



# Oregon

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**To:** Oregon Energy Facility Siting Council

**From:** Maxwell Woods, Senior Policy Advisor

**Date:** May 14, 2019

**Subject:** Assessment of Requests for Contested Case - Summit Ridge Wind Farm Amendment 4

**Attachments:** **Attachment 1\***: Request for Contested Case: Friends of the Columbia Gorge, et al  
**Attachment 2\*\***: Comments on Draft Proposed Order (Friends of the Columbia Gorge)  
**Attachment 3\***: Request for Contested Case: Friends of the Grand Ronde Valley (FGRV) and Irene Gilbert (as an individual)  
**Attachment 4\*\***: Comments on Draft Proposed Order (Irene Gilbert)  
**Attachment 5\***: Request for Contested Case: Fuji and Jim Kreider  
**Attachment 6\*\***: Comments on Draft Proposed Order (Fuji and Jim Kreider)

\*Already provided in the May meeting materials packet mailed to Council on May 3, 2019

\*\*Provided to Council for the March 22, 2019 Council Meeting

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## Introduction

In preparation for the May 16-17, 2019 Energy Facility Siting Council (Council) meeting, the Oregon Department of Energy (Department) provided a staff report to Council on May 3, 2019 for Agenda Item I, Council Decision on Contested Case and the Proposed Order on Summit Ridge Wind Farm Request for Amendment 4 of the Site Certificate. Agenda Item I includes two potential Council decisions: first, whether to grant or deny a contested case proceeding on the proposed order; second, if a contested case proceeding is not granted, whether to approve, amend, or deny the staff's proposed order, and issue an amended site certificate. The deadline for submittal of contested case requests occurred on the same date the staff report was provided to Council. Therefore, this supplemental staff report is provided to Council as staff's assessment of the requests for contested case received by the deadline.

Three requests for contested case proceedings on the proposed order were timely filed with the Department by the May 2 / May 3, 2019 deadline. The requests were submitted by Ms. Irene Gilbert, as an individual and on behalf of Friends of the Grande Ronde Valley (FGRV); Friends of the Columbia Gorge, et al; and Fuji and Jim Kreider.<sup>1</sup>

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<sup>1</sup> As noted within the ODOE Staff Report submitted to Council on May 3, 2019, commenters on the draft proposed order were able to submit requests for contested case either until May 2, or May 3, 2019,

## **Council Scope of Review on Request to Amend a Site Certificate to Extend Construction Deadlines**

Summit Ridge Wind Farm is seeking to amend its site certificate to extend construction deadlines. When considering the requests for a contested case, the Council should bear in mind the scope of its review when an existing certificate holder seeks an amendment solely to extend construction deadlines:

To issue an amended site certificate, the Council shall determine that the *preponderance of evidence on the record* supports the following conclusions: . . . (b) For a request for amendment to extend the deadlines for beginning or completing construction, *after considering any changes in facts or law since the date the current site certificate was executed*, the facility complies with all laws and Council standards applicable to an original site certificate application. . . .<sup>2</sup>

The Council has historically interpreted “changes in facts or law” to mean proposed changes in facility design or changes to the environment (e.g., changes within the applicable analysis areas related to land uses, habitat categorization, noise receptors, recreation areas, or other applicable issues under Council jurisdiction), and regulatory changes, which could include a change to the statutes governing the Council, a change in Council rules, or in other applicable rules and statutes.

## **Council Scope of Review on Requests for a Contested Case Proceeding re: a Site Certificate Amendment**

Following are the principal criteria governing the Council’s consideration of a request for a contested case regarding a proposed site certificate amendment.

### *Whether Request meets Informational Requirements- OAR 345-027-0071(6).*

The request must be submitted in writing, received by the specified deadline and include all information set forth in rule.<sup>3</sup>

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depending on when their certified mail packet was received by the US Post Office. Friends of the Grand Ronde Valley / Irene Gilbert timely submitted a request for contested case in two parts; one submitted on May 2 and supplementary materials submitted on May 3, 2019. For the purposes of this staff report, the materials submitted by Ms. Gilbert are referred to as one request for contested case.

<sup>2</sup> OAR 345-027-0075(2) (emphasis added).

<sup>3</sup> 345-027-0071(6)(a) – (j). Contested case requests must include: (a) The person's name, mailing address and email address and any organization the person represents; (b) A short and plain statement of the issue or issues the person desires to raise in a contested case proceeding; (c) A statement that describes why the Council should find that the requester properly raised each issue, as described in section (7), including a specific reference to the person’s prior comments to demonstrate that the person raised the specific issue or issues on the record of the public hearing, if applicable; (d) A statement that describes why the Council should determine that each identified issue justifies a contested case, under the evaluation described in section (9); (e) A detailed description of the person’s interest in the

Whether Issue Was Properly Raised

The requesting party must have properly raised the issue(s) on the record of the draft proposed order public hearing with sufficient specificity to afford the decision maker an opportunity to respond<sup>4</sup>.

To properly raise an issue:

- a) the issue must be within the Council’s jurisdiction. An issue is outside Council’s jurisdiction if the Council does not maintain authority to render a decision on the issue. In general, Council has jurisdiction to determine whether the facility, with proposed changes, meets a Council standard and all other applicable state statutes and rules.
- b) the person must have commented either in writing or in person on the record of the draft proposed order public hearing.<sup>5</sup>

For an issue to have been raised with sufficient specificity, the individual must have presented facts on the record of the draft proposed order public hearing that support the individual’s position on the issue.

Whether Request Raises Significant Issue of Law or Fact

OAR 345-027-0071(9) contains the standard of review for contested case requests for site certificate amendments. It states:

“To determine that an issue justifies a contested case proceeding, the Council must find that the request raises a significant issue of fact or law that may affect the Council’s determination that the facility, with the change proposed by the amendment, meets the applicable laws and standards included in chapter 345 divisions 22, 23 and 24.”

Therefore, simply raising a significant issue of law or fact is not sufficient to justify a contested case. The significant issue of law or fact must have some connection to the Council’s determination whether the Summit Ridge Wind Farm, with proposed changes, meets the applicable laws and Council standards.

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proceeding and how that interest may be affected by the outcome of the proceeding; (f) Name and address of the person’s attorney, if any; (g) A statement of whether the person’s request to participate in a contested case is as a party or a limited party, and if as a limited party, the precise area or areas in which participation is sought; (h) If the person seeks to protect a personal interest in the outcome of the proceeding, a detailed statement of the person’s interest, economic or otherwise, and how such interest may be affected by the results of the proceeding; (i) If the person seeks to represent a public interest in the results of the proceeding, a detailed statement of such public interest, the manner in which such public interest will be affected by the results of the proceeding, and the person’s qualifications to represent such public interest; and (j) A statement of the reasons why others who commented on the record of the public hearing cannot adequately represent the interest identified in subsections (h) or (i).

<sup>4</sup> OAR 345-027-0071(5).

<sup>5</sup> In this matter, the comment window ran from January 16, 2019 through February 22, 2019.

## Council Options

OAR 345-027-0071(10) gives the Council three options for action on a contested case request:

**Option 1:** if the Council finds that an issue justifies a contested case under the criteria quoted above, the Council can decide to conduct a contested case proceeding. The contested case proceeding would be limited to the issues that the Council finds sufficient to justify the proceeding.

**Option 2:** If the Council finds that the request identifies one or more properly raised issues that an amendment to the proposed order, including modification to conditions, would settle in a manner satisfactory to the Council, the Council may deny the request as to those issues and direct the Department to amend the proposed order and send a notice of the amended proposed order to the persons described in section (4).

**Option 3:** if the Council finds that an issue does not justify a contested case under the criteria quoted above, the Council can deny the contested case request. The Council would issue a written order specifying the basis for the decision. The Council would then have the further option to adopt, modify or reject the proposed order on the amendment request.

## Summary

In light of the rules governing issuance of a site certificate amendment to extend construction deadlines and those governing its review of a request for contested case on a site certificate amendment, the Council should only grant a request for contested case on Amendment 4 to the Summit Ridge site certificate if it finds:

- there has been a change in law or fact since the site certificate was issued that could impact the Council's prior determination that the preponderance of evidence on the record demonstrates the facility complies with all laws and Council standards applicable to an original site certificate application;
- the issue identified in a request for contested case was properly raised on the record of the public hearing, the request meets informational requirements for submission of a request, and the request raises a significant issue of law or fact that could impact the Council's determination the facility complies with applicable laws and standards; and
- an amendment to the proposed order would not settle the issue raised.

The following evaluation presents the Department's recommendations to Council on whether the requests submitted satisfy the requirements for granting a contested case proceeding.

## Department Evaluation of Request for Contested Case - Friends of the Columbia Gorge, et al.

Friends of the Columbia Gorge, et al, provided written comments on February 21, 2019 and oral testimony at the hearing on the draft proposed order on February 22, 2019; comments submitted

by the Friends of the Columbia Gorge included comments prepared by Shawn Smallwood, PhD. Although the comments did not specifically separate and number issues, the Department identified five distinct issues raised by Smallwood and four distinct issues raised by Friends of the Columbia Gorge.

In its request for a contested case proceeding received on May 2, 2019, provided as Attachment 1, the Friends of the Columbia Gorge identified a total of 13 issues. The Friends of the Columbia Gorge identified 7 issues arising from State of Oregon wildlife regulations; 3 issues arising from Wasco County Land Use and Development Ordinances; 2 issues arising from construction deadline extension regulations and; 1 issue arising from “responding to issues, arguments, and evidence raised by other parties.”

***Threshold issue – the Department does not believe Friends has identified any change in facts or law since the site certificate was issued that could impact the Council’s prior determination that the facility complies with Council standards and applicable laws.***

With regard to the threshold issue – whether, since the date the current site certificate was executed, there have been any changes in facts or law applicable to the proposed facility’s impact on fish and wildlife habitat and the fish and wildlife species - Friends generally allege that the:

“surveys and data [provided in support of the original application for site certificate] must be rectified and updated, in part in order to reflect changes in conditions in the vicinity of the Project site and at the proposed habitat mitigation parcels (including changes caused by significant wildfires in 2018), the changes in best available science and technologies for identifying and protecting wildlife and habitat; and the changes in agency guidance and policies for evaluating and protecting wildlife and habitat. Despite these changes and the substantial passage of time, Pattern [the certificate holder] utterly fails to demonstrate current compliance with the applicable laws and rules”<sup>6</sup>

Friends appear to intend for this allegation to apply to each of the issues they raise, as it is made in the Introduction to its Request, but not repeated in their analyses of the particular issues raised. Accordingly, the Department will address this allegation in general, rather than repeat it in the analysis of each issue that Friends’ raises.

In short, the Department does not believe Friends has identified a change in law or fact since the site certificate was issued that could impact the Council’s prior determination that the preponderance of evidence on the record demonstrates the facility complies with all laws and Council standards applicable to an original site certificate application.

While changes in conditions in the vicinity of the Project site caused by wildfires in 2018 may be a change in fact / environmental conditions, they are not changes that would impact the Council’s decision that the facility complies with Council standards. Specifically, wildlife habitat information

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<sup>6</sup> Friends Request, p. 3.

is used to inform and assess compliance with two Council standards: Fish and Wildlife Habitat and Threatened and Endangered Species.

As described in the Department's proposed order, only two state-listed Threatened or Endangered species have the potential to occur in the site boundary, two plant species (Tygh Valley milkvetch and Dwarf evening primrose). Neither species has ever been identified in the analysis area. Existing site certificate conditions require pre-construction field surveys for these species, and if found, the certificate holder would need to validate compliance with the standard via consultation with the Department and Oregon Department of Agriculture. No state-listed wildlife or bird species have the potential to occur in the analysis area for the facility.

As also described in the Department's proposed order, the EFSC Fish and Wildlife Habitat standard applies to land-based habitat and impacts from a facility. The habitat at the Summit Ridge site is classified as habitat categories 2 and 6; category 2 is the "second best" habitat and requires mitigation that meets the "no net loss plus net benefit" standard. Habitat category 6 is the worst quality (in this case, active agriculture) and no mitigation is necessary. No additional field surveys would change this categorization. Habitat category 1 is reserved for the "best habitat" which typically provides such importance to a sensitive or threatened or endangered species that any loss of that habitat would be substantially detrimental to the viability of that species, and as such, habitat category 1 cannot be impacted by energy facilities subject to EFSC jurisdiction. Considering that the only threatened or endangered species that could occur in the site are two plants, neither of which have ever been identified, the habitat at Summit Ridge is extremely unlikely to ever be classified as "habitat category 1." Additionally, the site certificate has existing conditions requiring pre-construction surveys to validate the anticipated habitat impacts based on final site design and configuration. Considering that the habitat categorization will almost certainly not change from categories 2 or 6 at any time, a contested case or additional surveys at this time would not provide any additional information that would be of value to Council in determining if the facility continues to meet the Fish and Wildlife Habitat standard.

Further, the Department does not agree with the argument that the baseline surveys need to be updated to employ best available science and technologies for identifying and protecting wildlife and to be consistent with current USFWS management guidance. There are multiple ways to conduct baseline surveys. The development of new methodologies since the site certificate was issued is not in and of itself a change that could impact the Council's prior determination that the preponderance of evidence on the record demonstrates the facility complies with all laws and Council standards. Further, after Friends and others raised this issue on the record of the draft proposed order, ODOE conferred with the Oregon Department of Fish and Wildlife (ODFW) about the sufficiency of the baseline surveys.<sup>7</sup> ODFW indicated they do not believe the baseline studies need to be updated. Thus, regardless of whether there has been a change in facts or law relevant to the surveys and data, in light of ODFW's determination that new baseline studies are not

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<sup>7</sup> ORS 469.370(4) states: "After reviewing the application, the draft proposed order and any testimony given at the public hearing *and after consulting with other agencies*, the department shall issue a proposed order recommending approval or rejection of the application" (emphasis added).

needed, any such changes would not merit the Council overturning its prior finding that the facility complies with Council standards and applicable laws or requiring the certificate holder to conduct new surveys.

***The Department recommends the Council find the Friends' Request for Contested Case satisfies the informational requirements of OAR 345-027-0071(6).***

Based on review of the Friends' Request, the Department believes, and recommends Council find, that the request satisfies the informational requirements of OAR 345-027-0071(6).

The Department will now evaluate whether each issue raised by the Friends was properly raised and justifies a contested case.

***Friends of Columbia Gorge Issue A.1. – compliance with OAR 345-021-0010(1)(p)***

The Friends allege that the certificate holder has failed to comply with OAR 345-021-0010(1)(p), which requires the applicant for a site certificate to provide “[i]nformation about fish and wildlife habitat and the fish and wildlife species . . . that could be affected by the proposed facility” and to describe “the biological and botanical surveys performed . . . including a discussion of the timing and scope of each survey”. The request argues that this issue justifies a contested case because:

“**First**, . . . to allow Requesters to submit new evidence, including sworn expert witness testimony, on this issue. **Second**, a contested case is needed to allow Requesters to seek from Pattern discoverable information likely to bear on this issue, and Requesters have no other means of obtaining such information and presenting it to the Council. See OAR 345-015-0023(5)(c), 137-003-00568(4) OAR 137-003-0025(4). **Third**, the Council should utilize the assistance of a neutral hearing officer to resolves disputes of fact, law, and policy regarding this issue (rather than relying solely on Department staff), and to ensure that the Council abides by its mandates to follow its own rules and to act consistent with prior Council decisions or otherwise provide valid reasons for departing from prior decisions. See *Harsh Investment Corp. v. State Housing Division*, 88 Or App 151, 157, 744 P2d 588 (1987); *Moki, Inc. v. OLCC*, 68 Or App 800, 803, 683 P2d 159 (1984). **Fourth**, this issue involves “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,” as well as the setting of standards that “call[] for the factual kind of judgment and procedures appropriate thereto” and that can be “made more concrete only in the course of a proceeding focusing on a particular kind of [energy] installation at a particular location,” and in such instances, the Oregon Supreme Court has held that [t]he procedure for adopting [such] standard[s] to be applied in a few complex, large-scale decisions such as the site certifications entrusted to the council” is via the “‘contested case’ procedure,” which “is to be used in applying statutory or agency policy to specific parties on particular facts.” *Marbet v. PGE*, 277 Or 447, 460–63, 561 P2d 154 (1977) (quoting ORS 183.310(2)). **And finally**, a contested case is needed to

allow “the agency and not the courts [to] pass[] first on the contention[s] of the participants”; the Council should allow Requesters to pursue the disputed issues in an “effective[] and meaningful[]” manner and to allow the Council (with the assistance of a hearing officer) to vet and resolve the disputed issues via a contested case, rather than abdicating to the Oregon Supreme Court to resolve the issues on first impression. *Hennesey v. SEC*, 285 F.2d 511, 515 (3d. Cir. 1961) (cited in *Marbet*, 277 Or at 455).”<sup>8</sup>

As justification for its request on Issue A.1., the Friends state:

“This issue involves significant issues of fact and law that may affect the Council’s determination as to whether the proposed facility complies with the applicable laws and rules, and ultimately whether the requested construction extensions should be granted or denied. See OAR 345-027-0071(9). For example, the Proposed Order includes a statement that “[t]he Department and ODFW have 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.” Proposed Order at 84, lines 23–26. This statement implicates numerous questions of fact, evidence, law, and policy that necessitate resolution via a contested case proceeding. This is merely one example illustrating why a contested case is necessary; the record of the public hearing is replete with numerous related disputed issues that necessitate a contested case (in particular at pages 6–14 of Requesters’ February 21, 2019 comment letter and at pages 2–32 and 34–41 of Dr. Smallwood’s February 21, 2019 comment letter). The Council should hold a contested case to resolve the disputed issues.”

Recommendation: Council find core issue was properly raised on the record; Issue A.1. should not be considered because it does not raise a significant issue of law or fact

First, the Friends of the Columbia Gorge (Friends) indicate that they raised the issue of compliance with OAR 345-021-0010(1)(p)) generally at pages 2-32 and 34-41 of its comments submitted on the draft proposed order. Reference to OAR 345-021-0010(1)(p) was included within the Friends’ comments; as such, the rule reference was properly raised on the record of the draft proposed order. Furthermore, the issue was raised with sufficient specificity because they presented facts to support the issue.

However, after reviewing the Friends’ written and oral comments in conjunction with the request for contested case, the Department recommends that the Council find that the request for contested case does not satisfy the requirement imposed by OAR 35-027-0071(9) because the request does not raise a significant issue of law or fact that may affect the Council’s determination that the facility meets applicable laws and standards. Secondly, the equitable remedies requested by the Friends, which are posed as “reasons” by which it requests Council to grant a

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<sup>8</sup> Friends’ Request, pp. 11-13.

contested case, are not within Council jurisdiction.

Specifically, the Friends' request for contested case cites to the Proposed Order as follows:

“The Department and ODFW have not established a specific timeframe for which previous surveys are no longer considered valid, and relies upon... the certificate holder's presentation of potential changes in land use or land cover to inform the necessity to conduct new surveys.”

The Friends conclude that the statement “implicates numerous questions of fact, evidence, law and policy;” however, the Friends fail to provide any reasoning by which the statement would justify a contested case proceeding in this matter. If Friends believe that the Department or ODFW should establish a timeframe by which a survey should be updated or re-done, they should request that the agencies do so. But the lack of such a timeframe in existing agency rules or guidance does not justify subjecting the request for an amendment to a contested case under the rules governing such requests. The above statement accurately describes the Department's review of request for amendments. Namely, that the determination of whether new surveys must be completed prior to the issuance of a site certificate amendment is reviewed on a case by case basis. As explained in length in the Department's draft proposed order and within its proposed order, the certificate holder demonstrated that new surveys are not required prior to Council's issuance of a site certificate amendment. The Department recommended that Council make this finding due to, in pertinent part, a demonstration of: (1) no changes to habitat classifications that would result in a greater mitigation burden on the developer, given that a large portion of the proposed facility was already designated as the highest habitat classification whereby development may occur (e.g. class 2 habitat); (2) that wildlife surveys were conducted in 2016 and; (3) that the existing site certificate already requires pre-construction surveys and monitoring conditions that could result in an alteration to habitat classifications, or could result in areas whereby construction is prohibited. As such, the “issue” presented by the Friends (*i.e.*, general non-compliance with OAR 345-021-0010(1)(p)) does not justify a contested case, given that it merely cites to a statement within the Department's proposed order, and then concludes that the statement is *prima facie* evidence of an implication of numerous questions of fact, evidence, law, and policy. Without providing any justification as to how the statement “implicates numerous questions of fact, evidence, law and policy” the Department cannot recommend that the request for contested case issue A.1. raises a significant issue of law or fact that would affect the Council's determination that the facility meets applicable laws and standards.

Secondarily, the Friends list “reasons” why the Council should grant a contested case (*i.e.*, to allow them to submit new evidence, allow the Council to utilize the services of a hearing officer, etc.). These reasons are not within the scope of Council review in determining whether to grant a contested case. Rather, the list provides policy rationales as to why the Friends believe that it should be afforded the opportunity to further establish a factual record on the Summit Ridge Wind Farm, as well as policy reasons as to why it believes that the Department and the Council are not properly suited to render decisions on “disputed” issues. As such, the “reasons” provided are, by definition, not “issues” that were raised on the record, and are also not within the

Council's jurisdiction because they do not relate to a contention of fact or law that is contained within the proposed order.

For the foregoing reasons, the Department recommends the Council find Friends' Issue 1 does not justify a contested case under the governing criteria and deny the contested case request.

***Friends of Columbia Gorge Issue A.2. – compliance with OAR 345-021-0010(1)(q)***

The Friends allege that the certificate holder has failed to comply with OAR 345-021-0010(1)(q), which requires the applicant for a site certificate to provide information about threatened and endangered plant and animal species that may be affected by the proposed facility. The Friends assert this issue justifies a contested provide for the same reasoning as in Issue 1.

Recommendation: Council find core issue was properly raised on the record; Issue A.2. should not be considered because it does not raise a significant issue of law or fact

For the same rationale as provided in response to Issue A.1., the Department recommends that the Council find that the issue was properly raised; however, the issue does not raise a significant issue of law or fact.

The Friends indicate that it commented on the record at pages 6-7 and 14-16 of its comments, as well as through pages 38-41 of comments submitted by Shawn Smallwood. Reference to OAR 345-021-0010(1)(q) was included within the Friends' comments; as such, the rule reference was properly raised on the record of the draft proposed order. Furthermore, the issue was raised with sufficient specificity because they presented facts to support the issue.

However, the Friends provided no reasoning to explain why the statement included within its request "implicates numerous questions of fact, evidence, law, and policy."<sup>9</sup> As described at length within the Department's proposed order and Staff Report, the certificate holder demonstrated compliance with OAR 345-021-0010(1)(q) through conducting a literature review of Oregon Department of Agriculture's Threatened and Endangered lists (note that literature review does not require the evaluation of survey results of nearby projects); that the certificate holder conducted surveys in 2016, which are considered sufficient to inform analysis under OAR 345-021-0010(q).

Secondarily, the Friends list "reasons" why the Council should grant a contested case. These reasons are not within the scope of Council review in determining whether to grant a contested case.

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<sup>9</sup>The Friends cite to the statement: "[t]he Department and ODFW have not established a specific timeframe for which previous surveys are no longer considered valid, and relies upon... the certificate holder's presentation of potential changes in land use or land cover to inform the necessity to conduct new surveys."

As such, the Department recommends the Council find Friends' Issue A.2. does not justify a contested case and deny the contested case request.

***Friends of Columbia Gorge Issue A.3. – compliance with OAR 345-022-0060(1)***

The Friends allege that the certificate holder has failed to comply with OAR 345-022-0060(1), which requires the demonstration of compliance with fish and wildlife mitigation goals provided by OAR 635-415-0025.

Recommendation: Council find core issue was properly raised on the record; Issue A.3. should not be considered because it does not raise a significant issue of law or fact

For the same rationale as provided in response to Issue A.1., the Department recommends that the Council find that the issue was properly raised; however, the issue does not raise a significant issue of law or fact.

The Friends indicate that it commented on the record at pages 6-7 and 16 of its comments, as well as through pages 2-32 and 34-41 of comments submitted by Shawn Smallwood. Reference to OAR 345-022-0060(1) was included within the Friends' comments; as such, the rule reference was properly raised on the record of the draft proposed order. Furthermore, the issue was raised with sufficient specificity because they presented facts to support the issue.

However, the Friends provided no reasoning to explain why the statement included within its request "implicates numerous questions of fact, evidence, law, and policy." As explained in detail, the Department describes in its proposed order the habitat types and categories within the analysis area; impacts to habitat; required habitat mitigation measures; impacts to state sensitive species and; required state sensitive species mitigation measures. The Department updated findings and conditions based on comments provided by the Friends. The Friends do not provide any reasoning to indicate why the findings and conditions set forth by the Department in its proposed order fail to meet the standard imposed by OAR 345-022-0060(1).

Secondarily, the Friends list "reasons" why the Council should grant a contested case. These reasons are not note within the scope of Council review in determining whether to grant a contested case.

As such, the Department recommends the Council find Friends' Issue A.3. does not justify a contested case and deny the contested case request.

***Friends of Columbia Gorge Issue A.4. – compliance with OAR 345-022-0070***

The Friends allege that the certificate holder has failed to comply with OAR 345-022-0070(1), which requires the demonstration of compliance with the Council threatened and endangered species standard.

Recommendation: Council find core issue was properly raised on the record; Issue 4 should not be considered because it does not raise a significant issue of law or fact

For the same rationale as provided in response to Issue A.1., the Department recommends that the Council find that the issue was properly raised; however, the issue does not raise a significant issue of law or fact.

The Friends indicate that it commented on the record at pages 6-7 and 16 of its comments, as well as through pages 2-32 and 34-41 of comments submitted by Shawn Smallwood. Reference to OAR 345-022-0060(1) was included within the Friends' comments; as such, the rule reference was properly raised on the record of the draft proposed order. Furthermore, the issue was raised with sufficient specificity given that the Friends presented facts to support the issue.

However, the Friends provide no reasoning to explain why the statement included within its request "implicates numerous questions of fact, evidence, law, and policy." As explained in detail, the Department describes in its proposed order the potential impacts to identified threatened and endangered species; the Department updated findings based on the comments of the Friends. The Friends do not provide any reasoning to indicate why the findings and conditions set forth by the Department in its proposed order fail to meet the standard imposed by OAR 345-022-0070(1).

Secondarily, the Friends list "reasons" why the Council should grant a contested case. These reasons are not note within the scope of Council review in determining whether to grant a contested case.

For the foregoing reasons, the Department recommends the Council find Friends' Issue 4 does not justify a contested case and deny the contested case request.

***Friends of Columbia Gorge Issue A.5. – compliance with OAR 345-024-0015 and 345-024-0015(4)***

The Friends allege that the certificate holder has failed to comply with OAR 345-024-0015, which requires the demonstration of compliance with the Council's "cumulative effects standard," and a failure to comply with subsection (4) in particular, which requires that the facility be designed "to reduce the risk of injury to raptors or other vulnerable wildlife in areas near turbines or electrical equipment."

Recommendation: Council find core issue was properly raised on the record; Issue A.5. should not be considered because it does not raise a significant issue of law or fact

For the same rationale as provided in response to Issue A.1., the Department recommends that the Council find that the issue was properly raised; however, the issue does not raise a significant issue of law or fact.

The Friends indicate that it commented on the record at pages 6-22 of its comments, as well as

through pages 2-41 of comments submitted by Shawn Smallwood. Reference to cumulative impacts of wind facilities was included within the Friends' comments; as such, the rule reference was properly raised on the record of the draft proposed order. Furthermore, the issue was raised with sufficient specificity because they presented facts to support the issue.

The Friends cite to the Department's statement in its proposed order, "[t]here are no changes to facility design; as such, the Department recommends that the Council find that the pre-existing conditions are sufficient to demonstrate continued compliance with the cumulative effects standard for wind energy facilities." The Friends broadly allege "[t]his statement implicates numerous questions of fact, evidence, law, and policy that necessitate resolution via a contested case proceeding." Merely alleging non-compliance with a standard and referencing a statement made by the Department does not constitute raising an issue of fact or law that could affect the Council's determination that the facility meets applicable laws and standards. They do not allege, for example, that there has been a change in facts (such as a change in facility design that affects the risk of injury to raptors or other vulnerable wildlife not previously considered by the Council) that would justify a contested case proceeding to determine whether the facility complies with this standard.

For the foregoing reasons, the Department recommends the Council find Friends' Issue A.5. does not justify a contested case and deny the contested case request.

***Friends of Columbia Gorge Issue A.6. – compliance with OAR 345-025-0016***

The Friends allege that the certificate holder has failed to comply with OAR 345-025-0016, which requires the site certificate applicant or certificate holder to develop proposed monitoring and mitigation plans subject to Council approval.

Recommendation: Council find core issue was properly raised on the record; Issue A.6. should not be considered because it does not raise a significant issue of law or fact

For the same rationale as provided in response to Issue A.1., the Department recommends that the Council find that the issue was properly raised; however, the issue does not raise a significant issue of law or fact.

The Friends indicate that it raised this issue on the record at pages 6-7, 12-14, and 16-17 of its comments, as well as through pages 2-32 and 34-41 of comments submitted by Shawn Smallwood. Reference to monitoring and mitigation plans was included within the Friends' comments; as such, compliance with this rule was properly raised on the record of the draft proposed order. Furthermore, the issue was raised with sufficient specificity because they presented facts to support the issue.

The Friends cite to the Department's statement in its proposed order, that "while Smallwood recommends that the [Habitat Mitigation Plan] be updated to account for loss of habitat from displacement, avian mortality is addressed through implementation of a Wildlife

Monitoring and Mitigation Plan (WMMP). ” The Friends broadly allege “[t]his statement implicates numerous questions of fact, evidence, law, and policy that necessitate resolution via a contested case proceeding.” Merely alleging non-compliance with a standard and referencing a statement made by the Department does not constitute raising an issue of fact or law that could affect the Council’s determination that the facility meets applicable laws and standards. They do not allege, for example, a particular fact (such as a change in facility design that affects the risk of injury to wildlife not previously considered by the Council) that would justify a contested case proceeding to determine whether the facility complies with this standard.

For the foregoing reasons, the Department recommends the Council find Friends’ Issue A.6. does not justify a contested case and deny the contested case request.

***Friends of Columbia Gorge Issue A.7. – compliance with OAR 635-415-0025***

The Friends allege that the certificate holder has failed to comply with OAR 635-415-0025, and ODFW rule which establishes different categories of habitats and mitigation goals for those habitats.

Recommendation: Council find core issue was properly raised on the record; Issue A.7. should not be subject to a contested case proceeding because it does not raise a significant issue of law or fact that may affect the Council’s prior determination.

For the same rationale as provided in response to Issue A.1., the Department recommends that the Council find that the issue was properly raised; however, the issue does not raise a significant issue of law or fact.

The Friends indicate that it raised this issue on the record at pages 6-7, 11-13, and 16 of its comments, as well as through pages 2-30 and 34-41 of comments submitted by Shawn Smallwood. Reference to monitoring and mitigation plans was included within the Friends’ comments; as such, compliance with this rule was properly raised on the record of the draft proposed order. Furthermore, the issue was raised with sufficient specificity because they presented facts to support the issue.

The Friends cite to the Department’s statement in its proposed order, that “the Council’s Fish and Wildlife Habitat standard does not dictate any specific method that must be followed to assess habitat or use of the habitat within the analysis area – only that appropriate protocols be approved by ODFW” The Friends broadly allege “[t]his statement implicates numerous questions of fact, evidence, law, and policy that necessitate resolution via a contested case proceeding.” Merely alleging non-compliance with a standard and referencing a statement made by the Department does not constitute raising an issue of fact or law that could affect the Council’s determination that the facility meets applicable laws and standards. They do not allege, for example, a particular fact (such as a change in facility design that affects the risk of injury to wildlife not previously considered by the Council) that would justify a contested case proceeding to determine whether the facility complies with this standard.

For the foregoing reasons, the Department recommends the Council find Friends' Issue A.7. does not justify a contested case and deny the contested case request.

***Friends of Columbia Gorge Issue B.1. – compliance with LUDO §§ 19.030.C.5, 19.030C.5a, 19.030.C.5.b, 19.030.C.5.c, and 19.030.C.5.h***

The Friends allege that the certificate holder has failed to comply with Wasco County Land Use and Development Ordinances (“LUDO”) §§ 19.030.C.5, 19.030C.5a, 19.030.C.5.b, 19.030.C.5.c, and 19.030.C.5.h addressing natural resource / wildlife protection.

Recommendation: Council find core issue was properly raised on the record; Issue B.1. should not be subject to a contested case proceeding because it does not raise a significant issue of law or fact that may affect the Council’s prior determination.

For the same rationale as provided in response to Issue A.1., the Department recommends that the Council find that the issue was properly raised; however, the issue does not raise a significant issue of law or fact.

The Friends indicate that it raised this issue on the record at pages 6-7 and 17-20 of its comments, as well as through pages 2-32 and 34-41 of comments submitted by Shawn Smallwood and oral comments by their counsel. Reference to wildlife protection and these Wasco County ordinances was included within the Friends’ comments; as such, compliance with these ordinances was properly raised on the record of the draft proposed order. Furthermore, the issue was raised with sufficient specificity because they presented facts to support the issue.

The Friends cite to the Department’s statement in its proposed order, that “[t]he Department recommends Council not consider that the reference to ‘other jurisdictional wildlife agency’ be intended to apply or incorporate requirements and resources protected by federal jurisdictional wildlife agencies.” The Friends broadly allege “[t]his statement implicates numerous questions of fact, evidence, law, and policy that necessitate resolution via a contested case proceeding.” Merely alleging non-compliance with a local ordinance and referencing a statement made by the Department does not constitute raising an issue of fact or law that could affect the Council’s determination that the facility meets applicable laws and standards. They do not allege, for example, a particular fact (such as a change in facility design that affects the risk of injury to wildlife not previously considered by the Council) that would justify a contested case proceeding to determine whether the facility complies with this standard.

For the foregoing reasons, the Department recommends the Council find Friends' Issue B.1. does not justify a contested case and deny the contested case request.

***Friends of Columbia Gorge Issue B.2. – compliance with LUDO §§ 5.020 and 5.020.F***

The Friends allege that the certificate holder has failed to comply with Wasco County Land Use

and Development Ordinances (“LUDO”) §§ 5.020 and 5.020.F addressing authorization to grant or deny conditional uses, and standards and criteria used, in particular that the proposed use will not significantly reduce or impair sensitive wildlife habitat, riparian vegetation along streambanks and will not subject areas to excessive soil erosion.

Recommendation: Council find core issue was properly raised on the record; Issue B.2. should not be subject to a contested case proceeding because it does not raise a significant issue of law or fact that may affect the Council’s prior determination.

For the same rationale as provided in response to Issue A.1., the Department recommends that the Council find that the issue was properly raised; however, the issue does not raise a significant issue of law or fact.

The Friends indicate that it raised this issue on the record at pages 6-7 and 20-21 of its comments, as well as through pages 2-30 and 34-41 of comments submitted by Shawn Smallwood and oral comments by their counsel. Reference to these ordinances was included within the Friends’ comments; as such, compliance with these ordinances was properly raised on the record of the draft proposed order. Furthermore, the issue was raised with sufficient specificity because they presented facts to support the issue.

The Friends cite to the Department’s statement in its proposed order, that “[t]he Department and ODFW have 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.” The Friends broadly allege “[t]his statement implicates numerous questions of fact, evidence, law, and policy that necessitate resolution via a contested case proceeding.” Merely alleging non-compliance with a local ordinance and referencing a statement made by the Department does not constitute raising an issue of fact or law that could affect the Council’s determination that the facility meets applicable laws and standards. They do not allege, for example, a particular fact (such as a change in facility design that affects the risk of injury to wildlife not previously considered by the Council) that would justify a contested case proceeding to determine whether the facility complies with these ordinances.

For the foregoing reasons, the Department recommends the Council find Friends’ Issue B.2. does not justify a contested case and deny the contested case request.

***Friends of Columbia Gorge Issue B.3. – compliance with LUDO §§ 5.030, 5.030.A and 5.030.J, and 5.030.K***

The Friends allege that the certificate holder has failed to comply with Wasco County Land Use and Development Ordinances (“LUDO”) §§ 5.030, 5.030.A and 5.030.J, and 5.030.K addressing imposing conditions to (among other items) minimize environmental effects such as noise, vibration, air pollution, glare and odor; and protect and preserve existing tree, vegetation and wildlife habitat.

Recommendation: Council find core issue was properly raised on the record; Issue B.3. should not be subject to a contested case proceeding because it does not raise a significant issue of law or fact that may affect the Council's prior determination.

For the same rationale as provided in response to Issue A.1., the Department recommends that the Council find that the issue was properly raised; however, the issue does not raise a significant issue of law or fact.

The Friends indicate that it raised this issue on the record at pages 6-7 and 21-22 of its comments, as well as through pages 2-32 and 34-41 of comments submitted by Shawn Smallwood and oral comments by their counsel. Reference to these ordinances was included within the Friends' comments; as such, compliance with these ordinances was properly raised on the record of the draft proposed order. Furthermore, the issue was raised with sufficient specificity because they presented facts to support the issue.

The Friends take issue with the Proposed Order being "silent on compliance" with these ordinances. The Friends broadly allege "[t]he failure in the Proposed Order to address these applicable sections of the Wasco County ordinance implicates numerous questions of fact, evidence, law, and policy that necessitate resolution via a contested case proceeding." These statements do not constitute raising an issue of fact or law that could affect the Council's determination that the facility meets applicable laws and standards. They do not allege, for example, a particular fact (such as a change in facility design that affects the risk of injury to wildlife habitat not previously considered by the Council) that would justify a contested case proceeding to determine whether the facility complies with these ordinances. LUDO 5.30, 5.30A, 5.30J, and 5.30K are not applicable substantive criteria from the Wasco County comprehensive plan and land use regulations that apply to the facility. Rather, this section of code gives the county direction to impose conditions in conditional use permits that could be necessary to ensure a conditional use is compatible with surrounding permitted uses. The referenced subsections A, J, and K are suggested types of conditions that the county could impose in conditional use permits. For a facility under EFSC jurisdiction, it is Council that imposes conditions in a site certificate in order to maintain compliance with applicable Council standards, including the Land Use standard. Council has imposed a number of conditions in the existing site certificate and the Department recommends in its proposed order on RFA4 that additional conditions be included, and some edits to existing conditions.

For the foregoing reasons, the Department recommends the Council find Friends' Issue B.3. does not justify a contested case and deny the contested case request.

***Friends of Columbia Gorge Issues C.1. and C.2. – compliance with OAR 345-027-0085(1)***

The Friends allege that the certificate holder has not demonstrated a need to extend the construction deadlines and therefore is not in compliance with OAR 345-027-0085(1).

Recommendation: Council find core issue was properly raised on the record; Issues C.1. and C.2. should not be subject to a contested case proceeding because it does not raise a significant issue of law or fact that may affect the Council’s prior determination.

For the same rationale as provided in response to Issue A.1., the Department recommends that the Council find that the issue was properly raised; however, the issue does not raise a significant issue of law or fact.

As explained in the Proposed Order, when a certificate holder seeks to extend construction deadlines, OAR 345-027-0085(1) requires the certificate holder to “include an explanation of the need for an extension”.<sup>10</sup> The certificate holder has explained that it needs a construction deadline extension to allow it adequate time to obtain a power purchase agreement and financing for the facility. Council rules do not include substantive review criteria for evaluating the explanation of the need for an extension. Council is not required to find, and its rules do not address what constitutes an “acceptable” explanation of need for a timeline extension. The certificate holder has provided an explanation and that satisfies the applicable standard.

Thus, the “need” issue raised by Friends does not raise a significant issue of law or fact that may affect the Council’s determination that the facility meets the applicable laws and Council standards.

For the foregoing reasons, the Department recommends the Council find Friends’ Issues C.1 and C.2 do not justify a contested case and deny the contested case request.

***Friends of Columbia Gorge Issue D – validity of Council’s Amendment Rules***

The Friends refer to a lawsuit pending before the Oregon Supreme Court in which they and other parties have challenged the validity of the Council’s amendment rules at OAR Chapter 345, Division 27. Should the Supreme Court not have ruled on the validity of the rules by the time a contested case is held (if held), Friends seek to “reserve the right to challenge the validity of the rules and/or application of the rules to Pattern’s Application as an issue to be resolved in the contested case.”

Issues D – the validity of the Council’s amendment rules - should not be subject to a contested case proceeding because this issue is under consideration by the Supreme Court of Oregon.

Per ORS 469.490, challenges to the validity of any rule adopted by the Council may be determined only upon a petition to the Oregon Supreme Court. Friends’ challenge to the validity of these

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<sup>10</sup> “The certificate holder may request an amendment to the site certificate to extend the deadlines for beginning or completing construction of the facility, or portion/phase of the facility, that the Council has approved in a site certificate or an amended site certificate by submitting a preliminary request for amendment in accordance with 345-027-0060. The preliminary request for amendment must include an explanation of the need for an extension and must be submitted to the Department of Energy before the applicable construction deadline, but no earlier than the date twelve months before the applicable construction deadline.” OAR 345-027-0085(1).

rules is presently pending before the Supreme Court. Friends may not separately challenge the validity of these rules in a contested case proceeding.

**Department Evaluation of Request for Contested Case - Irene Gilbert, as an individual and on behalf of Friends of the Grande Ronde Valley**

Ms. Irene Gilbert, on behalf of Friends of the Grande Ronde Valley and as an individual submitted written comments on February 22, 2019 identifying 11 issues. In requests for contested case received by the Department on May 2 and 3, 2019 ([Attachment 3](#)), Ms. Gilbert requests a contested case on three of the issues she raised in her comments.

***The Department recommends the Council find the Gilbert Request for Contested Case satisfies the informational requirements of OAR 345-027-0071(6).***

Based on review of the Gilbert Request<sup>11</sup>, the Department believes, and recommends Council find, that the request satisfies the informational requirements of OAR 345-027-0071(6).

The Department evaluates below whether each issue identified in the Gilbert Request for Contested Case was properly raised and justifies a contested case.

***Gilbert Issue 1<sup>12</sup>***

Site certificate Condition 10.9 currently allows the certificate holder to withdraw no more than 5,000 gallons of water per day, from an on-site well, for operations. In the draft proposed order on Amendment 4, the Department had recommended amending condition 10.9 to allow the certificate holder to utilize up to 15,000 gallons of water per day at the Operations and Maintenance building for domestic purposes or 5,000 gallons per day for industrial or commercial purposes.

Recommendation: Council find core issue was properly raised on the record; Issue 1 need not proceed to a contested case because the Proposed Order includes the revision Ms. Gilbert requested.

In her comments on the draft proposed order, Ms. Gilbert raised and provided facts in support of the issue that is now subject to her request for contested case Issue 1. Therefore, the Department recommends that the Council find that the issue was properly raised.

In her comments on the DPO, Ms. Gilbert argued that the recommended amendment to Condition 10.9 was 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 argued (among other points) that recommended amendment

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<sup>11</sup> [Attachment 3](#), May 2 letter pp. 9-10.

<sup>12</sup> Gilbert Issue 1 is set forth in [Attachment 3](#), May 2 letter, p. 2.

was an incorrect application of the definitions of “domestic” and “industrial.” She asserted that while ORS 537.545(1)(d) establishes a 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. She also provided documentation from the Oregon Water Resources Department confirming this interpretation. The Department agreed, and in the proposed order has removed the previously recommended condition language to which Ms. Gilbert objected. (See Proposed Order, pp. 121-122)

In her request for Contested Case, Ms. Gilbert requests a contested case on this issue only “[i]n the event the Siting Council fails to include the limitation of 5,000 gallons per day use.” The Department believes the Proposed Order satisfies Ms. Gilbert’s request, such that she will no longer seek a contested case on this issue.

***Gilbert Issue 2 – compliance with OAR 345-024-015 Cumulative Effects for Wind Energy Facility and OAR 345-022-0040 Protected Areas standard<sup>13</sup>***

Recommendation: Council find Gilbert Issue 2 was properly raised on the record

In her comments on the draft proposed order, Ms. Gilbert raised and submitted facts in support of the issue that is now subject to her request for contested case Issue 2. Therefore, the Department recommends that the Council find that Gilbert Issue 2 was properly raised.

Recommendation: Issue 2 should not be subject to a contested case proceeding because there have been no changes in law or fact that would affect the Council’s prior determination the facility complies with OAR 345-024-015 and OAR 345-022-0040, and Issue 2 does not raise a significant issue of law or fact that may affect the Council’s prior determination.

In Issue 2, Gilbert argues a contested case proceeding should be held to determine whether the Summit Ridge facility complies with OAR 345-024-0015, Cumulative Effects Standard for Wind

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<sup>13</sup> Gilbert Issue 2 is set forth in Attachment 3, May 2 letter pp. 2-8 and May 3 letter, pp. 1-2.

Energy Facilities<sup>14</sup> and OAR 345-022-0040, Protected Areas.<sup>15</sup>

In her comments on the record and her request for contested case, Gilbert argues (among other items) 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 has presented four sub-issues under Issue 2, which, when responding to her comments on the record, the Department evaluated as 2a, 2b, 2c and 2d.

In her request for contested case, Ms. Gilbert asserts that in analyzing the issues in this manner, the Department "failed to complete the 'cumulative' evaluation of the issues as required by the rules and statutes provided. Cumulatively, they clearly describe a composite of impacts which together result in significant and irreparable damages to the Lower Deschutes Wild and Scenic River."<sup>16</sup>

The Department disagrees that it did not consider the alleged cumulative impact of the concerns Ms. Gilbert raised. Rather, as explained further below, the Department believes Ms. Gilbert: 1) has not described any change in law or fact that would affect the Council's prior determination when issuing the site certificate that the facility complies with OAR 345-024-015 and OAR 345-022-0040 and 2) does not raise a significant issue of law or fact that may affect the Council's prior determination. For these reasons, the Department recommends the Council deny the Gilbert request for contested case.

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<sup>14</sup> OAR 345-024-0015. To issue a site certificate for a proposed wind energy facility, the Council must find that the applicant can design and construct the facility to reduce cumulative adverse environmental effects in the vicinity by practicable measures including, but not limited to, the following:

- (1) Using existing roads to provide access to the facility site, or if new roads are needed, minimizing the amount of land used for new roads and locating them to reduce adverse environmental impacts.
- (2) Using underground transmission lines and combining transmission routes.
- (3) Connecting the facility to existing substations, or if new substations are needed, minimizing the number of new substations.
- (4) Designing the facility to reduce the risk of injury to raptors or other vulnerable wildlife in areas near turbines or electrical equipment.
- (5) Designing the components of the facility to minimize adverse visual features.
- (6) Using the minimum lighting necessary for safety and security purposes and using techniques to prevent casting glare from the site, except as otherwise required by the Federal Aviation Administration or the Oregon Department of Aviation.

<sup>15</sup> OAR 345-022-0040. (1) Except as provided in sections (2) and (3), the Council shall not issue a site certificate for a proposed facility located in the areas listed below. To issue a site certificate for a proposed facility located outside the areas listed below, the Council must find that, taking into account mitigation, the design, construction and operation of the facility are not likely to result in significant adverse impact to the areas listed below. . . . (k) Scenic waterways designated pursuant to ORS 390.826, wild or scenic rivers designated pursuant to 16 U.S.C. 1271 et seq., and those waterways and rivers listed as potentials for designation; . . .

<sup>16</sup> Attachment 3, May 2 letter p. 3.

*Gilbert Issue 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.*

In this sub-issue, Gilbert does not describe any change in law or fact that would affect the Council's prior determination (when issuing the site certificate) that the facility complies with OAR 345-024-015 and OAR 345-022-0040.

In her comments, Ms. Gilbert provided material that purportedly supports the argument that turbines can impact groundwater flow, but, as explained in the Staff Report addressing comments on the DPO, the Department does not consider that the provided reference materials establish a basis to support the likelihood of a potential impact.<sup>17</sup> Likewise, the Department does not believe this sub-issue rises to the level of a significant issue of fact that merits a contested case specifically because the questions raised by Ms. Gilbert are not within Council jurisdiction and are not required to be assessed by Council's rules covering protected areas. The protected areas standard requires an assessment of a proposed facility's potential impact to protected areas from the following: noise, traffic, water use, wastewater disposal, and visual impacts. OAR 345-021-0010(1)(l)(C), which lists these impact assessment requirements, is an "open-ended list," and the Department agrees that other potential facility impacts to protected areas not included in the list (meaning, impacts not considered from noise, traffic, water use, wastewater disposal, or visual) could be assessed and considered if there was evidence to warrant such an evaluation. The Summit Ridge facility will not use groundwater during facility construction or operation except for the exempt well at the O&M building, which as described above, would be limited to 5,000 gallons per day. Ms. Gilbert's argument that the weight and vibration of the proposed facility would somehow affect groundwater flow into the Deschutes River is not supported by evidence. In support of her comment on the record of the DPO, Ms. Gilbert attached a short document from the Northern Ireland Environment Agency titled "Wind farms and groundwater impacts, a guide to EIA [environmental impact assessment] and planning considerations." The brief document outlines issues of potential study for environmental impact assessments in Northern Ireland, including potential impacts from wind farms to water and groundwater, such as pollution or contamination, issues with groundwater dewatering (only required in areas with high water table), and potential changes in groundwater distribution or changes to infiltration and surface runoff. The Department notes that similar guidance does not exist in Oregon, and EFSC rules and standards do not require an assessment of a wind turbine's potential impacts to groundwater flow regime from vibration and weight of turbines.

*Gilbert Issue 2b asserts that the facility would have a significant adverse visual impact on the Wild and Scenic Deschutes River*

Gilbert contends 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. However, as noted in the Staff Report, in her comments, Gilbert did not identify changes in fact or

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<sup>17</sup> March 13, 2019 Staff Report, pp. 12-13

law that would impact the Council's previous findings. Rather, her argument simply contests Council's previous reasoning and findings.

In her request for contested case, Gilbert argues that there has been a relevant change in law, asserting "the Land Use rules for Wasco County have been updated. The rules require 'Taking into account mitigation, siting, design, construction and operation of the energy facility will not cause significant adverse impact to important or significant natural resources identified in the Wasco county Comprehensive Plan . . .'" Regardless of when this update took place (which Gilbert does not state), the Department does not believe this "change in law" would impact the Council's previous finding because when issuing the original site certificate the Council did assess whether the turbines would have a significant visual impact and concluded they would not.

*Gilbert Issue 2c asserts wildlife surveys were not adequate.*

In this sub-issue, Gilbert argues that the wildlife surveys conducted, including those for raptors, do not comply with Council standards and other state and Wasco County requirements because the surveys are outdated and do not cover a sufficient area. However, Gilbert does not describe any change in law or fact that would affect the Council's prior determination. Further, as explained in the Staff Report,<sup>18</sup> the Department believes the certificate holder has complied with all state and local requirements relevant to the Council's assessment of the facility's impact on wildlife. Further, to the extent this issue is intended to apply to USFWS's guidance for evaluating potential impacts to eagles from wind facilities, it is outside of Council jurisdiction. In short, the Department does not believe Ms. Gilbert has raised any issue of law or fact that merits the Council holding a contested case on this issue. As described elsewhere in this document in response to the Friends et al request for contested case, the Department argues in its proposed order that there is sufficient information in the record for Council to continue to find that the Council's Fish and Wildlife Habitat standard and Threatened and Endangered Species standard have been satisfied.

*Gilbert Issue 2d – impact on recreational opportunities.*

In this sub-issue Gilbert contends 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 contends these matters need to be included in the cumulative impact analysis of the development.

However, Gilbert does not describe any change in law or fact that would affect the Council's prior determination that the facility complies with the Council's recreation standard. Further, as explained in the Staff Report<sup>19</sup>, the Department believes the certificate holder has complied with Council Recreation standard and DEQ's Noise Control regulation. The Department does not

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<sup>18</sup> March 13, 2019 Staff Report, pp. 14-15.

<sup>19</sup> March 13, 2019 Staff Report, p. 16.

believe Ms. Gilbert has raised any issue of law or fact that merits the Council holding a contested case on this issue.

For the foregoing reasons, the Department recommends the Council deny the Gilbert request for contested case on Issue 2.

***Gilbert Issue 3 – compliance with ORS 469.401 / monitoring for birds and bats<sup>20</sup>***

Recommendation: Council find Gilbert Issue 3 was properly raised on the record

In her comments on the draft proposed order (Comment 8, p. 10), Ms. Gilbert raised and submitted facts in support of the final issue on which she requests – whether the site certificate fails to comply with ORS 469.401 because it does not require monitoring of the impacts to birds and bats for the life of the project. Therefore, the Department recommends that the Council find that Gilbert Issue 3 was properly raised.

Recommendation: Issue 3 should not be subject to a contested case proceeding because there have been no changes in law or fact that would affect the Council’s prior determination and Issue 3 does not raise a significant issue of law or fact that may affect the Council’s prior determination.

In Issue 3, Gilbert argues a contested case proceeding to determine whether the site certificate should require monitoring of the impacts to birds and bats for the life of the project. In her request for a contested case on this issue, Gilbert does not describe any change in law or fact that would affect the Council’s prior determination that the facility complies with Council standards and other applicable laws.

Further, as explained in the Staff Report,<sup>21</sup> Condition 10.5 requires implementation of a final Wildlife Monitoring and Mitigation Plan (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. ORS 469.401(2) establishes that site certificates contain conditions to ensure compliance with Council standards, statutes, and rule, but it does not establish or prescribe monitoring. The WMMP is consistent with other WMMPs implemented at EFSC-approved wind energy facilities in the region. Thus, this is not an issue of law or fact that may affect the Council’s prior determination.

For the foregoing reasons, the Department recommends the Council deny the Gilbert request for

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<sup>20</sup> Gilbert Issue 3 is set forth in [Attachment 3](#), May 3 letter p. 2. Ms. Gilbert did not identify this issue by any particular issue number in her request for contested case, other than to note it is the same as Comment 8 in her comments on the record of the DPO. In order to distinguish this issue from the others for which Ms. Gilbert has requested a contested case, the Department refers to it herein as “Issue 3.”

<sup>21</sup> March 13, 2019 Staff Report, p. 19.

contested case on Issue 3.

### **Department Evaluation of Request for Contested Case – Jim and Fuji Kreider**

Jim and Fuji Kreider submitted written comments on February 22, 2019 ([Attachment 6](#)) citing three primary reasons the Council should not approve an amendment extending construction deadlines:

- 1) The project “has struggled to find financing and has no market (power-purchase agreement)”
- 2) “the raptor survey data for this project is stale and outdated” and, “technology for mitigating harm to birds – such as radar technology for curtailing operations during migratory periods - has changed substantially in the nine years since this project was first proposed”.
- 3) “Procedurally there are additional problems . . . Pattern submitted this request for a third extension under invalid rules or rules that have not been confirmed by the Oregon courts.”

In a request for contested case received by the Department on May 2 ([Attachment 5](#)), the Kreiders identify the following issues:

- 1) “Wildlife Impacts”: “lack of current wildlife survey data required to make a decision on this amendment” The Kreiders identify “several rules and statutes which apply to our issue” including OAR 345-022-0060 Wildlife Habitat rules, OAR 345-022-0070 Threatened and Endangered Species, OAR 345-022-0040 Protected Areas and ORS 469.503.<sup>22</sup>
- 2) “Need – No Power Purchase Agreements.” In addressing this issue, the Kreiders cite to ORS 469.503, and assert that if there is no rule referencing a determination of need for an extension “the Council must either deny the amendment request – or stay the request until there are rules in place to address this vital concern.”<sup>23</sup>

The Kreiders state they are “requesting a contested case regarding the failure of the applicant to document that they are in compliance with the above statutes and rules.”<sup>24</sup>

**Recommendation: Council find Kreiders properly raised on the record issues regarding wildlife impacts and need for the facility.**

As summarized above, in their comments on the draft proposed order, the Kreiders raised and identified facts in support of the issue raised in their request for contested case regarding wildlife impact and the need for the facility. Therefore, the Department recommends that the Council find that Kreiders properly raised these issues.

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<sup>22</sup> [Attachment 5](#), p. 1.

<sup>23</sup> [Attachment 5](#), p. 3.

<sup>24</sup> [Attachment 5](#), p. 3

The Kreiders Request for Contested Case does not satisfy all of the informational requirements of OAR 345-027-0071(6).

The Department does not believe the Kreiders' request includes all of the elements of a request for contested case set forth in OAR 345-027-0071(6); in particular, it does not appear to include the information described in subsections (h) through (i).<sup>25</sup> In spite of this lack of this information, the Department would not object to the Council's considering the substantive arguments the Kreiders make in their request for contested case.

The Department will now evaluate whether the issues identified in the Kreiders' request for a contested case justify a contested case.

Recommendation: the Council should deny the Kreiders request for a contested case because they have not identified changes in law or fact nor raise a significant issue of law or fact that may affect the Council's prior determination.

### ***Kreiders Issue 1 – Wildlife Impacts***

The Kreiders allege a change in fact related to the issue of wildlife impacts – that the technology for mitigating harm to birds has changed substantially in the nine years since this project was first proposed. However, the development of new mitigation technologies since the site certificate was issued is not in and of itself a change that could impact the Council's prior determination that the preponderance of evidence on the record demonstrates the facility complies with all laws and Council standards. Neither the Council standards cited by the Kreiders nor any other Council standard requires a certificate holder to employ the most recent or most effective technology available to comply with Council standards. The Council previously determined Summit Ridge will comply with the Council's Fish and Wildlife Habitat and Threatened and Endangered Species standards. The Kreiders have not identified any change in facts that would justify the Council revisiting those findings.

The Kreiders contend the wildlife surveys need to be updated. However, as discussed above, the Department does not believe the baseline studies need to be updated at this time. Thus, regardless of whether there has been a change in facts or law relevant to the surveys and mitigation, in light of the Department's determination that new baseline studies are not needed, any such changes would not merit the Council overturning its prior finding that the facility complies with Council standards and applicable laws, or requiring the certificate holder to conduct

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<sup>25</sup> (h) If the person seeks to protect a personal interest in the outcome of the proceeding, a detailed statement of the person's interest, economic or otherwise, and how such interest may be affected by the results of the proceeding; (i) If the person seeks to represent a public interest in the results of the proceeding, a detailed statement of such public interest, the manner in which such public interest will be affected by the results of the proceeding, and the person's qualifications to represent such public interest; and (j) A statement of the reasons why others who commented on the record of the public hearing cannot adequately represent the interest identified in subsections (h) or (i).

new surveys.

### ***Kreiders Issue 2 – Need***

As noted above, the Kreiders cite to ORS 469.503 when explaining why they believe a contested case proceeding should be held to address the need for an extension:

“The overarching concern is contained in ORS 469.503 which requires evidence in the record which provides a preponderance of evidence that the facility complies with the council standards or the overall public benefits of the facility outweigh those adverse effects on a resource or interest protected by the standards.

How can the Council rule on whether there are “public benefits” when there is no rule referencing a determination of need?! The Council therefore, cannot make the determination in the context of ORS 469.503. Therefore, we contend, again, the Council must either deny the amendment request—or stay the request until there are rules in place to address this vital concern.”<sup>26</sup>

ORS 469.503

The Kreiders misinterpret the meaning of ORS 469.503. It requires that, in order to issue a site certificate, the Council

“determine that the preponderance of evidence on the record supports the following conclusions: (1) the facility *complies with the applicable standards adopted by the council* pursuant to ORS 469.501 *or* the overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by the applicable standards the facility does not meet.”

As explained in the Proposed Order, OAR 345-027-0085(1) requires the certificate holder to “include an explanation of its needs” for a requested deadline extension. The certificate holder has explained that it needs a construction deadline extension to allow it adequate time to obtain a power purchase agreement and financing for the facility. Council rules do not include substantive review criteria for evaluating the explanation of the need for an extension. Council is not required to find, and rules do not guide a finding, as to what constitutes an “acceptable” need for a timeline extension. The certificate holder has provided an explanation and that satisfies the applicable standard.

Thus, the “need” issue raised by the Kreiders does not raise a significant issue of law or fact that may affect the Council’s determination that the facility meets the applicable laws and Council standards.

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<sup>26</sup> Attachment 5, p. 3, emphasis in original

For the foregoing reasons, the Department recommends the Council deny the Kreiders request for a contested case.

Oregon Department of Energy

**Attachment 1\*: Request for Contested Case  
Friends of the Columbia Gorge, et al**

\*Already provided in the May meeting materials packet mailed to Council on May 3, 2019

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Link:

<https://www.oregon.gov/energy/facilities-safety/facilities/Council%20Meetings/2019-05-16-17-Item-I-SRW-Attach3-Friends-CC-Request.pdf>

Oregon Department of Energy

**Attachment 2\*\*:** Comments on Draft Proposed Order  
**Friends of the Columbia Gorge, et al**

\*\*Provided to Council for the March 22, 2019 Council Meeting

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Link:

<https://www.oregon.gov/energy/facilities-safety/facilities/Council%20Meetings/2019-03-22%20Agenda%20F%20SRWAMD4%20All%20DISTINCT%20comments%20received%20on%20DPO.pdf>

Pages 46-237

Oregon Department of Energy

**Attachment 3\*: Request for Contested Case: Friends of the Grand  
Ronde Valley (FGRV) and Irene Gilbert (as an individual)**

\*Already provided in the May meeting materials packet mailed to Council on May 3, 2019

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Links:

Combined Comment

<https://www.oregon.gov/energy/facilities-safety/facilities/Council%20Meetings/2019-05-16-17-Item-I-SRW-Attach1-Gilbert-FGRV-CC-Request.pdf>

Individual Comment

<https://www.oregon.gov/energy/facilities-safety/facilities/Council%20Meetings/2019-05-16-17-Item-I-SRW-Attach4-Gilbert-CC-Request.pdf>

Oregon Department of Energy

**Attachment 4\*\*:** Comments on Draft Proposed Order (Irene Gilbert)

\*\*Provided to Council for the March 22, 2019 Council Meeting

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Link:

<https://www.oregon.gov/energy/facilities-safety/facilities/Council%20Meetings/2019-03-22%20Agenda%20F%20SRWAMD4%20All%20DISTINCT%20comments%20received%20on%20DPO.pdf>

Pages 239-302

Oregon Department of Energy

**Attachment 5\*: Request for Contested Case: Fuji and Jim Kreider**

\*Already provided in the May meeting materials packet mailed to Council on May 3, 2019

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Link:

<https://www.oregon.gov/energy/facilities-safety/facilities/Council%20Meetings/2019-05-16-17-Item-I-SRW-Attach2-Kreider-CC-Request.pdf>

Oregon Department of Energy

**Attachment 6\*\*:** Comments on Draft Proposed Order  
**Fuji and Jim Kreider**

\*\*Provided to Council for the March 22, 2019 Council Meeting

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Link:

<https://www.oregon.gov/energy/facilities-safety/facilities/Facilities%20library/2019-02-22-SRW-AMD4-DPO-Comments-Part2.pdf>

Page: 679-680; 693-695