

LUBA hands wind dispute back to Morrow County

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The Oregon Land Use Board of Appeals has asked the Morrow County Court to take another look at its decision regarding the Willow Creek wind farm and its neighbors.

The court ruled in January that the 48-turbine project near Ione exceeded the state's noise control rule at one nearby home. It gave Invenergy, the project's parent company, six months to comply with the rule.

But that decision, LUBA said this week, was flawed.

The county court, in its decision, upheld a portion of an earlier Morrow County Planning Commission ruling that found Invenergy broke the state noise rule at four homes. The planning commission had adopted a "black and white" standard of the state rule — noise from the wind farm, plus background, must not exceed 36 decibels, or 36 dBA, at nearby homes — although the rule itself is vague on that point. Invenergy's own study revealed that noise at the four homes grew louder than 36 dBA at times.

After all parties appealed to the county court, the court tossed out three of the neighbors' complaints on the grounds they lacked evidence to support their claim. It upheld the planning commission's decision for the home at which the combined noise rose above 36 decibels most often.

The three legal experts that make up LUBA, however, said the county court must explain why the "black and white" interpretation of the rule stands at one home but not the others. The court did not say the violations at the other homes qualified as "unusual and/or infrequent events," and therefore exceptions to the rule, it just stated there was insufficient evidence to conclude the project violated the noise rule at those homes.

"On remand, if the county court adheres to its view that the 36 dBA standard is violated at the Williams residence, but is not violated at other residences, it must adopt an explanation for that view that is sufficiently developed for LUBA review," LUBA wrote.

Elsewhere in its decision, LUBA seems to agree with Invenergy's interpretation of the noise rule, which differs from the planning commission's view. The rule states that a wind facility must not increase the ambient background noise by more than 10 dBA at nearby homes. If a developer does not determine the ambient noise, there is an assumed background of 26 dBA (10 dBA plus 26 dBA equals the "standard" of 36 dBA).

Invenergy argues that it has a choice, to use either the assumed background of 26 dBA or up to 50 dBA at times when background noise climbs higher than 26 dBA.

The project's neighbors insist that wind developers must choose one of the standards prior to construction. If it does not conduct an ambient noise study, they argue, it must abide by a strict 36 dBA rule. Invenergy did not complete such a study.

But LUBA wrote that it could not find that language — the requirement to choose — in the Oregon Administrative Rule itself. Reading such a constraint into the law, LUBA noted, could leave a developer who selected the assumed background level unable to avoid violating the rule if the actual background noise rose above 26 dBA. If the ambient noise rose above 36 dBA, the wind project would break the rule without making any noise at all.

“We conclude it is highly unlikely that the authors of (the law) would have intended that result,” LUBA wrote.

Invenergy and its neighbors have 30 days to appeal the LUBA decision to the Oregon Court of Appeals. In an email, an Invenergy representative said the company has yet to decide whether to appeal.

“We believed there had been a fundamental misreading of the standard under which Oregon law regulates noise emissions and the LUBA decision appears to acknowledge as much,” the company said. “We will reserve further comment until we are able to fully consider the LUBA decision.”

An attorney for one of the neighbors, Andrew Sprauer, said his client has no intention of appealing the ruling. In the meantime, the Willow Creek wind project continues to operate, although it still must obey the county court's order to reduce turbine noise at one home, that of Dan Williams', within six months. Invenergy requested that LUBA “stay” the court's decision, but LUBA did not grant that request, according to County Planner Carla McLane.

“I'm aware that they have been working with Mr. Williams to collect data to identify the measures they're taking to comply,” she said. “They are currently, actively working toward compliance.”