**IN THE COURT OF APPEALS OF THE STATE OF OREGON**

OREGON DEPARTMENT OF FISH AND WILDLIFE,

Petitioner Below-Respondent,

v.

CROOK COUNTY,

Respondent Below-Petitioner,

WEST PRINEVILLE SOLAR FARM LLC,

Intervenor/Respondent Below-Petitioner.

Land Use Board of Appeals No. 2020-114

**A176344**

BRIEF OF *AMICUS CURIAE* COMMUNITY RENEWABLE ENERGY ASSOCIATIONIN SUPPORT OF PETITIONER WEST PRINEVILLE SOLAR FARM LLC AND PETITIONER CROOK COUNTY

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Appeal from Land Use Board of Appeals’ Final Opinion and Order, dated June 9, 2021, Rudd, Board Chair; Ryan and Zamudio, Board Members

*[ORAP 1.30 Information Follows]*

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# STATEMENT OF THE CASE

## Error! Bookmark not defined.Nature of Action and Relief Sought

This appeal arises out of the final opinion and order of the Land Use Board of Appeals (“LUBA”) in *Oregon Department of Fish and Wildlife v. Crook County* (LUBA No. 2020-114, June 9, 2021) (“Opinion”). Amicus curiae Community Renewable Energy Association (“CREA”) is aligned with Petitioner West Prineville Solar Farm LLC (“West Prineville Solar”) and Petitioner Crook County (“County”) and seeks reversal and remand of LUBA’s decision with instructions to apply the correct legal standards.

## Nature of the Final Opinion and Order

CREA accepts the statements of the nature of the decision by West Prineville Solar and the County.

## Basis of Appellate Jurisdiction

CREA accepts the statements of the basis of appellate jurisdiction by West Prineville Solar and the County.

## Timeliness of Appeal

CREA accepts the statements of the effective dates for appellate purposes and timeliness of appeal by West Prineville Solar and the County.

## Questions Presented on Appeal

CREA accepts the statements of the questions presented on appeal by West Prineville Solar and the County.

## Summary of Argument

This appeal arises out of the County’s approval of a solar photovoltaic facility under ORS 215.446, as codified upon the passage of HB 2329 in 2019. HB 2329 authorizes counties to exercise decision-making authority over “renewable energy facility[ies]” by evaluating applications for land use permits. *See* ORS 215.446(2)–(3). Counties have long exercised authority over commercial generating facilities, including solar generating facilities up to 320 acres on nonarable land, ORS 215.283(2)(6); OAR 660-033-0130(38), and HB 2329 defines “[r]enewable energy facility” to include, in most relevant part, solar photovoltaic facilities between 321 and 1,920 acres on nonarable soils (“mid-sized Renewable Energy Facilities”). ORS 215.446(1)(a)–(b). Under ORS 215.446, the Energy Facility Siting Council (“EFSC”) retains authority over large “Energy Facilities” (ORS 469.300(11); ORS 215.446(1)(b)(A)), but, in passing HB 2329, the legislature excluded mid-sized Renewable Energy Facilities from that definition and returned decision-making authority to counties for approval of such facilities, subject to certain express siting standards and considerations. ORS 215.446. This Court is tasked with determining—as an issue of first impression—whether the legislature, when it returned control over mid-sized Renewable Energy Facilities to counties with the passage of HB 2329, also intended to strip counties of their customary land use role to make local policy choices consistent with state policy by instead requiring strict compliance with the State’s Wildlife Policy to the satisfaction of the Oregon Department of Fish and Wildlife. For the reasons described below, it did not.

In passing HB 2329, the legislature did not task counties with implementing a sui generis decision-making framework. Rather, “[a]n application for a land use permit to establish a renewable energy facility must be made under ORS 215.416 [(Permit application)].” ORS 215.446(2). In turn, a county necessarily must evaluate such an application within the context of Oregon’s coordinated statewide land use planning system, applying the substantive statutory standards in the process. ORS 215.446(2)–(3). Because the legislature intended for counties to exercise discretion and control over mid‑sized Renewable Energy Facilities within the framework of Oregon’s coordinated statewide land use planning system, LUBA misconstrues ORS 215.446 in its Opinion and vitiates the clear legislative intent for counties to permit such facilities as part of their broad planning responsibilities under Oregon law. LUBA’s misinterpretation of ORS 215.446 and application of an incorrect legal standard is incompatible with Oregon land use and renewable energy policy (as codified by the legislature) and overthrows the intent of the legislation to provide a more flexible and timely permitting process for mid-sized Renewable Energy Facilities. Accordingly, the Opinion should be reversed and the matter remanded to LUBA with instructions to apply the correct legal standard.

## Statement of Facts

CREA accepts the statements of fact by West Prineville Solar and the County.

# ARGUMENT

## Oregon Counties Have a Central Role in Oregon’s Coordinated Statewide Land Use Planning System.

Oregon’s coordinated statewide land use planning system began in 1969. 1000 Friends of Oregon v. Wasco County Court, 299 Or 344, 347, 703 P2d 207 (1985). By 1973, the legislature had passed Senate Bill 100, which is codified at ORS chapter 197. Id. Senate Bill 100 sprang from legislative concern that “state intervention was needed to stop a process of cumulative public harm resulting from uncoordinated land use.” Id.; see also ORS 197.005 (legislative findings); ORS 197.010 (policy).

The intent of Senate Bill 100 was to institute a “systematic decisional process” (1000 Friends (Wasco Co.), 299 Or at 347) within which “cities and counties \* \* \* remain as the agencies to consider, promote and manage the local aspects of land conservation and development for the best interests of the people within their jurisdictions.” ORS 197.005(3). That systematic decisional process depends on “consideration of all relevant facts, affected interests and public policies.” 1000 Friends of Oregon v. LCDC (Curry Co.), 301 Or 447, 451, 724 P2d 268 (1986) (internal quotation marks omitted).

Senate Bill 100 created the Department of Land Conservation and Development (the “Department”) and the Land Conservation and Development Commission (“LCDC”). 1000 Friends (Curry Co.), 301 Or at 451–52. The legislature directed the Department to develop, and LCDC to adopt, “goals and guidelines” for use by “state agencies, local governments, and special districts” in connection with “preparing, adopting, amending and implementing” comprehensive plans. ORS 197.225. “Goals” are statutorily-defined as “mandatory statewide land use planning standards” adopted by LCDC. ORS 197.015(8). LCDC has adopted 19 Statewide Planning Goals, which are rules within the meaning of the Administrative Procedures Act. See ORS 183.310(9). Many of LCDC’s statewide goals are accompanied by guidelines addressing “planning” and “implementation.” 1000 Friends (Curry Co.), 301 Or at 452. “Guidelines” are “suggested approaches designed to aid” cities, counties, state agencies, and special districts in carrying out these goals. ORS 197.015(9); 1000 Friends (Curry Co.), 301 Or at 452.

After LCDC adopted the statewide goals, local governments were required to prepare comprehensive plans that complied with these goals. 1000 Friends (Curry Co.), 301 Or at 452; ORS 197.175(2)(a). Each local government could then request that LCDC review and “acknowledge” a comprehensive plan’s compliance with the goals. ORS 197.251(1). Once a comprehensive plan is acknowledged, the local government must make land use decisions in compliance with the acknowledged plan. ORS 197.175(2)(c); 1000 Friends (Curry Co.), 301 Or at 452.

Goal 3 (Agricultural Lands) is one goal of particular significance to this appeal. Goal 3 provides that “agricultural lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space and with the state’s land use policy expressed in ORS 215.243 and 215.700.” OAR 660-015-0000(3). LCDC has promulgated implementing regulations for Goal 3 at OAR Chapter 660, Division 33. These regulations work in tandem with statutes the legislature has promulgated, amended, and refined over time, which collectively reflect a robust policy of allowing “nonfarm” uses on agricultural lands (such as land zoned for exclusive farm use (“EFU”)). *See* ORS 215.213, 215.283; OAR 660-033-0120.

In sum, counties play a central role and possess substantial discretion and authority over the permitting of land uses within the framework of Oregon’s coordinated land use planning system—as manifested through LCDC’s goals—including by determining permissible nonfarm uses of agricultural lands for the best interests of the people in their jurisdictions.

## Counties Have Exercised Discretionary Approval Authority Over Certain Energy Facilities For Decades.

Counties have been implementing the Oregon land use system for over 40 years and, within this framework, regularly exercise policy choices—*viz.*, “consider, promote and manage the local aspects of land conservation and development for the best interests of the people within their jurisdictions” (ORS 197.005 (3))—over a variety of complex land use matters on EFU lands and in other zones. For example, counties have responsibility for siting multi-use destination resorts, data centers, commercial generation facilities, commercial activities in conjunction with farm uses, and solid waste disposal sites, among other economic development and essential service projects. *See, e.g.*, ORS 197.445; ORS 215.283; ORS 459.017(b).

Out of necessity, counties making decisions on land use permits routinely construe and determine the applicability of land use regulations. Indeed, counties are prohibited from approving a permit application if it is “found to be in conflict with the comprehensive plan of the county and other applicable land use or ordinance provisions.” ORS 215.416(4)(a); *see also* ORS 215.416(8)(a) (requiring approval or denial of a permit to be “based on standards and criteria”). In other words, it is incumbent upon counties to determine what standards and criteria are applicable to a land use permit application and to apply those standards and criteria. *See, e.g.*, *Friends of the Creek v. Jackson County*, 165 Or App 138, 141–42, 995 P2d 1204 (2000) (exercise of policy or legal judgment comprising a local land use decision involves evaluating the applicability of state statutes in the context of developed facts); *see also Green v. Douglas County*, 245 Or App 430, 441, 263 P3d 355 (2011) (explaining “the county is in a far better position than LUBA or [the Court] to interpret [an] ordinance provision and, then, to make the largely factual and largely interdependent determination of whether the provision as it interprets it applies to” an applicant) (internal quotation marks omitted); *see also* ORS 215.427(2)–(3) (requiring county determination that land use application is “complete” and that “approval or denial of the application shall be based on upon the standards and criteria that were applicable at the time the application was first submitted” as determined by the county).

Each county is unique with differing siting standards tailored to the land and people within the county. As facilitated under Oregon’s land use framework, each, however, offers an accessible venue and process for public participation as well as decision-making transparency and accountability. *See e.g.*, Statewide Planning Goal 1 (Citizen Involvement), OAR 660-15-0000(1); ORS 197.763 (conduct of local quasi-judicial land use hearings; notice requirements; hearing procedures). Notably, the legislature has also provided that land use permit determinations must be timely made within 150 days of the completion of an application. ORS 215.427(1).

It is within this context that the legislature vested counties—since 1973—with conditional use authority over commercial generating facilities, including renewable energy facilities. Or Laws 1973, ch. 503, § 4, *codified at* ORS 215.213(2)(g) and ORS 215.283(2)(g) (“commercial utility facilities for the purpose of generating power for public use by sale”); *see also* *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995) (the legislature created two categories of use, as of right and conditional, in subsections (1) and (2) of ORS 215.213 and ORS 215.283). Thus, as with other land uses, counties have long retained authority and discretion to approve siting of renewable energy facilities as conditional uses based on “legislative criteria of its own that supplement those found in ORS 215.213(2) and 215.283(2).” *Brentmar*, 321 Or at 496.

For these reasons, it was a natural choice to return authority over mid-sized Renewable Energy Facilities to counties through HB 2329 when it became apparent that EFSC processes were ill-suited for such facilities.

## The EFSC Approval Process Grew To Be Ill-Suited For Mid-Sized Renewable Energy Facilities.

In 1975 the year the legislature created EFSC, renewable energy facilities such as wind and solar facilities were not commercially feasible. The legislature created EFSC to review large-scale energy projects and left smaller projects within county land use jurisdiction. EFSC replaced the Nuclear & Thermal Energy Council, which was the predecessor body tasked with siting approval for generation facilities commonly proposed at that time, namely coal, nuclear, and natural gas facilities. *See generally Marbet v. Portland General Electric Co.*, 277 Or 447, 449–50, 561 P2d 154 (1977).

The EFSC siting framework vests significant discretion in the siting council, much like counties, over the particular matters within the council’s discretion. *See* ORS 469.401(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.”) The legislature directed EFSC *inter alia* to adopt standards and rules for the performance of its vested regulatory functions and “implementation of the energy policy of the State of Oregon set forth in ORS 469.010 and 469.030[,]” including standards and rules for the siting of energy facilities. ORS 469.470(2). There is “no doubt that the council is directed to exercise its own judgment in setting standards beyond the policies stated in the statute itself, though of course consistent with those policies.” *Marbet*, 277 Or at 459. “The act gives the council wide discretion \* \* \* [that] includes judgments of two kinds: judgments about technological feasibility, economic projections, costs, safety, environmental consequences, and similar probabilities that will call for factual information and agency expertise, and judgments about the relative importance of conflicting goals, about values and priorities, in short, policy judgments.” *Id.* at 462–63.

Renewable energy began to develop in Oregon in the early 2000s, and this shift meaningfully changed the siting characteristics of proposed energy facilities. Unlike utility-owned facilities, renewable energy projects are largely developed by independent power producers in a competitive environment. Counties have gained significant experience in siting these kinds of facilities both in their advisory role to EFSC on land use standards as well as through direct permitting under county land use jurisdiction retained under ORS 215.283(2)(g) and OAR 660-033-0130(37), (38). *See, e.g.*, App-8 (February 28, 2019, Testimony of Ann Beier, Crook County Community Development Director noting “Crook County has granted land use approvals for six commercial solar facilities ranging in size from 180 acres to just over 300 acres); West Prineville Solar ER 191–224.

When the legislature began to consider HB 2329 and whether the siting of mid-sized Renewable Energy Facilities should be decided by counties through land use permit decisions rather than by EFSC, CREA and others testified before the legislature and participated in the legislative process during which HB 2329 was amended several times. Industry representatives experienced with the development of renewable energy facilities testified to the lengthy, costly, and sometimes cumbersome EFSC siting process and that its requirements were ill-suited to the siting requirements and characteristics of mid-sized Renewable Energy Facilities. *See*, *e.g.*, West Prineville Solar ER 045–046. CREA expressed concern that the EFSC process is “overly cumbersome, expensive and time consuming” and support for benefits like economic improvement, awareness of clean energy, and community pride that flow to communities able to locally permit small and mid-sized renewable energy projects through county processes. App-23 (March 4, 2019, Testimony of Brian Skeahan, Executive Director, Community Renewable Energy Association).[[1]](#footnote-1)

As discussed above, counties possess demonstrated, subject-matter competency and expertise in siting renewable energy facilities and land use permitting decisions. And, a county’s community-oriented process is quicker and less expensive while allowing closer oversight by local decision-makers most knowledgeable about the best interests of the people in their county, as intended by SB 100.[[2]](#footnote-2)

The legislature enacted HB 2329 with knowledge about the benefits of county land use permitting processes within the statewide coordinated framework and with the purpose of remedying the issues facing developers of mid-sized Renewable Energy Facilities using EFSC’s siting process.

## The Legislature Intended HB 2329 to Streamline the Approval Process For Mid-Sized Renewable Energy Facilities By Transferring the Approval Authority From EFSC to Counties.

While the Legislature included some siting criteria in HB 2329, it did so to provide guidance for a county’s exercise of authority and discretion—like LCDC’s statewide goals and guidelines—not to supplant a county’s discretion and judgment as a legislative body by prescribing rigid substantive standards at odds with the purpose of HB 2329. This is true for the bill as a whole and for the standards addressing the Wildlife Policy that are material to this appeal.

One public concern about HB 2329 was how counties might be equipped to address “substantial conflicts with wildlife habitat” in their local land use proceedings. App-21 (February 28, 2019, Testimony of 1000 Friends of Oregon). For example, 1000 Friends of Oregon (“Friends”) commented that it had concerns about the diversity of comprehensive plan and zoning ordinance provisions among counties as the decision-makers under the legislation, observing that most counties “have not updated their Goal 5 resources inventories for many years. And, they are not required to apply ODFW’s Habitat Mitigation Program.” *Id*.

Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas and Open Spaces) is another goal significant to this appeal. It imposes inventory and planning requirements for up to fifteen different resources, including wildlife habitat. Although the goal must be implemented, local governments have flexibility in implementation as they may use a “standard process” or a combination of specific rules and/or “safe harbors.” OAR 660-023-0020. The typical “program to achieve Goal 5” involves adoption of comprehensive plan policies after a rigorous analysis of economic, social environmental and energy (ESEE) consequences to identify conflicting and allowable uses among other standards. As an alternative, safe harbors and specific rules identify other metrics that a county may utilize to satisfy Goal 5 rather than following the standard process.[[3]](#footnote-3) *Id*.

LCDC’s rules clearly indicate the circumstances when a local jurisdiction is required to follow certain standards and when a jurisdiction retains discretion to choose different standards. For wildlife habitat, although local jurisdictions are required to inventory wildlife habitat, they decide whether to do so “following either the safe harbor methodology \* \* \* or the standard inventory process.” OAR 660-023-0110(2). Similarly, while there is an established “ESEE Decision Process” and requirement that jurisdictions “coordinate with appropriate state and federal agencies” for listed sensitive, threatened or endangered species, these procedural standards simply provide some guidance on *how* a county implements Goal 5. OAR 660-023-0040; OAR 660-023-0110(6). Local jurisdictions therefore retain significant discretion to enact differing regulatory approaches. This is also true under LCDC’s solar siting rule at OAR 660-033-0130(38) which authorizes facilities up to 320 acres on nonarable land. Under OAR 660-033-0130(38)(j)(F) and (G), applicants are required to confer with resource management agencies including ODFW on habitat avoidance or mitigation, but the “county is responsible for determining appropriate mitigation” without specific adherence to the state wildlife mitigation policy.

With this framework in mind, the legislature ultimately adopted the -A5 amendments to HB 2329. CREA and others understood these amendments to provide policy guidance for the exercise of county discretion, not to prescribe county action or to create requirements more onerous than in the EFSC siting process, regarding mitigation for Goal 5 wildlife habitat resources in this siting context. *See also* West Prineville Solar ER 041, 043 (Representative Helm noting that “counties needed some flexibility” in the application of fish and wildlife and cultural standards and that the bill’s standards “are not as super rigorous as the ones \* \* \* impose[d] in the regular EFSC process, [but] they are intended to get at the same goals and protect the same values and allow the counties to do in a more timely manner”), 045–046; App-25 (June 9, 2019, Testimony of 1000 Friends of Oregon regarding the -A5 amendment, expressing concern that “the county, not ODFW, will have the final say over whether applicant has adequately avoided and mitigated wildlife impacts.”). This understanding and legislative choice is codified in the express language of ORS 215.446: after “*consult[ation]* with” ODFW, an “applicant must demonstrate *to the satisfaction* *of the county* that the renewable energy facility” has developed a mitigation plan that is “*consistent with* the administrative rules adopted by the State Fish and Wildlife Commission for the purposes of implementing ORS 496.012 [(Wildlife Policy)].” ORS 215.446(2), (3)(a)(B) and (C) (emphasis added). CREA understands this language to mean an applicant will consult with ODFW and prepare a written mitigation plan for a county to determine to *its* satisfaction that significant impacts to fish and wildlife habitat will be offset through mitigation resulting in no net loss in habitat quantity or quality where required by the State Wildlife Policy. The legislative history supports the conclusion that the legislature shared this understanding as well.

## The Board’s Interpretation Misunderstands and Frustrates Important Legislative Policy Choices Underpinning HB 2329.

The Board interprets ORS 215.446(3)(a)(C)[[4]](#footnote-4) to limit a County’s customary function to determine what standards and criteria apply to land use permits by enunciating a rule that requires an applicant to strictly comply with “all” of the administrative rules promulgated by the State Fish and Wildlife Commission including each of the requirements applicable to a “written mitigation plan prepared for [ODFW].” OAR 635-415-0020(8); *Oregon Department of Fish and Wildlife v. Crook County* (LUBA No. 2020-114) Slip Op at 17, 23, 27. The Board further rejects the County’s determination that the mitigation plan addressed significant fish and wildlife habitat, to *the County’s satisfaction*, consistent with the statutory requirements to implement the State’s Wildlife Policy and instead defers to ODFW’s determination that the mitigation plan did not meet the requirements of the statute to ODFW’s satisfaction. Slip Op at 21–23.

The Board interprets ORS 215.446(2) and (3) in a manner that is incongruous with the intent of the bill and with the plain language of the statute. LUBA inserts a requirement that an applicant must comply with “all” administrative rules adopted for the purposes of implementing ORS 496.012, while admonishing petitioner for inserting “it deems applicable” after the phrase “administrative rules adopted \* \* \* for the purposes of implementing ORS 496.012.” Slip Op at 17. But LUBA’s insertion of “all” is neither necessary to give meaning to the clause, nor a supportable conclusion in light of the legislative history. The Board ignores that counties already have an obligation generally to determine what standards and criteria are applicable when considering land use permits under ORS 215.416. In other words, it is not inconsistent with the statutory language for counties, in performing their customary land use permitting role, to consider and determine which state “administrative rules” apply in accordance with their plain meaning to evaluate whether a mitigation plan is consistent with those rules.

The legislature’s intent was to remove barriers to permitting by creating an opportunity for a less expensive, faster process tailored to the location of the proposed facility while maintaining a rough equilibrium in the application of statewide siting policy among EFSC and counties. *See* West Prineville Solar ER 041–043. LUBA’s interpretation departs from this intent because it imposes requirements beyond the County’s satisfaction with implementation of provisions of the Wildlife Policy by adding technical mitigation plan requirements and imposing a requirement of ODFW satisfaction, which do not appear in the statute and are not even imposed in the more onerous EFSC siting process. The Board seeks to impose a greater burden on applicants than currently exists in the EFSC siting process and creates a significant permitting barrier that these facilities did not face at EFSC. Such a result contradicts the legislature’s purpose and intent in passing HB 2329.

To illustrate, the technical submittal requirements of OAR 635-415-0020(8) are not required at EFSC, nor is ODFW’s determination of consistency with the applicable standard. *See* OAR 345-022-0060 (EFSC Fish and Wildlife Habitat standard requiring EFSC to find the design, construction and operation of the facility, taking into account mitigation, are *consistent with* stated criteria).[[5]](#footnote-5) In addition, EFSC site certificates regularly allow applicants, *prior to construction but after issuance of the site certificate*, to finalize and amend habitat mitigation and monitoring plans and to acquire the legal rights necessary to create, enhance, maintain and protect habitat with an EFSC Final Order and Site Certificate’s requirement of no net loss of habitat (among other conditions).[[6]](#footnote-6) That is what the County determined was appropriate here. This allows applicants to phase project development and commitment of resources when project construction plans and associated impacts are finalized as well as to manage the feasibility of major financial commitments to projects that have advanced from the development to the construction phase.

This sequencing of mitigation plan development does not mean the plans are less robust or unenforceable. Based on its experience in managing complex land development (including impacts to wildlife habitat) in Crook County and based on evidence in the whole record, the County’s policy choice was to require a plan that was limited to options recommended by ODFW. *See, e.g.*, West Prineville Solar ER 201. The County plan also exceeded the State Wildlife Policy. It not only required no net loss of habitat but also required a habitat uplift. West Prineville Solar ER 193, 201, 211–12.

In addition to the incongruous practical effect of the Board’s interpretation, it is hard to divine the source of the Board’s inference that “[all of] the administrative rules” must be applied to applications under ORS 215.446. First, the Board does not explain why the legislature would choose to depart from established roles under EFSC siting and Oregon land use frameworks to dramatically expand ODFW’s role with a generic reference to “administrative rules.” Second, as noted above, counties, in their land use permitting function, customarily determine what state standards apply to an application according to their plain meaning. Here, the rule governing the technical mitigation plan submittal requirements that LUBA seeks to apply, on its face, applies when the mitigation plan is being prepared for ODFW (not the county) as the permitting agency. *See, e.g.*, OAR 635-415-0020(2) (“for development actions \* \* \*for which the Department has *statutory authority* to require mitigation as a condition of a permit or order” (emphasis added)); OAR 635-415-0015(6) (“Nothing in this policy shall be construed to vest authority in the Department where no such statutory or regulatory authority has been granted.”)

Third, the Board’s reading is also unnecessary to achieve the goal of the legislation, including ORS 215.446(3)(a)(C). The legislative history clearly demonstrates that the legislature was grappling with how to vest discretionary land use permit decision-making authority with counties on balance with statewide energy policy. West Prineville Solar ER 042–043 (Representative Helm noting that the bill’s standards are “not as super rigorous” as the ones in the “regular EFSC process” but are “intended to get at the same goals and protect the same values”). HB 2329 was a heavily negotiated bill and, as such, it was not a perfect solution for each stakeholder in the process. But, it was a purposeful one. The legislative record establishes that EFSC was an expert decision-making authority of uniform siting policy, but that it created meaningful barriers for realizing Oregon’s clean energy economy. The legislative record further demonstrates that counties have expertise in permitting complex energy facilities in a manner that can remove or reduce barriers present at EFSC for mid-sized Renewable Energy Facilities. To balance state energy policy, with the diversity of local code requirements, the legislature chose to authorize counties to exercise land use permit authority over mid-sized Renewable Energy Facilities while supplementing divergent county standards to enable a roughly symmetrical, yet more flexible, approach to Oregon siting policy than that exercised at EFSC. *See* West Prineville Solar ER 040–043. This supplementation included language to ensure that counties can exercise their land use permitting discretion but in a manner that is consistent with the Wildlife Policy. *See id*.; West Prineville Solar ER 019.

Last, the Board’s reading is incongruous with the legislative history that the reference to “administrative rules” was intended to be a generic, not a specific or technical, reference to guide compliance with a state statute as a matter of legislative drafting preference. *See* West Prineville Solar ER 19–20 (Representative Helm responding to Senator Findley that categories listed in the -3 amendment “are borrowed from ODFW rule[s]” and that “[t]hat’s one of the changes that I would be seeking to do. We cannot simply adopt administrative rules by reference in our statutes because the rules can change, but our statutes don’t.”).

In summary, the legislature vested counties with land use permitting over mid-sized Renewable Energy Facilities. This is a decision-making framework in which counties regularly exercise discretion and determine the applicability of standards and criteria. The Court should not construe the legislature’s drafting preference as obliquely expanding the role of a third agency with de facto decision-making authority in a manner that both upsets the decision-making status quo and overthrows the intent of the legislation. *See* *also* West Prineville Solar ER 040 (Todd Cornett, assistant director at Oregon Energy Department responding to Representative Hayden explaining the effect of the bill as “basically chang[ing] who has jurisdiction”).

# CONCLUSION

For the foregoing reasons, CREA respectfully requests that the Court reverse LUBA’s decision and correct its interpretation as to the meaning of ORS 215.446 by giving effect to the phrase “to the satisfaction of the county.”

DATED this 28th day of July, 2021.

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INDEX OF EXCERPT OF RECORD

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**CERTIFICATION OF COMPLIANCE**

**WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b)(ii)(A) to the extent applicable under ORAP 8.15(3)(c) and (2) the word count of this brief (as described in ORAP 5.05(1)(a)) is 4,798 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b)(ii).

Dated this 28th day of July, 2021.

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CERTIFICATE OF FILING AND SERVICE

I certify that I filed this BRIEF OF AMICUS CURIAE COMMUNITY RENEWABLE ENERGY ASSOCIATION IN SUPPORT OF PETITIONER WEST PRINEVILLE SOLAR FARM LLC AND PETITIONER CROOK COUNTY with the Appellate Court Administrator on this date using the appellate court eFiling System.

I certify that service of a copy of this BRIEF OF AMICUS CURIAE COMMUNITY RENEWABLE ENERGY ASSOCIATION IN SUPPORT OF PETITIONER WEST PRINEVILLE SOLAR FARM LLC AND PETITIONER CROOK COUNTY will be accomplished on the following participants in this case, who are registered users of the appellate courts’ eFiling system, by the appellate courts’ eFiling system at the participants’ email addresses as recorded this date in the appellate eFiling system:

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1. By way of example, renewable energy development projects, among other benefits, generate increased tax revenues for counties and services for residents which is particularly beneficial for rural counties with a low tax base; provide opportunity for creation of new jobs; and often support maintaining ongoing agricultural operations and employment by supplementing ranch or farm income. [↑](#footnote-ref-1)
2. For example, there is testimony in the legislative record that the EFSC process can exceed the time for County processing by a year or more; that the EFSC fees cost well over 10 times an average County fee; and that EFSC standards (*e.g.*, structural standards) may not be applicable and are not well-tailored to a diversity of sites, including small and mid-sized projects. App-6 (February 26, 2019, Testimony of Obsidian Renewables, LLC); App-10 [February 28, 2019, Testimony of Renewables Northwest). [↑](#footnote-ref-2)
3. For example, OAR 660-023-0090 addresses riparian corridors. It requires local jurisdictions to define and protect riparian corridors. It allows a jurisdiction to meet Goal 5 by using safe harbor provisions, such as preventing permanent alteration of areas 75 feet upland from the top of each bank for certain streams. It also allows the jurisdiction to use the standard process after consultation with a number of listed sources, such as Oregon Department of Fish and Wildlife maps indicating fish habitat. OAR 660-023-0090(4), (5). [↑](#footnote-ref-3)
4. ORS 215.446 provides, in part, as follows:

   “(2) An application for a land use permit to establish a renewable energy facility must be made under ORS 215.416. An applicant must demonstrate to the satisfaction of the county that the renewable energy facility meets the standards under subsection (3) of this section.

   (3) In order to issue a permit, the county shall require that the applicant

   (a)(A) Consult with the State Department of Fish and Wildlife, prior to submitting a final application to the county, regarding fish and wildlife habitat impacts and any mitigation plan that is necessary;

   (B) Conduct a habitat assessment of the proposed development site;

   (C) Develop a mitigation plan to address significant fish and wildlife habitat impacts consistent with the administrative rules adopted by the State Fish and Wildlife Commission for the purposes of implementing ORS 496.012; and

   (D) Follow administrative rules adopted by the State Fish and Wildlife Commission and rules adopted by the Land Conservation and Development Commission to implement the Oregon Sage-Grouse Action Plan and Executive Order 15-18.” [↑](#footnote-ref-4)
5. Similarly, as noted above, neither is required under LCDC’s solar siting rule at OAR 660-033-0130(38). [↑](#footnote-ref-5)
6. *See, e.g.*, Third Amended Site Certificate for Shepherd’s Flat North (February 26, 2021), Condition Nos. 83 & 85, *available at* https://www.oregon.gov/energy/facilities-safety/facilities/Facilities%20library/2021-02-26-SFSAMD3-Site-Certificate-on-Amendment-3.pdf (accessed July 26, 2021). [↑](#footnote-ref-6)