1] This appears to exclude only the commercial facilities established for the purpose of *generating power*; and not the distribution, transmission lines and access roads that may attend such projects. *See Save Our Rural Oregon v. Energy Facility Siting Council*, 339 Or 353, 376 n 15 ("Those provisions which impose a limit on 'power generating facile[ties]' do not apply here because the transmission lines, vegetative maintenance zone, and access roads are not 'power generation facile[ties]. * * *").

Wendie L. Kellington
Attorney at Law
Lake Oswego, Or 97035
Telephone: (503) 624-7790
www.wkellington.com

made the fact that it could also plausibly be considered as a utility facility, irrelevant. The court of appeals determined the fire station was allowed outright under the specific provision in ORS 215.283(1)(m). However, the court in *Keicher* also noted that the fire station was not a utility as it viewed that term, but, importantly, the *Keicher* court also determined:

> "While [the fire station] may be considered a utility in some instances, the fact that the legislature considered it sufficiently distinct to warrant its own use category in ORS 215.283(1)(w) means that it is to be treated separately from the larger class of facilities listed in ORS 215.283(1)(d). With the enactment of ORS 215.283(1)(w), the legislature acted specifically to permit fire service facilities for rural fire protection services."

It seems here, the same could be said for the specific reference to irrigation district facilities being allowed as outright permitted uses. Under *Keicher*, if the use is listed as permitted outright in ORS 215.213 or 215.283, local government may not prohibit or unreasonably condition it. Moreover, local government need not have adopted regulations governing or allowing the use.

In a case previous to *Keicher*, *Cox v. Polk County*, 174 Or App 332 (2001), the court of appeals reversed LUBA's determination that where a use met both the definition of a utility facility and a farm use that the standards applicable to both had to be applied. In *Cox*, the court of appeals determined that the application of treated wastewater to poplar trees was not a utility facility but rather a farm use. It specifically left unanswered LUBA's determination that where a use met both the "utility" and "farm use" definitions that the provisions of both were required to be applied. It appears *Keicher* answers that question that *Cox* left open. Obviously, it would be clearer if the irrigation district provision specifically referenced hydroelectric facilities.

If the specific reference to irrigation facilities does not make a proposed hydroelectric project a use permitted outright, then things get a little dicey in the EFU zoning district.

ORS 215.213(2)(g) (also applicable only to Oregon's two marginal lands counties) and ORS 215.283(2)(g) (applicable to all other counties) allows as a conditionally permitted use:

> "(g) Commercial utility facilities for the purpose of generating power for public use by sale."

These so called "sub 2" uses may be further restricted by local government. They also are not permitted to be allowed by counties as uses permitted outright. They can only be allowed as conditionally permitted uses.

Wendie L. Kellington
Attorney at Law
Lake Oswego, Or 97035
Telephone: (503) 624-7790
www.wkellington.com

Moreover, for "sub-2" uses, counties are not obliged to establish standards regarding them nor are counties required to approve them. Therefore, being a listed permitted use – a so called "sub 1" use is greatly superior for hydroelectric projects.

OAR 660-033-0130 limits the scope of these conditionally permitted power generation facilities to 12 acres on land considered "high value farmland" and to 20 acres on land not considered "high value farmland." Access roads and transmission facilities are not "power generating facilities" so they would not appear to be subject to these acreage limitations. *See Save Our Rural Oregon v. Energy Facility Siting Council*, 339 Or 353, 376 n 15 ("Those provisions which impose a limit on 'power generating facile[ties]' do not apply here because the transmission lines, vegetative maintenance zone, and access roads are not 'power generation facile[ties]. * * *"). Under ORS 215.296, a "commercial utility facility for the purpose of generating power for public use by sale" may be approved only on a showing that it (1) will not force a significant change in accepted farm or forest practices on surrounding lands or (2) significantly increase the cost of accepted farm or forest practices.

It appears the transmission lines, access roads and other facilities other than those specific to generating power, would be permitted outright -- subject to ORS 215.213(1)(c) or ORS 215.283(1)(c) (depending on whether the county is a marginal lands county). For irrigation districts, the facility's access roads are arguably permitted outright under ORS 213.213(w) and 215.283(1)(t).

b. Projects in a Forest District Subject to Goal 4

OAR 660-006-0025(1) establishes the following "general types of uses" that are relevant here, as uses that may be allowed in the forest environment:

> (b) Uses to conserve soil, air and water quality and to provide for fish and wildlife resources, agriculture and recreational opportunities appropriate in a forest environment;
>
> (c) Locationally dependent uses, such as communication towers, mineral and aggregate resources, etc.;

Small hydroelectric facilities, particularly those that are a part of projects that conserve water resources seem well suited to being considered a "type" of forest use. Moreover, OAR 660-006-0025(3)(i) makes "Water intake facilities, canals and distribution lines for farm irrigation and ponds" uses permitted outright in forest zones. OAR 660-006-0025(4)(j) allows a "power generation facility" on land zoned for forest uses so long as such facility "does not preclude more than ten acres from use as a commercial forest operation." OAR 660-006-025(4)(l) allows "Water intake facilities, related treatment facilities, pumping stations, and

Wendie L. Kellington
Attorney at Law
Lake Oswego, Or 97035
Telephone: (503) 624-7790
www.wkellington.com

distribution lines". OAR 660-006-025(4)(m) allows "Reservoirs and water impoundments." OAR 660-006-0025(4)(q) allows new electric transmission lines with right-of way widths of 100 feet "as specified in ORS 722.210."

In *Save Our Rural Oregon v. Energy Facility Siting Council*, 339 Or 353, 376, cited supra, EFSC determined that access roads for energy facilities were not permitted in forest zones and that an exception to Goal 4 was required for such access roads. No one challenged that determination. However, it seems likely that a small hydro project is a type of forest use and that the accessory of modest access roads to facilitate such projects would be allowed. However, an administrative rule change to clarify this would be helpful.

c. Goal 5

Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and its implementing rules in OAR 660-023-005 can present some of the greatest challenges if Goal 5 applies directly to a proposed hydroelectric project as the required Goal 5 process is time consuming and expensive. However, the administrative rules make this process a little less complicated through OAR 660-023-0190(1) and OAR 660-023-0190(2) which provides:

> "(1)(a) * * * * Energy sources *applied for or approved* through the * * * the Federal Energy Regulatory Commission (FERC) shall be deemed significant energy sources for purposes of Goal 5.
>
> "(b) 'Protect,' for energy sources, means to adopt plan and land use regulations for a significant energy source that limit new conflicting uses within the impact area of the site and authorize the present or future development or use of the energy source at the site.
>
> "(2)(a) For proposals involving energy sources under the jurisdiction of EFSC or FERC, the local government shall comply with Goal 5 by amending its comprehensive plan and land use regulations to implement the EFSC or FERC decision on the proposal as per ORS 469.504;[2]

[2] ORS 469.504 applies to facilities under the authority of EFSC and does not apply to hydroelectric facilities. ORS 469.300(11)(b) excludes from the definition of "energy facility" a "hydroelectric facility." Moreover, ORS 469.504 applies to "facilities" which ORS 469.300(14) defines to include "electric facilities."

Wendie L. Kellington
Attorney at Law
Lake Oswego, Or 97035
Telephone: (503) 624-7790
www.wkellington.com

"(2)(b) For proposals involving energy sources *not* under the jurisdiction of * * * FERC, the local government shall follow the standards and procedures of OAR 660-023-0030 through 660-023-0050."

As relevant to hydroelectric facilities, OAR 660-023-0190(1) requires that local government protect water in irrigation canals as "hydroelectric dam sites" for energy production as "significant" Goal 5 resources. This means that proposed hydroelectric projects are entitled to protection from new conflicting uses within the "impact area" and to be allowed to develop as a significant "energy source" (hydroelectric facility) at the selected site that is subject to the FERC application or FERC approval. OAR 660-023-0190(1)(b). In this regard, nothing in the rule suggests that an application for, or a FERC approval of, a conduit exemption for example is any less a FERC application or FERC approval.

The local government's measures to protect a "significant" Goal 5 site from conflicting uses must contain clear and objective standards per the terms of OAR 660-023-0050(2). Decisions under "clear and objective standards" are considered nondiscretionary and would presumptively establish land use compatibility under OWRD review per OAR 690.005-0035(4)(b)(B).

The Goal 5 rule alternatively allows a local government to adopt a Goal 5 program to protect hydroelectric sites on a case-by-case basis by amending its plan and land use regulations to reflect FERC approval. OAR 660-023-0190(2).

d. Natural Hazards Goal 7 - Floodplain standards

Goal 7 requires protecting the public and property from natural hazards. This also means avoiding establishing public infrastructure in floodplains; let alone more volatile floodways. Yet, there can be no dispute that hydroelectric projects are uniquely water dependent uses. Therefore, to comply with Goal 7 sufficient protections must be put into place to protect the facility from flood damage or from being a flood hazard to others in the event of flooding. Regardless, local plans and land use regulations may be problematic as they may not contemplate hydroelectric facilities and may generally prohibit establishing any facilities in the floodway or be problematic for floodplains as well. Local plan or code amendments may be required in order to establish land use compatibility concerning Goal 7 and its implementing regulations for proposed projects.

e. Goal 11 Public Facilities

Proposals for hydroelectric projects should have little trouble complying with public facilities standards.

Wendie L. Kellington
Attorney at Law
Lake Oswego, Or 97035
Telephone: (503) 624-7790
www.wkellington.com

How Long Will it Take?

As a general rule, for projects not requiring a plan amendment, cities have 120-days from the date an application is deemed to be "complete" to make a final decision on a land use matter. ORS 227.178. Counties generally have 150 days from the time an application is deemed complete to approve or deny an application for a land use matter. ORS 215.427.

Pulling Rank

Irrigation districts have special powers under the terms of ORS 545.249. Specifically, ORS 545.249 provides:

> "The use of all water required for the irrigation of the lands of any district formed under the Irrigation District Law, together with all water rights and rights to appropriate water, rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the Irrigation District Law, is declared to be a public use more necessary and more beneficial than any other use, either public or private, to which the water, water rights, rights to appropriate water, lands or other property have been or may be appropriated within the district."

Arguably, for irrigation district projects, this statute could be used to tip the balance in favor of land use approval.

Strategic Considerations

- Assemble a team of people with the right expertise and credibility to pull off a project. This is especially true where a proposal blazes new territory.
- Be sure to have all current statutes, administrative rules, and agency forms. These change amazingly quickly. Check with agencies to see if rule changes are on the horizon and prepare to deal with them if there are any such changes foreseeable during the duration of the approval of the project.
- Consider filing the FERC application as soon as possible. This will invoke the "significant Goal 5 resource" provisions of OAR 660-0023-0190.
- Consider proposing and seeing through to adoption, local plan and zone amendments to facilitate a specific project or projects generally.
- Determine potential opponents and deal with the issue of opponents strategically rather than by default.
- Consider investing in developing and gathering the positive data supporting the proposal early on and using it.

Wendie L. Kellington
Attorney at Law
Lake Oswego, Or 97035
Telephone: (503) 624-7790
www.wkellington.com

- Consider establishing allies early.
- If there will be no other local land use decision, consider ensuring the local government supplies the LUCS to persons entitled to notice of discretionary land use decisions.
- Consider letting all potentially affected agencies know what you are proposing. Understand their concerns and make it a priority to persuade them of the value of the project as soon as reasonably possible.

Wendie L. Kellington
Attorney at Law
Lake Oswego, Or 97035
Telephone: (503) 624-7790
www.wkellington.com