

**ESTERSON Sarah \* ODOE**

---

**From:** Irene Gilbert <ott.irene@frontier.com>  
**Sent:** Tuesday, November 5, 2019 4:20 PM  
**To:** ESTERSON Sarah \* ODOE; BENNER Janine \* ODOE  
**Subject:** Three contested Case Requests  
**Attachments:** Wheatridge Contested Case Regarding Unsupported Requirements.docx; Wheatridge Contested Case Regarding Weeds.docx; Wheatridge Contested Case Regarding Birds.docx; legislative council response federally threatened species.pdf

Attached are three different issues which I am requesting contested case requests as well as the Legislative Council Response to Rep. Gregg Barreto .referenced as documentation in my original comments regarding the failure to comply with required consideration of habitat impacts for Threatened and Endangered wildlife.

Sarah Esterson, Senior Siting Analyst

Oregon Department of Energy

550 Capitol Street NE, 1<sup>st</sup> Floor

Salem, OR 97301

Email: [sarah.esterson@oregon.gov](mailto:sarah.esterson@oregon.gov)

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

Please see to it that this contested case request is included in the record and any justification for refusing to allow a contested case on this issue. I am making this request due to previous paraphrasing and taking items out of context which have resulted in a failure to fully reference my issue.

The comment that was not acted on was presented in my comments as quoted at the end of this Contested Case request and intended to be a part of the request. This contested case raises a significant issue of law and fact and for which the Department and the EFSC control the rule being challenged and can change the illegal rule.

This contested case request is necessary due to the ongoing unwillingness of the Director of the Department of Energy to direct the head of the Energy Facility Siting Department in order to provide the opportunity for the public to participate in the siting of energy developments in the state. As a result, the head of the Siting Department has recommended and obtained the rubber stamp of the Energy Facility Siting Council to implement increasingly stringent rules, created rules not supported by statutes, denied all requests for contested cases on amended site certificates for this type development, allowed developers to take actions that require a site certificate by statute and exempted them from obtaining one with no opportunity for public participation or objection, overruled an Oregon Supreme Court decision making the rules I am currently being required to follow void by reinstating them as "temporary rules" and thus requiring an appeal to avoid establishing a precedent that state agencies are not bound by Court Decisions that procedural errors invalidate the entire rule.

This Issue is yet another example of the department of energy's failure to follow the language of the rules and statutes in order to make it difficult for the public to resolve disagreements with the recommendations of the Department of Energy. This action along with multiple others have been discriminatory and hostile toward the public with no legal basis for doing so. It is discriminatory because it denies most people any opportunity to participate in the contested case process due to an inability to comply with the requirement. It is discriminatory because the Department of Energy has excluded the public from participation in the process until a final amendment application is received and the draft proposed order is issued. The public is then given as little as 20 days to review hundreds of pages of the application, and hundreds of pages of the agency developed draft proposed order and agency justification for their actions which are not written in plain English understandable to most lay people. It is impossible for most individuals to read, analyze and identify errors in the application and draft proposed order in order to identify the issues and provide a minimal amount of support for their comments as is

required by statute and rule as well as stating the specific agency rule(s) being broken (which is a requirement that ODOE slipped in with no rule or statute supporting it}. Now the agency is indicating that no additional documentation supporting the issue can be provided with a contested case request in spite of the fact that ODOE and the EFSC are deciding the public is wrong based upon the contested case request itself. The public is never and has never been provided the promised opportunity to provide additional documentation since the requests are always denied and have been for all wind and solar developments for as long as the agency has existed,

I will be happy to provide concrete examples of all statements regarding the need for this contested case in the unlikely event that I will be the first to be allowed to participate in a contested case on an amended wind or solar site certificate, Requirements such as this one are necessitating court appeals that cost developers and the public unnecessary expense and which could be resolved in an impartial contested case determination. The lack of a legitimate process has also aligned groups such as counties, renewable energy advocates, developers and the public in support of the recently passed bill which removed most decisions regarding solar developments from the control of the Department and resulted in groups which historically supported the department and EFSC appealing your actions. It is time for an ethical and honest process which is user friendly and not simply a vehicle for the agency to discourage public participation and control outcomes. The Department of Energy claims that EFSC is responsible for the rules and siting procedure. A contested case needs to occur due to the public disagreement with the interpretation of the rule being referenced, the justification provided by the agency stating it is not intended to exclude the public from providing documentation, the lack of a rule supporting the procedural change and the fact that it discriminates against people with jobs or other time limiting obligations and against people with disabilities or reduced reading comprehension requiring additional time to research supporting documentation.

My Original Comment which was not addressed:

“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 its 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.”

I am requesting to be a full party to these proceedings.

I am personally impacted by this decision due to the fact that I am unable to meet the requirement to include more than the rule and statute require or formalize the documentation needed to compose a contested case request which meets the requirements being imposed and am

unable to access the contested case process with the existing rules. This added requirement will make the possibility of obtaining a contested case even further from ever being a legitimate option for me. The Friends of the Grande Ronde valley have similar concerns and in particular due to the fact that the individual members have given up even asking for a contested case to resolve their concerns with the procedure. Noone else has the ongoing association with this non-profit which would give them the qualifications to represent the group who would be willing to represent then pro bono.

Sincerely,

Irene Gilbert, Legal Research Analyst  
Friends of the Grande Ronde Valley  
2310 Adams Ave.,  
La Grande, Oregon 97850  
Email: [ott.irene@frontier.com](mailto:ott.irene@frontier.com)

Irene Gilbert  
2310 Adams Ave.  
La Grande, Oregon 97850  
email:[ott.irene@frontier.com](mailto:ott.irene@frontier.com)

Sarah Esterson, Senior Siting Analyst

Oregon Department of Energy

550 Capitol Street NE, 1<sup>st</sup> Floor

Salem, OR 97301

Email: [sarah.esterson@oregon.gov](mailto:sarah.esterson@oregon.gov)

#### CONTESTED CASE REGARDING THE REQUEST FOR AMENDMENT 4 BY THE Wheatridge Wind Energy Facility relating to Weeds

Please see to it that my entire contested case request is included in the record and any justification for refusing to allow a contested case on this issue. I am making this request due to previous paraphrasing and taking items out of context which have resulted in a failure to fully reference my issue.

The comment that was not acted on was presented in my comments as quoted at the end of this Contested Case request and intended to be a part of the request. This contested case request is necessary due to the fact that the draft proposed order raises a significant issue of fact and law over which the council has jurisdiction and which would require a change in the site certificate conditions.

This contested case request is to address the combined concerns listed as Item 3 and Item 4 in my written comments. The Proposed Site Certificate continues to fail to comply with state law regarding the control of noxious weeds. The Proposed Order fails to require the developer to address weeds resulting from seeds which develop at the site of the development, but are then dispersed beyond the site. Due to limiting the area the developer is being required to address noxious weeds to the site, the developer must adhere completely with the requirement that no seeds be allowed to develop at the site. If they do, there would be no way to preclude the dispersal of those seeds outside the site. The responsibility for protecting adjacent land from what the legislature and the state law considers a critical issue extends for the life of the project. Personnel, equipment, and vehicles will be entering and leaving the site for the life of the project. It is specifically these kinds of activities which disperse seeds from a site and which the law is intended to preclude. Noxious weeds are not an issue that can be controlled by doing a survey every few years. Most weeds develop, flower, create and disperse seeds on an annual basis and while the months of seed dispersal vary by species, the fact that the seeds can and will leave the site if allowed to develop is a given. Absent a site certificate condition that requires the weed management plan to comply fully with the requirements of ORS 569.390 and ORS 469.507, there will be noxious weeds leaving the site. Meeting these requirements is not an optional activity since the resolution of the disagreement with whether or not the proposed order meets the statute cannot be resolved in a way that fails to comply with the state statute. As with my contested case request regarding T & E species, the Oregon Department of Energy has failed to obtain input and concurrence from the Department of Agriculture that the proposed order will fully comply with the statute requiring that no seeds will be allowed to develop at the site. Saying the developer will work with the property owner regarding this issue does not require that their agreement will be consistent with the law. Since noxious weeds are considered a primary

reason for reduced crops as well as reduced quality of wildlife habitat for Threatened and Endangered species, the impacts of allowing this site certificate to become effective in its current form will absolutely cause irreparable damage to resources outside the site and increase the cost of farming activities.

My comment regarding this issue:

“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”

I am requesting to be a full party to these proceedings.

I am personally impacted by this decision due to the fact that I own both grazing land as well as timber land in Oregon. Having ODOE fail to require compliance with the law places me and all property owners at risk of having developers fail to comply with the law and leaving me responsible for the costs associated with being required to eradicate weeds that move onto my land from adjoining lands. The precedent it sets is unacceptable. The developer needs to be accountable to the same standard imposed upon me which is reflected in the statute. The site certificate does not make this clear, and there is no opportunity for the public to address the final plan requirements in the event they are not consistent with the law. e Friends of the Grande Ronde valley have similar concerns and in particular due to the fact that the individual members have given up even asking for a contested case to resolve their concerns with the procedure. No one else has the ongoing association with this non-profit which would give them the qualifications to represent the group who would be willing to represent them free of charge.

Sincerely,

Irene Gilbert, Legal Research Analyst  
Friends of the Grande Ronde Valley  
2310 Adams Ave.,  
La Grande, Oregon 97850  
Email: ott.irene@frontier.com

Irene Gilbert  
2310 Adams Ave.  
La Grande, Oregon 97850  
email:ott.irene@frontier.com

Comment Issue Number Three:

Comment Issues Number Five:

Irene Gilbert  
2310 Adams Ave.  
La Grande, Oregon 97850  
Email: ott.irene@frontier.com



Sarah Esterson, Senior Siting Analyst

Oregon Department of Energy

550 Capitol Street NE, 1<sup>st</sup> Floor

Salem, OR 97301

Email: [sarah.esterson@oregon.gov](mailto:sarah.esterson@oregon.gov)

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

### INTRODUCTION:

Please see to it that my entire contested case request is included in the record and any justification for refusing to allow a contested case on this issue. I am making this request due to previous paraphrasing and taking items out of context which have resulted in a failure to fully reference my issue. Kindly do not deny this request due to your determination that my concerns are adequately addressed in the proposed order. The reason a contested case is necessary is due to the fact that there is disagreement regarding this issue and whether or not you have adequately provided for the protection of the habitat for these animals in order to avoid authorizing actions that will place the developer and the State of Oregon in the position of approving actions that will place you in a position of breaking the Threatened and Endangered Species protection law.

The decision regarding the legitimacy of my concerns, the specific rule references I am referencing, as well as the provision of the documentation regarding my concerns, according to Todd Cornett, cannot be provided until the actual contested case occurs. While I disagree with that decision as well as the processing of this amendment request under rules that the Oregon Supreme Court has determined to be invalid are both concerns that cannot be included in this contested case request, but remain issues to be resolved.

My comment which was not acted upon and which identifies the issue requiring this contested case request is included at the bottom of this document.

### Basis for Requiring a Contested Case Request:

This contested case request is necessitated due to the following actions in the Proposed Site Certificate: The Oregon Department of Energy has defined as Category 1 habitat as only the nest site of Threatened and Endangered Birds, only consider it Category 1 habitat during the time that there are young in the nest, only require a setback from the nest site for a portion of the year, setbacks are not adequate to provide assurance that the birds will not abandon the nests and the young, it allows the destruction of the nests when not physically in use requiring birds to find other habitat when they normally return to the same nest year after year and which may result in them being displaced to inferior habitat, require no mitigation for direct or indirect impacts to the Threatened and Endangered bird Category 1 habitat, and have failed to include the agency responsible for the Threatened and Endangered Species law as either a consulting agency or in resolving the concerns I raised in my comments. These actions are in opposition to the Oregon Statute and Administrative rules requiring the agency to not overrule state statutes requiring consultation as well as the determination by Oregon Legislative Council in the opinion provided

to Representative Greg Barreto asking whether failing to include federally Threatened and Endangered wildlife in that section of the rule made the state and the department out of compliance with federal law.

You have previously been provided a copy of, and I am attaching to this contested case request the response from Oregon Legislative Council to Representative Greg Barreto regarding this issue. Representative Barreto asked for a determination regarding whether or not the State of Oregon and Oregon Department of Energy would be out of compliance with the federal law by not addressing Threatened and Endangered Species under that section of your rules. The response clearly indicates that so long as the species are addressed in the habitat mitigation section, they did not believe that the agency would be out of compliance. The response also clearly states that the agency is REQUIRED to address these animals under that standard. The proposed site certificate fails to assess direct and indirect damage to habitat considered critical to the survival of these species. You have failed to provide year round protection to Category 1 habitat. You have also failed to include the US Fish and Wildlife Service which is the agency responsible for protection of the species and development of the T & E rules as an advisory committee, or include them as consultants in addressing my concerns regarding your failure to comply with these rules. By statute, you cannot overrule state law in making your decisions or in resolving conflicts regarding your decisions. The state statutes as well as your own rules require you to consult with the agency responsible for the rules when there is disagreement regarding those rules. As a result, you are authorizing actions on the part of the developer which will make it impossible for the developer to comply with the federal laws if they follow your site certificate conditions and which will place the State of Oregon as well as the developer at risk of a federal lawsuit.

Your actions will increase the likelihood that listed species will become extinct. It is well documented, for example, that there is concern regarding the reduction in numbers of Golden Eagles as well as the fact that wind developments are responsible for the deaths of these protected birds. The Threatened and Endangered Species rules require that habitat be protected and that damage or degradation of the habitat critical to the species or displacement of animals to less desirable habitat is contrary to the law.

My Original Comment which was not addressed and which necessitates this contested case request is as follows:

“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.”

I am requesting to be a full party to these proceedings.

I am personally impacted by this decision since I am a “conservative environmentalist” who participates in bird watching and identification, as well as having a sincere and long standing concern with the survival of all species of animals. The listing of a bird as Threatened or Endangered indicates that there is a fine balance that must be maintained or the species will cease to exist. I consider it a crime for any agency or individual to take actions that increase the likelihood that another species will cease to exist.

Members of the Friends of the Grande Ronde Valley are organized based upon their shared concern for the resources that are damaged through the development of Wind and Solar developments which fail to provide protection or mitigation for damages they cause to the environment, citizens and wildlife of the state. As the Legal Research Analyst for the Friends of the Grande Ronde Valley, I am in the position of being able to represent the non profit absent the need to hire a consultant or attorney to proceed with a process that is supposed to be accessible to a lay person.

Sincerely,

Irene Gilbert, Legal Research Analyst  
Friends of the Grande Ronde Valley  
2310 Adams Ave.,  
La Grande, Oregon 97850  
Email: ott.irene@frontier.com

Irene Gilbert  
2310 Adams Ave.  
La Grande, Oregon 97850  
email:ott.irene@frontier.com



STATE OF OREGON  
LEGISLATIVE COUNSEL COMMITTEE

April 20, 2017

Representative Greg Barreto  
900 Court Street NE H384  
Salem OR 97301

Re: Department of Energy—Rule Review

Dear Representative Barreto:

You have asked our office to conduct a review, as provided in ORS 183.720, of OAR 345-021-0010 (1)(q), which was recently amended by the Energy Facility Siting Council (EFSC) to remove the requirement that developers identify federally protected threatened and endangered species in facility siting applications.<sup>1</sup> More broadly, however, we understand your question to be whether the recent rule change conflicts with federal law. In our opinion, OAR 345-021-0010 (1)(q) does not conflict with federal law. In addition, we believe a court would conclude that EFSC acted within its discretionary rulemaking authority when it amended its site certificate application rule.

1. Does the EFSC Rule Conflict with Federal Law?

*Federal Law*

The federal Endangered Species Act (federal ESA) is intended “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of [certain treaties and conventions listed in the Act].”<sup>2</sup> To enjoy the substantial protections afforded a species by the federal ESA, the species must first be listed as “threatened” or “endangered.”<sup>3</sup> The National Marine Fisheries Service (NMFS) is responsible for oceangoing species and anadromous species listing under the authority of the Secretary of Commerce.<sup>4</sup> The United States Fish and Wildlife Service (USFWS), under the authority of the Secretary of the Interior, is responsible for all other species not covered by NMFS jurisdiction.

Section 9 of the federal ESA prohibits the taking of a species listed as endangered or threatened.<sup>5</sup> The term “take” is defined under the federal ESA to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>6</sup> The term “harm,” furthermore, is defined to “include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior

---

<sup>1</sup> OAR 345-021-0010(1)(q).

<sup>2</sup> 16 U.S.C. 1531(b).

<sup>3</sup> 16 U.S.C. 1533 (governing the listing of species).

<sup>4</sup> *Id.*

<sup>5</sup> 16 U.S.C. 1538(a)(1).

<sup>6</sup> 16 U.S.C. 1532(19).

patterns, including breeding, feeding or sheltering.”<sup>7</sup> The take prohibition applies to any “person,”<sup>8</sup> including individuals, businesses and federal, state and local governmental bodies.<sup>9</sup>

Section 10 of the federal ESA provides a mechanism to allow private landowners to take threatened and endangered species “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”<sup>10</sup> A private landowner can avoid potential liability for taking a threatened species by obtaining an incidental take permit (ITP).<sup>11</sup> In exchange for permission to “take” a listed species pursuant to an ITP, the permit applicant must commit to implementing a plan that “conserv[es]”—i.e., facilitates the recovery of—the species.<sup>12</sup> This plan is called a Habitat Conservation Plan (HCP) and it must delineate “the impact which will likely result from such taking” and the “steps the applicant will take to minimize and mitigate such impacts.”<sup>13</sup>

### *Oregon State Law*

The Oregon Endangered Species Act (Oregon ESA) is far more limited in scope than its federal counterpart.<sup>14</sup> The law provides for the state listing and conservation of threatened and endangered species. The Director of Agriculture or the State Fish and Wildlife Commission (FWC), as appropriate, determines which species are on the state lists.<sup>15</sup> As a result, Oregon’s threatened and endangered species lists do not necessarily mirror the federal ESA lists. In fact, it is part of Oregon’s stated environmental policy to minimize duplication and overlap between state and federal laws dealing with threatened or endangered species.<sup>16</sup> To that end, unlike the federal ESA which applies to individuals, businesses, and federal, state and local governmental bodies, the Oregon ESA generally focuses only on state lands and state management activities such as permitting.

Passed in 1987, the Oregon ESA underwent revisions that outlined listed species protection requirements in 1995.<sup>17</sup> For threatened or endangered species listed by the state during or after 1996, the FWC is directed to establish by rule quantifiable and measurable guidelines that it considers necessary to ensure the survival of individual members of the species.<sup>18</sup> The guidelines “may include take avoidance and protecting resource sites.”<sup>19</sup> If a species is listed as threatened, state agencies are required to determine whether “a proposed action on land it owns or leases, or for which it holds a recorded easement, has the potential to violate the [survival] guidelines established” by the commission.<sup>20</sup> If the potential exists, the agency must work with the State Department of Fish and Wildlife (ODFW) to either pursue reasonable and prudent alternatives to the proposed action, or to take other actions to minimize adverse impacts on the affected species.<sup>21</sup>

---

<sup>7</sup> 50 C.F.R. 17.3.

<sup>8</sup> 16 U.S.C. 1538(a)(1).

<sup>9</sup> 16 U.S.C. 1532(13).

<sup>10</sup> 16 U.S.C. 1539(a)(1)(B).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; 16 U.S.C. 1539(a)(2)(A); see also *Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 441-442 (5th Cir. 2001) (“[c]onservation’ is a much broader concept than mere survival” because the “ESA’s definition of ‘conservation’ speaks to the recovery of a threatened or endangered species.”).

<sup>13</sup> 16 U.S.C. 1539(a)(2)(A).

<sup>14</sup> ORS 496.171 to 496.192.

<sup>15</sup> ORS 496.176 (2), ORS 564.110 (2).

<sup>16</sup> ORS 496.182 (1).

<sup>17</sup> Chapter 590, Oregon Laws 1995.

<sup>18</sup> ORS 496.182 (2)(a).

<sup>19</sup> *Id.*

<sup>20</sup> ORS 496.182 (3).

<sup>21</sup> ORS 496.182 (3), (4).

Like the federal ESA, the Oregon ESA prohibits the “take” of listed species.<sup>22</sup> However, there is some ambiguity as to whether the take prohibition in the Oregon ESA applies to private parties. On the one hand, the Oregon ESA specifically provides that it is not “intended, by itself, to require an owner of any commercial forestland or other private land to take action to protect a threatened species or endangered species, or to impose additional requirements or restrictions on the use of private land.”<sup>23</sup> ODFW, however, has apparently interpreted this limiting provision narrowly, arguing that ORS 496.192 (1) does not provide private landowners with take authorization, but instead simply states that a private owner is not required to take affirmative steps to protect a listed species.<sup>24</sup> Application of the Oregon ESA take provisions to private parties has not been tested in court. The Oregon ESA does also include a process for FWC to issue incidental take permits.<sup>25</sup>

Finally, although it was not adopted pursuant to the Oregon ESA, ODFW’s formal Fish and Wildlife Habitat Mitigation Policy plays an important role in ODFW and FWC implementing the Oregon ESA and in carrying out its duties under the other federal, state and local permitting processes. The policy is “to require or recommend, depending upon the habitat protection and mitigation opportunities provided by specific statutes, mitigation for losses of fish and wildlife habitat resulting from development actions.”<sup>26</sup> ODFW applies the policy when developing recommendations to other state, federal or local agencies regarding development actions for which “mitigation for impacts to fish and wildlife habitat is authorized or required by federal, state, or local environmental laws or land use regulations.”<sup>27</sup> Thus, despite the stated limitation of the Oregon ESA to state actions found in ORS 496.192 (1), ODFW’s implementation of its Fish and Wildlife Habitat Mitigation Policy serves as a mechanism for considering the effects of development actions on listed species, and often results in recommendations for mitigation that become incorporated into development permits and approvals for actions by private entities.

### *Energy Facility Siting*

The Legislative Assembly has entrusted the EFSC with the authority to decide whether to issue an energy facility site certificate for a proposed project.<sup>28</sup> As part of this authority, the EFSC is tasked with adopting standards for the siting, construction and operation of energy facilities.<sup>29</sup> Although it is not required to do so, when establishing these standards the EFSC may consider the effects of the proposed facility on fish and wildlife, including threatened and endangered fish, wildlife or plant species.<sup>30</sup>

OAR 345-022-0070 states that before the EFSC may issue a site certificate, it must find that the design, construction and operation of the proposed facility, taking into account mitigation, are not likely to cause a significant reduction in the likelihood of survival or recovery of threatened or endangered species listed by the FWC and the Director of Agriculture.<sup>31</sup> In addition, although not addressed in the EFSC rules or statutes, if the construction or operation of the proposed facility affects federally listed threatened or endangered species, the applicant

---

<sup>22</sup> ORS 498.026.

<sup>23</sup> ORS 496.192 (1).

<sup>24</sup> David E. Filippi and Greg D. Corbin, “Federal and Oregon Endangered Species Acts” in *Environmental and Natural Resources Law*, at 43.38 (2002).

<sup>25</sup> ORS 496.172 (4); OAR 635-100-0170.

<sup>26</sup> OAR 635-415-0010.

<sup>27</sup> OAR 635-415-0015 (2).

<sup>28</sup> ORS 469.470 (1).

<sup>29</sup> ORS 469.501 (1).

<sup>30</sup> ORS 469.501 (1)(e).

<sup>31</sup> OAR 345-022-0070.

may be required to apply separately to the Secretary of the Interior for an ITP under section 10 of the federal ESA in addition to the application to EFSC.<sup>32</sup>

Despite the EFSC's recent rule change, applicants for energy facility site certificates must continue to identify *all* threatened and endangered species that may be affected by the construction and operation of the proposed facility, regardless of whether those species are listed on the federal or state list. First, the applicant must disclose any affected state listed species to the EFSC in Exhibit Q of its site certificate application.<sup>33</sup> Second, the applicant must identify all additional fish and wildlife species and habitat that may be affected by the project in Exhibit P of the site certificate application, which would include any federally listed species.<sup>34</sup> Third, if any of the potentially affected species are listed on the federal endangered or threatened species list, the federal ESA may require the applicant to apply separately to the Secretary of the Interior for an ITP.<sup>35</sup> Accordingly, the EFSC's recent rule change does not appear to be in conflict with any applicable federal laws because applicants must still identify *all* fish and wildlife species and habitat that may be affected by the project in the site certificate application. In addition, the federal ESA continues to apply to energy facility site certificate applicants.

## 2. ORS 183.720 Administrative Rule Review

As a member of the Legislative Assembly, you may request that the Legislative Counsel review an adopted rule of a state agency.<sup>36</sup> When reviewing a rule, the scope of review of this office is limited to:

- Determining whether the rule appears to be within the intent and scope of the enabling legislation purporting to authorize its adoption; and
- Determining whether the rule raises constitutional issues other than falling outside of the intent and scope of the law.<sup>37</sup>

You have asked our office to review OAR 345-021-0010 (1)(q)(A), as amended effective March 8, 2017. OAR 345-021-0010 sets forth specific information that must be provided with applications for energy facility site certificates. Prior to March 8, 2017, OAR 345-021-0010(1)(q)(A) required applications to include:

Information about threatened and endangered plant and animal species that may be affected by the proposed facility . . . [b]ased on appropriate literature and field study, identification of all threatened or endangered species listed under ORS 496.172 (2), ORS 564.105 (2) or 16 USC Sec. 1533 that may be affected by the proposed facility.<sup>38</sup>

ORS 496.172 (2) refers to Oregon's list of threatened and endangered wildlife species, as identified by the FWC. ORS 564.105 (2) refers to Oregon's list of threatened and endangered

---

<sup>32</sup> 16 U.S.C. 1539(a)(1)(B).

<sup>33</sup> OAR 345-021-0010 (1)(q).

<sup>34</sup> OAR 345-021-0010 (1)(p).

<sup>35</sup> 16 U.S.C. 1539(a)(1)(B).

<sup>36</sup> ORS 183.720.

<sup>37</sup> ORS 183.720 (3).

<sup>38</sup> OAR 345-021-0010(1)(q)(A) (prior to March 8, 2017).

native plant species, as identified by the Director of Agriculture. 16 U.S.C. 1533 refers to the list of threatened and endangered species under the federal ESA.

As of March 8, 2017, OAR 345-021-0010(1)(q) no longer requires applicants to identify threatened or endangered species under the federal ESA that may be affected by the proposed facility.

In determining whether a rule is within the “intent and scope” of the enabling legislation, Legislative Counsel is directed to “follow generally accepted principles of statutory construction.”<sup>39</sup> Accordingly, the text of the statute is the principal guide in determining whether or not the agency is authorized to make the rule.

The EFSC offers ORS 469.470 and 469.501 as the statutory authority for its rulemaking. ORS 469.470 provides that the EFSC shall:

In accordance with the applicable provisions of ORS chapter 183, and subject to the provisions of ORS 469.501 (3), adopt standards and rules to perform the functions vested by law in the council including the adoption of standards and rules for the siting of energy facilities pursuant to ORS 469.501, and implementation of the energy policy of the State of Oregon set forth in ORS 469.010 and 469.310.<sup>40</sup>

ORS 183.332 provides that it is the policy of the State of Oregon that agencies attempt to adopt rules that correspond with equivalent federal laws and rules unless, among other exceptions, there is specific statutory direction to the agency that authorizes the adoption of the rule.<sup>41</sup> Oregon’s energy policy set forth in ORS 469.010 and 469.310 makes no direct reference to the federal ESA, but does indicate that the siting, construction and operation of energy facilities shall be consistent with the environmental policies of this state.<sup>42</sup> With respect to endangered species, it is state policy to minimize duplication and overlap between state and federal laws dealing with threatened or endangered species.<sup>43</sup>

ORS 469.501 provides, in pertinent part, that the EFSC shall adopt standards for the siting of facilities and that such standards “may address but need not be limited to the . . . [e]ffects of the facility, taking into account mitigation, on fish and wildlife, including threatened and endangered fish, wildlife or plant species.”<sup>44</sup> The use of the words “may address” in ORS 469.501 (1) demonstrates that the legislature intended the council to have discretion regarding the creation of its permitting standards.<sup>45</sup>

Pursuant to this discretionary rulemaking authority, the EFSC enacted OAR 345-022-0070 which limits the issuance of site certificates to projects that are “not likely to cause a significant reduction in the likelihood of survival or recovery of” state listed threatened or endangered species.<sup>46</sup> The rule at issue here, OAR 345-021-0010 (1)(q), promulgated under the same rulemaking authority, previously required site certificate applicants to identify both federal

---

<sup>39</sup> ORS 183.720 (4).

<sup>40</sup> ORS 469.740 (2).

<sup>41</sup> ORS 183.332 (1).

<sup>42</sup> ORS 469.310.

<sup>43</sup> ORS 496.182 (1).

<sup>44</sup> ORS 469.501 (1).

<sup>45</sup> *Save Our Rural Oregon v. Energy Facility Siting Council (In re COB Energy Facility)*, 339 Or. 353, 377 (2005).

<sup>46</sup> OAR 345-022-0070.



and state listed threatened and endangered species that may be affected by the proposed facility in Exhibit Q of the site certificate application. Presumably, OAR 345-021-0010 (1)(q) was enacted to require applicants to provide EFSC with the information it needs to comply with OAR 345-022-0070; however, OAR 345-022-0070 does not apply to federally listed threatened and endangered species. Accordingly, in March, the EFSC amended OAR 345-021-0010 (1)(q) to remove the requirement that developers identify federally listed threatened and endangered species in Exhibit Q. Nevertheless, developers must still identify state listed threatened and endangered species in Exhibit Q. Furthermore, developers must still identify any other fish and wildlife species and habitat which may be affected by the proposed project (which would include any affected federally listed species) in Exhibit P of the site certificate application.<sup>47</sup>

The EFSC is tasked with prescribing standards and rules for the siting of facilities under ORS 469.470 and 469.501. The only reference in either ORS 469.470 or 469.501 to endangered or threatened species is in ORS 469.501 (1) regarding the discretionary authority of the EFSC to develop standards regarding the effects of proposed facilities on fish and wildlife, including threatened or endangered species. Accordingly, we believe that the EFSC's removal of the requirement in OAR 345-021-0010 (1)(q)(A) that applicants for site certificates identify federally listed threatened or endangered species in Exhibit Q of the site certificate application meets the EFSC's duties to prescribe standards and rules for the siting of facilities under ORS 469.470 and 469.501 because there is no express statutory requirement that EFSC consider federally listed threatened and endangered species when it issues site certificates. Furthermore, EFSC still requires applicants to identify state and federally listed species on site certificate applications, albeit in different exhibits. For these reasons, we conclude that the rule adopted by the EFSC falls under the broad rulemaking authority of the EFSC, is within the intent and scope of the enabling legislation and does not raise any additional constitutional issues.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON  
Legislative Counsel



By  
Lori Anne Sills  
Staff Attorney

---

<sup>47</sup> OAR 345-021-0010 (1)(p).