



Oregon

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To: Oregon Energy Facility Siting Council

From: Chase McVeigh-Walker, Senior Siting Analyst

Date: June 14, 2019

Subject: Agenda Item C (Information Item):
Montague Wind Power Facility – Council Review of Draft Proposed Order on Request for Amendment 4 and Draft Proposed Order Comments for the June 27, Council Meeting

Introduction

At the May 16-17, 2019 Energy Facility Siting Council (EFSC or Council) meeting in Condon, Oregon, and in accordance with Council rules on a request for amendment under the “Type A” review process, EFSC conducted a public hearing on the draft proposed order (DPO) on Request for Amendment 4 of the Montague Wind Power Facility Site Certificate (RFA4 or amendment request). The Montague Wind Power Facility (Facility or Montague) is a wind energy generation facility currently under construction located in Arlington, Oregon in Gilliam County. The facility, as currently being constructed (referred to as Phase 1) will include up to 56 wind turbines and is expected to generate approximately 202 megawatts (MW).

The amendment request (also referred to as Phase 2) seeks Council authorization to expand the site boundary by approximately 13,339 acres, allowing flexibility to install any combination of wind, solar, and battery storage energy components, as described in RFA4. The certificate holder proposes three design scenarios (referred to as Scenario A, B, and C), where scenarios A and B represent a maximum and minimum disturbance layout for wind facility components, respectively; Scenario C represents a disturbance layout for a solar photovoltaic array that would occupy a maximum footprint of up to 1,189 acres. All three proposed design scenarios include battery storage.

Following the May 16, 2019 DPO Public Hearing, based on a request from members of the public as well as the certificate holder, Council extended the public comment period from May 17 to May 23, 2019, and the certificate holder’s opportunity to respond to public comments from May 17 to May 30, 2019.

On June 7, 2019, the Oregon Department of Energy (Department) provided Council electronic copies of all comments received prior to the May 30th deadline, which are also available on the

Department's website at: <https://www.oregon.gov/energy/facilities-safety/facilities/Pages/Council-Meetings.aspx>

Draft Proposed Order Comment Review

During the comment period on the DPO, including the May 16, 2019 Public Hearing, the Department received 25 comments from members of the public, reviewing agencies, and the certificate holder. All comments have been transmitted to Council for its review and consideration. The Department evaluated every comment received during the DPO comment period, and as provided below in this staff report, has responded to all substantive and specific issues raised by commenters that are within Council jurisdiction, including comments from the certificate holder and its responses to public comments; Ms. Irene Gilbert, as an individual and on behalf of Friends of the Grande Ronde Valley; and Michelle Colby, Gilliam County Planning Director on behalf of the Gilliam County Planning Department. Issues raised by the commenters not identified in this staff report are either incorporated into the responses provided below, were outside of EFSC jurisdiction, or were outside of EFSC jurisdiction and responded to by the certificate holder in their May 30, 2018 comment response letter. The Table below is representative of all commenters on the record of the DPO.

Comment Index			
Date Received	Last Name	First Name	Entity
Previously provided in the May 2 Staff Report and included in Attachment 1			
4/9/2019	Cherry	Steve	Oregon Department of Fish and Wildlife (ODFW)
5/2/2019	Buck	Craig	Public
5/2/2019	Fitzner	Elaine	Public
Previously provided in the May 14 Staff Report and included in Attachment 1			
5/13/2019	Wales	Barbara	Public
5/13/2019	Wisdom	Michael	Public
5/13/2019	Wisdom	Elias	Public
Previously provided during the May 16/17 EFSC Meeting and included in Attachment 1			
5/14/2019	Hutchinson	Matt	Certificate Holder
5/16/2019	Albrich	Elaine	Certificate Holder*
5/16/2019	Walsh	Brian	
5/16/2019	Hutchinson	Matt	
5/16/2019	Gilbert	Irene	Public
5/16/2019	Olsen	Eudora	Public
5/16/2019	Weedman	Erin	Public
5/16/2019	Macnab	Dennis	Public
5/16/2019	Shaffer	Steve	Public
5/16/2019	Colby	Michelle	Gilliam County Planning Department
5/16/2019	Little	Chuck	Public

5/16/2019	McGuire	Rodney	Public
5/16/2019	Kronner	Karen	Public
	Gritski	Bob	
5/16/2019	Rhodes	Paul & Shirley	Public
5/16/2019	Skeahan	Brian	Public
Comments received during the public comment period extension concluding on Mar 23rd			
5/23/2019	Irby	Myra	Public
5/23/2019	Weedman	Erin	Public
Responses received from the certificate holder prior to the written response period concluding on May 30, 2019			
5/30/2019	Albrich	Elaine	Certificate Holder

Certificate Holder Comments (from May 14, 2019 comment letter)

Certificate Holder Comment 1 (Recommended Amended Condition 27)

The certificate holder requests that the hub height restriction imposed in recommended amended Condition 27, as presented in Section III.A. *General Standard of Review* of the draft proposed order, be removed because it limits the size of wind turbines that could be used for Phase 2 and is not correlated with an impact evaluated under a Council standard with the exception of noise impacts; however, the certificate holder asserts that wind turbine hub height is not strongly correlated with noise impacts and describes that wind turbine noise, and any potential minimal changes due to variation in wind turbine hub height would be verified through the Condition 107 pre-construction final facility design noise analysis where compliance with DEQ’s Noise Control Regulation (OAR 340-035-0035) is required.

ODOE Evaluation of Certificate Holder Comment 1

In Section III.A. *General Standard of Review* of the draft proposed order, the Department recommended Council amend Condition 27 to impose equipment dimension restrictions (e.g. maximum wind blade tip height; minimum aboveground blade tip clearance) based on dimensions connected to an impact evaluated under a Council standard or applicable requirement. Recommended amended Condition 27 included a restriction on wind turbine hub height of 351 feet, consistent with representations in RFA4, because hub height is associated with the noise evaluation. However, the Department understands that, based on OAR 340-035-0035, windspeeds at hub height establish conditions for which to evaluate ambient noise level, when a certificate holder opts not to use the regulatory ambient noise level default allowed for wind facilities of 26 dBA. While windspeeds could vary at differing hub heights and could result in differing ambient noise levels and differing modeled operational noise, because the certificate holder is obligated to demonstrate compliance with the Noise Control Regulation under Condition 107 and based on the certificate holder’s assertion that hub height is not strongly correlated with wind turbine operational noise level, the Department recommends Condition 27 be amended in the proposed order as follows:

Recommended Amended Condition 27: The certificate holder shall construct a facility substantially as described in the site certificate and may select turbines of any type, subject to the following restrictions and compliance with all other site certificate conditions. Before beginning construction, the certificate holder shall provide to the Department a description of the turbine types selected for the facility demonstrating compliance with this condition.

i. For Phase 1 facility components:

- (a) The total number of turbines must not exceed 81 turbines.
- (b) The turbine hub height must not exceed 100 meters and the maximum blade tip height must not exceed 150 meters.
- (c) The minimum blade tip clearance must be 14 meters above ground. [Amendment #3] [Final Order on ASC; AMD3]

ii. For Phase 2 facility components:

- (a) Components may include any combination of wind and solar energy generation equipment, up to 81 wind turbines or the maximum layout (including number and size) of solar array components substantially as described in RFA4.
- (b) ~~The turbine hub height must not exceed 351 feet (107 meters)~~ and the maximum blade tip height must not exceed 597 feet (182 meters). The minimum aboveground blade tip clearance must be 46 feet (14 meters).
[AMD4]

Certificate Holder Comment 2 (Hauling of Batteries and Battery Waste, Condition 116 and Condition 55)

The certificate holder requests that Recommended Condition 116, as presented in Section III.B. *Organizational Expertise* of the draft proposed order, be modified removing the certificate holder's obligation to provide evidence to the Department that a contractual agreement requiring compliance with all applicable laws and regulations, including 49 CFR 173.185 – applicable to the handling and transport of batteries and battery waste - with a third-party haul/transport entity has been obtained. The certificate holder argues that Condition 55 already requires compliance with applicable laws and regulations for hazardous waste handling and storage and therefore requiring an additional demonstration of compliance is unnecessary.

ODOE Evaluation of Certificate Holder Comment 2

As presented in Section III.B. *Organizational Expertise* of the draft proposed order, the Department recommended Council impose recommended Condition 116 requiring that the certificate holder provide evidence that its third-party contractor responsible for transporting battery and battery related waste is contractually obligated to comply with 49 CFR 173.185, a federal requirement applicable to battery transport implemented to prevent dangerous evolution of heat; prevent short circuits; prevent damage to terminals; and, prevent contact with other batteries or conductive material, all of which the Department considers necessary to ensure protection of public health and safety as evaluated under the standard. However, the Department agrees that reference to specific regulatory provisions could be problematic based

on potential future regulatory changes. The Department recommends that the condition be amended in the proposed order consistent with the certificate holder's comment but that the modified language include clarification on the reporting obligation to provide information to the Department regarding any compliance issues related to the storage, handling and transport of batteries and battery waste, as presented below:

Recommended Condition 116: The certificate holder shall ensure its third-party contractor transports and disposes of battery and battery waste in compliance with all applicable regulations and manufacturer recommendations related to the transport of hazardous battery materials.

- a. Prior to and during construction, as applicable, the certificate holder shall provide evidence to the Department of applicable regulations and manufacturer recommendations applicable to that a contractual agreement has been obtained for the transport and disposal of batteries and battery related waste by a licensed hauler and requires the third party to comply with all applicable laws and regulations, including applicable provisions of 49 CFR 173.185.
- b. During construction and operation, the certificate holder shall report to the Department any potential compliance issue or cited violations of its third party contractor for the requirements identified in sub(a) of this condition. Prior to transporting and disposing of battery and battery waste during facility operations, provide evidence to the Department that a contractual agreement has been obtained for transport and disposal of battery and battery waste by a licensed hauler and requires the third party to comply with all applicable laws and regulations, including applicable provisions of 49 CFR 173.185.
[AMD4]

Certificate Holder Comment 3 (Third-Party Permits, Recommended Amended Condition 29)

The certificate holder requests that recommended amended Condition 29, as presented in Section III.B. *Organizational Expertise* of the draft proposed order, be modified removing the certificate holder's obligation to provide compliance documentation for permits that must be provided to the Department prior to construction, but which would be obtained by parties other than the certificate holder ("third-party permits"), such as an Air Contaminant Discharge Permit, a Water Right or Limited Waste Use License. The certificate holder argues that reporting of compliance with third-party permits is not supported by evidence and that the Department has the authority to obtain proof of compliance with such requirements under Oregon Administrative Rule (OAR) Chapter 345 Division 26 rules if an issue arises.

ODOE Evaluation of Certificate Holder Comment 3

As presented in Section III.B. *Organizational Expertise* of the draft proposed order, the Department recommended Council amend Condition 29 to require that, during construction, the certificate holder provide compliance documentation required by third-party permits that,

if not obtained by a third-party, would normally be governed by the site certificate. The Department agrees that because these permits would be issued, enforced and reviewed by another state or local agency, such as Oregon Department of Water Resources or Oregon Department of Environmental Quality, providing compliance documentation to the Department is not necessary. However, the Department recommends that the condition be modified in the proposed order to specify a reporting requirement by the certificate holder to the Department if a compliance issue or violation is cited by another agency for the identified third-party permits.

Recommended Amended Condition 29: ~~Before beginning construction,~~ The certificate holder shall:

- i. Before beginning construction of each phase of the facility, For Phase 1, provide to the Department a list of all third-party permits which would normally be governed by the site certificate and that are necessary for construction (e.g. Air Contaminant Discharge Permit; Limited Water Use License). Once obtained, the certificate holder shall provide copies of third-party permits to the Department and Gilliam County confirmation to the Department that the construction contractor or other third party has obtained all necessary permits or approvals and shall provide to the Department proof of agreements between the certificate holder and the third party regarding access to the resources or services secured by the permits or approvals.
- ii. During construction and operation, promptly report to the Department if any third-party permits referenced in sub(a) of this condition have been subject to a cited violation, Notice of Violation, or allegation of a violation. [AMD4] For Phase 2, submit to the Department and Gilliam County a list of third party permits to be obtained or that have been obtained.
 - a. ~~The certificate holder shall submit to the Department copies of all obtained third party permits.~~
 - b. ~~Provide to the Department in semi-annual reports pursuant to OAR 345-026-0080, copies of compliance recordkeeping as required by third party permits normally governed by the site certificate (e.g. Type I Administrative Review Conditional Use Permit for Temporary Batch Plant; Air Contaminant Discharge Permit for Batch Plant; Limited Water Use License; Water Right; Water Pollution Control Facilities Permit(s)).~~

Certificate Holder Comment 4 (Pre-Construction Site Specific Geotechnical Investigation)

The certificate holder requests that recommended amended Condition 52, as presented in Section III.C. *Structural Standard* of the draft proposed order, be modified removing reference to the certificate holder's description of tasks to be completed for the final design geotechnical investigation. The certificate holder argues that the description of tasks repeats language included in the Oregon Department of Geology and Mineral Industries (DOGAMI) guidelines referenced in Condition 52, and is not warranted by additional risks or hazards identified at the site.

ODOE Evaluation of Certificate Holder Comment 4

As presented in Section III.C. *Structural Standard* of the draft proposed order, the Department recommended Council amend Condition 52 consistent with the certificate holder's description included in RFA4 of tasks to be completed for the final design geotechnical investigation. The condition amendment was recommended based on OAR 345-021-0010(1)(h)(C) which directs the certificate holder to provide a description and schedule of site-specific geotechnical work to be performed before construction for inclusion as site certificate conditions. The Department agrees though, that the description of site-specific geotechnical work provided in RFA4 and included in the recommended amended condition was generic and not necessary to prescribe in a condition because Condition 52 includes a requirement to consult with DOGAMI prior to any pre-construction geotechnical work. For clarification on the outcome of the pre-construction consultation, the Department recommends Council amend Condition 52 in the proposed order as follows:

Recommended Amended Condition 52: Before beginning construction of each phase of the facility, the certificate holder shall conduct a site-specific geotechnical investigation and shall report its findings to the Oregon Department of Geology & Mineral Industries (DOGAMI) and the Department. The certificate holder shall conduct the geotechnical investigation after consultation with DOGAMI to confirm appropriate site-specific methodologies for evaluating seismic and non-seismic hazards to inform equipment foundation and road design and in general accordance with current DOGAMI recommendations.

~~i. Phase 2 of the facility, the certificate holder must: conduct a site-specific geotechnical investigation and shall report its findings to the Oregon Department of Geology & Mineral Industries (DOGAMI) and the Department. The report must be submitted to the Department and DOGAMI at least 90 days prior to beginning construction of Phase 2, unless otherwise agreed upon by the Department.~~

~~The certificate holder shall conduct the geotechnical investigation in general accordance with current DOGAMI guidelines for engineering geologic reports, and site-specific seismic hazards, and shall include at least the following activities:~~

- ~~a. Reviewing available data from previous geotechnical explorations in the vicinity of the approved and proposed expanded site boundary.~~
- ~~b. Reviewing available geologic information from published sources.~~
- ~~c. Subsurface explorations (including soil borings, test pits, infiltration tests, and possible geophysical testing) at locations of proposed facility components.~~
- ~~d. Collecting additional soil samples for classification and laboratory testing and conducting laboratory tests on selected soil samples, if necessary to comply with DOGAMI guidelines.~~

Certificate Holder Comment 5 (Battery Inspections, Recommended Condition 118)

The certificate holder requests that recommended Condition 118, as presented in Section III.D. *Soil Protection* of the draft proposed order, be modified to: require battery storage system inspections but not based on a specified monthly frequency; authorize Department review of battery storage inspection reports but remove annual reporting requirement; and, remove requirement to provide evidence of active property coverage as the imposed requirement was not supported by findings of risks or hazards.

ODOE Evaluation of Certificate Holder Comment 5

In Section III.D. *Soil Protection* of the draft proposed order, the Department recommended Council impose Condition 118 requiring that, during operations, the certificate holder conduct monthly inspections of the battery storage system and annually report to the Department results of the battery inspections, including any corrective actions. The recommended condition also requires that the certificate holder demonstrate active property coverage under its commercial business insurance to provide additional protection to the State where circumstances resulted in both the State needing to utilize the bond or letter of credit on file for facility decommissioning and an unintended catastrophic event (e.g. fire or explosion) associated with battery storage system operation.

Based on the certificate holder's comments, the Department recommends Condition 118 be modified to remove specificity on the battery system inspection frequency. While the monthly inspection frequency was based on the certificate holder's representation in RFA4, the Department agrees that the inspection frequency need not be specified and may be based on a frequency recommended by the battery manufacturer. While the Department recommended that inspection reports be provided annually to allow the Department the opportunity to evaluate corrective actions and sufficiency of certificate holder response time to minimize hazard risk, the Department agrees that these reports need not be reported if provided upon request during annual compliance inspections. The Department also recommends that the provision requiring that the certificate holder provide evidence of activity property coverage be removed, as the risks identified and evaluated in RFA4 and the draft proposed order did not support such requirement. The Department recommends Condition 118 be modified in the proposed order as follows:

- Recommended Condition 118:** During facility operation, the certificate holder shall:
- a. Conduct ~~monthly~~ inspections of the battery storage systems, in accordance with manufacturer specifications. The certificate holder shall maintain documentation of inspections, including any corrective actions, and shall make available for review upon request by the Department, ~~and shall submit copies of inspection documentation in its annual report to the Department.~~
 - b. ~~Provide evidence in its annual report to the Department of active property coverage under its commercial business insurance from high loss catastrophic events, including but not limited to, onsite fire or explosion. [AMD4]~~

Certificate Holder Comment 6 (Recommended Amended Condition 80 Topsoil Management Plan; Operational Spill Management Plan; Solar Panel Washing)

The certificate holder requests that recommended amended Condition 80, as presented in Section III.D. *Soil Protection* of the draft proposed order, be substantively modified to: 1) clarify that the topsoil management plan would only be required for the solar and not wind energy generation components; 2) that if an operational Spill Prevention Countermeasure and Control (SPCC) Plan is not required based on oil quantity (i.e. 1,320 gallons) maintained onsite, an operational Spill Management Plan is not warranted given the minimal spill risk potential and material quantities described in RFA4 for the proposed battery storage system; and, 3) to remove reference to solar panel washing and potential Water Pollution Control Facilities permit based on a duplicate requirement in Condition 87.

ODOE Evaluation of Comment 6

As presented in Section III.D. *Soil Protection* of the draft proposed order, the Department recommended Council amend Condition 80 to require that, prior to construction, the certificate holder submit to the Department and Gilliam County a topsoil management plan including how topsoil would be stripped, stockpiled, and clearly marked in order to maximize topsoil preservation and minimize erosion impacts consistent with the Oregon Land Conservation and Development Commission (LCDC's) OAR 660 Division 330 rule. The Department also recommended that the certificate holder provide to the Department an operational SPCC plan, if required, or in the alternative, provide to the Department an Operational Spill Prevention and Management Plan.

First, LCDC's OAR 660 Division 330 rule establishes that for wind facilities located on arable land, that a certificate holder demonstrate its actions to minimize erosion impacts through topsoil management and that the provision may be satisfied by submittal of a topsoil management plan to the County. The Department recommends the requirement to develop and implement a County-approved topsoil management plan be maintained for the wind facility but not the solar components, as the topsoil management provisions for solar facilities no longer appear in LCDC's OAR 660 Division 330 rule.

Second, based on the material inventory submitted in RFA4 Exhibit G, the Department does not expect for an SPCC plan to be required for the facility and considered the Operational Spill Prevention and Management Plan supportive of minimizing potential spill risk from large quantities of non-oil materials including 7,500 gallons of liquid coolant associated with the proposed battery storage system. However, because the liquid coolant is not considered a hazardous material and based on the certificate holder's spill prevention and response measures described in RFA4, the Department agrees that an additional plan is not necessary to reduce potential soil impacts from spills.

Lastly, the Department agrees that the duplicate requirement related to solar panel washing and the Water Pollution Control Facilities permit should be removed from Condition 80 and 87,

due to duplication with Condition 29. The Department recommends the following amendments to Conditions 80 and 87 be included in the proposed order:

Recommended Amended Condition 80:

- i. The certificate holder shall...
- ii.
 - a. Before beginning construction of Phase 2 wind energy generation facility components, the certificate holder shall submit to the Department and Gilliam County Planning Director for review and approval a topsoil management plan including how topsoil will be stripped, stockpiled, and clearly marked in order to maximize topsoil preservation and minimize erosion impacts. [OAR 660-033-0130(378)(#b)(B)]. The topsoil management plan may be incorporated into the final Erosion and Sediment Control Plan, required under sub(iii) or may be provided to the Department as a separate plan.
 - b. Prior to beginning facility operation, the certificate holder shall provide the Department a copy of an ~~DEQ approved~~ operational SPCC plan, if ~~determined to be required pursuant to OAR 340-141-0001 to -0240 by DEQ. If an SPCC plan is not required by DEQ, the certificate holder shall prepare and submit to the department for review and approval an operational Spill Prevention and Management plan.~~
 - c. ~~During operation, if blade washing and/or solar array washing becomes necessary, the certificate holder shall conduct all equipment washing in compliance with a General Water Pollution Control Permit (WPCF) 1700 C, as issued by DEQ to the site certificate holder's third party contractor. A copy of the permit shall be provided to the Department prior to blade or solar array washing. [AMD4]~~

Recommended Amended Condition 87: During facility operation, if wind turbine blade or solar panel-washing becomes necessary, the certificate holder shall ensure that there is no runoff of wash water from the site or discharges to surface waters, storm sewers or dry wells. The certificate holder shall not use acids, bases or metal brighteners with the wash water. The certificate holder may use biodegradable, phosphate-free cleaners sparingly. [AMD4]

- ~~i. During facility operation, if solar array washing becomes necessary, the certificate holder shall provide to the Department a copy of the Oregon Department of Environmental Quality a WPCF 1700 B permit to the certificate holder's third party contractor.~~

Certificate Holder Comment 7 (Financial Assurance, Recommended Amended Condition 32(ii)(b)(iii))

The certificate holder requests that recommended amended Condition 32, as presented in Section III.G. *Retirement and Financial Assurance* of the draft proposed order, be modified to reduce the future development contingency applied to the solar facility components of 20

percent to 10 percent, consistent with the future development contingency previously and currently applied to Phase 1 wind facility components.

ODOE Evaluation of Certificate Holder Comment 7

As described on page 117 of Section III.G. *Retirement and Financial Assurance* of the draft proposed order, the Department recommended Council amend Condition 32 to account for the estimated retirement cost of proposed facility components, including solar energy generating components and battery storage equipment. The Council has historically applied 20 percent to an applicant's decommissioning cost estimate to account for future development contingencies, with the exception of wind facilities where Council has applied a 10 percent future development contingency.

As explained on page 116 of the DPO, the certificate holder prepared a decommissioning cost estimate for all three of the Phase 2 facility design scenarios by utilizing the Department's former *Cost Estimating Worksheet (2011)*. Due to its latency in formal review and update, the Department no longer recommends use of the *Cost Estimating Worksheet (2011)*; however, if used in full or in part, an applicant or certificate holder must provide discussion or justification about the assumptions used to develop the cost estimate. In the Department's May 24, 2018 request for additional information, the Department requested that additional information be provided on the methods and assumptions used for the proposed solar array and battery storage. In their June 14, 2018 response to the Department's request for additional information, the certificate holder clarified that the unit cost per MW was derived to facilitate the comparison of the different technologies (solar array and battery storage), allowing for the scaling of the decommissioning estimate based on final design.

While the certificate holder provided additional information clarifying that the calculated unit cost per MW was derived from individual costs of components of the solar array and battery storage system, the costs of each of the identified individual components were not included. Without knowing the individual costs per component that the unit cost per MW was derived from, and accounting for other factors of uncertainty (for example, different environmental standards or other legal requirements that might be in place in the future, new disposal sites might need to be found for demolition debris, and the cost of labor and equipment available might increase at a rate exceeding the standard inflation), the Department recommends that Council maintain a 20 percent future development contingency for both the battery storage system and solar array components.

The Department did not recommend any changes in the Administration and Project management allowance (10 percent), from what the certificate holder represented in Exhibit W of RFA4. The Department will include in the proposed order clarification that the recommended adjustments are intended to apply specifically to the future development contingency of the solar array and the battery storage system. The Department recommends changes to findings in the proposed order to further clarify the basis for the future development contingency applies to battery storage and solar energy generation components.

Certificate Holder Comment 8 (Land Use Category for Battery Storage; Goal 3 supporting reason related to GHG emission reductions)

The certificate holder requests that the Department revise the discussion in Section III.E. *Land Use* of the draft proposed order to clarify that the proposed battery storage system and collector substation would be an ancillary facility to Phase 2 wind facility or solar facility energy generating components, and while not specifically included in the RFA4 Goal 3 exception acreage identified in RFA4, would result in a de minimus 1.5 percent increase in acreage impacted.

The certificate holder also requests that, based on an evaluation prepared by Jacobs, the Department and Council consider an additional reason justifying a Goal 3 exception based on greenhouse gas emission (GHG) reductions from the removal of direct and indirect GHG agricultural emission sources within the proposed solar micro-siting corridor.

ODOE Evaluation of Certificate Holder Comment 8

As presented in Section III.E. *Land Use* of the draft proposed order, the Department evaluated the proposed battery storage system as part of the Phase 2 wind energy generation components, consistent with the land use evaluation included in RFA4. However, as noted by the certificate holder, while the proposed battery storage system and the collector substation were not included in the Goal 3 exception acreage for the proposed solar photovoltaic energy generation components, the overall impact of the omission is negligible and the reasons and analysis presented in RFA4 for the Goal 3 exception are considered valid and applicable to a modified analysis that would include the proposed battery storage system and collector substation. The Department recommends that the proposed order include an administrative revision to the land use evaluation of the solar energy generation components to incorporate the proposed battery storage system and collector substation.

The Department reviewed the certificate holder's additional reason for a Goal 3 exception and, while agricultural GHG-emissions would be reduced from the removal of indirect and direct GHG emission sources, does not consider a reduction in direct and indirect GHG emissions from the removal of agricultural operations from land specifically zoned for agricultural use to be a valid reason justifying an exception to the goal established to preserve and protect agriculture, Goal 3. The Department also views the proposed GHG emission reduction reasons to be one that would apply to all proposed solar facilities and questions then how, if applied to all proposed solar facilities, it could reasonably be sufficient in justifying non-compliance with the statewide planning goal.

Certificate Holder Comment 9 (ODFW Policy; WGS Category 2 Buffer; Total Compensatory Mitigation)

The certificate holder argues that the 1500-meter designation of Category 2 Washington Ground Squirrel (WGS) habitat from active WGS burrows, as described in Section III.H. *Fish and Wildlife Habitat* of the draft proposed order, is not supported by evidence on the record.

The certificate holder also requests that the overall compensatory mitigation required through the Habitat Mitigation Plan not be based on a rounded whole number resulting in mitigation of 5.2 versus 6.0 acres, as presented in the draft proposed order and the draft Habitat Mitigation Plan provided as Attachment D of the draft proposed order.

ODOE Evaluation of Certificate Holder Comment 9

As presented in Section III.H. *Fish and Wildlife Habitat* of the draft proposed order, based on ODFW policy, the Department recommended Category 2 WGS habitat be delineated to 1,500 meters when adjacent to Category 1 WGS habitat. ODFW has consistently applied the Category 2 habitat designation to 1,500 meters of suitable habitat adjacent to Category 1 WGS habitat for multiple EFSC facilities. However, the Department has reviewed the record and confirmed that ODFW did not make this specific comment regarding the 1,500 meter Category 2 habitat designation on the record of Montague RFA4. There is very little, if any, such Category 2 habitat in the Phase 2 site boundary or that would be potentially impacted by Phase 2 facility components. Because of the lack of such habitat in the Phase 2 site boundary or that would be impacted by the proposed Phase 2 facility components, and because Condition 31 requires the certificate holder to consult with ODFW in classifying the affected habitat into habitat categories prior to construction, the Department recommends that the reference to a 1,500-meter buffer be removed from the proposed order. However, the Department recommends Condition 31 be amended in the proposed order to identify that ODFW consultation should include a discussion on extent of Category 2 WGS habitat if Category 1 WGS habitat is identified during the pre-construction habitat assessment. Recommended condition language is provided below:

Recommended Amended Condition 31: Before beginning construction but no more than two years before beginning construction and after considering all micro-siting factors, the certificate holder shall provide to the Department, to the Oregon Department of Fish and Wildlife (ODFW) and to the Planning Director of Gilliam County detailed maps of the facility site, showing the final locations where the certificate holder proposes to build facility components, and a table showing the acres of temporary and permanent habitat impact by habitat category and subtype, similar to Table 6 in the Final Order on the Application. The detailed maps of the facility site shall indicate the habitat categories of all areas that would be affected during construction (similar to Figures P-8a through P-8d in the site certificate application). In classifying the affected habitat into habitat categories (including Category 2 Washington Ground Squirrel habitat), the certificate holder shall consult with the ODFW. The certificate holder shall not begin ground disturbance in an affected area until the habitat assessment has been approved by the Department. The Department may employ a qualified contractor to confirm the habitat assessment by on-site inspection.

The certificate holder requests not to be obligated to provide compensatory habitat mitigation based on a rounded whole number, resulting in this instance in a habitat mitigation area covering 5.2 versus 6 acres. The approach of rounding the compensatory habitat mitigation acreage to the nearest whole number was proposed by the certificate holder in its draft Habitat Mitigation Plan. Because the certificate holder's methodology (i.e. acreage ratio per habitat category) evaluating the amount of compensatory mitigation satisfies the mitigation goals of the Council's Fish and Wildlife Habitat standard, the Department does not consider rounding the overall acreage amount necessary to satisfy the standard and recommends that reference to acreage rounding be removed in the proposed order and draft Habitat Mitigation Plan.

Certificate Holder Comment 10 (Cultural Resources, Recommended Amended Condition 50)

The certificate holder requests that recommended amended Condition 50, as presented in Section III.K. *Historic, Cultural, and Archeological Resources*, be modified to clarify that cultural monitoring during ground disturbing activities applies to ground disturbance at depths of 12 inches or greater but that it would exclude activities involving post-driving equipment, as post-driving equipment would not expose deeply buried soil. The certificate holder also requests that the condition be modified to remove both the review of the cultural monitor qualifications by the Department in consultation with the Confederated Tribes of the Umatilla Indian Reservation of Oregon (CTUIR) and the requirement that preference of the selected cultural monitor be given to a CTUIR citizen.

ODOE Evaluation of Certificate Holder Comment 10

As presented in Section III.K. *Historic, Cultural, and Archeological Resources* of the draft proposed order, the Department recommended Council amend Condition 50 to require cultural monitoring during ground disturbing activities at depths of 12 inches or greater by a cultural monitor, based on qualifications reviewed and approved by the Department in consultation with CTUIR and that preference be given to a CTUIR citizen. Based on the certificate holder's reasoning, the Department agrees that cultural monitoring need not occur during post-driving activities and that while the Department maintains value in allowing the CTUIR to review the cultural monitor qualifications, that preference to a CTUIR citizen was not requested by CTUIR. Recommended condition language to be included in the proposed order is provided below:

- Recommended Amended Condition 50:** During construction, the certificate holder shall:
- (a) Ensure that a qualified archeologist, as defined in OAR 736-051-0070, instructs construction personnel in the identification of cultural materials and avoidance of accidental damage to identified resource site.
 - (b) Employ a qualified cultural resource monitor to conduct monitoring of ground disturbance at depths of 12 inches or greater, excluding those activities that involve post-driving equipment. The qualifications of the selected cultural resources monitor shall be reviewed and approved by the Department, in consultation with the CTUIR Cultural Resources Protection Program. Cultural monitors shall be prioritized for

~~selection based on demonstrated experience with CTUIR tribal resources. In the selection of the cultural resources monitor to be employed during construction, preference shall be given to citizens of the CTUIR..... [AMD4]~~

Certificate Holder Comment 11 (Noise, Recommended Amended Condition 107)

The certificate holder requests that recommended amended Condition 107, as presented in Section III.Q.1. *Noise Control Regulations* of the draft proposed order, be modified to remove the certificate holder's obligation to conduct post-construction noise monitoring to verify that the facility is in compliance with the DEQ noise regulations. The certificate holder argues that existing Condition 107 already requires confirmation from the certificate holder that the final facility design meets the DEQ noise regulations prior to construction, and that Condition 108 ensures operational compliance. The certificate holder also proposed revisions to Condition 107 that would eliminate the requirement that the pre-construction noise assessment evaluate noise from solar energy generating components and battery storage system.

Additionally, the certificate holder explains that under Condition 108, the certificate holder is required to maintain an operational noise complaint response system requiring prompt notification to the Department if complaints are received and of any actions taken by the certificate holder to address those complaints. The certificate holder further explains that if the Department receives a complaint via Condition 108, the Department has the ability to require operational noise monitoring if a complaint is received.

ODOE Evaluation of Certificate Holder Comment 11

As presented in Section III.Q.1. *Noise Control Regulations* of the draft proposed order, the ambient noise degradation standard requires a demonstration that noise generated during facility operation must not cause the hourly L50 noise level at any noise-sensitive property to exceed 10 A-weighted decibels (dBA) above ambient noise levels or, in this case, 36 dBA. Based upon the certificate holder's noise analysis and noise contour maps, proposed Design Scenarios A, B and C are predicted to exceed the ambient noise degradation standard of 36 dBA at many noise sensitive receptors. Council previously imposed Condition 107 to confirm that the final facility design meets the DEQ noise regulations prior to construction. At identified noise sensitive receptors in exceedance of the noise ambient degradation standard, the certificate holder is required to provide the Department copies of waivers to demonstrate compliance with the noise control regulation for noise increases of 10 dBA.

As part of RFA4 Exhibit X noise modeling and analysis, the certificate holder indicated that the maximum sound power levels used to conduct the noise modeling included an additional 2 dBA per noise source to account for uncertainty, consistent with manufacturer specifications. In the Department's DPO, Table 3 identifies the maximum sound power levels per identified noise source, inclusive of the 2 dBA uncertainty factor. The certificate holder argues that the preconstruction requirements of Condition 107, and the requirements of Condition 108 (applied during facility operation) would demonstrate that the facility can or would comply with

the DEQ noise regulations. By including a 2 dBA uncertainty factor in the maximum sound power levels per identified noise source, and the requirements of existing Conditions 107 and 108, the Department agrees with the certificate holder that imposing post construction monitoring at noise sensitive receptors within 1 dBA to the DEQ noise threshold is not necessary. However, the Department recommends Council modify Condition 107 to require the certificate holder verify that all noise sensitive properties within one mile of the final design locations of noise generating components for Phase 1 and Phase 2 have been identified and included in the preconstruction noise analysis. Additionally, the Department recommends that Condition 108 be modified to include a noticing requirement for the certificate holder to notice noise sensitive receptors within one mile of noise generating facility components of the noise complaint system and how to file a noise complaint. The Department recommends the proposed order include the following amendments to Conditions 107 and 108:

Recommended Amended Condition 107: The certificate holder shall provide to the Department

- i. Prior to Phase 1 construction:
 - a. Information that identifies the final design locations of (all turbines, to be built at the facility...
- ii. Prior to Phase 2 construction of the facility:
 - a. Prior to construction, a noise analysis that includes the following Information:

Final design locations of all Phase 1 and Phase 2 noise generating facility components (all wind turbines; substation transformers; inverters and transformers associated with the photovoltaic solar array; and inverters and cooling systems associated with battery storage system).

The maximum sound power level for the Phase 2 substation transformers; inverters and transformers associated with the photovoltaic solar array; inverters and cooling systems associated with battery storage system; and the maximum sound power level and octave band data for the Phase 2 wind turbines selected for the facility based on manufacturers' warranties or confirmed by other means acceptable to the Department.

The results of noise analysis of Phase 1 and Phase 2 components according to the final design performed in a manner consistent with the requirements of OAR 340-035-0035(1)(b)(B)(iii) (IV) and (VI) demonstrating to the satisfaction of the Department that the total noise generated by the facility (including the noise from wind turbines, substation transformers, inverters and transformers associated with the photovoltaic solar array; inverters and cooling systems associated with battery storage system) would meet the ambient degradation test and maximum allowable test at the appropriate measurement point for all potentially-affected noise sensitive properties. The certificate holder verify that all noise sensitive properties within one mile of the final design locations of noise generating components for Phase 1 and Phase 2 have been identified and included in the

preconstruction noise analysis based on review of the most recent property owner information obtained from the Gilliam County Tax Assessor Roll.

For each noise-sensitive property where the certificate holder relies on a noise waiver to demonstrate compliance in accordance with OAR 340-035-0035(1)(b)(B)(iii)(III), a copy of the a legally effective easement or real covenant pursuant to which the owner of the property authorizes the certificate holder's operation of the facility to increase ambient statistical noise levels L10 and L50 by more than 10 dBA at the appropriate measurement point. The legally-effective easement or real covenant must: include a legal description of the burdened property (the noise-sensitive property); be recorded in the real property records of the county; expressly benefit the certificate holder; expressly run with the land and bind all future owners, lessees or holders of any interest in the burdened property; and not be subject to revocation without the certificate holder's written approval.

~~b. During operation, if the results of the pre-construction final noise analysis submitted per Condition 107(ii) identify that modeled noise levels are predicted to be within 1 dBA of the ambient degradation standard (10 dBA) for noise sensitive properties where noise waivers were not obtained, or within 1 dBA of the maximum allowable noise standard (50 dBA) for any noise sensitive property, the certificate holder shall monitor and record actual statistical noise levels at these noise sensitive properties to verify that Phase 2 facility components are operating in compliance with the noise control regulation. The monitoring plan must be reviewed and approved by the Department prior to implementation.~~

~~If, during monitoring, the ambient degradation standard (10 dBA) or maximum allowable noise standard (50 dBA) are exceeded at any noise sensitive property, the certificate holder shall submit to the Department its mitigation proposal demonstrating the measures to be utilized to lower noise levels and achieve compliance with the applicable noise standard. The mitigation proposal shall be reviewed and approved by the Department.~~

~~[Final Order on ASC; AMD4]~~

Recommended Amended Condition 108: During operation of the facility, the certificate holder shall implement measures to ensure compliance with the noise control regulation, including:

- (a) Providing notice of the noise complaint system and how to file a noise complaint to noise sensitive receptors within 1-mile of noise generating components.
- (b) Maintain a complaint response system to address noise complaints. The certificate holder shall promptly notify the Department of any complaints received regarding facility noise and of any actions taken by the certificate holder to address those complaints. In response to a complaint from the owner of a noise sensitive property regarding noise levels during operation of the

facility, the Council may require the certificate holder to monitor and record the statistical noise levels to verify that the certificate holder is operating the facility in compliance with the noise control regulations.

[AMD 4]

Certificate Holder Comment 12 (Response to Public Comments on Olex historic resources)

In response to public comments raised on the record of the draft proposed order related to the Olex Townsite, Olex Schoolhouse, Olex Cemetery, and Olex loading platform, the certificate holder describes that the identified resources are not included in the Gilliam County Comprehensive Plan Goal 5 inventory, and explains that even if they were, the county has not adopted specific land use requirements for protection of these resources other than a requirement to evaluate potential alteration and demolition impacts, which would not result from proposed Phase 2 facility components as proposed Phase 2 facility components would not result in direct or physical impacts to these resources.

The certificate holder describes that these resources were not included in the evaluation of the Council's Historic, Cultural and Archeological standard because the analysis area is defined as the proposed amended site boundary and that these resources are not located within the proposed amended site boundary. However, in response to public comments, the certificate holder provided an evaluation of the history of the town of Olex and conducted surveys of aboveground resources within the town. Based on the survey, the certificate holder was unable to identify or confirm the presence of the loading platform and did not further evaluate the Olex Cemetery based on its location outside of the analysis area. The survey results provided additional information on the Olex Townsite and Olex Schoolhouse.

The town of Olex was the site of the first post office established east of The Dalles, which opened in 1874. The town had approximately fifty residents and was predominately a farming community. Alfalfa, fruits and vegetables were the primary crops and were sold in Olex, Condon, and Arlington. Olex is notable as the birthplace of Earl Snell, the Governor of Oregon from 1943 to 1947. Olex is now considered an unincorporated community. The area is still rural and the main industry remains farming.

The Olex Townsite was established in 1874 in Gilliam County, Oregon. While the town of Olex still exists, much of what made up the original townsite is gone. The commercial hub has been demolished, though several residences, the Olex Schoolhouse (though converted to a residential use) and cemetery still exist.

The certificate holder evaluated the structures at 66325 Upper Rock Creek Road – the site of the Olex Schoolhouse. The site currently contains eight resources including two residential buildings, one barn and one stable, a corral, and sheds. All but the original building, which was previously a school but is now a residence, are modern structures. The original building,

formerly the Olex Schoolhouse, was constructed in 1875 and was the first public school in Gilliam County.

The certificate holder then voluntarily proposes to prohibit construction of the wind turbines in closest proximity to the Olex Townsite and Olex Schoolhouse until concurrence from the Oregon State Historic Preservation Office (SHPO) is received on the likelihood of eligibility of listing on the National Registry of Historic Places (NRHP). The certificate holder then proposes to implement appropriate mitigation, as agreed upon by the certificate holder and SHPO, if the resources or deemed likely eligible for NRHP listing.

ODOE Evaluation of Certificate Holder Comment 12

As presented in Section III.K. *Historic, Cultural and Archeological Resources* of the draft proposed order, the analysis area is the site boundary. However, according to the Project Order for the Facility, if resources protected under a Council standard are identified outside of the site boundary which could be impacted by facility components – including indirect impacts, the certificate holder is obligated to evaluate potential impacts to those resources. The Department considers the identified Olex resources to be resources required to be evaluated under the Council’s Land Use and Historic, Cultural and Archeological Resources standard. Based on review of the certificate holder’s analysis, the Department agrees that the resources are not identified in the Gilliam County Comprehensive Plan as Goal 5 resources and even if they were Goal 5 resources, the proposed Phase 2 facility components would not result in impacts based on the county’s applicable substantive criteria for historic resources which are specific to direct impacts (i.e. alteration or demolition), but not indirect impacts such as visual or noise impacts.

Because the Olex resources were not evaluated in RFA4, but were identified through comments received on the record of the draft proposed order, and concurrence from SHPO on the likelihood of eligibility for NRHP listing has not yet been obtained, the Department treats the Olex Townsite, Olex Schoolhouse and Olex Cemetery as resources likely eligible for NRHP listing, unless or until SHPO concurrence is obtained to support that the resources are not likely eligible for NRHP-listing. Based on the certificate holder’s evaluation presented in its May 14, 2019 comments and May 17, 2019 presentation and testimony to Council, the Department considers that the certificate holder has made a good faith effort to document that the Olex loading platform is no longer in place or available for evaluation.

Indirect impacts (such as from facility visibility or operational noise) are considered by SHPO when evaluating a facility’s potential impacts to historic aboveground resources. Based on the visual and noise impact evaluation provided in RFA4, proposed Phase 2 wind turbines, specifically the “K-string” wind turbines, would be visible and audible at the Olex historic resources. The Department assumes the indirect impacts to the Olex historical resources to be likely significant and require mitigation. However, the Department also recognizes that a full evaluation of eligibility for listing on the NRHP has not been conducted, and as such, the Department also recommends that this step first be conducted for the Olex resources, and if it is confirmed that the Olex resources are likely eligible for listing on the NRHP, mitigation must

be implemented. The Department then recommends Council amend Condition 47 in the proposed order based on potential indirect impacts of facility visibility to the importance of the setting and feeling of the Olex historic resources as follows.

Recommended Amended Condition 47: Before beginning construction, the certificate holder shall:

- (a) Label all identified historic, cultural or archeological resource sites on construction maps and drawings as “no entry” areas. If construction activities will occur within 200 feet of an identified site, the certificate holder shall flag a 30-meter no entry buffer around the site. The certificate holder may use existing private roads within the buffer areas but may not widen or improve private roads within the buffer areas. The no-entry restriction does not apply to public road rights-of-way within the buffer areas or to operational farmsteads. [Final Order on ASC]
- (b) ~~Finalize the Phase 2 Historical Resource Mitigation Plan, provided in Attachment H of the Final Order on Request for Amendment 4, including selection of mitigation option and confirmation of implementation schedule. Submit for review and approval by the Department in consultation with the State Historic Preservation Office, a final Phase 2 Historical Resource Mitigation Plan (HRMP), based on the draft HRMP provided in Attachment H of the Final Order on Request for Amendment 4.~~ The final HRMP shall include the following:
 - i. Confirmation on established setback of Phase 2 facility components to the Weatherford Barn, if confirmed by the Department and SHPO to represent a distance whereby indirect impacts to setting and feeling would be minimized to less than significant. In the alternative, the certificate holder shall specify the mitigation option selected from the HRMP and the implementation schedule to reduce significant adverse indirect impacts to the Weatherford Barn.
 - ii. Concurrence from SHPO that the Olex Townsite, Olex School, and the Olex Cemetery (“Olex resources”) are not likely eligible for listing on the National Register of Historic Places (NRHP); or if SHPO concurs that the Olex resources are likely eligible for listing, the certificate holder shall include in its final HRMP appropriate descriptions of the resources and mitigation, which could include an appropriate setback of Phase 2 facility components to the Olex resources as confirmed by the Department in consultation with SHPO to represent a distance whereby indirect impacts to setting and feeling would be minimized to less than significant. In the alternative, the certificate holder shall specify the mitigation option selected and the implementation schedule to reduce significant adverse indirect impacts to the Olex resources such as: historic photo documentation and scale drawings of Olex; additional archival and literature review; video media publications; public interpretation funding; or other form of compensatory mitigation deemed appropriate by the Department, in consultation with SHPO. [AMD4]

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 6 issues, which are evaluated below.¹ Ms. Gilbert both submitted a hard copy of her comments to the Department at the May 16 DPO Public Hearing, and provided oral testimony, in which she read the majority of her written comments.

Gilbert Comment 1

Ms. Gilbert's Comment 1 states:

"The site certificate fails to comply with OAR 345-022-0000(a) which requires the facility to comply with the requirements of the Oregon Energy Facility Siting statutes ORS 469.300 to ORS 469.570.

The paragraph starting on Line 23 of Page 11 needs to be removed from the order as it is incorrect. ODOE references OAR 345-027-0067 as supporting a restriction on justification for a request for contested case to information included in the public comments is inaccurate. The enabling statute is OAR 469.370(3) which states, "Any issue that may be the basis for a contested case shall be raised not later than the close of the record at or following the final public hearing prior to issuance of the department's proposed order. Such issues shall be raised with sufficient specificity to afford the council, the department and the applicant an adequate opportunity to respond to each issue."

OAR 469.370(5) further states that a failure to follow the requirements of OAR 469.370(3) means that contested case requests are no longer limited to those issues raised during the public hearing. The exact language of OAR 345-027-067(3)(G) referenced by ODOE is: "The Council will not consider any further public comment on the request for amendment or the draft proposed order after the close of the record of the public hearing." This reference appears in the section of the rule entitled "Public Comment and Hearing on the Draft Proposed Order for Requests for Amendment Under Type A Review"

Any council members with a legal background will recognize the principle of statutory interpretation which states "not to omit what has been inserted" or to "insert that which has been omitted." The Statute and the Rule being referenced makes no reference to it applying to the later action of requesting a contested case. Further, the statute and the rule only require a simple statement of what the issue is. Again, there is appeal language that indicates that the public comments are intended to establish the topic, not make the argument regarding the topic. ODOE is asking you to approve and take responsibility for statements that are prefabricated and contrary to the requirements contained in statute which the agency is to abide by. This comment relates to an issue that is under the control of the Council, would effect decisions made on any future requests for

¹ 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 "Ms. Gilbert."

contested cases, and make the council responsible and accountable for signing off on the desires of the Siting Division which have no support in either statute or rule.

What is very distressing about this type of insertion of the Oregon Energy Siting Division desires to rewrite the law absent involvement of the legislature or the public is the following:

This will result in ODOE responding to a significantly increased amount of information which will be included in comments regarding site certificates. Much of this information would never have to be responded to as most comments do not result in a contested case. The Department is asking EFSC to allow them to increase their work load, which will be billed to the developers, and which will be used to support their request that the legislature authorize 2 new siting analyst positions. Developers should be outraged at the increase in costs to them since they are billed for not only ODOE time, but also legal expenses the department incurs in defense of ODOE actions. As they should be outraged when contested cases are denied over and over resulting in issues never being resolved and developers being placed on the hook for the costs ODOE is billing them responding to these issues over and over. ODOE escapes responsibility, accountability and costs related to their decisions. EFSC ends up being blamed and is then viewed by the public as being incompetent and unethical.

I urge you to refuse to support actions which appear to be to be nothing more than efforts on the part of the Siting Division to increase their empire at the expense of the public and the developers”

ODOE Evaluation of Gilbert Comment 1

Ms. Gilbert expresses concern regarding the Department’s position that a person may not support a contested case request with new information or documents the person did not provide while the public comment period / record was open. The Department’s position is consistent with statute and rule, for the following reasons.

Ms. Gilbert references to ORS 469.370(3) and (5) to support her position that submittal of information in a request for contested case is not limited to the information submitted in comments provided on the record of the draft proposed order. However, ORS 469.370 is applicable only to new applications for site certificate. The Montague RFA4 is a request for amendment to an existing site certificate. As such, ORS 469.405 applies, which states at (1) “A site certificate may be amended with the approval of the Energy Facility Siting Council. The council may establish by rule the type of amendment that must be considered in a contested case proceeding.” The Council has complied with this statute through its rules, specifically at OAR 345, Division 27, and for Type A amendments such as Montague RFA4, OAR 345-027-0067 and -0071.

As is stated at OAR 345-027-0067(5)(b), any issue that may be the basis for requesting a contested case must be raised on the record of the public hearing with sufficient specificity to afford the Council, the Department and the certificate holder an adequate opportunity to respond to the issue. To raise an issue with sufficient specificity, a person must present facts, on the record of the public hearing, that support the person's position on the issue. In Section II.D. *Council Review Process* of the draft proposed order, the Department explains that pursuant to OAR 345-027-0067(3)(G), Council will not consider or accept further public comment on the request for amendment or on the draft proposed order after the close of the public hearing. The purpose of these rules is to ensure that the public provides the Department and Council all comments, including any documents or statutory or regulatory citations, that the public believes are relevant to the site certificate analysis conducted by the Department and Council at a point in the process where the Department, Council and certificate holder have "an adequate opportunity to respond to the issue" (as stated in OAR 345-027-0067(5)(b)) – *i.e.*, at a point when the Department can address any relevant issues raised by those comments in the proposed order. Allowing a person requesting a contested case to submit additional documents or information that might have influenced the Council's comments regarding a draft proposed order and the Department's preparation of a proposed order undermines that goal.

It is not the Department's position that all information that would be submitted in a contested case proceeding be submitted in comments provided on the record of the draft proposed order. It is not the Department's intent to limit the level, type and amount of information that may be submitted in a contested case proceeding, if granted. A contested case proceeding is an evidentiary process overseen by a third-party hearing officer, whom has the discretion to allow the introduction of new evidence into the record for the purpose of evaluating contested case issues.

The Department recommends the discussion provided in this staff report clarifying the differences between information provided in support of an issue on the record of the draft proposed order, information provided in a request for contested case, and information provided in a contested case proceeding be included in the proposed order.

Gilbert Comment 2

Ms. Gilbert's Comment 2 states:

"ODOE failed to consult with the Department of Navy or include them as an advisory group as required by OAR 345-022-0000. This rule requires the department to consult with other agencies regarding a determination regarding compliance with rules and ordinances administered by other agencies or when other agencies have special expertise. The Department of Navy administers the rules related to the impacts to the safety and health of pilots and the public when pilots in training are performing high speed, low altitude maneuvers. In addition, they are responsible for determining safety when any structure exceeds 500 feet in height. I am submitting by reference with this

comment the documents provided by the Department of Navy in the Saddle Butte contested case hearing which includes documentation of turbine impacts to safety and health and the Navy's special expertise related to low altitude training for new pilots responsible for protecting the United States. In the predictable future when ODOE claims that the testimony presented as evidence from the Saddle Butte hearing is not admissible as evidence in this site certificate, please refer to the legal definition for "evidence" as it has been defined through appeal. It basically says that while the weight of some evidence may be stronger than others, any document that could be used to influence the public to come to a decision is appropriate and admissible as evidence.

The Department is not given authority in the statutes to move the Department of Navy into the ranks of the public with limited access to opportunities to review, analyze, research and comment on the proposed amended site certificate.

ODOE is placing me, Navy personnel and citizens at risk due to the failure to meet the requirements to consult with them. Given past actions of ODOE and EFSC to deny access to the a contested case from the Department of Navy in spite of the fact that they did not receive notice in a timely fashion, I am making this comment to preserve my right to a contested case hearing absent documentation that the Department of Navy has been consulted with and determined that the turbines do not pose a threat to pilots, me and other citizens due to their increased height. The increased size of the proposed turbines which have never before been constructed in the state require additional fatality monitoring to determine impacts to wildlife and their habitat in the area of the proposed development."

ODOE Evaluation of Gilbert Comment 2

Ms. Gilbert states that the Department failed to consult with the Department of Navy as a special advisory group during review of RFA4. Ms. Gilbert explains that the Department was required to include the Department of Navy as an advisory group under OAR 345-022-0000, and that ODOE is not given authority in the statutes to move the Department of Navy into the ranks of the public with limited access to opportunities to review, analyze, research and comment on the proposed amended site certificate. Furthermore, Ms. Gilbert indicates that ODOE is placing herself, Navy personnel, and citizens at risk due to the failure to meet the requirements to consult with [the Navy].

The Department agrees with Ms. Gilbert's claim that the Department of Navy was not consulted as a special advisory group, and that [the Department of Navy] was given the same opportunities to review, analyze, research and comment on the DPO as those given to the public. Pursuant to OAR 345-001-0010(52), the Department of Navy is not identified as a special advisory group, nor is the Navy a reviewing agency. The statutory (ORS 469.480) definition of special advisory groups is "the governing body of any local government within whose jurisdiction the facility is proposed to be located." For reference, on November 20, 2009, EFSC designated the Gilliam County Board of Commissioners as the Special Advisory Group (SAG) for

the Montague Wind Power Facility. Their designation as the SAG for the facility remained unchanged in Amendment 4. The Navy is not a special advisory group. The Navy is also not a default reviewing agency, as defined at OAR 345-001-0010(52).

As described in Section III.P.1. *Public Health and Safety Standards for Wind Energy Facilities* of the draft proposed order, the Department relies upon the knowledge, experience, and input of the Oregon Department of Aviation (ODA) when assessing a wind facility's impacts to navigable airspace. Furthermore, in November 2018 ODA made a determination that they do not object with conditions to the construction described in [RFA4]...and that their determination was with respect to the safe and efficient use of the navigable airspace by aircraft and to the safety of persons and property on the ground.

In Section III.K. *Land Use* of the draft proposed order, the Department explains that the certificate holder discussed impacts to avian species in Exhibits P and Q of RFA4. Furthermore, the Department describes the requirements of Condition 91, and clarifies that the requirements of condition 91 would continue to apply to the proposed Phase 2 components. Condition 91 requires the certificate holder to complete post-construction monitoring for potential bird and bat fatalities from wind turbine collision.

Finally, the Department notes that the Navy did not comment on the record of the Montague RFA4 DPO, despite receiving all information, notice, and time allowances that all members of the public receive, including Ms. Gilbert.

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

Gilbert Comment 3

Ms. Gilbert's Comment 3 states:

"The Oregon Department of Energy gave an inaccurate response to the direct question from Gilliam County. In the e-mail dated January 25, 2019, they requested the blade length. In the response to the question, it was stated that the blade length of the largest turbine would be 246 feet. It is actually proposed to be 492 feet. Previously the blade length approved was 328 feet. The increase of 164 feet increases the effective kill area for birds and bats from 1.94 acres per turbine to 4.36 acres per turbine. (Area Calculations are attached.)"

ODOE Evaluation of Gilbert Comment 3

Ms. Gilbert questions the Department's January 25, 2019 email response to Michelle Colby, Gilliam County Planning Director (provided as Attachment B of the draft proposed order) which confirmed that the proposed wind turbine blade length would be equal to 246 feet; Ms. Gilbert argues that the proposed wind turbine blade length would be equal to 492 feet. Ms. Gilbert

asserts that based on a blade length of 492 feet, the effective bird and bat kill area would increase from 1.94 to 4.36 acres.

As described in Section II.A. *Requested Amendment* and presented in RFA4 Exhibit B Figure B-1, dimensions of proposed wind turbines would include a maximum diameter of 492 feet. The Department understood Ms. Colby's question to be specific to blade length and not diameter, which is the specification provided. The Department's assessment of Phase 2 potential impacts to fish and wildlife habitat and threatened and endangered species was included in Section III.H., *Fish and Wildlife Habitat* and Section III.I., *Threatened and Endangered Species*. Ms. Gilbert's Comment 3 does not address a specific issue or finding of compliance with either the Council's Fish and Wildlife Habitat standard or Threatened and Endangered Species standard. The Department does not consider this comment to necessitate a change in recommended findings or conditions included in the proposed order.

Gilbert Comment 4

Gilbert's Comment 4 states:

"Properties of religious and cultural significance identified in the communications from the Confederated Tribes of the Umatilla Indian Reservation dated March 26, 2019 need to be included and reviewed under the Land Use Rules and listed on Page 139 and 140 of the Draft Proposed Order on Request for Amendment 4. Tribal land management plans along with many tribal rules and contractual agreements are provided in oral histories. The information provided in the letter place in written form the verbal history indicating the significant importance of these sites and the land use protections which apply. The application fails to meet the requirements of OAR 345-022-0030 in order to determine that the applicant meets these requirements.

A couple of years ago I was invited by a group of 12 elders from the Amish Community in Monroe and Vernon Counties, Wisconsin to talk with them and their attorney regarding plans to run the Badger Cooley transmission line through their community. The issue was how to convey to "Englishmen"(that would be us) why the transmission line would be an infringement on their religious freedom and destroy their community due to those impacts. I took on the task of attempting to communicate what I have observed and learned over the years of spending time in my cabin within the area and my relationships with the Amish people. The transmission line ended up being constructed in another area. The response of the Oregon Department of Energy indicating that they would require a 200 foot setback from these properties is the kind of action that the Amish feared. As a step mother of two Native American girls, I find myself outraged that the Oregon Department of Energy would be so bold. The appropriate site certificate condition would be to require the developer to provide a formal site plan for these locations that includes mitigation for impacts that is acceptable to the tribal leaders. I do not understand the thinking of the Amish or the tribes regarding what is important to them and how to protect their religious values. I know that when a young Amish man

told me I was a "hard working woman", it was a statement of incredible respect and highly unusual. That I can understand. I would not venture to assume I understand their religious beliefs. The developer and certainly the Oregon Department of Energy have no legitimate basis for establishing that a 200 foot setback is adequate when the tribal representative has clearly stated that the development will have a significant adverse effect to the integrity of design, setting, feeling and association" of these locations of significance to their culture and religion. The site certificate needs to be changed to include a site certificate condition that provides for the tribes to sign off on mitigation requirements."

ODOE Evaluation of Gilbert Comment 4

Ms. Gilbert asserts that two historic properties of religious and cultural significance to Indian Tribes (HPRCSIT), as identified in a March 26, 2019 letter from the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) to the Department (provided as Attachment B of the draft proposed order), need to be evaluated under the Council's Land Use standard and that because they were not, RFA4 fails to satisfy the standard. Ms. Gilbert requests that Council impose a condition requiring that a mitigation agreement be executed between CTUIR and the certificate holder.² Ms. Gilbert also requests that the two HPRCSITs be included on the list of plans evaluated under the Council's Scenic Resources standard; however, the Department clarifies that HPRCSITs do not represent a Tribal Land Management Plan, which is the type of plan required to be evaluated and listed under the Scenic Resources standard.

As explained in Section III.E. *Land Use*, p. 55 of the draft proposed order, the proposed amended site boundary would not be located within a designated combining zone, the designated overlay zone where, if identified in the Gilliam County Comprehensive Plan, significant historic resources would be protected from significant alteration or demolition (see Gilliam County Zoning Ordinance Article 4 Section 4.100). Therefore, because the two HPRCSITs are not included in Gilliam County Comprehensive Plan and the proposed amended site boundary, therefore, is not located within a county designated combining zone, the two identified HPRCSITs would not be evaluated under the Council's Land Use standard. As addressed in Section III.K. *Historic, Cultural and Archeological Resources* of the draft proposed order, based on CTUIR's recommendations for mitigating potential significant impacts from the proposed RFA4 facility components to the two identified HPRCSITs as presented in the March 26, 2019 comment letter, the Department recommends Council impose Condition 50 requiring that a CTUIR and Department-approved cultural monitor be onsite during ground disturbing activities at depths of 12 inches or greater. CTUIR described cultural monitoring during ground disturbing activities as sufficient mitigation because it would protect any unknown resources that would have used or been used at or within the HPRCSIT boundaries. The Department does

² Ms. Gilbert's Comment 4 questions a 200 foot setback from proposed facility components to the two HPRCSITs in reference to the Department and the certificate holder's proposed mitigation. It is not clear where the information related to a 200 foot setback was obtained as it is not included in or referenced in RFA4 or the Department's draft proposed order.

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 states:

"The developer has not provided information necessary to make a determination that the development meets the requirements of ORS 469.310. This site certificate fails to meet the requirements of ORS 469.401(2) and does not provide information necessary to determine compliance with the standards, statutes and rules described in ORS 469.501 and ORS 469.503. The statement on Page 12, line 36 indicates that the developer will have the ability to design the facility in a manner that is different from any of the design scenarios presented in this amendment. This level of "flexibility" denies the public, reviewing agencies, and any other interested parties the information necessary to determine whether or not it is necessary to comment or object to impacts the development will have on any of the criteria for evaluation contained in Div. 22, Div. 24, The evaluation of visual, noise, health and safety, land use, habitat impacts, impacts to Threatened and Endangered Wildlife, etc. are dependent upon knowing what resources exist and where the siting corridors will be located. Two specific examples (Note that these are only examples, but the comment refers to the inability to evaluate any of the standards given the amount of flexibility being proposed) 1. The land use standard requires evaluation of multiple issues such as views, wildlife, etc. which are dependent upon knowing where exactly the development will be built. 2. Depending upon where the development is built, there could be a need for an exception to a rule, etc.)

The developer has enlarged the site boundary to the extent that major changes and resulting impacts are possible with the level of flexibility being proposed in the site certificate. The site certificate already proposes three different options for this development. That provides a level of flexibility beyond any development sited to date. Expanding the site to over 44,000 acres which is approximately 69 square miles and then giving the developer the opportunity to utilize any of that site is basically abdicating on the part of the Development and EFSC to assure compliance with the statutes and rules and denies the public and other agencies any opportunity to comment on actual impacts that could occur depending upon what part of the site is actually used. This is not acceptable."

ODOE Evaluation of Gilbert Comment 5

Ms. Gilbert suggests that there is not enough evidence on the record to ensure that the facility would comply with ORS 469.310. Additionally, Ms. Gilbert states that the site certificate fails to meet the requirements of ORS 469.401(2) and does not provide information necessary to determine compliance with the standards, statutes and rules described in ORS 469.501. Ms. Gilbert concludes by expressing concern about the level of flexibility recommended by the

Department to the certificate holder through a variation of technologies, as proposed in RFA4. Ms. Gilbert indicates that the provided flexibility denies the public, reviewing agencies, and any other interested party the information necessary to evaluate impacts to any of the evaluated criteria contained in Division's 22 and 24 (visual, noise, health and safety, land use, habitat impacts, impacts to threatened and endangered wildlife, etc.).

In the RFA4 Narrative, the certificate holder explains that it is seeking flexibility to install any combination of the wind and solar power generation for Phase 2, as long as the maximum generation of Phase 2 does not exceed 202 MW and the combined Phase 1 and 2 does not exceed 404 MW. The certificate holder developed three design scenarios (Design Scenarios A, B, C) to analyze a range of potential impacts associated with RFA4. In Section III. *Review of the Requested Amendment* of the draft proposed order, the Department, recognizing the potential of the final Phase 2 design layout differing from the three design scenarios provided, recommended that Council impose conditions, as needed, based on the methodology and maximum impact evaluated for each design scenario but not be prescriptive to a design scenario or specific proposed facility component. The Department has evaluated the full range of potential impacts in accordance with Council rule and standards, and stands by its recommendations and findings that Council approve RFA4. The Department does not consider this comment to necessitate a change in recommended findings or conditions included in the proposed order.

Gilbert Comment 6

Gilbert's Comment 6 states:

"The weed Management plan needs to comply with the Oregon Statutes 569.530 requiring the developer to control noxious weeds and keep them from going to seed. It also impacts both the Wildlife Standard as well as the Threatened and Endangered species rule OAR 345-022-0060 and OAR 345-022-0070 due to the impacts noxious weeds have on habitat. The Oregon Statute also requires washing of equipment and vehicles which enter or leave the development to control the spread of noxious weeds."

ODOE Evaluation of Gilbert Comment 6

Ms. Gilbert's Comment 6 references ORS 569.530, which according to Ms. Gilbert, requires the developer to control noxious weeds and keep them from going to seed. The Department is unable to evaluate ORS 569.530 as it does not exist and assumes the intended reference is ORS 569.350. Based on review of ORS 569.350, the Department agrees that equipment wheel washing should be required prior to entering public roads to minimize the introduction of noxious weeds. Section III.K. *Land Use* of the DPO explains that existing condition 43 requires a weed management plan be implemented during facility construction and operation. The weed control plan will be developed to be consistent with the Gilliam County Weed Control Program, in consultation with the Gilliam County Weed Control Officer.

Condition 92 requires the certificate holder to implement a revegetation plan. In RFA4, the certificate holder provided a Phase 2 Revegetation Plan, in which weed control measures were included. Included as Attachment E to the Montague Wind Power Facility DPO, the Phase 2 Revegetation Plan instructs the certificate holder to clean vehicles and equipment before entry into revegetation areas, to help minimize the introduction of noxious weed seeds to the site. The Department recommended the Phase 2 Revegetation Plan be amended in the proposed order to also include cleaning requirements for equipment exiting the site as well.

Gilliam County Planning Department

On behalf of the Gilliam County Planning Department, Ms. Colby submitted a comment at the May 16, 2019 DPO public hearing. Ms. Colby's comment encourages EFSC to consider "taking up the task of [addressing] how EFSC Goal 3 exception[s] to EFU land may be coordinated/ implemented/ recognized at the local-county level.

At the May 16, 2019 EFSC meeting in Condon, OR, Councilor Kent Howe questioned how land use laws are incorporated into county comprehensive plans. Secretary Todd Cornett responded by stating that this question (the question that Counselor Howe raised, and Ms. Colby reiterated) was raised several months ago, and that the Department is currently evaluating the comment. While the comment was provided on the record of the DPO Public Hearing, it is not specific to an applicable substantive criteria or specific evaluation of compliance under an applicable Council standard. Therefore, the Department recommends that changes in the proposed order are not necessary for inclusion in response to this comment.

Staff Recommendations

Department staff recommend Council direct staff to incorporate the recommended amended conditions and additional analysis outlined in this June 14, 2019 staff report to the proposed order.