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To: Oregon Energy Facility Siting Council

From: Maxwell Woods, Senior Policy Advisor/Acting Council Secretary

Date: August 15, 2019

Subject: Agenda Item M (Action Item) – Supplemental Staff Report to August 8, 2019 Staff Report re: Summit Ridge Wind Farm Request for Amendment 4 (RFA4), Council Decision on Requests for Contested Case, possible Council Final Decision on RFA4 for the August 22-23, 2019 EFSC Meeting

This staff report is provided to supplement the August 8, 2019 Agenda Item M staff report regarding Council's Review of Requests for Contested Case on the Amended Proposed Order for Request for Amendment 4 of the Summit Ridge Wind Farm Site Certificate, for the August 22-23, 2019 Council meeting.

Council Scope of Review on Contested Case Proceeding Requests on an Amended Proposed Order

The Department received two requests for a contested case proceeding on the amended proposed order. Requests for a contested case proceeding were received from Irene Gilbert, as an individual and on behalf of the Friends of the Grande Ronde Valley (FGRV), and from Friends of the Columbia Gorge, Oregon Wild, Oregon Natural Desert Association, Central Oregon LandWatch, and the East Cascades Audubon Society ("Friends et al"). The Council's scope of review for considering the requests for contested case include an evaluation of: 1) whether the request satisfies the requirements for requesting a contested case proceeding on an amended proposed order; 2) whether the issues were related to the amendment to the proposed order; and 3) whether the issues justify a contested case proceeding, as further described below.

Evaluation of Request for Contested Case

In accordance with OAR 345-027-0071(10)(b), individuals eligible to participate in a contested case proceeding on an amended proposed order must submit to the Department a request, by a specified deadline, that contains the following three items:

- A. The person's name, mailing address and email address;

- B. A statement of the contested issues related to the amendment to the proposed order, including facts believed to be at issue; and
- C. A statement that describes why the Council should find an issue justifies a contested case, as described in section (8) [OAR 345-027-0071(8)].

Evaluation of Whether Issue Is Related to Changes Presented in Amended Proposed Order

In accordance with OAR 345-027-0071(9) and -(10)(b), in order for an issue to be eligible for review in a contested case proceeding on an amended proposed order, the person must:

- 1) Raise an issue related to changes presented in the amended proposed order, and
- 2) Raise an issue of significant law or fact that may affect the Council's determination that the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in OAR Chapter 345 Divisions 22, 23 and 24.

In determining whether issues raised represent a significant issue of law or fact that may affect Council's determination of the facility's compliance with an applicable Council standard, Council should carefully consider the factual and legal arguments made by the requestor and review of the administrative record for the facility, including Council's July 9, 2019 Order on Requests for Contested Case on the Proposed Order on Request for Amendment 1 of the Summit Ridge Wind Farm Site Certificate (Order on Contested Case).

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

Option 1: Under OAR 345-027-0071(10)(a), 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 found sufficient to justify the proceeding.

Option 2: Under OAR 345-027-0071(10)(b), if the Council finds that the request identifies one or more properly raised issues that justifies a contested case but that could be settled in a manner satisfactory to the Council through an amendment to the proposed order, including modification to conditions, 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 OAR 345-027-0071(4).

Option 3: Under OAR 345-027-0071(10)(c), 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.

Department Evaluation of Issues Raised in Requests for Contested Case

The Department’s recommendations to Council on 1) whether the request satisfies the requirements for requesting a contested case proceeding on an amended proposed order; 2) whether the issues were related to the amendment to the proposed order; and 3) whether the issues justify a contested case proceeding is presented in summary format in Table 1 below. As presented in the table, the Department recommends that none of the issues raised in the two requests for contested case raise a significant issue of law or fact that could affect that Council’s determination of compliance with an applicable Council standard.

Table 1: Summary of Department Recommendations on Issues Identified in Requests for Contested Case Proceeding

| Issue Statement | Request for Contested Case Submitted Properly | Issue Related to Amended Proposed Order Material Changes | Issue Raise a Significant Issue of Law or Fact Related to OAR Chapter 345 Divisions 22, 23 and 24 | Department’s Recommended Reasoning/Basis for Denial of Review of Issue in Contested Case Proceeding |
|--|---|--|---|---|
| | Yes or No | | | |
| <i>Gilbert/FOGV</i> | | | | |
| Material changes (to Condition 10.7) do not provide a preponderance of evidence necessary to satisfy Council’s Fish and Wildlife Habitat and Threatened and Endangered (T&E) Species Standard, as is required under ORs 469.503. | Yes | Yes | No | Factual and legal arguments not provided |
| Material changes (to Condition 10.7) improperly exclude federally listed T&E species from survey and mitigation evaluation. | Yes | Yes | No | Factual and legal arguments not provided |
| Material changes (to Condition 10.7) fail to provide information necessary to evaluate indirect impacts to habitat and therefore fails to appropriately impose appropriate habitat mitigation. | Yes | Yes | No | Factual and legal arguments not provided |

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|--|---|--|---|--|
| | Yes or No | | | |
| <i>Friends Et. Al.</i> | | | | |
| ODOE and EFSC are unlawfully implementing invalid rules | Yes | No | No | Factual and legal arguments provided are not related to material change; issue not related to compliance with OAR Chapter 345 Division 22, 23 or 24. Also see arguments in Council’s July 9, 2019 Order Denying Contested Case re: related issue. |
| Construction commencement deadline has expired, and site certificate is void due to Supreme Court ruling invalidating amendment rules | Yes | No | No | Factual and legal arguments provided are not related to material change; issue not related to compliance with OAR Chapter 345 Division 22, 23 or 24. Also see arguments in Council’s July 9, 2019 Order Denying Contested Case re: related issue. |
| Material changes to Conditions 10.4, 10.5, And 10.7 lack legally sufficient findings and evidence, omit the public participation process, and defer review of information necessary for Council’s determination of compliance with OAR Chapter 345 Division 21 Exhibit P information requirements, Council’s Fish and Wildlife Habitat standard, and ODFW’s Habitat Mitigation Policy (OAR 635-415-0025) | Yes | Yes | No | Factual and legal arguments, including issues related to future information to be provided, do not result in change in recommended findings of compliance with Council’s Fish and Wildlife Habitat standard. See arguments in Council’s July 9, 2019 Order Denying Contested Case re: related issue. |
| Material changes to Conditions 10.4, 10.5, And 10.7 lack legally sufficient findings and | Yes | Yes | No | Factual and legal arguments, including issues related to future information to be |

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|---|---|--|---|---|
| | Yes or No | | | |
| evidence, omit the public participation process, and defer review of information necessary for Council’s determination of compliance with OAR Chapter 345 Division 21 Exhibit Q information requirements and Council’s T&E species standard. | | | | provided, do not result in change in recommended findings of compliance with Council’s T&E Species standard. See arguments in Council’s July 9, 2019 Order Denying Contested Case re: related issue. |
| Material changes to Conditions 10.4, 10.5, And 10.7 lack legally sufficient findings and evidence, omit the public participation process, and defer review of information necessary for Council’s determination of compliance with Council’s Monitoring and Mitigation Conditions (OAR 345-025-0016). | Yes | Yes | No | Factual and legal arguments, including issues related to future information to be provided, do not result in change in recommended findings of compliance with Council’s Monitoring and Mitigation Conditions (OAR 345-025-0016). See arguments in Council’s July 9, 2019 Order Denying Contested Case re: related issue. |
| Material changes to Conditions 10.4, 10.5, And 10.7 lack legally sufficient findings and evidence, omit the public participation process, and defer review of information necessary for Council’s determination of compliance with Council’s Cumulative Effects Standard for Wind Energy Facilities. | Yes | Yes | No | Factual and legal arguments, including issues related to future information to be provided, do not result in change in recommended findings of compliance with Council’s Cumulative Effects Standard for Wind Energy Facilities. See arguments in Council’s July 9, 2019 Order Denying Contested Case re: related issue. |
| Material changes to Conditions 10.4, 10.5, And 10.7 lack legally sufficient findings and evidence, omit the public participation | Yes | Yes | No | Factual and legal arguments, including issues related to future information to be provided, do not result in change in |

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|--|---|--|---|---|
| | Yes or No | | | |
| <p>process, and defer review of information necessary for Council's determination of compliance with Council's Land Use Standard. Specifically, the issue addresses compliance with Wasco County Land Use Development Ordinance (WCLUDO) 19.030.C.5a-c, and -h.</p> | | | | <p>recommended findings of compliance with Council's Land Use Standard/WCLUDO 19.030.C.5a-c, and -h. See arguments in Council's July 9, 2019 Order Denying Contested Case re: related issue.</p> |
| <p>Material changes to Conditions 10.4, 10.5, And 10.7 lack legally sufficient findings and evidence, omit the public participation process, and defer review of information necessary for Council's determination of compliance with Council's Land Use Standard. Specifically, the issue addresses compliance with WCLUDO 5.020 and -F.</p> | Yes | Yes | No | <p>Factual and legal arguments, including issues related to future information to be provided, do not result in change in recommended findings of compliance with Council's Land Use Standard/WCLUDO 5.020 and -F. See arguments in Council's July 9, 2019 Order Denying Contested Case re: related issue.</p> |
| <p>Material changes to Conditions 10.4, 10.5, And 10.7 lack legally sufficient findings and evidence, omit the public participation process, and defer review of information necessary for Council's determination of compliance with Council's Land Use Standard. Specifically, the issue addresses compliance with WCLUDO 5.030, A, J and K.</p> | Yes | Yes | No | <p>Factual and legal arguments, including issues related to future information to be provided, do not result in change in recommended findings of compliance with Council's Land Use Standard/WCLUDO 5.030, A, J and K. See arguments in Council's July 9, 2019 Order Denying Contested Case re: related issue.</p> |

Next Steps

The Department will provide Council a draft Order on Requests for Contested Case on the Amended Proposed Order on Request for Amendment 4 of the Summit Ridge Wind Farm Site Certificate prior to the August 22-23, 2019 Council meeting to support Council's review of the issues raised and of the reasoning, legal arguments and facts relied upon by the Department to support the recommendations presented in Table 1 of this staff report.