



Oregon

Kate Brown, Governor



550 Capitol St. NE
Salem, OR 97301-3737
Phone: (503) 378-4040
Toll Free: 1-800-221-8035
FAX: (503) 373-7806
www.Oregon.gov/ENERGY

To: Oregon Energy Facility Siting Council

From: Maxwell Woods, Senior Policy Advisor and Sarah Esterson, Senior Siting Analyst

Date: November 7, 2019

Subject: Agenda Item J (Action Items) – Wheatridge Wind Energy Facility – Council Review of Request for Contested Case on Proposed Order on Request for Amendment 5, and potentially the Proposed Order on Request for Amendment 4 for the November 21-22, 2019, EFSC Meeting

Attachments: Attachment 1: Proposed Order on Request for Amendment 4 to the Wheatridge Wind Energy Facility Site Certificate
Attachment 2: Request for Contested Case (Irene Gilbert/Friends of Grande Ronde Valley)
Attachment 3: Comments on Draft Proposed Order (Irene Gilbert/ Friends of Grande Ronde Valley)

STAFF RECOMMENDATION SUMMARY

Denial of Request for Contested Case

As presented in this staff report, the Department recommends that Council conclude that the three issues raised in the request for contested case from Irene Gilbert and Friends of the Grande Ronde Valley received on the Proposed Order on Request for Amendment 4 (proposed order) of the Wheatridge Wind Energy Facility Site Certificate were properly raised, or were related to material changes included in the proposed order, but that none of the issues raise a significant issue of fact or law that may affect the Council's determination that the facility, with proposed changes, meets an applicable standard. As such, the Council should deny the requests.

Approval of Proposed Order as Final Order

As presented in this staff report, the Department recommends that, based upon compliance with the recommended amended site certificate, that the Council find that the facility, with proposed changes, would comply with all applicable Council standards and other applicable rules and statutes, and that the Council should approve the proposed order as the final order and issue a fourth amended site certificate.

Background

The Oregon Energy Facility Siting Council (Council) issued a site certificate for the Wheatridge Wind Energy Facility (facility) on April 28, 2017, authorizing construction and operation of a wind energy facility with a generation capacity up to 500 megawatts (MW). Since the 2017 site certificate approval, the certificate holder received Council approval for two site certificate amendments, for construction and operation of two battery storage systems (20 and 30 MW, each) and a change in the maximum wind turbine blade tip height (a site certificate prescribed wind turbine dimension specification). The facility has not yet been constructed, and has a construction commencement deadline of May 24, 2020.

Wheatridge Wind Energy, LLC, (certificate holder) a wholly owned subsidiary of NextEra Energy Resources, LLC submitted a complete Request for Amendment 4 (amendment request or RFA4) of the Wheatridge Wind Energy Facility site certificate on June 28, 2019. RFA4 requests Council approval to add 1,527 acres to the site boundary for construction and operation of 150 megawatts (MW) of photovoltaic solar power generation equipment and up to 41 distributed energy storage (battery) systems. The proposed photovoltaic solar power generation equipment would be configured into two solar arrays (Solar Array 1 and Solar Array 2). Solar arrays would include a combination of solar modules, tracker systems, posts, and related electrical equipment. The certificate holder also seeks Council approval to amend four previously imposed condition including Land Use Condition 9 (GEN-LU-03), Land Use Condition 18 (PRE-LU-08), Fish and Wildlife Condition 3 (CON-FW-01), and Fish and Wildlife Habitat Condition 5 (CON-FW-02). The amendment is being processed as a “Type A” amendment request.

On July 25, 2019, the Oregon Department of Energy (Department) released its draft proposed order (DPO) on the amendment request, and issued public notice of a 45-day public comment period on the amendment request and DPO. A public hearing on the DPO was held on August 22, 2019, at the Port of Morrow – Riverfront Room, Boardman, Oregon. Council considered comments provided at the hearing and the certificate holder’s response at the September 22, 2019 Council meeting conducted in Clatskanie, Oregon.

The Department issued a Proposed Order and Notice of Proposed Order on October 4, 2019. On the same day, ODOE issued a Notice of the Opportunity to Request a Contested Case to all persons who commented on the record of the public hearing of the DPO and provided their contact information. One request for contested case was received from Irene Gilbert, as an

individual and on behalf of Friends of the Grande Ronde Valley (“Gilbert”), prior to the November 5, 2019 deadline.

The proposed order was issued in red-line version to demonstrate changes that occurred between the DPO and proposed order, including substantive changes in response to issues raised in received comments, related to an applicable Council standard and the amendment request. This memo is intended to assist Council in its review of Gilbert’s request for contested case and the proposed order, specific to the changes incorporated from the DPO to the proposed order in response to comments.

Council Scope of Review on Contested Case Proceeding Requests for Site Certificate Amendments

One request for a contested case proceeding on the proposed order was timely filed with the Department by the November 5, 2019 deadline. The request was received from Irene Gilbert, as an individual and on behalf of Friends of the Grande Ronde Valley (FGRV, Gilbert). The following evaluation presents the Department’s recommendations to Council on: 1) whether the request satisfies the requirements for requesting a contested case proceeding; 2) whether the issues were properly raised on the record of the draft proposed order public hearing; and 3) whether each of the issues identified in the request justifies a contested case proceeding.

Evaluation of Request for Contested Case

Individuals eligible to participate in a contested case proceeding must submit to the Department a request, by a specified deadline, that contains responses to the information requirements of OAR 345-027-0371(6)(a) – (j).

Evaluation of Whether Issue Was Properly Raised

Pursuant to OAR 345-027-0371(5), in order to be eligible to request a contested case proceeding on the proposed order, a person must have properly raised the issue. To properly raise an issue, the person must have:

- (1) Commented either in writing or in person on the record of the draft proposed order public hearing, from July 18 through September 9, 2019;
- (2) Raised the issue with sufficient specificity to afford the Council an adequate opportunity to respond; and,
- (3) Raised an issue that is within the jurisdiction of the Council.

For reference, the Department provides additional description for the Council’s review of the eligibility requirements listed above.

Sufficient Specificity

For an issue to have been raised with sufficient specificity, the individual must have presented facts on the record of the draft proposed order public hearing that support the individual's position on the issue (OAR 345-027-0367(3)(e)(F)). It is not sufficient for an individual to refer to one of Council's standards and make generalized assertions that a standard has not been met.

Jurisdiction

An issue is outside of Council jurisdiction if it has no authority to render a decision on the issue. In general, Council has jurisdiction to determine whether the facility, with proposed changes, meets a Council standard and all other applicable state statutes and rules.

Evaluation of Whether Request Raises Significant Issue of Law or Fact

OAR 345-027-0371(9) contains the standard of review for contested case requests for site certificate amendments. It states:

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

Therefore, simply raising a significant issue of law or fact is not sufficient to justify a contested case. The significant issue of law or fact must have some connection to the Council's determination whether the facility, which in this case is the Wheatridge Wind Energy Facility, with proposed changes, meets applicable laws and Council standards.

OAR 345-027-0371(10) gives the Council three options for action on a contested case request:

Option 1: Under OAR 345-027-0371(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 345-027-0371(10)(b), if the Council finds that the request identifies one or more properly raised issues that an amendment to the proposed order, including modification to conditions, would settle in a manner satisfactory to the Council, the Council may deny the request as to those issues and direct the Department to amend the proposed order and send a notice of the amended proposed order to the persons described in OAR 345-027-0371(4).

Option 3: Under OAR 345-027-0371(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 Request for Contested Case

Irene Gilbert/FGRV provided written comments and oral testimony on September 9 and August 22, 2019, respectively, on the record of the draft proposed order. In these comments, Ms. Gilbert/FGRV raised 5 issues. In her request for a contested case proceeding (request) received on November 5, 2019, provided as Attachment 2, she includes 3 issues which she represents to be of the 5 issues raised in her September 9, 2019 comments, provided as Attachment 3. Based on review, the Department recommends Council consider the request filed to satisfy the informational requirements of OAR 345-027-0371(6).

The analysis presented below includes the Department's evaluation of whether the issue was properly raised and whether the issue justifies a contested case.

Irene Gilbert Issue 1

*"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..."**

**Additional discussion was included with this issue in the request, which is not included for brevity. See Attachment 2 of this Staff Report for the complete request.*

Recommendation: Council find issue was properly raised on the record

After reviewing Ms. Gilbert's written and oral comments, the Department agrees that Ms. Gilbert's issue was provided in a comment on the record of the draft proposed order. In Ms. Gilbert's comments on the draft proposed order, specific questions were raised related to the Department's interpretation of rules and statutes (ORS 469.370(3) and OAR 345-027-0367(5)(b)) supporting the basis for limiting the introduction of new information in a request for contested case. Therefore, the Department recommends Council find that because the issue was raised on the record of the draft proposed order with sufficient specificity and is within Council's jurisdiction, the issue was properly raised.

Recommendation: Council find that the issue does not raise a significant issue of fact or law that may affect the Council's determination of compliance with an applicable standard

Ms. Gilbert disagrees with the Department's interpretation of OAR 345-027-0367(5)(b), as evaluated in Section II.C. *Council Review Process* of the proposed order. Ms. Gilbert requests a contested case proceeding to allow for interpretation of OAR 345-027-0367(5)(b).

As presented in Section II.C. *Council Review Process* of the proposed order, the Department considers OAR 345-027-0367(3)(f)(G), which states, “**The Council will not accept or consider any further public comment** on the request for amendment or on the draft proposed order **after the close of the public hearing**” to support the interpretation limiting the introduction of new information within a request for contested case, where the proposed order states that, “All rules and supporting evidence that a person may wish to cite or include in a request for a contested case proceeding must be included in comments provided on the record of the draft proposed order public hearing.”

Importantly, however, as further described in the proposed order, pursuant to OAR 345-027-0371(5), individuals who comment in person or in writing on the record of the public hearing may request a contested case proceeding on *new* issues related to material changes between the draft proposed order and proposed order, including any recommended conditions of approval, presented in the proposed order [Emphasis added]. It is not the Department’s position that an individual interested in raising issues related to material changes presented in the proposed order be limited to the rules and supporting evidence submitted in their specific issues raised on the record of the DPO; it is the Department’s position that a request for contested case is not an opportunity to further supplement an individual’s original issue raised with rules, citations and supporting evidence without regard to material changes made in the proposed order in response to the issue. It is, however, an opportunity to raise new issues related to material changes made in response to such issues.

The purpose of OAR 345-027-0367 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 345-027-0367(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 new or additional documents, information or regulatory citations 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.

The above-described interpretation was presented to Council as part of Council’s review of comments received on the draft proposed order at the September 21-22, 2019 Council meeting, and was presented in the proposed order. This interpretation was also presented in the final orders for Request for Amendment 5 of the Golden Hills Wind Project Site Certificate, Request for Amendment 4 of the Montague Wind Power Facility Site Certificate, and Request for Amendment 2 of the Wheatridge Wind Energy Facility Site Certificate based upon the same issue raised by Ms. Gilbert.

The issue of rule interpretation raised by Ms. Gilbert is not specific to the certificate holder’s ability to satisfy an applicable Council standard identified in Chapter 345 Division 22, 23 and 24

and therefore does not raise a significant issue of fact or law that may affect the Council's determination that the facility, with proposed changes, meets an applicable standard. The Department therefore recommends Council deny the issue for consideration in a contested case proceeding.

Irene Gilbert Issue 2

*"Proposed Site Certificate continues to fail to comply with state law regarding the control of noxious weeds."**

**Additional discussion was included with this issue in the request, which is not included for brevity. See Attachment 2 of this Staff Report for the complete request.*

Recommendation: Council find issue was properly raised on the record

On the record of the draft proposed order, Ms. Gilbert expressed concern related to weed control and the certificate holder's ability to satisfy the state's weed control statutes at ORS 569.390 and ORS 469.507. ORS 569.390 applies to any person, firm or corporation owning or occupying land and requires that noxious weeds be destroyed or prevented from seeding. Ms. Gilbert suggested that the certificate holder needs to be required to: identify noxious weeds at the site and identify noxious weed seed production season; develop a monitoring and treatment schedule that would prevent weeds from seeding; and, establish a monitoring schedule that extends for the life of the operating facility.

In response to these comments, the Department incorporated material changes into the proposed order, including Attachment F, draft Noxious Weed Control Plan. In the draft Noxious Weed Control Plan, consistent with Morrow County's Weed Control Plan Guidelines and Ms. Gilbert's comments on the draft proposed order, requirements include a pre-construction weed survey to determine weed inventory and pre-disturbance weed conditions; the draft plan specifies that based on the pre-construction weed survey, a treatment schedule be established based on consultation with the Department, Oregon Department of Fish and Wildlife, and Morrow and Umatilla County Weed Control Departments. The draft plan specifies that annual monitoring will be conducted for the first five years of operation, and then re-evaluated by the certificate in consultation with the above-referenced agencies to confirm long-term monitoring schedule. The draft plan specifies that vehicle tire washing shall be implemented during construction and operation prior to entering into revegetation areas.¹ Ms. Gilbert's request for contested case on this issue includes the previously raised issues, described above, and new issues, described below. However, the Department maintains that the draft Noxious Weed Control Plan addresses the issues previously raised and therefore focuses the evaluation on new issues raised presumably related to the draft plan.

¹ Ms. Gilbert suggests that the proposed order failed to require that the certificate holder identify weeds, identify timing of weed seed production, require vehicle cleaning prior to roadway entry, and long-term monitoring. To the contrary, as described above, the draft plan includes these components.

Based on the material changes incorporated into the proposed order via the draft Noxious Weed Control Plan, which had not been previously provided, Ms. Gilbert raises new issues, as allowed under OAR 345-027-0371(5). New issues include that the proposed order fails to require the certificate holder to address seed dispersal and control outside of the site boundary, and therefore should require that the certificate holder be obligated to prohibit weeds from going to seed within the site boundary. Ms. Gilbert also raises a new issue that the Department failed to obtain concurrence from the Oregon Department of Agriculture on the evaluation of the certificate holder's compliance with the state weed control statutes.

The Department recommends Council find that Ms. Gilbert properly raised the issues because she raised the issues on the record of the draft proposed order with sufficient specificity, and new issues are related to a material change incorporated into the proposed order.

Recommendation: Council find that the issue does not raise a significant issue of fact or law that may affect the Council's determination of compliance with an applicable standard

As described above, Ms. Gilbert raises new issues related to compliance with state weed control statutes, which the Department considers to be related to material changes incorporated into the proposed order. These new issues include a concern that if the certificate holder is not obligated to control weeds outside of the site boundary, that uncontrolled weed dispersal to adjacent lands would occur which would be inconsistent with legislative intent of the statute. Ms. Gilbert requests then, to address the issue, that Council impose a requirement obligating the certificate holder to prohibit weeds from going to seed within the site boundary. Ms. Gilbert also raises a new issue expressing concern that the Department failed to obtain concurrence from the Oregon Department of Agriculture on the compliance evaluation of the state weed control statutes.

Neither ORS 569.390 or ORS 469.507 provide compliance review or approval authority to the Oregon Department of Agriculture; however, the Department notified the Oregon Department of Agriculture along with all other state and local reviewing agencies of their opportunity to review the amendment request and draft proposed order, and did not receive comments from state or local agencies expressing concern related to compliance with the state weed control statutes. As described above, the draft plan references review and coordination with the Department, the Oregon Department of Fish and Wildlife, and Morrow and Umatilla County Weed Control Departments to develop and implement a final plan.

A site certificate issued by the Council authorizes construction and operation impacts within an approved site boundary; the Council does not have authority to obligate the certificate holder to conduct weed monitoring and control outside of the site boundary. Imposing a condition, as Ms. Gilbert suggests, requiring that the certificate holder prohibit weeds from going to seed within the site boundary is inconsistent with the statutory language which states that weeds be destroyed or prevented from seeding, not prohibited from seeding. The intent of the draft Noxious Weed Control Plan is to prevent weeds from seeding, and destroy weeds based on methods recommended by state and local agencies, consistent with ORS 569.390.

Therefore, the Department recommends Council conclude that these new issues raised by Ms. Gilbert would not raise a significant issue of fact or law that may affect the Council's determination that the facility, with proposed changes, meets an applicable standard. The Department therefore recommends Council deny the issue for consideration in a contested case proceeding.

Irene Gilbert Issue 3

*"Proposed site certificate fails to assess direct and indirect damage to habitat considered critical to the survival of these species."**

**Additional discussion was included with this issue in the request, which is not included for brevity. See Attachment 2 of this Staff Report for the complete request.*

Recommendation: Council find issue was properly raised on the record

After reviewing Ms. Gilbert's written and oral comments, the Department agrees that Ms. Gilbert's issue was provided in a comment on the record of the draft proposed order. In comments on the draft proposed order, Ms. Gilbert expressed that in order to mitigate both direct and indirect habitat impacts, in compliance with OAR 635-415-0025, the certificate holder needs to be obligated to impose permanent setback restrictions from activities and facility components to nest sites of federally listed threatened and endangered (T&E) bird species, based on an assumption that federally listed T&E nest sites are considered Category 1 habitat. To support her position, Ms. Gilbert provided as an attachment an Oregon Legislative Council memo from Greg Barreto.

The Department recommends Council find that, because the issue was raised on the record of the draft proposed order with sufficient specificity and because habitat impacts are within Council's jurisdiction, the issue was properly raised.

Recommendation: Council find that the issue does not raise a significant issue of fact or law that may affect the Council's determination of compliance with an applicable standard

As presented as part of Council's review of comments received on the draft proposed order at the September 21-22, 2019 Council meeting and as presented in the proposed order, the Council's Fish and Wildlife Habitat standard and T&E Species standard, OAR 345-022-0060 and -0070, protects habitat for special status state-listed species and state-listed T&E species, respectively. However, consistent with the Oregon Legislative Council memo from Greg Barreto, informational requirements for the Council's Fish and Wildlife Habitat standard as established in OAR 345-021-0010(p)(B) obligate a certificate holder to evaluate and identify presence or historically documented habitat use within the analysis area of federally-listed T&E species within Exhibit P. As presented in RFA4 Exhibit P, there were no federally listed T&E species identified within the analysis area and therefore the issue is not relevant to the amendment request. Further, while federally listed T&E species should be identified in Exhibit P

as an informational requirement, Council standards do not currently address federally-listed T&E species. ODFW could make recommendations under its Fish and Wildlife Habitat Mitigation Policy based on information about federally-listed T&E species, which would then be implemented through the Council's standard.

Based upon the above reasoning and analysis, the Department recommends Council conclude that the issues raised by Ms. Gilbert were addressed in the proposed order and would not raise a significant issue of fact or law that may affect the Council's determination that the facility, with proposed changes, meets an applicable standard. The Department therefore recommends Council deny the issue for consideration in a contested case proceeding.

Summary of Revisions Incorporated into Proposed Order

During the 45-day public comment period on the DPO on RFA4, the Department received 8 written comments from members of the public, reviewing agencies and Morrow County Board of Commissioners as the Special Advisory Group (SAG). Based on comments received, the Department incorporated additional reasoning and analysis into the procedural discussion and for the following sections presenting Council standards:

- **Section II.C. Council Review Process:** Additional legal analysis incorporated in response to issues raised by Ms. Gilbert, as an individual and on behalf of the Friends of the Grande Ronde Valley (Gilbert) related to the limitations and allowance of new material submitted in a request for a contested case proceeding on the proposed order.
- **Section II.D. Applicable Division 27 Rule Requirements:** Additional legal analysis incorporated in response to Friends of the Columbia Gorge issues raised related to the Council's ability to review the amendment request under temporary rules.
- **Section III.E. Land Use:** Additional analysis incorporated in response to comments received from the SAG and Gilbert. Revisions were incorporated into the evaluation of Morrow County Zoning Ordinance (MCZO) Section 3.010 Yard Setbacks and recommended Land Use Condition 1 (GEN-LU-01), MCZO Section 6.030(D) General Conditions for vehicle access points; and, evaluation of the certificate holder's ability to comply with the state's noxious weed control statutes at ORS 569.390, including incorporation of a draft Noxious Weed Control Plan.
- **Section III.G. Retirement and Financial Assurance:** Additional analysis was incorporated in response to comments received from the SAG and certificate holder, related to the transport of solar array post foundations to an appropriate disposal facility and the landowner consultation process, previously established in site certificate conditions, required prior to facility decommissioning to ensure that facility components are removed and disturbance areas restored in a manner consistent with preferred land use practices at the time of decommissioning.