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## Save our Rural Or. v. Energy Facility Siting Council, 121 P.3d 1141 (Or. 2005)

Nathan Whitney

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The court sustained Salem's first assertion and held the plain language of the Ohio Code required ERAC to consider the additional limitations when seeking to impose permit discharge limitations. The court reversed and remanded the first argument holding OEPA needed to consider biological criteria regulation. The court declined to address Salem's second and third assertions because ERAC needed to review these issues on remand.

*Alexandra Farkouh*

## OREGON

**Save our Rural Or. v. Energy Facility Siting Council, 121 P.3d 1141 (Or. 2005)** (holding the Oregon Energy Facility Siting Council's decision to have the Water Resources Commission issue a water permit was proper because the record contained substantial evidence that the permit would not injure existing water rights).

The Oregon Energy Facility Siting Council ("Council") granted a site certificate allowing Cob Energy Facility LLC ("COB") to construct a privately owned energy facility. Save our Rural Oregon ("Rural Oregon"), which consisted of 22 Klamath County residents and two organizations representing them, challenged the Council's final order granting COB a site certificate.

The application process for site certification begins by submission of a Notice of Intent ("NOI") to the Council, after which the Council notifies the public. Next, the State Department of Energy ("Department") drafts a project order, which establishes the legal requirements for the application for site certification ("ASC"). Then, the state sends the NOI and ASC to various state agencies and affected municipalities for comment. After a comment period, the Department reviews the ACS to determine whether it is complete. If the Department deems the ACS complete, the Department prepares and issues a draft proposed order. The Council then holds public hearings regarding the ASC and the proposed order. After the hearings, the Department issues a proposed order and notifies the public that the Council will hold a contested case hearing to consider adoption of the proposed order. Following the contested case hearing, the Council issues a final order approving or rejecting the ASC.

On September 5, 2002, COB submitted its ASC to the Department. Thereafter, the Department gave public notice of the ASC proposing a natural gas-fired, combustion turbine, combined-cycle energy facility that would require between 5,390 and 7,590 gallons of water per minute for cooling. COB proposed to draw the water from deep wells in the Lost River Basin by means of a new water pipeline. Upon negative comment, COB informed the Department it intended to amend its

ASC to reflect an air-cooled facility that would reduce the proposed facility's water requirement from roughly 7,500 gallons per minute to 210 gallons per minute. The Council issued a site certificate for the proposed facility.

On direct review in the Supreme Court of Oregon, Rural Oregon contested the issuance of the site certificate on four general grounds: the Council misinterpreted *Ore. Rev. Stat. § 469.504* in determining the proposed facility's compliance with statewide planning goals; the Council erred in granting exceptions to statewide planning goals; substantial evidence did not support the Council's determination that the ASC met the conditional use criteria of Klamath County Land Development Code; and, the Council's decision to direct the Water Resources Commission to issue a permit was erroneous. The court agreed with Rural Oregon's first challenge but sustained the Council's decision. The court disagreed with Rural Oregon's second and third challenges, ruling that the Council misinterpreted *Ore. Rev. Stat. § 469.504*, but the Council correctly applied the statute. The court found that the Council properly granted exceptions to statewide planning goals, and that substantial evidence supported the Council's determination that the ASC met conditional use criteria of the Klamath County Land Development Code.

Finally, Rural Oregon challenged the council's decision to have the Water Resources Commission issue a water permit to COB. Under Oregon law, the Council may grant an application for water rights if it determines that the proposed use will ensure the preservation of the public welfare, safety and health. Furthermore, *Ore. Rev. Stat. § 573.621(2)* creates a rebuttable presumption that a proposed water permit will ensure preservation of the public welfare, safety, and health when the basin program allows for the proposed use; water is available; the proposed use will not injure other water rights; and the use complies with rules of the Water Resource Commission. The court noted the record contained conflicting expert testimony. In addition, the court stated the Council has authority to determine which evidence to credit when contradictory evidence exists within the record. Since the Council determined, based upon the evidence presented, any impact on surrounding water users would be minimal, and since it required COB to monitor the impact of its deep well on surrounding shallow wells and to alter or cease water use if monitoring revealed a measurable impact, the court concluded substantial evidence supported the Council's determination to issue COB a permit. In sum, the court rejected all of Rural Oregon's challenges and affirmed the Council's decision to grant COB cite certification.

*Nathan Whitney*