

**ESTERSON Sarah \* ODOE**

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**From:** Irene Gilbert <ott.irene@frontier.com>  
**Sent:** Monday, September 9, 2019 4:56 PM  
**To:** ESTERSON Sarah \* ODOE; ESTERSON Sarah \* ODOE; CORNETT Todd \* ODOE  
**Subject:** Comments on Wheatridge Wind Amendment 4  
**Attachments:** Wheatridge comment One.docx

Attached are my comments on the above application.

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## COMMENT REGARDING THE REQUEST FOR AMENDMENT 4 BY THE Wheatridge Wind Energy Facility

Issue One;

I object to the restriction listed on Page 11, starting on Line 37 stating that all evidence that the person may want to cite or include in a request for contested case proceeding must be included in comments provided on the record of the draft proposed order.. This restriction is not consistent with the statute or the Administrative Rule cited in the draft proposed order. ORS 469.370(3) 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 345-067-0067(5)(b) states, “A person who intends to raise an issue that may be the basis for granting a contested case proceeding must raise that issue 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.”

Note that neither the statute or the administrative rule refer to anything other than the close of the comment period and there is no reference to how the comments effect the contested case request with the exception of indicating the above language regarding the need to have raised it with “sufficient specificity.”

While there is no doubt that the Oregon Department of Energy and Energy Facility Siting Council will deny any contested case request based upon these comments, I want this request in it’s entirety included on the record for documentation purposes.

I have been denied multiple contested case requests on amended site certificates during the past 8 years, and the reasons have changed time and again. The department has developed a reputation as was stated by one of the attorneys testifying before the Legislative Committee charged with attempting to “fix” the siting process that what is being run is a “Kangaroo Court”. Given that the department and the council have never allowed even one contested case on an amended solar or wind development since the department was formed, it seems that reputation is well earned.

In order to place this comment in perspective, the following applies:

When I first submitted a contested case request, the response was that the request did not provide any new information that had not been submitted with my comments and those comments had already been considered. DENIED

I then attempted to include additional information that supported the need for the contested case. The response was DENIED

Then I added even more information in the contested case request to the point that I argued that the department and the council were requiring me to include all my arguments and documents in the contested case request which should not be required until the contested case hearing. The department and council were basically determining the outcome of the hearing based upon the request and determining that they did not agree with my arguments. DENIED

Now the department has decided to read into the statute requirements which are not in the plain language of the statute (nothing is supposed to be added that isn't there) and limit the contested case request to the information provided in the comments. I have now received a response that my contested case request related to a new issue because I included additional statutes supporting the fact that the agency was not acting in compliance with the statutes and rules. DENIED

Since the department has a history of doing what they want absent any rule or statute change and then changing their rules to be consistent with what they have been doing and calling it "housekeeping", I can predict the future plans to amend the rules to make them inconsistent with the statute and hope that no one takes them to court for their actions.

Since the draft proposed order references the above administrative rule and interprets it in a manner that conflicts with the Oregon Statute, any decisions made regarding future requests for a contested case which limit the listing of related rules, statutes, or documents supporting the original issue brought up in public comments will be in conflict with ORS 469.370. Per ODOE and EFSC rules and the Oregon law, the department cannot overrule state statutes. The proposed order needs to remove the information regarding the restriction of information submitted as a part of a contested case request to only those documents and statutes referenced in public comments.

Comment Issue Number Two:

The previous information regarding Issue Number One also apply to this comment:

There is no basis in state statute, ODOE administrative rules, Administrative rules of other state agencies or the model rules where there is any requirement that the public identify statutes or rules which apply to a comment or contested case request. This is an arbitrary requirement that is being imposed upon the lay people attempting to have a voice in the siting of energy developments in Oregon. It can only be interpreted as yet another requirement intended to block the public from being able to access the contested case procedure. Absent the identification of a statute or rule requiring the public to correctly identify ODOE administrative rules specific to any given comment, this requirement needs to be removed from the draft proposed order prior to issuing it as a "proposed order".

Comment Issue Number Three:

The Oregon Department of Energy and Energy Facility Siting Counsel are required to honor state statutes and do not have the authority to overrule Statutes that may conflict with their rules.

Since there is a conflict between what ODOE is requiring and the statute, I am referencing the statute as the standard that must be met. ORS 569.390 requires the owner or occupant to eradicate weeds. This statute requires that noxious weeds be destroyed or prevented from seeding. This statute applies for the life of the development. A site certificate condition needs to be added requiring the developer to identify noxious weeds at their site, and when they typically produce seeds. The developer then needs to develop a monitoring and treatment timeframe that will keep the weeds from going to seed. In addition, ORS 469.507 requires a monitoring program that extends for the life of the development. The draft Proposed Order does not include a monitoring program that assures that noxious weed seeds will not be allowed to develop during the years when no monitoring or treatment is being required.

Comment Issue Number Four:

This comment is related to Comment 3 and the comments above should be looked at cumulatively. “machinery which may be infected with noxious weed seeds must be cleaned prior to traveling over public roads or from one farm to another”. The site certificate needs to require compliance with ORS 569.390 and ORS 569.445 at a minimum. A site certificate condition needs to be added requiring this cleaning of equipment used in areas with different land owners.

Comment Issues Number Five:

The draft proposed order fails to provide protection for federally protected bird habitats. The nest sites for these birds are considered Category 1 habitat. The DPO ignores the requirement in OAR 635-415-0025 that there be no direct or indirect impacts to Category 1 habitat by completely ignoring at risk bird species in the list of sensitive species and required setbacks from nests. The draft proposed order needs to include setbacks from buto hawks, peregrine falcon, bald eagle, burrowing owl. Golden Eagles (setbacks need to be a minimum of ½ mile from nest site per previous site certificate requirements and ODFW recommendations on previous developments), and any other federal threatened or endangered raptor species. Per the previously submitted memo from Oregon Legislative Council to Greg Barreto regarding the failure to address federally listed threatened and endangered wildlife under the T & E standard, the Oregon Department of Energy and Energy Facility Siting Council must address them under the habitat standard. This site certificate fails to do that which puts the agency out of compliance with the federal rules.

Any exceptions to the setback requirements for times when nests are not occupied are not legitimate. The nest sites remain Category 1 during the times the birds are not physically present or hatching young. Raptors return to the same nest sites year after year, and the action of destroying or building structures within the setback areas does not provide protection from direct or indirect impacts. Displacement of protected species is not allowed under the Endangered Species Act, and taking action that requires the birds to move to other habitat that may not provide the same quality is illegal.

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