Reeve Kearns PC

Attorneys at Law

1225 Oregon National Building
621 S.W. Morrison Street
Portland, Oregon 97205
Telephone: 503-225-0713
Facsimile: 503-225-0276
Email: dan@reevekearns.com

Daniel H. Kearns
Direct Dial: 503-225-1127

February 3, 2015

Hon. Chris Edwards, Chair
Senate Committee on Environment
and Natural Resources
900 Court St., NE
Salem, OR 97301

SENT VIA E-MAIL

Re: SB-258 (amendments to ORS 469.401)
Comments on behalf of The Blue Mountain Alliance

Dear Chairman Edwards and Committee Members:

I represent The Blue Mountain Alliance and was the lawyer that briefed and argued the case in *Blue Mountain Alliance v. EFSC*, 353 Or 465 (April 18, 2013). I am told that SB 258 is submitted by ODOE as simply a house-keeping measure to codify the Supreme Court's opinion in the *Blue Mountain Alliance* case. I respectfully disagree and urge you to reject SB-258.

First, there is no need to codify the Supreme Court's opinion in this case, and an attempt to do so actually changes the law making it less clear. In the *Blue Mountain Alliance* case the Supreme Court simply interpreted ORS 469.401 as it exists in its current form. The Supreme Court's opinion is quite clear as to what the statute means. SB-258 will now change the statute in a misguided attempt to "codify" what ODOE staff believes the Supreme Court's opinion means. The only thing certain about this effort is that it will invalidate the Court's decision by changing the statute and calling into question exactly what the new statute means. The status quo is clear, and the statute does not need amendment as ODOE staff suggests.[1]

Second, it is bad policy to amend ORS 469.401 as suggested by SB-258 because to do so would make all site certificated power projects exempt from any later-adopted local regulations when revised through an amended site certificate. Many certificate amendments are extremely substantive and significantly increase the size, scale and impacts of a power project. These substantive amendments should be subject to later-adopted local health, safety and land use regulations that were adopted by local governments to address those impacts. For example, a

1 Typically, statutes are amended in response to problems, errors or other defects identified by the courts. It makes no sense to amend ORS 469.401 unless ODOE staff disagrees with the meaning that the Court ascribed to the statute, which does not appear to be the case. In that light, SB-258 appears to be an attempt to manipulate the statute and substantively change the existing law - something that the Committee should reject.

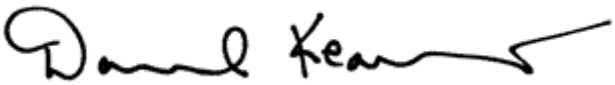
power project may obtain a site certificate based on an extremely small and low-impact project proposal, then subsequently amend the site certificate by substantially increasing the size, scale and environmental impact of the project. A good example is a small wind project with an ill-defined powerline alignment may obtain a site certificate and subsequently (years later) amend the site certificate to significantly increase the number of turbines by an order of magnitude or more and specify a wide and damaging power transmission line through high-value EFU farmland. Under SB-258, all such site certificate amendments are expressly exempt from later-adopted local regulations and environmental review of the new and much larger environmental impacts. These amendments frequently are significant, and their impacts are new and substantial. They should not automatically be exempt from later-adopted health, safety and land use regulations, which would be the effect of SB-258.

Third, many site certificate amendments are simply time extensions on the original site certificate, which have the effect of keeping a power project alive but unbuilt for many years or decades after issuance of the original site certificate. This is especially common since the drop in oil prices which has caused many alternative power projects to be suspended. SB-258 is particularly bad policy in light of these site certificate amendments because it means that a small-scale power project that vested its site certificate many years ago but subsequently expanded the size, scale and impact of the project will now be buildable many years or decades later. Thus, large projects could be constructed under long outdated local regulations simply because the original site certificate vested under the local regulations and the certificate amendment is exempt from new regulations. Local health, safety and land use regulations are frequently adopted specifically in response to the particular impacts of large-scale power projects. SB-258 would forever expressly exempt all such projects from later-adopted local health, safety and land use regulations. This is bad policy because it eliminates local control, invalidates local regulations designed to protect the public health and safety and preserve high-value agriculture lands. SB-258 also creates the anomalous situation where a large power project is subject only to long outdated local regulations that are years or decades old.

Finally, SB-258 includes a provision that allows EFSC to "require compliance with local ordinances or state law or rules of the council adopted after issuance of a site certificate if there is a clear showing of a significant threat to public health, safety or the environment that requires application of the later-adopted ordinances, laws or rules." This provision creates such a high bar to applying later-adopted local ordinances as to guarantee that it will never be used. Again, this is bad policy because it virtually guarantees all amended site certificate projects will be exempt from all later-adopted local regulations.

In its current form, SB-258 should not be referred out of committee or recommended for approval. Thank you.

Sincerely,



Daniel Kearns