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To: Oregon Energy Facility Siting Council

From: Luke May, Siting Analyst

Date: March 13, 2019

Subject: Agenda Item F (Information Item):
Summit Ridge Wind Farm, Request for Amendment 4 –
Continuation of Council’s Review of Draft Proposed Order and Comments for the
March 22, 2019 EFSC Meeting

Attachments: Attachment 1: Draft Proposed Order Comments (Electronic Access)
Attachment 2: ODOE Evaluation of Commenters Issue 3

INTRODUCTION

At the February 22, 2019 Energy Facility Siting Council (EFSC or Council) meeting in The Dalles, Oregon, Council initiated review of the Draft Proposed Order on Request for Amendment 4 of the Summit Ridge Wind Farm site certificate (draft proposed order). The Summit Ridge Wind Farm is an approved but not yet constructed wind energy generation facility, to be located within Wasco County, with up to 72 wind turbines and a maximum generating capacity of approximately 194.4 megawatts. Request for Amendment 4 (amendment request or RFA4) is the certificate holder’s third request to extend construction deadlines by an additional two years, and if approved, would extend the date of construction commencement from August 19, 2018 to August 19, 2020, and the date of construction completion from August 19, 2021 to August 19, 2023.

During the January 16, 2019 through February 22, 2019 draft proposed order comment period, the Oregon Department of Energy (Department) received approximately 1,000 comments in opposition of the amendment request. In accordance with Council rules on a request for amendment under the “Type A” review process, at the February 22, 2019 meeting, Council conducted a public hearing on the draft proposed order. Following the public hearing, the Council initiated review of the draft proposed order and comments received. However, based on the scope of comments received, Council’s review of the draft proposed order was continued to the next regularly scheduled Council meeting on March 22, 2019. At the February 22, 2019 Council meeting, the Department presented comments received prior to the meeting; however, the Department was not able to provide address all comments at that time due to (1) volume of comments received, and (2) because some comments were received immediately prior to the close of the record.

This staff report presents Council’s scope of review, and the Department’s analysis and recommendations in response to comments received that were not addressed during the February 22, 2019 Council meeting.

COUNCIL’S SCOPE OF REVIEW

For amendments requesting to extend construction deadlines, the Department and Council must evaluate whether there have been “changes in fact or law” since the site certificate or amended site certificate was issued to determine whether, based on changes in fact or law, the facility would continue to satisfy requirements of the Council standards and other applicable rules.¹ The Council has historically interpreted “changes in fact or law” as applying generally to any requested or proposed changes in facility design, or changes to the existing environment (e.g., changes within the applicable analysis areas related to land uses, habitat categorization, noise receptors, recreation areas, etc.), and regulatory changes, which could include a change to Council rules, statutes, or other applicable rules and statutes.

Following the evaluation of changes in fact or law, the Department and Council then may evaluate whether the facility continues to comply with all laws and Council standards applicable to the original application for site certificate (ASC).

DRAFT PROPOSED ORDER COMMENT REVIEW

Public Comments of Similar Scope

The Department received over 1,000 comments on the draft proposed order of similar scope (collectively referred to as “Comments of Similar Scope.”). All comments have been transmitted to Council for its review and consideration. In this staff report, the Department evaluates and responds to all substantive and specific issues raised by commenters that are within Council jurisdiction. The Comments of Similar Scope contained the same issues as raised by Smallwood, Commenters, and Gilbert. Specifically, those issues include: 1) need for the deadline extension; 2) reliance on outdated habitat and species surveys; 3) using best available science (technologies) to evaluate and mitigate potential impacts to (avian) species; 4) legitimacy of Department’s actions due to pending Oregon Supreme Court review of amendment rules; and, 5) significance of wind turbine visibility to the Deschutes River. These issues were discussed in the Department’s DPO presentation at the March 22, 2019 meeting. The Department refers Council to its evaluation included in the staff report to address the Comments of Similar Scope.

Shawn Smallwood (on behalf of Friends of the Columbia Gorge, Oregon Wild, Oregon Natural Desert Association, Central Oregon LandWatch, Audubon Society of Portland, East Cascades Audubon Society)

On behalf of Friends of the Columbia Gorge, Oregon Wild, Oregon Natural Desert Association, Central Oregon LandWatch, Audubon Society of Portland, and East Cascades Audubon Society, Dr. Shawn Smallwood submitted comments, which were represented as two issues.² The issues, as represented in summary, relate to 1) the suitability of the habitat assessment underlying the

¹ OAR 345-027-0075(2)(b)

² The comments of Friends of the Columbia Gorge, Oregon Wild, Oregon Natural Desert Association, Central Oregon LandWatch, Audubon Society of Portland, and East Cascades Audubon Society and Dr. Smallwood are referred to collectively through a reference to “Smallwood.”

amended Habitat Mitigation Plan, and 2) the need to update baseline surveys, project impact predictions, mitigation measures, and post-construction monitoring protocols. For clarification of the issues, the Department presents an evaluation of the two summarized issues as four separate sub-issues.

Smallwood Issue 1: Use Surveys Need to Be Conducted to Evaluate Habitat Loss from Avian Species Displacement and Inform Habitat Mitigation Requirements pursuant to WCLUDO Section 19.030.C.5

Smallwood's Issue 1 argues that the certificate holder's habitat assessment is inconsistent with Oregon Department of Fish and Wildlife's (ODFW) Oregon Administrative Rule (OAR) 635-415-0005(5) definition of "habitat," because it failed to assess habitat quality, or account for habitat loss from displacement; and, therefore would not comply with Wasco County Land Use Development Ordinance (WCLUDO) Section 19.030.C.5.³ Smallwood suggests that under WCLUDO Section 19.030.5, and consistent with OAR 635-415-0005(5), habitat quality should be evaluated based on "use-and-availability" studies designed to measure performance metrics (productivity, abundances, stability, and persistence). Then, the comment recommends that, based on the use and availability studies, the Habitat Mitigation Plan (HMP) must account for habitat quality impacts including habitat loss from avian use displacement, and individualized impacts to bird and bat species.

ODOE Evaluation of Smallwood Issue 1

As described in Section III.H. *Fish and Wildlife Habitat* of the draft proposed order, the certificate holder relied upon its 2009-10 habitat assessment that informed the ASC and all previously approved site certificate amendment requests. Based on review of the record, the methods utilized in the 2009-10 habitat assessment included a desktop analysis and field-based ground verification. The certificate holder's consultant, Northwest Wildlife Consultants, prepared the habitat assessment by first delineating habitat boundaries using GIS with 1-meter resolution orthophotographs overlaid with layers for topography, hydrology, and transportation. The desktop analysis was then field verified during three site visits conducted during peak flowering and nesting season (i.e. May, June).⁴ The certificate holder's consultant utilized habitat mapping to assess habitat quality consistent with ODFW's Habitat Mitigation Policy, which is based on habitat categorization, and established that habitat within the facility site boundary included Categories 2, 3, 4 and 6.

In 2013, ODFW conducted a mapping exercise for big game winter range habitat. ODFW policy determined that big game winter range land would be classified as Category 2 habitat, the second-highest quality habitat in the ODFW habitat classification. ODFW's 2013 big game winter range map, when compared to the facility site boundary, established that all habitat previously considered to be Category 3 and 4 would then be classified as Category 2 habitat. However, ODFW considers areas that are actively used for agricultural purposes to be Category 6 habitat,

³ OAR 635-415-0005 defines habitat as, "the physical and biological conditions within the geographic range of occurrence of a species, extending over time, that affect the welfare of the species or any sub-population or members of the species."

OAR 635-415-0005 defines habitat quality as, "the relative importance of a habitat with regard to its ability to influence species presence and support the life-cycle requirements of the fish and wildlife species that use it."

⁴ SRWASCDoc56. ASC Exhibit P.

even if located within ODFW's mapped Category 2 big game winter range. Category 6 habitat is the lowest quality habitat category, and does not require mitigation under ODFW's Fish and Wildlife Habitat Mitigation Policy. Therefore, the facility site boundary includes habitat quality associated with Category 2 and Category 6 habitat; the following assessment focuses on the certificate holder's mitigation for Category 2 habitat impacts, given that Category 6 habitat does not require mitigation.

For the Summit Ridge Wind Farm, the habitat assessment establishes that the majority of land within the site boundary is Category 2 habitat, which is the highest habitat categorization whereby construction may occur (no construction may occur in Category 1 habitat). Temporary and permanent impacts to Category 2 habitat require the highest level of mitigation (i.e. no net loss of either habitat quantity or quality, and a net benefit of habitat quantity or quality), which the draft HMP meets by establishing the size of the mitigation area to be obtained through an easement, prior to construction and based on final facility design. The draft HMP establishes that the mitigation area must contain at least 65 acres of Category 2 habitat, which would offset permanent impacts to approximately 25 acres, and temporary impacts to approximately 35 acres of habitat disturbance. Note that temporary impacts, when there is not a temporal loss (as is predominately the case for this facility), are only required to be mitigated through revegetation and not through habitat mitigation. In the case of the Summit Ridge Wind Farm, the certificate holder proposes to mitigate temporary impacts to Category 2 habitat through revegetation and compensatory mitigation, even though compensatory mitigation is not required.

The certificate holder's assessment of habitat quality is consistent with ODFW rules and the results of the assessment establish that the majority of the land within the site boundary is already classified as the highest quality habitat permissible for the siting of energy facilities, Category 2 habitat. To reiterate, active agriculture land is always considered to be Category 6 habitat, and ODFW policy encourages the siting of energy facilities within Category 6 habitat so as to minimize impacts to less disturbed native habitat.

While use-and-availability studies designed to measure habitat quality may be an acceptable method to evaluate habitat quality, it is not the required method – Council standards do not dictate any specific method that must be followed to conduct wildlife and habitat surveys, only that appropriate methods be discussed with ODFW. In response to Smallwood's comments on habitat loss from displacement, or impacts to air space used by avian species from the placement of wind turbines in potential use areas, the Council and ODFW evaluate habitat based on presence or absence of physical, terrestrial habitat that is important for a species rather than on the air space, or on the mortality of individual species that might use the air space. However, avian mortality is addressed through adoption of a Wildlife Monitoring and Mitigation Plan (WMMP), which is discussed in further detail within this staff Report.

After review, the Department has determined that the facts relied upon in the draft proposed order have not changed and remain valid. The Department recommends that the Council consider the previous habitat assessment to be sufficient to inform the draft HMP, and that additional use surveys are not required to satisfy WCLUDO 19.030.C.5. However, the Department intends to incorporate responses to these comments within the proposed order.

Smallwood Issue 2: WCLUDO 19.030.5 Requires Compliance with USFWS's Eagle Take Rule and USA Eagle Conservation Plan Guidance

Smallwood's Issue 2 suggests that, pursuant to WCLUDO 19.030.5, the certificate holder must provide information pertaining to the facility's potential impacts, and subsequent measures to avoid impacts, on all potential species of reasonable concern as identified by "any jurisdictional wildlife agency resource management plan." Smallwood interprets this statement to apply to the United States Fish and Wildlife Service's (USFWS) Eagle Take Rule and USA Eagle Conservation Plan Guidance.

Based on USFWS's 2013 USA Eagle Conservation Plan Guidance, Smallwood recommends two or more years of evaluation, which would include 40 hours of relative abundance or use surveys per station covering at least 30 percent of the facility's footprint. The results of these studies would then be used to predict bird and bat collision fatality impacts, and inform facility micrositing to avoid risks of injury to birds and bats from wind turbines. The issue further references a micrositing strategy, which Smallwood argues has not been considered, that includes mapping breeding sites, spacing of wind turbine (i.e. avoiding ridge saddles, breaks in slope), and shifting of wind turbine locations to avoid terrain or environmental conditions (e.g. copses of trees or ponds) heavily trafficked by flying birds and bats.

ODOE Evaluation of Smallwood Issue 2

As identified in Section III.E. *Land Use* of the draft proposed order, WCLUDO Section 19.030.5 is an applicable substantive criteria that the Summit Ridge Wind Farm must satisfy under the Council's Land Use standard. WCLUDO Section 19.030.5 requires a finding that the construction and operation of the facility would not cause a significant adverse impact to important or significant natural resources identified in the Wasco County Comprehensive Plan, WCLUDO or by "any jurisdictional wildlife agency resource management plan adopted and in effect on the date the application is submitted" [Emphasis added]. Further, WCLUDO Section 19.030.5 requires that monitoring and mitigation actions be determined appropriate by the County, ODFW, or other jurisdictional wildlife or natural resource agency. [Emphasis added]. The Department disagrees that WCLUDO's Section 19.030.5 reference to "any jurisdictional wildlife agency" was intended to apply to federal agencies and federal plans and considers it highly unlikely that the County intended to assume such vast authority, and questions whether the County (or the Council, in this case) even could legally assume such authority

While Smallwood's comment recommends "use and behavior" studies to inform potential fatality risk from wind turbine collision, the Department does not agree that WCLUDO Section 19.030.5 supports such requirement; WCLUDO Section 19.030.5 offers "biologically appropriate baseline surveys" as a mitigation option to reduce a potentially significant impact. As noted by Smallwood, collision risk was evaluated by the certificate holder through avian use surveys conducted in 2009-10. While Smallwood argues that the avian use surveys were not adequate, the Department notes that there is not a specific protocol that must be followed and that because OAR 345-021-0010(1)(p)(E) establishes that surveys conducted to evaluate use of habitat by species be based on an ODFW-approved protocol, that the methods used for the certificate holder's avian use surveys were previously determined to be acceptable by ODFW, ODOE, and EFSC during its review of the ASC for informing an evaluation of potential bird and bat fatality from wind turbine collision risk.

For the Summit Ridge Wind Farm, and all EFSC-wind facilities, fatality impacts are monitored and mitigated, if necessary, through the Wildlife Monitoring and Mitigation Plan (WMMP) by the certificate holder providing a benefit to the affected species in a form determined appropriate and acceptable by the Department, Council and ODFW. Council previously imposed Condition 10.5, which requires the certificate holder to implement a WMMP, as finalized and approved by the Department, in consultation with ODFW. The WMMP requires the completion of a two-year post construction fatality monitoring study, which includes a requirement to implement additional mitigation if fatality thresholds are exceeded. The WMMP also requires that the certificate holder coordinate collection of federally-listed endangered or threatened species and Migratory Bird Treaty Act protected avian species with the USFWS; and, obtain appropriate collection permits from ODFW and USFWS, if deemed necessary.

While Smallwood argues that micro-siting factors have not been considered, and should include mapping breeding sites, wind turbine spacing (i.e. avoiding ridge saddles, breaks in slope), and shifting of wind turbine locations to avoid terrain or environmental conditions (e.g. copses of trees or ponds) heavily trafficked by flying birds and bats, Council previously imposed Condition 10.7 which requires that, prior to construction, the certificate holder consider all micro-siting factors to inform its final facility design, and then to conduct a plant and wildlife investigation to inform its habitat assessment and final HMP. The Department intends to amend Condition 10.7 to clarify the scope of review of micro-siting factors in the proposed order.

Smallwood Issue 3 Cumulative Impact Assessment

Smallwood's Issue 3 asserts that cumulative impacts to bird and bat species must be assessed based on changes in circumstance. Referenced changes include the increase in wind energy facilities in the United States from 2009 to 2018, from 35,128 to 96,488 MW, and USFWS's 2013 Eagle Conservation Plan Guidance which acknowledges a significant cumulative impact to eagles from wind facilities.

ODOE Evaluation of Smallwood's Issue 3

Smallwood's Issue 3 does not reference a Council standard, or applicable substantive criteria, to support the request for a cumulative impact assessment that compares impacts to birds and bats arising from the facility, to national impacts arising from all wind facilities currently in operation within the United States. Neither the WCLUDO Section 19.030.5, nor any Council standard establishes a requirement for such requested cumulative assessment.

The Department does not consider this comment to necessitate changes in recommended findings or conditions in the proposed order.

Smallwood Issue 4 Post-Construction Monitoring and Mitigation for Bird and Bat Collision Fatalities

Smallwood's Issue 4 recommends modifications to the certificate holder's post-construction fatality monitoring study methods to account for sources of uncertainty, biases and methodological efficacy.

ODOE Evaluation of Smallwood's Issue 4

As described in Section III.H. *Fish and Wildlife Habitat* of the draft proposed order, the Council previously imposed Condition 10.5, which requires the certificate holder to implement a WMMP that requires a two-year post construction fatality monitoring study, according to a protocol including methods developed by a statistician.

While there may be other methods to conduct and assess bird and bat fatalities, such as those recommended by Smallwood, the Department, the Council, and ODFW have historically relied upon the methods established in the draft WMMP, which are statistically viable, and importantly, are used by all EFSC wind facilities across the region. Condition 10.5 requires that the WMMP be finalized prior to construction, which provides the certificate holder, the Department, and ODFW the opportunity to make recommendations on changes to study methods and protocols, if necessary.

In response to this comment, the Department intends to amend the draft WMMP, included as Attachment F of the draft proposed order, to trigger a review by the certificate holder, ODFW and the Department, of referenced protocols to determine if new methods may be better suited to evaluate fatality impacts at the time of survey implementation.

Smallwood Issue 5 Detection Surveys are Necessary to Inform Preconstruction Surveys

Smallwood Issue 5 recommends that Condition 10.7, which requires that the certificate holder conduct preconstruction plant and wildlife surveys to inform a final habitat assessment, be amended to clearly state the purpose and objective of the surveys. Smallwood further recommends that the certificate holder be required to conduct detection surveys, described as “surveys of sufficient rigor that absence determinations can be justified if no members of the target species are found,” to both inform and prioritize location of the Condition 10.7 preconstruction plant and wildlife surveys and inform compensatory mitigation.

ODOE Evaluation of Smallwood Issue 5

As presented in Attachment A Draft Amended Site Certificate of the draft proposed order, Council previously imposed Condition 10.13 requiring that, prior to construction, the certificate holder conduct field surveys for T&E species, which would be conducted in accordance with a specific protocol of sufficient rigor for T&E species, which the Department considers to be the detection surveys referred to by Smallwood Issue 5. The results of the surveys would be used to inform final facility design, restricted areas, and sufficiency of existing conditions to protect any State-sensitive and T&E species.

The Department agrees, though, that the objectives of Condition 10.7 could be clarified and intends to recommend the condition be further amended in the proposed order in response to this comment.

Friends of Columbia Gorge, Oregon Wild, Oregon Natural Desert Association, Central Oregon LandWatch, Audubon Society of Portland, East Cascades Audubon Society (collectively referred to as “Commenters”)

On behalf of Friends of the Columbia Gorge, Oregon Wild, Oregon Natural Desert Association, Central Oregon LandWatch, Audubon Society of Portland, and East Cascades Audubon Society (collectively referred to as “Commenters”), Nathan Baker and Doug Heiken submitted comments, which are addressed below.

Commenters Issue 1: Because the Request for Amendment was submitted pursuant to invalid rules, it cannot be processed and must be denied.

Commenters Issue 1 asserts that because Council’s OAR Chapter 345 Division 27 rules (adopted October 2017) are currently on appeal at the Oregon Supreme Court, the amendment request is invalid, and must be denied. Commenters further argue that, if the prior rules were applied, the amendment request would also fail to comply because the amendment request was not submitted 6 months prior to the construction deadline, and the amendment request failed to provide a demonstration of good cause, two criteria under the prior rules.

ODOE Evaluation of Commenters Issue 1

The Council’s OAR Chapter 345 Division 27 Amendment Rules were adopted by EFSC in October 2017 and are valid. While portions of the rules are being challenged in the Oregon Supreme Court, the Supreme Court has not issued a stay of the rules or any other injunction against using the rules. As such, the rules are valid and are applicable to the amendment request, as well as all other amendment requests pending with EFSC at this time. The prior rules were repealed in 2017, and are not applicable to the review of the RFA4.

Commenters Issue 2: Pattern has failed to adequately explain or demonstrate any need for the requested third round of two-year extensions

Commenters’ Issue 2 argues that the certificate holder failed to adequately demonstrate a need for the deadline extension, as the Commenters argue is required by OAR 345-027-0085(1), because evidence to substantiate the certificate holder’s assertion that additional time was necessary for marketing, negotiations, or procuring of letters of intent, was not provided within the RFA.

Commenter’s Issue 2 also references OAR 345-027-0085(5)(c), which establishes that the Council must consider the “number” of previously granted deadline extensions in determining whether to grant a deadline extension request. The arguments suggest that because the certificate holder did not explain why a previous statement of intent to commence construction prior to August 2016 was not honored, or explain why an extension of both the commencement and construction deadlines is necessary, that the certificate holder fails to demonstrate the reasons a deadline extension is requested, and therefore the Council should deny the request under OAR 345-027-0085(5)(c).

ODOE Evaluation of Commenters Issue 2

As noted in Commenters’ Issue 2, OAR 345-027-0085(1) requires the certificate holder to explain its “need” for the requested deadline extension. OAR 345-027-0085(5)(c) requires the Council to consider the “number” of previously granted deadline extensions. However, Council rules include no substantive review criteria for why the extension is needed and requested; or, how the number of previously approved deadline extensions should be evaluated.

Council is not required to find, and rules do not guide a finding, as to what constitutes an “acceptable” need for a timeline extension. If the Department were to determine that the certificate holder failed to meet the OAR 345 Division 27 information requirement to include an explanation of the need for the extension, then it would determine the amendment request to be incomplete and request further information during its completeness review.

As explained in Section III.A. *General Standard of Review* of the draft proposed order, the certificate holder provided an explanation of need in its request for a deadline extension, which includes that additional time is necessary to obtain a power purchase agreement and secure financing, and identified that Council previously granted three deadline extensions. In contrast to Commenters’ Issue 2, the certificate holder is not required to prove that financing and development activities have occurred, explain why a previous letter of intent was not honored, or justify why both the commencement and completion deadlines should be extended.

Relating to Council’s requirement to review of the “number” of extensions granted, the Council may deny a construction deadline extension if it were to provide a rationale as to why the “number” of requests is inappropriate. However, as with the certificate holder’s requirement to demonstrate “need” for an extension, there are no evaluative criteria to guide the Council in making a determination as to whether to approve or deny the time construction extension request based on the “number” of prior construction extension approvals.

The information required under OAR 345-027-0085(1) and (5)(c) was provided by the certificate holder; therefore, the Department recommends the Council consider the merits of the amendment request and the certificate holder’s ability to satisfy the requirements of Council standards and other applicable statutes, rules and ordinances

Commenters Issue 3: Pattern has failed to demonstrate compliance with the applicable rules and standards for the protection of wildlife, plants, and habitat.

Commenters’ Issue 3 argues that the amendment request fails to demonstrate compliance with the Council’s Fish and Wildlife Habitat (OAR 345-022-0060) and Threatened and Endangered Species (OAR 345-022-0070) standards, and WCLUDO Section 19.030.C.5 based on an assertion that current habitat surveys, mapping, and categorization were not completed; updated field surveys for wildlife and plants were not completed; and the latest science and technologies for avoidance and mitigation of impacts was not considered. To support Issue 3, Commenters provide arguments for each OAR Chapter 345 Division 21 requirement for Exhibit P and Q, which apply to the referenced Council standards, and the applicable substantive criteria contained in WCLUDO Section 19.030.C.5.

ODOE Evaluation of Commenters Issue 3

As presented in Attachment 2 of this staff report, the Department evaluated the merits of Commenters’ Issue 3 Division 21 requirement arguments. Commenters Issue 3 WCLUDO Section 19.030.C.5 arguments are substantially similar to Smallwood’s Issue 2 and is therefore evaluated and addressed in ODOE’s Evaluation of Smallwood Issue 2 above.

Commenters’ Issue 3 contests the validity and completeness of the literature reviews, and reliance on previous surveys to be sufficient for demonstrating compliance with the Council’s Fish and Wildlife Habitat and T&E Species standard. The Department considers that the literature review referenced in RFA4 included an evaluation of reasonably available sources

(2017 and 2018 versions of ODFW and ODA lists; 2018 ORBIC database), and that review of survey data from adjacent projects or wind facilities, as suggested by Commenters, is not required. The Department and ODFW have also not established a specific timeframe for which previous surveys are no longer considered valid, and relies upon, for amendments requesting to extend construction deadlines, the certificate holder's presentation of potential changes in land use or land cover to inform the necessity to conduct new surveys. In this case, the certificate holder most recently conducted Special-status plant and wildlife surveys in 2016, which are considered reasonably recent, and sufficient to evaluate compliance with Council's Fish and Wildlife Habitat and T&E Species standards.

Commenter's Issue 3 references potential impacts to migratory birds, need to evaluate relative abundance of avian and bat species, and a need to use the latest science and technologies for avoidance and mitigation of impacts. Council previously imposed Condition 10.5 which provides protection and mitigation to avian and bat species, including migratory birds, through implementation of the WMMP. While relative abundance may be a factor considered for evaluating habitat quality, it is not the required method. Moreover, habitat quality within the site boundary is already considered the highest quality for which facility components may be sited, requiring the highest level of compensatory mitigation. It is not clear to what science or technologies Commenters refer.

Based on the assessment presented in Attachment 2, and Commenters expressed concern related to the draft HMP, the Department considers that the draft HMP could be further amended at this time to clarify the scope of the enhancement options, monitoring schedule, and evaluation of enhancement action success, and intends to incorporate such clarity into the proposed order. The Department also intends to incorporate information on the record from prior EFSC preceding's for this facility to address concerns on the completeness of the information related to identification of species within the analysis area, potential impacts and existing conditions previously imposed to minimize potential impacts to species.

Commenters Issue 4: The Council must be provided with, and must consider, all written comments received on the record of the hearing before taking any action.

Commenters Issue 4 requests that, pursuant to OAR 345-027-0067(7) and -0071(1), copies of all comments received on the record of the draft proposed order be provided to Council in order to allow Council the opportunity to review all comments received. Commenters Issue 4 argue that as of February 20, 2019, Council had only been provided 28 of 892 comments.

ODOE Evaluation of Commenters Issue 4

On February 20, 2019, the Department provided Council copies of all distinct comments that had been received to date. On February 22, 2019 at 7:30 a.m., prior to the draft proposed order public hearing, the Department provided Council electronic access to a complete set of comments, which was again updated on February 25, 2019 based on all comments received through the close of the draft proposed order public hearing (which occurred at 11:51 a.m. on February 22, 2019), as posted to its project website. *All comments received on the record of the DPO have been transmitted to Council (emphasis added)*. Because of the volume and substance of the comments received, Council extended its review of the DPO and comments on the record of the DPO to the March 22, 2019 EFSC meeting.

Irene Gilbert (as an individual and on behalf of Friends of the Grande Ronde Valley)

On behalf of Friends of the Grande Ronde Valley, Ms. Gilbert submitted comments identifying 11 issues, which are evaluated below.⁵

Gilbert Comment 1

Gilbert's Comment 1 argues that recommended amended Condition 10.9, which establishes a determination of the quantity of water that may be withdrawn from a permit exempt well, that serves the Operations and Maintenance (O&M) building, is not consistent with ORS 469.310 (Policy) or the Council's General Standard of Review (OAR 345-022-0000), Land Use (OAR 345-022-0030), and Fish and Wildlife Habitat (OAR 345-022-0060) standards. Gilbert argues that the Department's recommended amended Condition 10.9, which would increase the allowable daily water use limit of the O&M building well from 5,000 to 15,000 gallons per day, is an incorrect application of the definitions of "domestic" and "industrial."

Issue 1 claims that while ORS 537.545(1)(d) establishes permit exemption for wells withdrawing up to 15,000 gallons per day for domestic purposes, that based on the dictionary definition, domestic water use can only apply to personal residential purposes and cannot apply to the facility's O&M building. Ms. Gilbert also asserts that, based on the County's website and an attachment, there is significant public concern regarding future water availability in Wasco County.

ODOE Evaluation of Gilbert Comment 1

As described in Section III.Q.3. *Water Rights* of the draft proposed order, water use by the facility's O&M building would be considered a "domestic" use and therefore the applicable permit exemption limit of 15,000 gallons per day should apply.

The amendment to Condition 10.9 was proposed by the Department, based on consultation with the Oregon Water Resources Department (OWRD). Based on inter-agency consultation, the permit exemption for well water use is specific to the *use* rather than *facility* (emphasis added). In other words, the O&M water use is not defined by the facility, rather it is defined by the actual use, which includes water for drinking, kitchen use, showers, and toilets by employees of the facility.

While Gilbert's Comment 1 expresses concern regarding the future of water availability within Wasco County, the Department relies upon the fact that a statutory limit of 15,000 gallons per day has been established as a daily use limit for which an OWRD-issued permit is not required, thereby establishing that the daily use is not a quantity expected to require agency review or impact assessment. The Department recommended that the condition be amended to maintain consistency with the regulatory interpretation from OWRD (i.e. 15,000 gallons per day limit applies to domestic water use).

The Department recommends additional clarification describing the basis for the recommended amended condition be presented in the proposed order.

⁵ The comments of Ms. Irene Gilbert, as an individual and on behalf of Friends of the Grande Ronde valley are referred to collectively through a reference to "Gilbert."

Gilbert Comment 2

Gilbert's Comment 2 argues that the facility would have significant and cumulative impacts on the Lower Deschutes Wild and Scenic River, and would therefore not satisfy the requirements of the Council's Protected Areas (OAR 345-022-0040) and Cumulative Effects Standards for Wind Energy Facilities (OAR 345-024-0015). Ms. Gilbert presents four issues under Comment 2, evaluated as Comment 2a, 2b, 2c and 2d below.

Gilbert Comment 2a

Gilbert's Comment 2a argues that the weight and vibration of wind turbines, and wind turbine pads, is likely to have negative impacts on the Deschutes River and fish habitat by reducing groundwater flow. To support her arguments, Gilbert offers attachments (4) *Wind Farms and Groundwater Impacts: A Guide to EIA and Planning Considerations*, Version 1.1, Department of the Environment, Northern Ireland Environment Agency (April 2015); *Groundwater Level Declines in the Columbia River Basal Ground and their Relationship to Mechanisms for Groundwater Recharge: A Conceptual Groundwater System Model*. Columbia Basin Ground Water Management Areas of Adams, Franklin, Grant, and Lincoln Counties, GSI Water Solutions, Inc. (June 2009); *Columbia Plateau Groundwater Availability Study*, USGS: Washington Water Science Center. Gilbert recommends that the certificate holder be required to conduct long-term groundwater monitoring, and to evaluate potential groundwater impacts from facility operation based on an evaluation of impacts in areas outside of the site boundary.

ODOE Evaluation of Gilbert Comment 2a

Gilbert's Comment 2a does not specifically identify a Council standard; however, the Department construes the intended reference to include the Council's Protected Areas standard (OAR 345-022-0040), as identified in the introduction of Comment 2. As described in Section III.F. *Protected Areas* of the draft proposed order, the standard requires an evaluation of potential impacts during facility construction and operation including impacts to protected areas from facility-related water use, and does not specifically require an evaluation of potential impacts to groundwater resources.

Nonetheless, if there were to be an applicable Council standard, statute or ordinance requiring a groundwater impact assessment, the Department does not consider that the provided reference materials establish a basis to support the likelihood of a potential impact. One of the referenced materials included a guidance document developed by Northern Ireland Environment Agency for wind facility planning. The Department acknowledges that this document identifies "potential impacts" from wind farms to groundwater as including "possible changes to groundwater distribution" and a "reduction in groundwater storage." However, the document does not substantiate claims that wind turbines affect groundwater. Because impact to groundwater is not an evaluation required under the Council's Protected Areas standard, and because the basis for concluding that wind turbine operation could result in groundwater impacts is not clear, or scientifically supported by the reference materials provided, the Department does not consider this comment to necessitate a change in recommended findings or conditions included in the proposed order.

Gilbert Comment 2b

Gilbert's Comment 2b asserts that the facility would have a significant adverse visual impact on the Wild and Scenic Deschutes River and therefore would not meet the requirements of the Council's Protected Areas (OAR 345-022-0040) standard, nor Goal 5 and 6 of the Wasco County Comprehensive Plan (WCCP) under the Land Use (OAR 345-022-0030) standard.

Gilbert states that due to intermittent visibility of wind turbines and wind turbine lighting for over 20 miles of the Wild and Scenic Deschutes River, visual impacts would be significant. Gilbert further argues that the certificate holder has not provided sufficient evidence to establish that the level of visual impacts to the resource and users of the resource would not be significant. Gilbert provides copies of comments provided on the record of previous EFSC proceedings for the facility and questions Council's previous findings that relied, in part, on the fact that wind turbine visibility would be limited to areas considered generally inaccessible, where it is argued that access is an irrelevant consideration to a river designated "wild and scenic."

ODOE Evaluation of Gilbert Comment 2b

Protected Areas

As described in Section III.F. *Protected Areas* of the draft proposed order, the Council previously found that the facility would not result in a significant adverse visual impact to the Lower Deschutes River because they would not dominate views, would be subordinate to the landscape, and would otherwise be visible from areas that are considered to be generally inaccessible. While Gilbert argues that there is not a preponderance of evidence to support a finding concluding that visual impacts of the facility would not result in a significant adverse impact to the river, she has not identified changes in fact or law that would impact the Council's previous findings. Rather, her argument simply contests Council's previous reasoning and findings. Because there have been no changes in fact or law, the Department does not intend to address this comment further in the proposed order.

For Council's reference, in the ASC, facility design was reduced from 167 to 87 wind turbines, based on its assessment that "several turbines may result in adverse impacts." (ASC Exhibit R, p. 2). As such, the facility contains fewer than half of the turbines that were initially proposed. Initial visual simulations were developed at 5 different locations along the Deschutes River. These viewpoints were (1) an area near the Game Commission Camp; (2) Bedsprings; (3) Snake in the box; (4) Box Elder Canyon; (5) Cedar Island. These viewpoint locations were selected "to reflect 'worst case' conditions when viewed from important or significant scenic and aesthetic resources... these viewpoints include locations with relatively high use (based on ease of access and presence of developed recreational facilities) and position from which turbines would be most visible." (ASC Exhibit R, p. 2) The visibility analysis stated that "portions of multiple turbines would be visible and some highly visible along the Deschutes River generally between Macks Canyon and Game Commission Camp," and that otherwise turbines would be "intermittently" visible from various locations along the Deschutes River.

Visual simulations from RFA2 indicate that the “worst case” scenario⁶ from Game Commission Camp is 1 turbine, which would be barely visible;⁷ from Bedsprings is 3 turbines, of which 1 turbine would be barely visible;⁸ from Snake-in-the-box is 5 turbines, of which 1 would be barely visible;⁹ and no turbines would be visible from the Box Elder Canyon or Cedar Island. As stated above, because there are no changes in fact or law, including no changes in facility design, the Department recommends that the Council continue to find that facility meets the Protected Areas and Land Use standards.

Land Use

In Comment 2b, Gilbert indicates that visual impacts at the Lower Deschutes River Canyon are protected under Goal 5 and Goal 6 of the WCCP. Applicable WCCP goals and policies are addressed under the Council’s Land Use standard. As explained in the Final Order on Request for Amendment 2 (final order), and WCCP Goal 5, the Policy provides a broad directive for the Deschutes and John Day River Scenic Waterways to be maintained and protected as natural and open spaces. As stated in the final order, Council previously found that the facility would not be located within the boundary of scenic waterways and therefore would be consistent with WCCP Goal 5, Policy 5. Even if Goal 5, Policy 5 were broadly interpreted to relate to visual impacts of surrounding development on the waterways, the policy does not require a specific level of protection of scenic views.

As explained in the final order, WCCP Goal 6, Policy 1 encourages land uses and management practices that preserve air, water, and land resources. First, the policy appears to be a directive to the county to encourage the identified land use and management practices through the land use code. More importantly, the policy does not address land uses and activities in or near specific areas (e.g., wild or scenic rivers) and does not mention the Lower Deschutes River Canyon. In the final order, the Council previously found that, subject to compliance with the Revegetation and Weed Control Plan, the facility would be consistent with this goal.

The Department agrees with Ms. Gilbert that the WCCP’s Goal 5 and 6 apply to the facility; however, they do not establish or support Ms. Gilbert’s claim that because of wind turbine visibility at specific locations along the Deschutes Wild and Scenic River, the facility would not be consistent with these goals. The Department does not consider this comment to necessitate a change in recommended findings or conditions included in the proposed order.

Gilbert Comment 2c

Gilbert’s Comment 2c expresses concern that the facility would result in significant impacts to wildlife (specifically, raptors [golden eagles]) and argues that the Department’s recommended amendment to Condition 10.7, which specifies that the pre-construction wildlife and plant surveys extend 400-feet from ground disturbing activities, is inconsistent with the 5 mile and ½-mile study area boundaries for the Council’s T&E Species and Fish and Wildlife Habitat standards as defined in OAR 345-001-0010(59). She further argues that the survey area defined in the

⁶ Note that the simulations provided an assessment of the number of turbines, and scope of turbine visibility, that would result from the proposed Scenario B and Scenario C layouts. The Department is assuming a “worst case” estimate by combining each “worst case” view that would arise from the discrete layouts.

⁷ Design scenario B; Figure 7

⁸ Design scenario B; Figure 8

⁹ Design scenario C; Figure 9

recommended amended Condition 10.7 is insufficient for evaluating potential impacts to raptors from wind turbine collision and fatality risk.

Gilbert also argues that the pre-construction raptor nest survey protocol, which establishes a survey area extending ½-mile from the site boundary, is inadequate to evaluate the area of impact to golden eagles and seems to suggest that the raptor nest survey area needs to extend 10 miles from the site boundary to adequately evaluate potential impacts under the Council's Protected Areas and Cumulative Effects Standard for Wind Facilities.

ODOE Evaluation of Gilbert Comment 2c

As explained in Section III.H. *Fish and Wildlife Habitat* of the draft proposed order, Condition 10.7 requires that, prior to construction, the certificate holder must conduct a plant and wildlife investigation to inform a final habitat assessment. The Department recommended that the condition be amended to include a survey area boundary extending 400-feet from ground-disturbing activities, consistent with the boundaries of the initial special status plant surveys conducted to inform the ASC. While Ms. Gilbert argues that the survey area, as specified in the amended condition, is not consistent with the OAR 345-001-0010(59) study area definition, this definition does not establish the area to be included in site specific surveys, only the extent for which potential impacts must be evaluated. In this instance, the certificate holder conducted a literature review for the area included within the study area to identify any recorded species; this information was subsequently used to inform an evaluation of the likelihood of presence of species within the site boundary, and then to determine the types of T&E and State-sensitive species surveys to be conducted.

While Gilbert disagrees with the survey area specified in the recommended amended Condition 10.7, her comments are specific to potential impacts to raptors from wind turbine collision and fatality risk. The scope of Condition 10.7 is not intended to address potential impacts to raptors from wind turbine collision and fatality risk, as Condition 10.7 applies to a final habitat assessment.

In response to Gilbert's arguments that the raptor nest survey area extend 10 miles from the site boundary, versus ½-mile as required under Condition 10.13, to adequately evaluate potential impacts to raptors from wind turbine collision and fatality risk under the Council's Cumulative Effects Standard for Wind Facilities, the Department notes Condition 10.13 is not intended to address potential impacts to raptors from wind turbine collision and fatality risk, as it is used to inform Condition 10.15, which protects State-sensitive avian species during nesting and breeding seasons by imposing a buffer distance from construction activities to active nests during sensitive seasons.

As described in RFA4, the certificate holder describes that eagle use surveys are currently being performed to support potential federal permitting and guidance documents. To the extent that Gilbert's comments are intended to apply USFWS's guidance for evaluating potential impacts to eagles from wind facilities, the Department refers to the certificate holder's representation that eagle surveys and review of federal requirements are ongoing; the certificate holder is obligated to comply with federal requirements, and in this instance, with USFWS's Eagle Take Rule, which is outside of Council jurisdiction. The Department does not consider this comment to necessitate a change in recommended findings or conditions included in the proposed order.

Gilbert Comment 2d

Gilbert's Comment 2d expresses concern that the facility would result in significant adverse impacts to the recreational opportunities at the Lower Deschutes River due to visibility of wind turbines, turbine lighting, and noise. She further argues that there is not sufficient evidence on the record to support a finding that the "interests" of the citizens that utilize the Lower Deschutes River would not be significantly and negatively impacted.

Ms. Gilbert suggests that the noise modeling conducted for the facility does not account for height or impacts from noise magnification due to topography; and argues that there does not appear to be a requirement that the certificate holder conduct noise monitoring to confirm compliance with noise limits.

ODOE Evaluation of Gilbert Comment 2d

As described in Section III.Q.1. *Noise Control Regulations* of the draft proposed order, the noise analysis utilized the Computer Aided Noise Abatement (CadnaA), version 3.72, 2009 software program, to predict peak noise levels during facility operation. The program includes sound propagation factors adopted from International Organization for Standardization's (ISO) 9613 "Attenuation of Sound during Propagation Outdoors" to account for distance, atmosphere and ground attenuation. Atmospheric absorption was computed in accordance with ISO 9613-1 and ISO 9613-2 Simple Ground Procedure, which accounts for noise source height and distance.

Council standards and DEQ's Noise Control Regulation do not specify a specific software modeling program or method that must be utilized to evaluate noise impacts. The certificate holder's noise analysis relies upon a noise modeling software considered an industry standard noise measurement tool. Moreover, Council previously imposed Condition 12.4 that requires the certificate holder conduct a pre-construction noise analysis demonstrating that, based on final facility design, the certificate holder would comply with DEQ's noise rules. In the draft proposed order, the Department recommended that Council amend Condition 12.4 to require operational noise monitoring if the final noise analysis indicates that the certificate holder would be within 1 dBA of the applicable DEQ noise limits.

In response to Gilbert's comments related to potential visual and noise impacts to the recreational opportunities at the Lower Deschutes River, no additional facts or issues have been provided in support of the position. It is not clear how Gilbert's comments relate to evidence required to evaluate the significance of the impacts on the "interests" of the users, as this is not part of the impact assessment required under the Council's Recreation standard. The Department does not consider this comment to necessitate a change in recommended findings or conditions included in the proposed order.

Gilbert Comment 3

Gilbert's Comment 3 expresses concern that the facility Weed Management Plan would not preclude the spread of weeds into the surrounding area (including Deschutes scenic waterway, farmland, and wildlife habitat) and is therefore not consistent with ORS 569.390. Ms. Gilbert argues that the facility Weed Management Plan should require at least two monitoring and treatments per year, based on the expectation that weed development and seed cycles occur

every 3 months; weed monitoring be required for the life of the facility; and consistent with ORS 569.445, a requirement that no machinery would use public roads prior to being cleaned.

ODOE Evaluation of Gilbert Comment 3

ORS 570.500 through ORS 570.575 establish weed management requirements. The Department does not agree that the statutes establishes specific requirements or schedules for monitoring and treatment of listed noxious weeds, as specified by Gilbert. However, the Department agrees that, consistent with ORS 569.390 and -445, weed monitoring should be required for the life of the facility and equipment washing should be required prior to entering and exiting the facility site. The Department intends to amend the draft Revegetation and Weed Control Plan, to be provided as an attachment to the proposed order, in response to this comment.

Gilbert Comment 4

Gilbert's Comment 4 suggests that siting of wind turbines within bald and golden eagle habitat boundaries, and allowing raptor nest surveys areas to be limited to ½-mile from the site boundary, fails to protect federally protected species (from injury) and its habitat and is required under ORS 469.501(1)(e) and 183.332; and the Council's Fish and Wildlife Habitat standard (OAR 345-022-0060) and Cumulative Effects Standard for Wind Facilities (OAR 345-024-0015(4)).

ODOE Evaluation of Gilbert Comment 4

As described in Section III.H. *Fish and Wildlife Habitat* of the draft proposed order, Council previously imposed Condition 10.13 and 10.14 requiring that, prior to construction, the certificate holder conduct field surveys for State-listed T&E species and raptor nests. If a State-listed T&E species is identified during the pre-construction surveys, the certificate holder would not be permitted to site facility components in or near those areas.

While in 2013 the USFWS recommended that a larger area, extending up to 10 miles from the facility, be assessed and the information be utilized to inform potential fatality impacts, these recommendations are part of a federal guidance document, which has not been adopted by ODFW or Council. Compliance with federal regulations is the responsibility of the certificate holder, and is outside of EFSC jurisdiction. The Department does not consider this comment to necessitate a change in recommended findings or conditions included in the proposed order.

Gilbert Comment 5

Gilbert's Comment 5 suggests that the Department's recommended amended Condition 5.5, which would remove the restriction that the facility generating capacity be limited to 194.4 MW, would be inconsistent with OAR 345-025-0006(3) and ORS 469.407.

ODOE Evaluation of Ms. Gilbert Comment 5

OAR 345-025-0006(3) is a mandatory condition included in all site certificate and requires that the certificate holder design, construct and operate the facility substantially as described in its ASC; and in compliance with other state permit requirements and any other applicable requirements. Removal of the generating capacity limitation would not, in any way, absolve the

certificate holder from its obligation to meet OAR 345-025-0006(3). ORS 469.407 is not applicable as it applies to base load gas plants.¹⁰

Gilbert Comment 6

Gilbert's Comment 6 argues that the certificate holder's methodology for mitigating Category 2 habitat, designated Category 2 because of elk winter range, must be based on a 2:1 ratio to be consistent with OAR 345-022-0060 and OAR 635-415-0025.

ODOE Evaluation of Gilbert Comment 6

As described in Section III.H. *Fish and Wildlife Habitat* of the draft proposed order, the certificate holder's methodology for mitigating Category 2 habitat located within ODFW's mapped Big Game Winter Range is based on securing, within a conservation easement, more than 1 acre of similar quality habitat for every 1 acre permanently impacted. The certificate holder also proposes to include, within its conservation easement, 1 acre of similar quality habitat for every 1 acre temporarily impacted, which would also be restored during required revegetation activities. This approach satisfies ODFW's mitigation goal for Category 2 impacts of no net loss of either habitat quantity or quality, and provision of a net benefit of habitat quantity or quality. Neither the ODFW Mitigation Policy nor the EFSC Fish and Wildlife Habitat standard prescribe a specific methodology or approach for meeting the habitat mitigation goal.

The certificate holder's proposed methodology for mitigating temporary and permanent habitat impacts has not changed in RFA4; and, Gilbert's Comment 6 does not present any changes in fact or law that would impact Council's previous finding of compliance. The Department intends to address this comment in the proposed order, but does not consider changes to findings or conditions necessary.

Gilbert Comment 7

Gilbert's Comment 7 argues that, based on the site boundary, new or substantially modified roads required to support facility construction and operation would be needed and have not been included in the site certificate and therefore the Council's General Standard of Review (OAR 345-022-0000) and all other OAR Chapter 345 Division 22 would not be satisfied.

ODOE Evaluation of Gilbert Comment 7

As described in Section I.C. *Description of Approved Facility Site Location*, the site boundary, by definition, includes the perimeter of the site of the energy facility, its related or supporting facilities, all temporary laydown and staging areas and all corridors and micrositing corridors. For this facility, the site boundary and approved micrositing corridor extends 1,300-feet from facility components. Once issued, the site certificate is a binding, contractual agreement between the certificate holder and the State of Oregon, which restricts construction activities to areas within the site boundary.

¹⁰ ORS 469.407(1) states: "A recipient may by amendment of its application for a site certificate or by amendment of its site certificate increase the capacity of the facility if the Energy Facility Siting Council finds that..." "Recipient" is defined at ORS 469.407(3)(a) as: "Recipient" means any base load gas plant, as defined in ORS 469.503, determined by the council to have the lowest net monetized air emissions among the applicants participating in a contested case proceeding."

If in order to serve the construction or operational needs of the energy facility, or related or supporting facilities, the certificate holder intends to substantially modify an existing road or construct a new road and which is considered a related or supporting facility, the certificate holder must submit and receive Council approval of an amendment to the site certificate prior to the modification or construction.

Gilbert Comment 8

Gilbert's Comment 8 argues that Condition 10.5, which requires that the certificate holder implement a final, approved WMMP, fails to comply with ORS 469.401 because it does not require fatality monitoring, nest surveys or groundwater monitoring for the life of the facility.

ODOE Evaluation of Gilbert Comment 8

As described in Section III.H. *Fish and Wildlife Habitat* of the draft proposed order, Condition 10.5 requires implementation of a final WMMP, as approved by the Department in consultation with ODFW. The draft WMMP specifies that the certificate holder conduct a two-year post construction fatality monitoring study; and, short- and long-term raptor nest monitoring for the life of the facility. While referenced by Gilbert Comment 8, ORS 469.401(2) establishes that site certificates contain conditions to ensure compliance with Council standards, statutes, and rules; the statute does not establish or prescribe monitoring. The WMMP is consistent with other WMMPs implemented at EFSC-approved wind energy facilities in the region.

Gilbert Comment 9

Ms. Gilbert's Comment 9 expresses concern regarding the Department's recommended amended Condition 10.12, which provides a variance option to lift the construction activity seasonal restriction, December 1 through April 15, imposed to limited potential impacts to big game.

ODOE Evaluation of Gilbert Comment 9

As described in Section III.H. *Fish and Wildlife Habitat* of the draft proposed order, the recommended amended Condition 10.12 would allow the certificate holder to request Department approval to lift the seasonal restriction on construction activities in big game winter range. The request would need to include justification for lifting the restriction, which would include any actions that it would take to avoid, minimize, or mitigate impacts to big game habitat within the area. The Department would be obligated to consult with ODFW on the request, prior to approving or denying such a request. If the certificate holder is capable of demonstrating that construction would not result in any impacts to big game wildlife, then the purposes of the condition are satisfied and the certificate holder should not be arbitrarily constrained from constructing the facility, if the evidence demonstrates that doing so would not result in any impacts.

Gilbert Comment 10

Gilbert's Comment 10 argues that pre-construction surveys of 500 feet fail to comply with the Council's Fish and Wildlife Habitat (OAR 345-022-0060) and Threatened and Endangered Species (OAR 345-022-0070) standards.

ODOE Evaluation of Gilbert Comment 10

As described in Section III.H. *Fish and Wildlife Habitat* of the draft proposed order, the certificate holder conducted pre-construction surveys within 500-feet of potential ground disturbing activities in 2016 to inform Condition 10.13; the survey protocol was pre-approved by ODFW. While Ms. Gilbert argues that the survey area was not sufficient to meet Council's Fish and Wildlife Habitat and T&E Species standards, she provides no evidence or supporting arguments to indicate why the surveys were inadequate.

Gilbert Comment 11

Gilbert's Comment 11 argues that Council's previous approval of a variance to a WCLUDO setback requirement fails to comply with the Council's Public Health and Safety Standards for Wind Facilities Standard (OAR 345-024-0010). Gilbert further argues that the certificate holder failed to address the hazards associated with ice throw.

ODOE Evaluation of Gilbert Comment 11

Council previously approved a variance to a setback from roads to turbines, for 17 turbines. WCLUDO Section 19.030 requires a setback of 1.5 times the blade tip height to county roads; the approved variance authorizes a lesser setback of 1.1 times the blade tip height to county roads. The Department notes that the purpose of this County provision is to ensure that if the turbine tower were to fail, that the collapsed turbine would not strike a County road. The setback was never intended to avoid risk from potential blade or ice throw events.

As described in Section III.P.1. *Public Health and Safety Standards for Wind Energy Facilities*, blade and ice throw is a potential risk to public health and safety during wind facility operation. However, the standard requires that Council evaluate a certificate holder's ability to design, construct and operate the facility to prevent structural failure of the tower or blades and to provide sufficient safety devices to warn of failure; it does not establish a requirement to eliminate any potential risk from events such as a blade or ice throw, nor does it establish a specific setback distance that would eliminate such risk.

In the draft proposed order, the Department recommended Condition 7.5 be amended to require that the certificate holder receive approval of an operational and safety monitoring program, conduct regular blade inspections and maintenance, and report a blade throw incident and provide a report to the Department, which would require an analysis of the incident, and further compliance review. Furthermore, existing Condition 7.6 requires the certificate holder to install and maintain self-monitoring devices, linked to sensors, which would alert operators to potentially dangerous conditions. Condition 7.6 is specifically developed to address the risk associated with ice throw or blade failure. If the software detects abnormal vibrations that would suggest that ice has accumulated on a blade, then the turbine would automatically shut down.

Based on the above analysis, the Department does not agree that the Council's previous approval of the setback variance for 17 wind turbines fails to comply with the Council's Public Health and Safety Standard for Wind Facilities.

Attachment 1: Draft Proposed Order Comments

Available per hyperlink: <https://www.oregon.gov/energy/facilities-safety/facilities/Pages/SRW.aspx>

Attachment 2: ODOE Evaluation of Commenters Issue 3

Commenters Issue 3 – Review of Exhibit P Requirements

OAR Reference	OAR Requirement	Issue	ODOE Response
345-021-0010(1)(p)	Information about the fish and wildlife habitat and the fish and wildlife species, other than the species addressed in subsection (q) that could be affected by the proposed facility, providing evidence to support a finding by the Council as required by OAR 345-022-0060. The applicant shall include:	<p>Certificate holder failed to provide current, accurate information about all fish and wildlife species and habitat that could be affected by the facility (identifies specific special status fish and wildlife species not identified in RFA4)</p> <p>Suggests that information about ALL species needs to be provided, not just information on State listed species and argues Table 2 is deficient because it only includes ODFW-listed State Sensitive species</p> <p>Without current, complete information about the presence, distributions and relative abundance of all fish and wildlife species, habitat categorization and suitability of habitat cannot be fully assessed</p>	<p>Additional species referenced by FOCG were identified previously in ASC – the Department will include updated table in proposed order</p> <p>Department considers the name of RFA4 Table 2 misleading; RFA4 Table 2 includes several species not ODFW listed (e.g. bald eagle, golden eagle). OAR 345-021-0010(1)(p)(D) refers to State Sensitive Species to establish the species that could impact habitat designation and therefore those that should be identified.</p> <p>The Department does not agree; habitat within the site boundary has been designated Category 2, the highest quality permissible for siting facility components.</p>
345-021-0010(1)(p)(A)	A description of biological and botanical surveys performed that support the information in this exhibit, including a discussion of the timing and scope of each survey	Fails to provide details about specific species observations, type of survey conducted, portion of project species was observed or any information about scope of each survey	Proposed order to include description of biological and botanical surveys performed and details about observations, protocols, and location
345-021-0010(1)(p)(B)	Identification of all fish and wildlife habitat in the analysis area, classified by the general fish and wildlife habitat categories as set forth in OAR 635-415-0025 and the sage-grouse specific habitats described in the Greater Sage-Grouse Conservation Strategy for Oregon at OAR 635-140-0000 through -0025 (core, low density, and general habitats), and a description of the characteristics and condition of that habitat in the analysis area, including a table of the areas of permanent disturbance and temporary disturbance (in acres) in each habitat category and subtype	2009 desktop habitat categorization is not sufficient for evaluating impacts on habitat	The desktop habitat categorization including review of GIS data and field visits. Habitat category within the site boundary is already designated as the highest quality habitat where facility impacts are permissible
345-021-0010(1)(p)(C)	A map showing the locations of the habitat identified in (B).	Habitat maps are deficient because they are not based on field surveys	There is not a specific protocol for habitat mapping; ODFW and ODOE consider habitat maps provided sufficient
345-021-0010(1)(p)(D)	Based on consultation with the Oregon Department of Fish and Wildlife (ODFW) and appropriate field study and literature review, identification of all State Sensitive Species that might be present in the analysis area and a discussion of any site-specific issues of concern to ODFW.	<p>Fails to provide evidence that consultation with ODFW occurred in 2018/19 and is needed to identify site-specific issues of concern</p> <p>Claims field study and literature review are insufficient</p>	Department coordinated and consulted with ODFW during RFA4 review to obtain comments about any site-specific issues. None were identified.

Commenters Issue 3 – Review of Exhibit P Requirements

OAR Reference	OAR Requirement	Issue	ODOE Response
			<p>Department considers the literature review described in RFA4 to be sufficient as it included review of USFWS, ODFW, and ORBIC databases which are reasonably available sources. The certificate holder is not required to evaluate results of surveys from other wind facilities</p> <p>Field studies were done – and will be completed again prior to construction (Condition 10.7, 10.13, and 10.14)</p>
345-021-0010(1)(p)(E)	A baseline survey of the use of habitat in the analysis area by species identified in (D) performed according to a protocol approved by the Department and ODFW.	Avian surveys conducted in 2009 and 2010 are outdated; baseline surveys of use of habitat not provided (must provide information about relative prevalence, location of detection, seasons detected)	OAR 345-021-0010(1)(P)(E) requires a baseline, or, initial survey of the use of habitat. The 2009-10 use surveys represent an initial survey conducted to satisfy the requirement. ODFW has not requested or recommended new use surveys to establish a new baseline, based on the fact that there have not been significant land use changes within the analysis area that would warrant updated baseline surveys
345-021-0010(1)(p)(F)	A description of the nature, extent and duration of potential adverse impacts on the habitat identified in (B) and species identified in (D) that could result from construction, operation and retirement of the proposed facility.	<p>Requirement is ignored</p> <p>Fails to disclose which season(s) each migratory bird and bat species has been documented at the site, and the relative abundance of each species at the site</p>	<p>Information about the nature, extent and duration was provided in ASC Exhibit P and will be incorporated into the proposed order</p> <p>Evaluation of relative abundance of each migratory bird and bat species is not required under the Council’s F&W Habitat standard</p>

Commenters Issue 3 – Review of Exhibit P Requirements			
OAR Reference	OAR Requirement	Issue	ODOE Response
345-021-0010(1)(p)(G)	A description of any measures proposed by the applicant to avoid, reduce, or mitigate the potential adverse impacts described in (F) in accordance with the general fish and wildlife habitat mitigation goals and standards described in OAR 635-415-0025... and a discussion of how the proposed measures would achieve those goals and requirements.	<p>Because Pattern has failed to update its data and analyses to reflect current conditions and best available science and technologies, there are no assurances that the facility continues to comply with the applicable rules and standards.</p> <p>Habitat Mitigation Plan fails to include binding provisions requiring Pattern to acquire the legal rights to ensure permanent protection for the proposed Habitat Mitigation Area, it fails to incorporate state standards for protecting habitat in any binding, meaningful way, it fails to prohibit cattle grazing, and it defers consultation with and review by ODFW of the proposed mitigation measures until a future, unspecified date.</p> <p>There is no evidence as to whether the current version of the Draft Habitat Mitigation Plan has been reviewed or approved by ODFW. There is no indication as to ODFW's current conclusions as to whether the proposed mitigation parcels (and the Draft Habitat Mitigation Plan) are satisfactory to ODFW.</p>	<p>Council previously imposed conditions requiring re-evaluation of conditions prior to construction (10.7, 10.13, and 10.14). Neither Council standard nor ODFW contain specific protocols for assessing habitat quality or use of habitat</p> <p>Condition 10.4 requires that the certificate holder acquire the legal right to create, enhance maintain and protect a habitat mitigation area; and provide a habitat assessment of the mitigation area to confirm it contains sufficient habitat quantity and quality to meet ODFW's habitat mitigation goals for impacts to Category 2 habitat</p> <p>The draft HMP identifies that modifications of livestock grazing practices may be an enhancement option employed</p> <p>The draft HMP includes proposed enhancement options. The specificity (i.e. methods and schedule) of the options will be determined during finalization; however, the Department will amend the draft HMP to provide additional clarity on enhancement options and expectations to be verified in the final HMP</p> <p>The Department discussed in detail the draft HMP with ODFW.</p>
345-021-0010(1)(p)(H)	A description of the applicant's proposed monitoring plans to evaluate the success of the measures described in (G).	Draft Habitat Mitigation Plan (2019), Pattern has failed to include specific and binding monitoring requirements,	The Department agrees and will include additional specificity in the draft HMP on success criteria, monitoring and reporting

Commenters Issue 3 – Review of Exhibit P Requirements			
OAR Reference	OAR Requirement	Issue	ODOE Response
		reporting requirements, and success criteria, instead supplying vague and general statements that the “monitoring protocol[s]” and “details of monitoring time frames and success criteria will be designed after the final site is selected	

Commenters Issue 3 – Review of Exhibit Q Requirements			
OAR Reference	OAR Requirement	Issue	ODOE Response
345-021-0010(1)(q)(A)	Based on appropriate literature and field study, identification of all threatened or endangered species listed under ORS 496.172(2) and ORS 564.105(2) that may be affected by the proposed facility.	There is no evidence that Pattern has conducted any current field surveys of the project site, nor any evidence that Pattern has reviewed any other surveys in the vicinity, or by other nearby wind projects.	<p>The certificate holder conducted a literature review of ODFW and ODA’s T&E lists; the literature review is not required to evaluate surveys results of nearby projects</p> <p>The Department considered the surveys conducted in 2016, conducted at the time for pre-construction compliance for Conditions 10.13 and 10.14, to be reasonably recent and to satisfy the field survey requirement. There is not a timeframe for which the Department and ODFW no longer consider survey data accurate, unless specific to a T&E species protocol. The Department and ODFW rely on the changes in landscape that could result in significantly varying habitat or habitat use – which in this case occurred, but from wildlife which results in initial degradation and then potential uplift. If potential uplift occurs, these changes will be evaluated during pre-construction.</p>
345-021-0010(1)(q)(B)	For each species identified under (A), a description of the nature, extent, locations and timing of its occurrence in the analysis area and how the facility might adversely affect it	<p>Failed to update any wildlife or plant surveys</p> <p>Pattern does not describe “the nature, extent, locations, and timing” of the occurrence of each species in the analysis area, nor “how the facility might adversely affect” the species if it is present, as required by the rule.</p>	Surveys conducted in 2016 are considered sufficient Information previously provided in ASC Exhibit P and will be incorporated into the proposed order

Commenters Issue 3 – Review of Exhibit Q Requirements			
OAR Reference	OAR Requirement	Issue	ODOE Response
345-021-0010(1)(q)(C) – (F)	<p>For each species identified under (A), a description of measures proposed by the applicant, if any, to avoid or reduce adverse impact.</p> <p>For each plant species identified under (A), a description of how the proposed facility, including any mitigation measures, complies with the protection and conservation program, if any, that the Oregon Department of Agriculture has adopted under ORS 564.105(3).</p> <p>For each plant species identified under paragraph (A), if the Oregon Department of Agriculture has not adopted a protection and conservation program under ORS 564.105(3), a description of significant potential impacts of the proposed facility on the continued existence of the species and on the critical habitat of such species and evidence that the proposed facility, including any mitigation measures, is not likely to cause a significant reduction in the likelihood of survival or recovery of the species.</p> <p>For each animal species identified under (A), a description of significant potential impacts of the proposed facility on the continued existence of such species and on the critical habitat of such species and evidence that the proposed facility, including any mitigation measures, is not likely to cause a significant reduction in the likelihood of survival or recovery of the species.</p>	Failed to meet this criteria because updated wildlife and plant surveys were not conducted	Surveys conducted in 2016 are considered sufficient to inform the analysis required under Council’s T&E Species standard