

## **Attachment 2 Transfer Hearing Comments**

1. Comments from Friends of the Columbia Gorge, Oregon Wild and Central Oregon LandWatch
2. Audio File from November 19, 2020 Transfer Hearing  
<https://soundcloud.com/odoe/sets/november-19-20-2020-efsc-meeting>

# REEVES, KAHN, HENNESSY & ELKINS

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November 19, 2020

Oregon Energy Facility Siting Council  
c/o Sarah Esterson, Senior Siting Analyst, Oregon Department of Energy  
*Via email to sarah.esterson@oregon.gov*

**Re: Request for Amendment #5 to the Site Certificate for the Summit Ridge Wind Farm to Transfer Certificate Holder Ownership**

Dear Chair Jenkins and Council Members:

The following comments regarding the above-referenced request for site certificate amendment are submitted on behalf of Friends of the Columbia Gorge, Oregon Wild, and Central Oregon LandWatch, (collectively, “Commenters”).

Commenters are nonprofit public interest organizations, with more than 26,000 collective members and supporters, with strong interests in responsible energy generation and the proper implementation of state law governing the approval, construction, and modification of large energy facilities in Oregon. Commenter Friends of the Columbia Gorge is a nonprofit organization with approximately 6,500 members dedicated to protecting and enhancing the resources of the Columbia River Gorge. Commenter Oregon Wild represents approximately 20,000 members and supporters who share Oregon Wild’s mission to protect and restore Oregon’s wildlands, wildlife, and waters as an enduring legacy. Commenter Central Oregon LandWatch (“LandWatch”) is a conservation organization with more than 200 members that has advocated for the preservation of natural resources in Central Oregon for more than thirty years. LandWatch plays a vital role in achieving a responsible, balanced approach to planning for and conserving Central Oregon’s land and water resources, while recognizing the needs of future generations. LandWatch works to protect and conserve the region’s ecosystems and wildlife habitats; to foster thriving, sustainable communities; and to spread the costs and benefits of growth equitably across the community as a whole.

To the extent that the record of this public hearing does not already include all of EFSC’s and ODOE’s files on the original Site Certificate for the Summit Ridge Wind Farm as well as Amendments 1 through 4 to the Site Certificate, Commenters hereby designate and incorporate all such materials as part of the record of this hearing.

For the reasons explained below, the Request for Amendment #5 (“RFA5”) to the Site Certificate for the Summit Ridge Wind Farm submitted by Aypa Power LLC (Parent Company) and Summit Ridge Wind, LLC (Certificate Holder) fails to meet the standards and criteria in the applicable law. Commenters request that the Council deny the RFA5 and confirm that the Site Certificate has expired and will be terminated.

## 1. Background

The Summit Ridge Wind Farm (“Project”) is the most controversial wind project currently proposed to be built in Oregon. It has been more than eleven years since the preliminary application for this Project was filed, and more than nine years since the Project was first approved. As a point of reference, in 2009, when the Project was first applied for, Ted Kulongoski was Governor of Oregon, and Barack Obama was in his first year as President of the United States. Since then, much has changed. The Project was abandoned by the initial owner-developer (LotusWorks), then transferred *three times* to new parent owners (first to Summit Ridge Wind Holdings, LLC (“SRW Holdings”), then to Pattern Renewables 2 LP (a subsidiary of Pattern Energy Group 2 LP) (“Pattern”), and most recently to Aypa Power LLC (“Aypa”). To the best of Commenters’ knowledge, throughout these eleven years, and apparently continuing to the present, the site certificate holder, Summit Ridge Wind, LLC, has been unable to secure any purchaser(s) for the power that might be generated by the Project.

Meanwhile, the Project’s deadlines for beginning and completing construction were each extended—*three times*. The third round of extensions was granted despite the certificate holder’s failures to comply with applicable law by updating and rectifying the Project’s outdated and inadequate surveys, data, and proposed mitigation and monitoring methods for the protection of wildlife, plants, and habitat. The certificate holder continues to fail or refuse to comply with the applicable law to this very day by failing to update, evaluate, and disclose current conditions at the Project site and vicinity. The certificate holder has failed to provide *current* information regarding the Project’s impacts, has failed to demonstrate *current* compliance with applicable laws and rules; and failed to update and finalize proposed monitoring and mitigation plans and measures and submit them for agency review and approval—all of which are required by the Council’s rules and other applicable law.

Among other problems, the bird and bat use surveys in the proposed wind turbine areas, as well as the habitat mapping and categorizations, are all now more than a decade old, and the surveys for raptor nests and threatened and endangered plants are several years old. None of these outdated surveys and data have been proven to reflect current conditions—and moreover, even when they were prepared, they failed to sufficiently disclose and evaluate conditions at the time. The certificate holder has failed to rectify and update these surveys and data, in part in order to reflect the changes in conditions in the vicinity of the Project site and at the proposed habitat mitigation parcels (including changes caused by significant wildfires in 2018), the changes in best available science and technologies for identifying and protecting wildlife and habitat; and the changes in agency guidance and policies for evaluating and protecting wildlife and habitat. Despite these changes and the substantial passage of time, the certificate holder has utterly failed to demonstrate current compliance with the applicable laws and rules.

During avian use surveys in 2009, multiple bald and golden eagles were detected in the vicinity of the project. (Final Application for Site Certificate (Aug. 25, 2010) at § P.5.) On September 20, 2010, in a letter addressed to EFSC and ODOE, the U.S. Fish and Wildlife Service (“USFWS”) concluded that this Project, “including all turbines, transmission and roads, and associated facilities has the potential to result in injury and mortality of individual eagles and potential loss of nest sites over the life of the Project.” In the same letter, the USFWS also recommended that no wind turbines

for this Project should be sited any closer than six miles from a golden eagle nest (except for in “non-use locations”), that turbine operations should be shut down during peak migration periods, and that turbine lighting should be minimized to protect eagles. The USFWS also wrote that “[i]n the absence of clear solutions to address golden eagle mortalities at wind energy projects, to enhance populations through conservation measures, or to off-set losses in other ways, our best efforts should be directed at avoidance of mortalities by siting wind turbines well away from the areas where resident and migrating eagles are known to concentrate their activities.” The site certificate holder has never demonstrated compliance with these USFWS prescriptions.

In addition, the certificate holder failed to lawfully start construction of the Project by the construction start deadline of August 19, 2020. As a result, the Site Certificate for the Project has expired and must be terminated pursuant to OAR 345-027-0110(9) and other applicable law. The certificate holder is also in violation of numerous terms and conditions of the Site Certificate. *See* Attachment A (Commenters’ complaint letter to ODOE).

The Project is currently the subject of two pending court cases. In *Friends of the Columbia Gorge v. EFSC* (Multnomah County Circuit Court, Case No. 20CV13611), Commenters are challenging EFSC’s denials of Commenters’ requests for a contested case proceeding regarding the Project’s compliance with the applicable law. Attached hereto as Attachment B is a copy of the Petition for Judicial Review filed in this case. Although this case is currently pending in the Multnomah County Circuit Court, the question of which court has jurisdiction over the case will soon be referred by the Circuit Court to the Oregon Court of Appeals pursuant to ORS 14.165(1)(b).

In the other pending case, *Friends of the Columbia Gorge v. ODOE* (Multnomah County Circuit Court, Case No. 20CV35596), Commenters are challenging numerous actions by ODOE, including ODOE’s erroneous determinations that construction of the Project lawfully began prior to the August 19, 2020 construction start deadline; ODOE’s unlawful amendments to or waivers of numerous pre-construction terms and conditions of the Site Certificate; ODOE’s approval of a “phased” construction of the Project outside of and in violation of the required decision-making procedures for amending a site certificate and/or amending EFSC’s rules; ODOE’s erroneous findings and conclusions regarding the Project’s compliance with the applicable law and terms and conditions of the Site Certificate; ODOE’s actions in unlawfully acting on behalf of, or purporting to act on behalf of, EFSC in approving a bond or letter of credit in a form and amount satisfactory to EFSC to restore the Project site to a useful, non-hazardous condition; ODOE’s erroneous findings and conclusions regarding road work done at the Project site in August 2020; and ODOE’s erroneous determinations that the Site Certificate has not expired and instead has been “activated.” Attached hereto as Attachment C is a copy of the Petition for Judicial Review filed in this case. This case is currently pending in the Multnomah County Circuit Court.

**2. The RFA5 is incomplete and must be denied because Aypa failed to include in the RFA5 “the expected date of the transaction” for the transfer of the parent ownership from Pattern to Aypa, as required by OAR 345-027-0400(4).**

Pursuant to EFSC’s rules, “[t]o request an amendment to transfer the site certificate, the new owner *must* submit a written request to the Department that includes . . . the expected date of the transaction” for the transfer of the parent ownership from Pattern to Aypa. OAR 345-027-0400(4)

(emphasis added). In this context, the “new owner” is defined as “the person or entity that will gain ownership, possession or control of the facility or the certificate holder.” OAR 345-027-0400(1)(b). Here, Aypa is the new owner.

Despite this clear requirement to include in the request for amendment the “expected date of the transaction,” the RFA5 is completely silent on the date when parent ownership was or will be transferred to Aypa. The date of the transfer transaction is important, because numerous rights and responsibilities flow from or are measured by that date, including the requirement under OAR 345-027-0400(2) to “notify the Department [of the proposed transfer] at least 60 days before the date of the transfer of ownership.” Here, the RFA5 fails to comply with EFSC’s rules by completely omitting the date of the transaction. The RFA5 is incomplete and must be denied.

**3. Because Aypa was prohibited by OAR 345-027-0400(3) from constructing the Project before an amended site certificate approving the proposed transfer becomes effective, construction of the Project could not have been, and was not, lawfully commenced. As a result, the Site Certificate has expired and must be terminated.**

Despite Aypa’s failure to include in the RFA5 “the expected date of the transaction” as required by OAR 345-027-0400(4), Commenters have reason to believe that the date of the transaction was August 3, 2020. Commenters base this belief on the attached August 21, 2020 letter from Aypa to ODOE (Attachment D). This letter lists the “transfer date” as August 3, 2020 and states that “the sale closed on August 3, 2020, at which time Summit Ridge Wind, LLC became the wholly-owned subsidiary of Aypa.” If those representations are true, then Aypa became the “new owner,” as that term is defined by OAR 345-027-0400(1)(b), on August 3, 2020.

OAR 345-027-0400(3) prohibits a new owner from constructing a facility unless and until an amended site certificate issued by the Council, or a temporary amended site certificate issued by the Council Chair, becomes effective:

The new owner may not construct or operate the facility until an amended site certificate as described in section (10) of this rule or a temporary amended site certificate as described in section (11) of this rule becomes effective.

OAR 345-027-0400(3). This rule could not be more clear. A new owner must wait to construct or operate a facility until the Council approves a proposed transfer. In emergency situations, the new owner may seek a temporary amended site certificate from the Council Chair. *See* OAR 345-027-0400(11). These rules are important. A new owner cannot merely assume in advance that the Council will approve a request to transfer ownership and amend a site certificate. Instead, the Council must first evaluate the request and ensure that it meets all applicable laws and Council standards and that the upstream transfer to the new owner is satisfactory to and approved by the Council.

In the context of OAR 345-027-0400(3), the “facility” is defined to mean “an energy facility together with any related or supporting facilities.” ORS 469.300(14). Further, “construction” of the facility is defined to mean “work performed on a site, excluding surveying, exploration or other activities to define or characterize the site, the cost of which exceeds \$250,000.” ORS 469.300(6); *see*

also OAR 345-001-0010(12) (same). The Summit Ridge Site Certificate also incorporates this same definition of “construction”:

The definitions in ORS 469.300 and OAR 345-001-0010 apply to terms used in this site certificate, except where otherwise stated, or where the context clearly indicates otherwise.

(Site Certificate, Condition 1)

Before beginning construction, the certificate holder shall notify the Department in advance of any work on the site that does not meet the definition of “construction” in ORS 469.300 (excluding surveying, exploration, or other activities to define or characterize the site) and shall provide to the Department a description of the work and evidence that its value is less than \$250,000.

(Site Certificate, Condition 5.10)

In reporting the beginning of construction, the certificate holder shall describe all work on the site performed before beginning construction, including work performed before the Council issued the site certificate, and shall state the cost of that work. For the purpose of this exhibit, “work on the site” means any work within a site or corridor, other than surveying, exploration or other activities to define or characterize the site or corridor.

(Site Certificate, Condition 14.7)

Thus, any on-site physical activities valued at \$250,000 or less are deemed to be “site work” or “work performed on the site,” while on-site physical activities valued at more than \$250,000 are defined as “construction.” ORS 469.300(6).

Here, the plain language of OAR 345-027-0400(3) prohibited Aypa from constructing the facility, *i.e.*, performing site work in excess of \$250,000 at the Project site, unless and until either a Council-issued amendment to the Site Certificate approving the upstream transfer to Aypa becomes effective, or in an emergency situation, a temporary amendment to the Site Certificate issued by the Council Chair and approving the upstream transfer becomes effective.

Aypa pursued neither course of action. Instead, Aypa violated the express prohibition in OAR 345-027-0400(3) against the new owner constructing the facility before approval of the upstream transfer becomes effective. Again, Aypa became the new owner on August 3, 2020. The date when ODOE believes that construction of the facility commenced (*i.e.* the point in time at which ODOE believes the \$250,000 threshold of site work was reached) is somewhat unclear, but that date would definitely have been *after* Aypa became the new owner on August 3, 2020. EFSC’s [Summit Ridge webpage](#) states that “Phase 1 of construction commenced on August 6, 2020, including modifications to an access road.” Based on site visits and review of public records, Commenters believe that August 6, 2020 was instead the date that *site work* began, and that if the \$250,000 threshold for commencing “construction” was subsequently reached, that would have occurred at a later date. In any event, once

Aypa became the new owner on August 3, 2020, it was prohibited by OAR 345-027-0400(3) from constructing the Project unless and until the Council approves the upstream transfer and that approval becomes effective. Thus, Aypa could not yet have lawfully commenced construction of the Project.

Because OAR 345-027-0400(3) prohibited Aypa from constructing the Project before an amended site certificate approving the proposed transfer is issued and becomes effective, construction of the Project was not—and could not have been—lawfully commenced. The deadline to lawfully start construction of the Project was August 19, 2020. Aypa failed to meet that deadline. As a result, the Site Certificate has expired and must be terminated. *See* OAR 345-027-0313, 345-027-0110(9). Aypa could have avoided that result by either applying for another extension of the construction start deadline pursuant to OAR 345-027-0385, and/or requesting an emergency temporary amended site certificate from the Council Chair pursuant to OAR 345-027-0400(11). Because Aypa pursued neither course of action, Aypa is solely responsible for the expiration of the Site Certificate.

In conclusion, Aypa was prohibited by OAR 345-027-0400(3) from commencing construction of the Project unless and until the Council (or the Council Chair) approves the upstream transfer in the form of an amendment to the Site Certificate. Because Aypa was prohibited by the Council's rules from commencing construction of the Project, construction did not lawfully commence prior to the August 19, 2020 construction start deadline. Under its own terms and applicable law, the Site Certificate for this Project has expired and must be terminated. The Council should accordingly deny the RFA5, deem the Site Certificate expired, and terminate the Site Certificate.

**4. Because Aypa has failed to demonstrate “a reasonable likelihood of obtaining a bond or letter of credit in a form and amount satisfactory to the Council to restore the site to a useful, non-hazardous condition,” as required by OAR 345-022-0050(2), the RFA5 must be denied.**

Pursuant to OAR 345-022-0050(2), a new owner must demonstrate “a reasonable likelihood of obtaining a bond or letter of credit in a form and amount satisfactory to the Council to restore the site to a useful, non-hazardous condition.” Aypa has failed to meet that requirement here.

Aypa includes with the RFA5 a letter from the Royal Bank of Canada addressed to ODOE. But there is no evidence in this letter, or anywhere else in the RFA5, that the Royal Bank of Canada has reviewed the actual language, *i.e.*, the “form,” of the bond or letter of credit that the Council has previously determined satisfactory. Instead, the Royal Bank of Canada letter merely states that this bank “may be asked to provide *a* letter of credit” for the Project (emphasis added). Unless and until there is some evidence that the Royal Bank of Letter would be reasonably likely to provide a bond or letter of credit “in a form . . . satisfactory to the Council,” the RFA5 must be denied.

Similarly, the Royal Bank of Canada letter states that “[i]t is our further understanding that the potential liability of the Project Letter of Credit could total an amount *up to US \$12,019,000*” (emphasis added). Apparently the Royal Bank of Canada is not aware that this \$12,019,000 figure is outdated because it was expressed in 4th Quarter 2018 U.S. dollars, and that the actual required amount of the bond or letter of credit would be substantially higher to adjust for inflation, pursuant to

a prescribed formula. (*See* Site Certificate Condition 14.1.) To provide a basic example of how the required dollar amount of the required bond or letter of credit can increase over time, the original amount, as set forth in the 2011 original Site Certificate, was \$6.965 million (in 3rd Quarter 2010 U.S. dollars). Since that time, the dollar amount has likely nearly doubled when expressed in 2020 dollars.

Here, there was no effort to convert the \$12.019 million figure to current dollars, nor even any recognition that the \$12.019 million figure is no longer applicable. Given that the Royal Bank of Canada apparently believes US \$12,019,000 is the *maximum* dollar amount that it might be asked to provide security for, there is insufficient evidence to conclude that Aypa will be reasonably likely to obtain “a bond or letter of credit in [an] amount satisfactory to the Council.”

In summary, there is insufficient evidence to conclude that the Royal Bank of Canada is even aware of—let alone would or could satisfy—the requirements to provide a bond or letter of credit in a form and amount satisfactory to the Council. Because the RFA5 fails to demonstrate compliance with OAR 345-022-0050(2), the RFA5 must be denied.

**5. The Council is prohibited by OAR 345-027-0400(9) from adopting the Draft Final Order and from approving the Draft Fifth Amended Site Certificate.**

On November 16, 2020, ODOE staff released a memorandum with an attached “Draft Final Order on Request for Amendment 5 to Transfer the Summit Ridge Wind Farm Site Certificate” (“Draft Final Order”). The Draft Final Order, in turn, includes an attached “Draft Fifth Amended Site Certificate” (“Draft AMD5”). The Draft Final Order and Draft AMD5 go way beyond the scope of the transfer process. Both documents contain *numerous* proposed substantive amendments to the terms and conditions of the Site Certificate that have absolutely nothing to do with the proposed upstream corporate transfer.

Just to provide a few examples, the Draft AMD5 contains multiple proposed amendments to the Site Certificate that would insert new references to “phases” or “components” of Project construction; a proposed amendment that would eliminate the pre-construction requirement for the site certificate holder to “obtain all necessary federal, state, and local permits or approvals required for construction, operation, and retirement of the facility” prior to starting construction; proposed amendments to the requirements for a final Habitat Mitigation Plan; proposed amendments to the requirements for the certificate holder to demonstrate the construction manager’s qualifications and experience; and proposed amendments to the requirements applicable to contractors and subcontractors.

All of these and other proposed amendments are prohibited by OAR 345-027-0400(9), which specifies as follows:

Except as described in OAR 345-027-0351(5), the Council may not otherwise change the terms and conditions of the site certificate in an order approving the request for amendment to transfer the site certificate.



OAR 345-027-0400(9). In other words, when EFSC receives a transfer request, EFSC can *only* approve the requested transfer in ownership, and can make no other changes to the terms and conditions of a site certificate. The only exception is if the certificate holder also requests other amendments to the Site Certificate pursuant to OAR 345-027-0351(5), in which case those other amendments must be processed pursuant to EFSC's rules under either the "Type A" or "Type B" review process. OAR 345-027-0351 ("[T]he Council must review all proposed changes through the process with the more procedural steps applicable to any one of the proposed changes.").

Here, ODOE staff are attempting to unlawfully use the transfer review process to include major substantive amendments to the terms and conditions of the Site Certificate, rather than using the "Type A" or "Type B" review procedures required by EFSC's rules. The unlawful and unfair nature of ODOE's approach here is underscored by the fact that ODOE released the Draft Final Order and Draft AMD5 on November 16, 2020, only three days before the public hearing on the transfer request. If ODOE staff had instead followed the "Type A" or "Type B" review procedures as required by EFSC's rules for substantive amendments to the Site Certificate, then ODOE would have been required to issue a draft proposed order and allow the public at least twenty days to review and comment on the draft proposed order before the Council could even *consider* adopting the draft proposed order. ODOE's approach here not only truncates the mandatory twenty-day comment period down to only three days, it also hides the fact that this transfer review process is being used to improperly and unlawfully propose substantive amendments to the Site Certificate via the wrong process and in the wrong forum.

The Draft Final Order attempts to justify the proposed substantive amendments to the Site Certificate as somehow connected to the proposed change in parent corporate ownership. But these suggested justifications quickly fall apart under scrutiny. Changing the terms and conditions of a Site Certificate to make substantive amendments—such as changing pre-construction requirements to apply only before building certain phases or components of the facility, rather than the facility as a whole—has absolutely nothing to do with the proposed transfer to a new parent company. Moreover, such substantive changes would violate the applicable statutes and rules and other provisions of the Site Certificate, which expressly link the term "construction" to the construction of *the facility*, which is defined to include *all* related and supporting facilities. OAR 345-027-0400(3); ORS 469.300(14); ORS 469.300(6); OAR 345-001-0010(12). In other words, where the words "construction" or "pre-construction" are used in a site certificate, these terms apply to the entire facility (in this case, the entire wind Project and all of its components), not just specific components. EFSC cannot lawfully use the word "construction" to apply to only *part* of the Project. At any rate, amendments like the ones proposed here are absolutely substantive in nature, and they therefore *must* be processed under EFSC's "Type A" or "Type B" review procedures; the transfer review procedures cannot be used to approve them.

In summary, OAR 345-027-0400(9) expressly prohibits EFSC from making any amendments to the terms and conditions of the Site Certificate other than approving the proposed transfer in parent ownership to Aypa. The Draft Final Order and Draft AMD5 violate this rule and cannot be adopted or approved as drafted.

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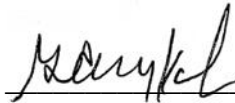
**6. Conclusion**

For the reasons stated above, the Council should deny the RFA5, deem the Site Certificate expired, and terminate the Site Certificate.

Thank you for your time and consideration.

Sincerely,

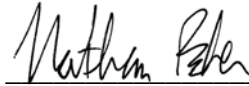
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FRIENDS OF THE COLUMBIA GORGE



Nathan J. Baker, OSB No. 001980

*Senior Staff Attorney, Friends of the Columbia  
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cc (via email): Clients  
Karl Anuta, Attorney for Commenters  
Patrick Rowe, Oregon Department of Justice  
Todd Cornett, Oregon Department of Energy

**Attachment A**

# REEVES, KAHN, HENNESSY & ELKINS

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*SUBMITTED VIA E-MAIL*

August 20, 2020

Duane Kilsdonk, Siting Compliance Officer  
Oregon Department of Energy  
c/o Oregon Energy Facility Siting Council  
*Via email to duane.kilsdonk@oregon.gov*

**Re: Violations and Termination of the Site Certificate for the Summit Ridge Wind Farm**

Dear Mr. Kilsdonk:

Friends of the Columbia Gorge, Oregon Wild, and Central Oregon LandWatch (collectively, “Complainants”) write to advise the Oregon Department of Energy (“ODOE” or “Department”) and the Oregon Energy Facility Siting Council (“EFSC” or “Council”) of new and ongoing violations of the laws and site certificate conditions applicable to the Summit Ridge Wind Farm (“Project”), as well as the expiration and termination of the Fourth Amended Site Certificate for the Summit Ridge Wind Farm (“Site Certificate”). Complainants request a site inspection, investigation, and enforcement action in order to remedy the violations described herein; confirmation that the Site Certificate expired on August 19, 2020 and is terminated; an immediate cessation of all site work and ground-disturbing activity at the Project site, an assessment of civil penalties, and any other remedies deemed appropriate by the Department and/or Council.

Complainants are nonprofit public interest organizations, with more than 26,000 collective members and supporters, with a strong interest in responsible energy generation and the proper implementation of state law governing the approval, construction, and modification of large energy facilities in Oregon generally, and the Summit Ridge Project specifically. Complainant Friends of the Columbia Gorge (“Friends”) is a nonprofit organization with approximately 6,500 members dedicated to protecting and enhancing the resources of the Columbia River Gorge. Complainant Oregon Wild represents approximately 20,000 members and supporters who share Oregon Wild’s mission to protect and restore Oregon’s wildlands, wildlife, and waters as an enduring legacy. Complainant Central Oregon LandWatch (“LandWatch”) is a conservation organization with more than 200 members that has advocated for the preservation of natural resources in Central Oregon for more than 30 years.

A site certificate for the Summit Ridge Project was first applied for in 2009. EFSC issued a site certificate for the Project in 2011 and has subsequently amended the site certificate four times at the request of the site certificate holder. The holder of the site certificate is Summit Ridge Wind, LLC. The original parent company was LotusWorks. The current parent company is Pattern Energy.

The original deadline to commence construction of the Project was August 19, 2014. EFSC extended that deadline three times at the request of the site certificate holder. The final deadline to commence construction was August 19, 2020.

Meanwhile, to the best of Complainants' knowledge, numerous required surveys and plans for the Project were never completed, updated, or finalized over the nine years since the original certificate was first issued. These included the bird and bat use surveys, the wildlife habitat mapping and categorizations, the wildlife monitoring and mitigation plan, and the surveys for raptor nests and for threatened and endangered plants. To the best of Complainants' knowledge, some of these items were not updated for more than a decade, others were not updated for four years or more, and others were never completed or finalized.

As will be explained below, to the best of Complainants' knowledge, the Site Certificate has expired and must be terminated because the site certificate holder failed to either (1) lawfully commence construction prior to the construction start deadline of August 19, 2020, or (2) apply for a fourth extension of the construction start deadline by filing a request for amendment of the Site Certificate prior to that date.

The Siting Act, the Council's rules, and the Site Certificate itself all regulate the circumstances under which the Site Certificate expires and/or is terminated. First, ORS 469.370(12) requires that "[t]he council shall specify in the site certificate a date by which construction of the facility must begin."

Second, the Council's rules require that "[t]he certificate holder must begin and complete construction of the facility by the dates specified in the site certificate." OAR 345-025-0006(4).

Third, if the certificate holder fails to begin construction by the deadline, the Site Certificate expires:

*If the certificate holder does not begin construction of the facility by the construction beginning date specified in the site certificate or amended site certificate, the site certificate expires on the construction beginning date specified, unless expiration of the site certificate is suspended pending final action by the Council on a request for amendment to a site certificate under OAR 345-027-0385(2).*

OAR 345-027-0313 (emphasis added). Again, the most recent construction beginning date for this Project was August 19, 2020.

Fourth, the Council's rules also provide that "[w]hen the Council finds that the site certificate has expired as described in OAR 345-027-0313, the Council *shall* issue an order terminating the site certificate." 345-027-0110(9) (emphasis added).

Finally, the Site Certificate itself contains the following condition (Condition 2.2):

This site certificate is effective until 1) it is terminated under OAR 345-027-0110 or the rules in effect on the date that termination is sought; or 2) until the site certificate is

revoked under ORS 469.440 and OAR 345-029-0100 or the statutes and rules in effect on the date that revocation is ordered. [ORS 469.401(1)]

Thus, for this Project, the Siting Act, Council rules, and Site Certificate all require that the Site Certificate must be terminated if the certificate holder fails to lawfully commence construction by August 19, 2020. In the context of the Siting Act, the Council rules, and the Site Certificate, the word “construction” is a defined term. The Siting Act expressly defines “construction” as “work performed on a site, excluding surveying, exploration or other activities to define or characterize the site, the cost of which exceeds \$250,000.” ORS 469.300(6); *see also* OAR 345-001-0010(12) (same). The Site Certificate also incorporates this same definition of “construction”:

The definitions in ORS 469.300 and OAR 345-001-0010 apply to terms used in this site certificate, except where otherwise stated, or where the context clearly indicates otherwise.

(Site Certificate, Condition 1)

Before beginning construction, the certificate holder shall notify the Department in advance of any work on the site that does not meet the definition of “construction” in ORS 469.300 (excluding surveying, exploration, or other activities to define or characterize the site) and shall provide to the Department a description of the work and evidence that its value is less than \$250,000.

(Site Certificate, Condition 5.10)

In reporting the beginning of construction, the certificate holder shall describe all work on the site performed before beginning construction, including work performed before the Council issued the site certificate, and shall state the cost of that work. For the purpose of this exhibit, “work on the site” means any work within a site or corridor, other than surveying, exploration or other activities to define or characterize the site or corridor.

(Site Certificate, Condition 14.7)

Thus, any on-site physical activities valued at \$250,000 or less are deemed to be “work performed on [the] site,” while on-site physical activities valued at more than \$250,000 are defined as “construction.” ORS 469.300(6). And where the Site Certificate uses terms like “before beginning construction,” “pre-construction,” and “prior to construction,” the word “construction” within these terms is as defined by ORS 469.300(6).

The conditions of the Site Certificate are binding on both the State of Oregon and the site certificate holder. ORS 469.300(26) (“‘Site certificate’ means the binding agreement between the State of Oregon and the applicant, authorizing the applicant to construct and operate a facility on an approved site, incorporating all conditions imposed by the council on the applicant.”); ORS 469.401(1) (“The certificate or amended certificate shall authorize the applicant to construct, operate and retire the facility subject to the conditions set forth in the site certificate or amended site

certificate.”); ORS 469.401(3) (“Subject to the conditions set forth in the site certificate or amended site certificate, any certificate or amended certificate signed by the chairperson of the council shall bind the state and all counties and cities and political subdivisions in this state as to the approval of the site and the construction and operation of the facility.”); Site Certificate, Condition 2.1 (“To the extent authorized by state law and *subject to the conditions set forth herein*, the State authorizes the certificate holder to construct, operate, and retire a wind energy facility, together with certain related or supporting facilities, at the site in Wasco County, Oregon, as described in Section 3.0 of this site certificate.”) (emphasis added); Site Certificate, Condition 2.5 (“Subject to the conditions herein, this site certificate binds the State and all counties, cities, and political subdivisions in Oregon as to the approval of the site and the construction, operation, and retirement of the facility as to matters that are addressed in and governed by this site certificate.”).

The Site Certificate imposes numerous requirements that **must** be satisfied **prior to “construction.”** Again, all Site Certificate conditions—including all pre-construction conditions—are binding on the site certificate holder and the State of Oregon. Thus, wherever the Site Certificate imposes a requirement that must be satisfied “prior to construction,” “before beginning construction,” “pre-construction,” or the like, these are prerequisites, or conditions precedent, that must occur before “construction” may lawfully be started. Failure to comply with any such condition precedent would be in violation of the Site Certificate, the Siting Act, and the Council’s rules, but more importantly, they would preclude the certificate holder from lawfully commencing construction (*i.e.*, conducting more than \$250,000 worth of on-site work). In other words, **the certificate holder cannot start construction without first complying with all pre-construction conditions.**

In this instance, Complainants believe that numerous conditions precedent to “construction” were never satisfied prior to the construction start deadline of August 19, 2020. If Complainants are correct that the certificate holder failed to satisfy any of these pre-construction requirements prior to the deadline, then the site certificate holder could not have lawfully commenced—and did not lawfully commence—construction by the deadline. As a result, the site certificate is expired and must be terminated.

The following Site Certificate conditions **must** be met prior to commencing construction. If even one of these conditions was not met, then the certificate holder failed to lawfully commence construction. But in this case, based on currently available information, Complainants believe that many of these conditions were not met prior to the deadline:

- **Condition 3.0:** This Condition requires the certificate holder, “prior to construction,” to “determine[]” the “engineering requirements” for “component locations and design” within the “micrositing corridors.” Similarly, **Condition 12.2.a** requires the certificate holder, prior to beginning construction, to “provide to the Department . . . [i]nformation that identifies the final design locations of all turbines to be built at the facility.” At a bare minimum, these two Conditions required the certificate holder to notify the Department, prior to beginning construction, which of the two potential design alternatives it was selecting as the final Project alternative. The Final Order approving the Second Amended Site Certificate allows the site certificate holder permission to select between two different alternatives, labeled as Alternative B and Alternative C, each of which has a different total number of turbines, as well as different specifications for turbine generator sizes, hub heights, rotor diameters, blade

tip clearance, and overall turbine heights. **Condition 3.0** also prohibits the certificate holder from utilizing any micro-siting corridors if it fails to satisfy all pre-construction survey requirements (e.g., wildlife and cultural resource surveys) prior to beginning construction.

- **Condition 5.1:** This Condition requires the certificate holder, prior to beginning construction, to “notify the Department of the identity and qualifications of the major design, engineering and construction contractor(s) for the facility.” Here, “facility” means the entire Project, which includes the wind energy turbines, the transmission lines, the operations and maintenance building, the roads, and any other supporting facilities. *See* ORS 469.300(14) (“‘Facility’ means an energy facility together with any related or supporting facilities.”).
- **Condition 5.2:** This Condition requires the certificate holder, prior to beginning construction, to “contractually require all construction contractors and subcontractors involved in the construction of the facility to comply with all applicable laws and regulations and with the terms and conditions of the site certificate.”
- **Condition 5.3:** This Condition requires the certificate holder, prior to beginning construction, to “ensure that participating landowners obtain a Farm-Forest Management Easement,” which must be a document that has been “sign[ed] and record[ed] in the deed records for the county[,] binding the landowner, and the landowner’s successors in interest, prohibiting them from pursuing a claim for relief or case of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937.”
- **Condition 5.4:** This Condition requires the certificate holder, prior to beginning construction, to “submit a Notice of Proposed Construction or Alteration to the Federal Aviation Administration (FAA) and the Oregon Department of Aviation identifying the proposed final locations of turbine towers and meteorological towers” and to “provide to the Department copies of a Determination of No Hazard for all turbine towers and meteorological towers or an equivalent determination to confirm that the structures comply with applicable FAA and Oregon Department of Aviation air hazard rules.”
- **Condition 5.5:** This Condition requires the certificate holder, prior to beginning construction, to “provide to the Department a description of the turbine types selected for the facility demonstrating compliance with this condition.”
- **Condition 5.6:** This Condition requires the certificate holder, prior to beginning construction, to “obtain approval of a final Revegetation and Weed Control Plan [based upon the draft plan included as Attachment E of the *Final Order on Amendment 4*] from the Department, in consultation with the Wasco County Weed Department and ODFW, to control the introduction and spread of noxious weeds.”
- **Condition 5.7:** This Condition requires the certificate holder, prior to beginning construction, to obtain “construction rights on all parts of the site.” “Construction rights” is defined as “the legal right to engage in construction activities.” Thus, for example, unless and until the certificate holder satisfies all pre-construction requirements, the certificate holder does not



have the legal right to engage in construction activities, and therefore does not have construction rights.

- **Condition 5.8:** This Condition requires the certificate holder, prior to beginning construction, to “conduct a site-specific geotechnical investigation” and to “report its findings to the Oregon Department of Geology & Mineral Industries (DOGAMI) and the Department. The report must be submitted to the Department and DOGAMI at least 90 days prior to beginning construction unless otherwise agreed upon by the Department. The certificate holder shall conduct the geotechnical investigation in general accordance with current DOGAMI guidelines for engineering geologic reports and site-specific seismic hazard reports. The geotechnical report must, at a minimum, include geotechnical investigations at all wind turbine locations, transmission line dead-end and turning structures, substation(s), and the operations and maintenance building.”
- **Condition 5.10:** This Condition requires the certificate holder, prior to beginning construction, to “notify the Department in advance of any work on the site that does not meet the definition of ‘construction’ in ORS 469.300 (excluding surveying, exploration, or other activities to define or characterize the site)” and to “provide to the Department a description of the work and evidence that its value is less than \$250,000.”
- **Condition 5.11:** This Condition requires the certificate holder, prior to beginning construction, to submit to the Department and Wasco County “a Road Impact Assessment/Geotechnical Report for roads to be used by the project” and to incorporate these reports “into a Road Use Agreement with the County.”
- **Condition 5.12:** This Condition requires the certificate holder, “[p]rior to beginning construction of new access roads” to “obtain any Road Approach Permit(s) that may be required by the Wasco County Public Works Department.”
- **Condition 5.13:** This Condition requires the certificate holder, prior to beginning construction, to “obtain any Utility Permit(s) that may be required by the Wasco County Public Works Department.”
- **Condition 5.14:** This Condition requires the certificate holder, prior to beginning construction, to “provide to the Department evidence demonstrating that the certificate holder has obtained a guarantee from the turbine manufacturer for those turbines located within one mile of the boundaries of the Deschutes Federal Wild and Scenic River and the Deschutes State Scenic Waterway that the maximum sound power of those turbines would not exceed 109 dBA plus 2 dB uncertainty when measured according to IEC (International Electrotechnical Commission) 61400-11:2002 ed. 2.”
- **Condition 6.1.a:** This Condition requires the certificate holder, prior to beginning construction, to “notify the Department of the identity, telephone number, e-mail address and qualifications of the full-time, on-site construction manager. Qualifications shall demonstrate

that the construction manager has experience in managing permit and regulatory compliance requirements and is qualified to manage a wind facility construction project.”

- **Condition 7.12:** This Condition requires the certificate holder, prior to beginning construction, to “schedule a time to brief the OPUC Safety, Reliability, and Security Division (Safety) Staff as to how it will comply with OAR Chapter 860, Division 024 during design, construction, operations, and maintenance of the facilities.”
- **Condition 8.2:** This Condition requires the certificate holder, prior to beginning construction, to “require that all on-site construction contractors develop a site health and safety plan to be implemented during facility construction that informs workers and others on-site about first aid techniques and what to do in case of an emergency and that includes important telephone numbers and the locations of on-site fire extinguishers and nearby hospitals.”
- **Condition 8.4:** This Condition requires the certificate holder, prior to beginning construction, to “develop fire safety plans in consultation with the Columbia Rural Fire District to minimize the risk of fire and to respond appropriately to any fires that occur on the facility site. . . . In developing the fire safety plans, the certificate holder shall take into account the dry nature of the region and shall address risks on a seasonal basis.”
- **Condition 10.1:** This Condition requires the certificate holder, prior to beginning construction, to “provide to the Department, to the Oregon Department of Fish and Wildlife (ODFW) and to the Planning Director of Wasco County detailed maps of the facility site, showing the **final** locations where the certificate holder proposes to build facility components, and a table showing the acres of temporary habitat impact by habitat category and subtype and the acres of permanent habitat impact by habitat category and subtype. The detailed maps of the facility site shall indicate the habitat categories of all areas that would be affected during construction. In classifying the affected habitat into habitat categories, the certificate holder shall consult with ODFW” (emphasis added). In addition, **Condition 10.2** specifies mandatory design elements that must be “incorporate[d] . . . into the final facility design to avoid or mitigate impacts to sensitive wildlife habitat.”
- **Conditions 10.4.a and 10.4.b:** These conditions require the certificate holder, prior to beginning construction, to “[s]elect qualified specialists (wildlife biologist/botanist) that have substantial experience in creating, enhancing, and protecting habitat mitigation areas within Oregon” and to “[n]otify the Department of the identity and qualifications of the personnel or contractors selected to implement and manage the habitat mitigation area.”
- **Condition 10.4.c:** This Condition requires the certificate holder, prior to beginning construction, to “[a]cquire the legal right to create, enhance, maintain and protect a habitat mitigation area, as long as the site certificate is in effect, by means of an outright purchase, conservation easement or similar conveyance.”
- **Condition 10.4.d:** This Condition requires the certificate holder, prior to beginning construction, to “[c]onduct a field-based habitat assessment of the habitat mitigation sites,

based on a protocol approved by the Department in consultation with ODFW, which includes methodology, habitat map, and available acres by habitat category and subtype in tabular format.”

- **Condition 10.4.e:** This Condition requires the certificate holder, prior to beginning construction, to “[d]evelop and submit a final Habitat Mitigation Plan (HMP) for approval by the Department in consultation with ODFW, based upon the draft amended HMP included as Attachment D of the Final Order on Amendment #4.” Similarly, **Condition 10.5** requires the certificate holder, prior to beginning construction, to “finalize the Wildlife Monitoring and Mitigation Plan (WMMP), based on the draft WMMP included as Attachment F of the Final Order on Amendment 4, as approved by the Department in consultation with ODFW.” **Condition 10.5** goes on to state several requirements for the contents of the final WMMP.
- **Condition 10.4.f:** This Condition requires the certificate holder, prior to beginning construction, to “[i]mprove the habitat quality, within the habitat mitigation area, as described in the final HMP, and as amended.”
- **Condition 10.7.a:** This Condition requires the certificate holder, prior to beginning construction, to “[c]onsider micrositing factors designed to minimize bird and bat collision risk including but not limited to locating wind turbines away from saddles in long ridges and locating wind turbines on the top of or slightly downwind of distinct ridges and set back from the prevailing upwind side” and to “provide a map, to the Department and ODFW, showing the final design locations of all facility components and the areas of potential disturbance, and that identifies geographic and micrositing factors considered in final design.”
- **Condition 10.7.b:** This Condition requires the certificate holder, prior to beginning construction, to “[h]ire a qualified professional biologist to conduct a pre-construction habitat survey (Condition 10.7) and Threatened and Endangered (T&E) plant survey (Condition 10.13). The surveys shall be conducted concurrently and in accordance with the survey protocol set forth in the Survey Protocol provided in Attachment G of the Final Order on Amendment 4 (for T&E plants and raptors), and in accordance with a survey protocol reviewed and approved by ODFW for habitat categorization. The survey area will include all areas within the micrositing corridor. The pre construction habitat and T&E plant survey shall be planned in consultation with the Department and ODFW, and shall include both desktop and field surveys to be confirmed with the Department and ODFW. The desktop survey shall evaluate habitat within ½ mile from the site boundary (analysis area). Field surveys shall be conducted the entirety of the micrositing corridor in areas that are not active agriculture (Category 6 habitat).” **Condition 2.14** states that “[f]ollowing the completion of surveys required by this site certificate, the Department will present the results of those surveys and required consultations at the next regularly scheduled Council meeting.” Given that the surveys required by **Condition 10.7.b** were neither presented at a regularly scheduled Council meeting nor listed on the agenda for the Council’s August 21, 2020 regular meeting, this leads Complainants to believe that the pre-construction surveys required by this condition were not completed prior to the construction start deadline of August 19, 2020.

- **Condition 10.7.c:** This Condition requires the certificate holder, “[f]ollowing completion of the habitat and T&E plant surveys [required by **Condition 10.7.b**], and final layout design and engineering [required by numerous conditions, including **Conditions 3.0, 5.5 10.7.a, 12.2.a, & 12.2.b**],” but prior to beginning construction, to “provide the Department and ODFW a report containing the results of the survey, showing expected final location of all facility components, the habitat categories of all areas that will be affected by facility components, and the locations of any sensitive resources. The report shall present in tabular format the acres of expected temporary and permanent impacts to each habitat category, type, and sub-type. The pre-construction habitat survey shall be used to complete final design, facility layout, and any additional micrositing adjustment of facility components. . . . As part of the report, the certificate holder shall include its impact assessment methodology and calculations, including assumed temporary and permanent impact acreage for each transmission structure, wind turbine, access road, and all other facility components.” **Condition 2.14** states that “[f]ollowing the completion of surveys required by this site certificate, the Department will present the results of those surveys and required consultations at the next regularly scheduled Council meeting.” Given that the surveys required by **Condition 10.7.c** were neither presented at a regularly scheduled Council meeting nor listed on the agenda for the Council’s August 21, 2020 regular meeting, this leads Complainants to believe that the pre-construction surveys required by this condition were not completed prior to the construction start deadline of August 19, 2020.
- **Condition 10.13:** This Condition requires the certificate holder, prior to beginning construction, to “perform new field surveys for threatened and endangered species following the survey protocol set forth in the Northwest Wildlife Consultants Memorandum regarding Endangered and Threatened Plant Species and Raptor Nest Surveys dated October 17, 2014. The certificate holder shall report the results of the field surveys to the Department, ODA and ODFW. If the surveys identify the presence of threatened or endangered species within the survey area, the certificate holder shall implement appropriate measures to avoid a significant reduction in the likelihood of survival or recovery of the species, as approved by the Department, in consultation with ODA and ODFW.”
- **Condition 10.14:** This Condition requires the certificate holder to “conduct two (2) seasons of raptor nest surveys with at least one (1) season of the surveys occurring prior to the beginning of construction. The raptor nest surveys shall be conducted following the instructions set forth in the Raptor Nest Survey Protocol for Summit Ridge Wind Farm included as Attachment G to the Final Order on Amendment 4. The certificate holder shall report the results of the field surveys to the Department and ODFW. If the surveys identify the presence of raptor nests within the survey area, the certificate holder shall implement appropriate measures to assure that the design, construction and operation of the facility are consistent with the fish and wildlife habitat mitigation goals and standards of OAR 635-415-0025, as approved by the Department, in consultation with ODFW.” The last raptor nest survey for this site was conducted in 2016. Complainants interpret this Condition to require **new** raptor nest surveys, at least one of which must be conducted prior to the beginning of construction. Otherwise, if the prior raptor nest surveys had been sufficient, then this Condition would not have been included in the Site Certificate. Moreover, Complainants have determined with the assistance of a professional wildlife ecologist who visited the

Project site in May 2019, that the 2016 raptor nest survey no longer accurately reflected current conditions for raptor nests as of 2019. This Condition required at least one new raptor nest survey (conducted over at least one full season) prior to beginning construction.

- **Condition 11.1:** This Condition requires the certificate holder, prior to beginning construction, to “label all identified historic, cultural or archaeological resource sites on construction maps and drawings as ‘no entry’ areas. The applicant shall implement a 200 foot buffer for all [*sic*] rock alignment and cairn sites, and shall implement a 100 foot buffer for all other archaeological sites. The certificate holder may use existing private roads within the buffer areas but may not widen or improve private roads within the buffer areas. The no-entry restriction does not apply to public road rights-of-way within the buffer areas.”
- **Condition 11.2:** This Condition requires the certificate holder, prior to beginning construction, to “provide to the Department a map showing the final design locations of all components of the facility, the areas that would be temporarily disturbed during construction and the areas that were previously surveyed [for historic, cultural, and archaeological resources] as described in the Application for Site Certificate.”
- **Condition 11.3:** This Condition is referred to by **Condition 3.0** as a “pre-construction survey requirement.” Therefore, the requirements of **Condition 11.3** must be met prior to construction. This Condition requires the certificate holder to “hire qualified personnel to conduct field investigation of all areas to be disturbed during construction that lie outside the previously-surveyed areas. The certificate holder shall provide a written report of the field investigation to the Department and to the Oregon State Historic Preservation Office (SHPO). If any potentially significant historic, cultural or archaeological resource sites are found during the field investigation, the certificate holder shall instruct all construction personnel to avoid the identified sites and shall implement appropriate measures to protect the sites, including the measures described in Condition 11.5 and in accordance with the Archaeological Monitoring Plan required per Condition 11.6.”
- **Condition 12.2.b:** This Condition requires the certificate holder, prior to beginning construction, to “provide to the Department . . . [t]he maximum sound power level for the substation transformers and the maximum sound power level and octave band data for the turbine type(s) selected for the facility based on manufacturers’ warranties or confirmed by other means acceptable to the Department.”
- **Condition 12.2.c:** This Condition requires the certificate holder, prior to beginning construction, to “provide to the Department . . . [t]he results of the noise analysis of the final facility design performed in a manner consistent with the requirements of OAR 340-035-0035(1)(b)(B)(iii)(IV) and (VI). The analysis must demonstrate to the satisfaction of the Department that the total noise generated by the facility (including the noise from turbines and substation transformers) will not exceed the maximum allowable noise level at any potentially-affected noise receptor. The analysis must also demonstrate that the facility would meet the ambient degradation test at the appropriate measurement point for potentially-affected noise sensitive properties, or that the certificate holder has obtained the

noise waiver described in Condition 12.2.d for each noise-sensitive property where the ambient degradation standard cannot be met.”

- **Condition 12.2.d:** This Condition requires the certificate holder, prior to beginning construction, to “provide to the Department . . . [f]or each noise-sensitive property where the certificate holder relies on a noise waiver to demonstrate compliance with OAR 340-035-0035(1)(b)(B)(iii)(III), a copy of the a legally effective easement or real covenant pursuant to which the owner of the property authorizes the certificate holder’s operation of the facility to increase ambient statistical noise levels L10 and L50 by more than 10 dBA at the appropriate measurement point.” This Condition goes on to specify five criteria that must be met for each “legally-effective easement or real covenant,” including that it must have been “recorded in the real property records of the county.”
- **Condition 13.3.a:** This Condition requires the certificate holder, prior to beginning construction, to “consult with affected state agencies, local governments and tribes,” to “develop specific monitoring programs for impacts to resources protected by the standards of Divisions 22 and 24 of OAR Chapter 345 and resources addressed by applicable statutes, administrative rules and local ordinances,” and to “submit the monitoring programs to the Department of Energy and receive Department approval before beginning construction.”
- **Condition 14.1:** This Condition requires the certificate holder, prior to beginning construction, to “submit to the State of Oregon through the Council a bond or letter of credit in the amount described herein naming the State of Oregon, acting by and through the Council, as beneficiary or payee.” This Condition goes on to include numerous mandatory requirements for the required bond or letter of credit, including that it must “use a form of bond or letter of credit approved by the Council” and that it must “use an issuer of the bond or letter of credit approved by the Council.” Similarly, OAR 345-025-0006(8) provides that “[b]efore beginning construction of the facility, the certificate holder must submit to the State of Oregon, through the Council, a bond or letter of credit in a form and amount satisfactory to the Council to restore the site to a useful, non-hazardous condition.” Based on statements made by the Department in an [August 14, 2020 memorandum](#), the certificate holder failed to comply with Condition 14.1 and OAR 345-025-0006(8) prior to the construction start deadline of August 19, 2020. The memorandum admits that the certificate holder did not use a form of bond or letter of credit approved by the Council. Instead, the certificate holder submitted a letter of credit that differs from the Council’s pre-approved form by proposing multiple changes to the contents of that form. In addition, the letter of credit submitted by the certificate holder proposes to use CitiBank as the issuer, an entity that has not been previously approved by the Council. According to the August 14, 2020 memo, the site certificate holder waited until August 3, 2020 to propose these changes to the form and issuer of the letter of credit. The certificate holder’s tardiness in submitting these changes failed to allow sufficient time for the Council to review the proposed form and issuer of the letter of credit prior to the August 19, 2020 construction start deadline. As a result, Condition 14.1 and OAR 345-025-0006(8) were not satisfied, and construction could not have lawfully started prior to the construction start deadline. In the August 14, 2020 memo, the Department purports to have “agreed to temporarily accept the Letter of Credit as issued by Citibank, pending Council consideration at [the August 21, 2020 Council] meeting.” However, the

memorandum cites no authority for the Department to act on behalf of the Council in this instance, nor are Complainants aware of any such authority. Both Condition 14.1 and OAR 345-025-0006(8) expressly require the form and issuer of the letter of credit to be satisfactory to and approved by **the Council**, and for both approvals to occur before construction begins. In this instance, the requirements of Condition 14.1 and OAR 345-025-0006(8) were not satisfied prior to the construction start deadline.

- **Condition 14.7:** This Condition requires the certificate holder, “[a]t least 90 days prior to beginning construction (unless otherwise agreed to by the Department),” to “submit to the Department, a compliance plan that documents and demonstrates completed actions or actions to be completed to satisfy the requirements of all terms and conditions of the amended site certificate and applicable statutes and rules.”

As explained for each individual Condition discussed above, the site certificate holder was required to satisfy these Conditions **before** beginning construction. If **any** of the Conditions were not satisfied prior to the construction start deadline of August 19, 2020, then the site certificate holder failed to satisfy the conditions precedent for lawfully starting construction. Here, Complainants believe that the certificate holder failed to satisfy **many** or **most** of the conditions described above. Thus, the certificate holder **did not**, and indeed **could not have**, lawfully started “construction,” as that term is defined in the Site Certificate and the applicable law. As a result of the certificate holder’s failure to lawfully start construction prior to the construction start deadline, the Site Certificate expired under its own terms and conditions, as well as under the Siting Act and the Council’s rules, at 11:59:59 p.m. on August 19, 2020. And because the Site Certificate has expired, it must be deemed terminated.

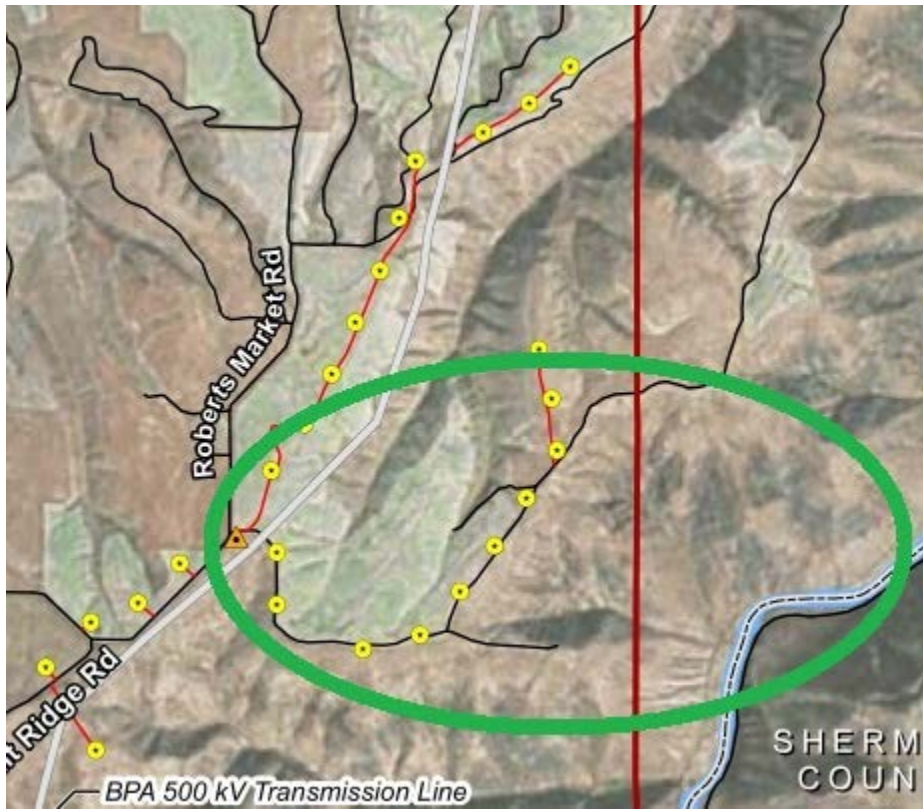
On August 11 and 16, 2020, a Friends staff member observed road-building activity taking place in the northeast portion of the Project site. It is unclear when this road-building activity began, but according to the [August 14 ODOE memorandum](#), it apparently began no earlier than “the week of August 4, 2020.”<sup>1</sup> Regardless, because the site certificate expired before the site certificate holder lawfully commenced construction, any road-building activity that took place between August 4 and August 19, 2020, would have been deemed “on-site work” rather than “construction” pursuant to the Site Certificate and the applicable laws. Construction under the Site Certificate never lawfully began.

Another requirement to lawfully begin construction is to conduct more than \$250,000 worth of on-site work on Project facilities. Here, as far as Complainants are aware, the certificate holder has merely performed at most two weeks of road-building work along a preexisting residential driveway.

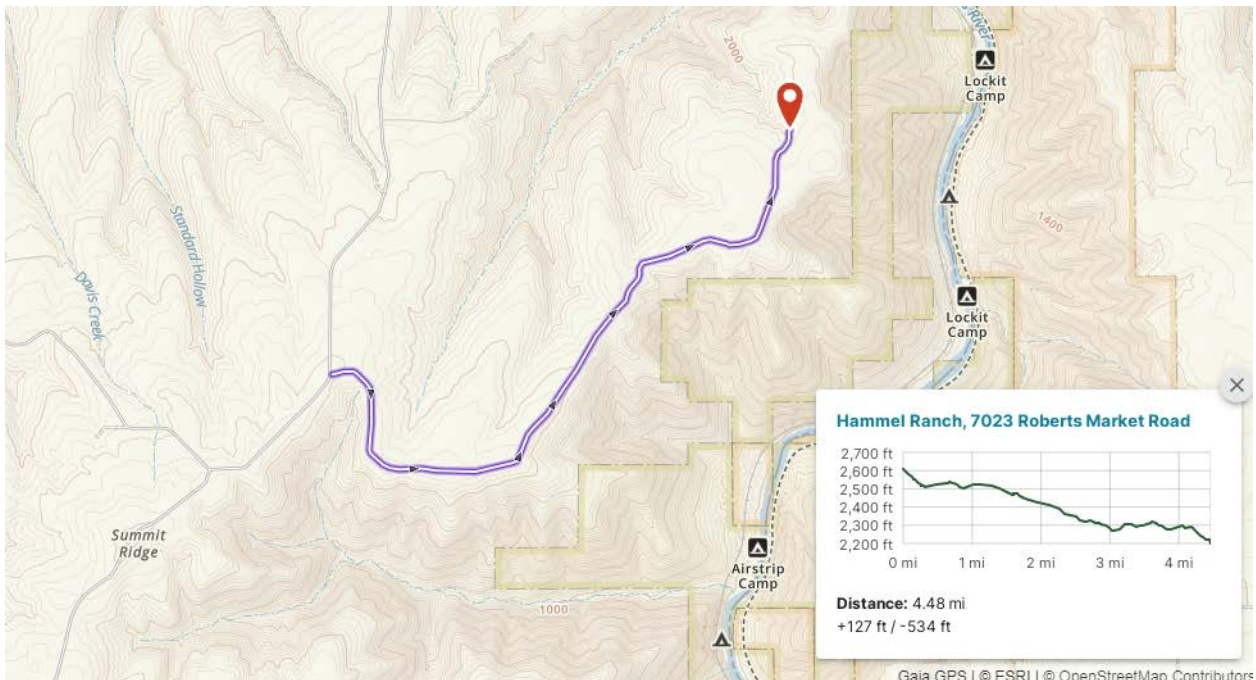
Below is an excerpted screenshot of the Project Facilities map (Figure 1 in the Final Order on the Second Amended Site Certificate). On this map, the certificate holder depicted all existing roads with black lines, and all proposed new roads with red lines. Complainants have added a green circle to show the existing residential driveway (the black line within the green circle), where Complainants believe the only roadwork in August 2020 has taken place.

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<sup>1</sup> The ODOE memorandum appears to incorrectly use the statutorily defined term “construction” where it refers to the certificate holder “begin[ning] construction activities the week of August 4, 2020.” Complainants assume that the memorandum was intended to refer here instead to “on-site work,” rather than “construction activities,” beginning the week of August 4, 2020.



The driveway in question is [identified as a residential driveway/private road access](#) to the Hammel Ranch at 7023 Roberts Market Road, and can be seen depicted with a purple double line in the screenshot below.





Based on three site visits in August 2020, Complainants believe that the road-building activities that have taken place in August 2020 have merely placed new gravel, replaced an existing cattle-guard, and expanded the width of this preexisting private residential road. If that is indeed the only road-building activity that the site certificate holder has conducted, then Complainants dispute whether all of the work performed in August 2020 on this preexisting residential driveway constitutes construction of the facility. *See* OAR 345-001-0000(50) (definition of “Related or supporting facilities”) (“The Council interprets the terms ‘proposed to be constructed in connection with’ to mean that a structure is a related or supporting facility **if it would not be built but for construction or operation of the energy facility**. “Related or supporting facilities” **does not include any structure existing prior to construction of the energy facility**, unless such structure must be substantially modified **solely** to serve the energy facility.”) (emphasis added). Complainants also question whether the roadwork that has occurred at this site for two weeks or less would be fairly valued in excess of \$250,000, as required by the statutory definition of “construction.” *See* ORS 469.300(6). ODOE staff should immediately inspect the site to determine whether it is correct that the only road-building activities that have taken place were solely along this preexisting residential driveway, the scope and value of these activities, and whether the roadwork in August 2020 was solely to serve the energy facility.

Finally, assuming for the sake of argument that the certificate holder had managed to overcome all of the hurdles discussed above and could be deemed to have lawfully started construction of the Project, the certificate holder may also be in violation of numerous other conditions of the Site Certificate that are not necessarily pre-construction conditions. For example, **Condition 10.1** requires that “[t]he certificate holder shall not begin ground disturbance in an affected area until the [final] habitat assessment has been approved by the Department.” If the certificate holder has not complied with this requirement, then it is in violation of this Condition by conducting road-building (ground-disturbing) activities. **Condition 8.2** requires that “[t]he certificate holder shall ensure that construction contractors have personnel on-site . . . who are first aid and CPR certified.” **Condition 8.4** requires the site certificate holder’s fire safety plans to be “maintained onsite and implemented throughout construction.” **Condition 10.6** requires the certificate holder to “hire a qualified environmental professional to provide environmental training during construction” and requires the certificate holder to have a designated “onsite environmental manager.” **Condition 11.4** requires the certificate holder to “ensure that a qualified archaeologist, as defined in OAR 736-051-0070, instructs construction personnel in the identification of cultural materials and avoidance of accidental damage to identified resource sites” and to maintain records of this required training, which must be made available to ODOE representatives upon request. **Condition 11.6** requires the certificate holder to “prepare and implement an Archaeological Monitoring Plan for construction and maintenance activities to address and mitigate impacts from exposure of unanticipated or previously unidentified cultural properties that may be exposed during construction or operation of the facility” and to maintain a current copy of this required plan and make it available to ODOE representatives upon request. ODOE should immediately inspect the site and investigate to determine whether these and similar conditions are being complied with. If not, ODOE should order immediate cessation of all ground-disturbing activities and site work until full compliance is achieved.

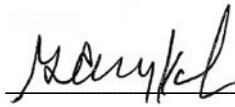
In conclusion, Complainants request a site inspection, investigation, and enforcement action in order to remedy the violations described herein; confirmation that the Site Certificate expired on

August 19, 2020 and is terminated; an immediate cessation of all site work and ground-disturbing activity at the Project site, an assessment of civil penalties, and any other remedies deemed appropriate by the Department and/or Council. Given the time-sensitive nature of the violations described herein, Complainants request that the site inspection occur immediately, and that the Department provide a written response to this letter no later than September 3, 2020.

Thank you for your time and consideration.

Sincerely,

REEVES, KAHN, HENNESSY & ELKINS



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Gary K. Kahn, OSB No. 814810  
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Columbia Gorge, Oregon Wild, and Central  
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FRIENDS OF THE COLUMBIA GORGE



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*Senior Staff Attorney, Friends of the Columbia  
Gorge*

cc (via email): Clients  
Patrick Rowe, Oregon Department of Justice  
Janine Benner, Oregon Department of Energy  
Todd Cornett, Oregon Department of Energy

**Attachment B**

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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

FRIENDS OF THE COLUMBIA	)	Case No. 20CV _____
GORGE, OREGON WILD, and	)	
CENTRAL OREGON LANDWATCH,	)	<b>PETITION FOR JUDICIAL REVIEW</b>
	)	
Petitioners,	)	(Oregon Administrative Procedures Act,
	)	ORS ch. 183)
v.	)	
	)	[Filing Fee Authority: ORS 21.135(1),
ENERGY FACILITY SITING	)	(2)(e)]
COUNCIL,	)	
	)	<b>NOT SUBJECT TO MANDATORY</b>
Respondent.	)	<b>ARBITRATION</b>

**PARTIES**

1.

Petitioner FRIENDS OF THE COLUMBIA GORGE (“Friends”) is a nonprofit Oregon corporation with approximately 7,000 members. Friends’ mission is to vigorously protect the scenic, natural, cultural, and recreational resources of the Columbia River Gorge. Friends fulfills this mission by ensuring strict implementation of the Columbia River Gorge National Scenic Area Act and other laws protecting the region of the Columbia River Gorge; promoting responsible stewardship of Gorge land, air, and waters; encouraging public ownership of sensitive areas; educating the public about the unique natural values of the Columbia River Gorge and the importance of preserving those values; and working with groups and individuals to accomplish mutual preservation goals.

2.

Petitioner OREGON WILD is a nonprofit Oregon corporation with more than 20,000 members and supporters. Oregon Wild’s mission is to protect and restore Oregon’s wildlands,

1 wildlife and waters as an enduring legacy for all Oregonians. Founded in 1974, Oregon Wild has  
2 been instrumental in securing permanent legislative protection for some of Oregon’s most  
3 precious landscapes, including approximately two million acres of federally designated  
4 wilderness areas and almost 1,800 miles of federally designated wild and scenic rivers. Oregon  
5 Wild works to maintain and enforce environmental laws, while building broad community  
6 support for its campaigns.

7 3.

8 Petitioner CENTRAL OREGON LANDWATCH (“LandWatch”) is a nonprofit Oregon  
9 corporation with more than 200 members that has advocated for the preservation of natural  
10 resources in Central Oregon since 1986. LandWatch plays a vital role in achieving a responsible,  
11 balanced approach to planning for and conserving Central Oregon’s land and water resources,  
12 while recognizing the needs of future generations. LandWatch works to protect and conserve the  
13 region’s ecosystems and wildlife habitats; to foster thriving, sustainable communities; and to  
14 spread the costs and benefits of growth equitably across the community as a whole.

15 4.

16 Respondent ENERGY FACILITY SITING COUNCIL (“EFSC” or “Council”) is an  
17 agency of the State of Oregon. Pursuant to ORS 469.450(1), EFSC is a subsidiary agency of the  
18 Oregon Department of Energy (“ODOE” or “Department”). EFSC reviews and decides whether  
19 to approve large energy projects throughout the State of Oregon pursuant to the Energy Facility  
20 Siting Act (“Siting Act”), ORS 469.300–.619, and the Oregon Administrative Procedures Act  
21 (“APA”), ORS ch. 183. EFSC is also authorized by state law to adopt rules through rulemaking.

22 **THE PROJECT AT ISSUE**

23 5.

24 This case involves the Summit Ridge Wind Farm (“Project”), an approved but unbuilt  
25 wind energy generation facility that may consist of up to 72 wind turbines with a peak generating  
26 capacity of 194.4 megawatts, to be sited within a site boundary of approximately 11,000 acres,  
27 generally located along the Lower Deschutes Wild and Scenic River in Wasco County, Oregon.

1 6.

2 In 2009, an application for the Project was filed with EFSC.

3 7.

4 In 2011, EFSC issued a permit approval, called a “site certificate,” for the Project.

5 8.

6 The site certificate holder for the Project is Summit Ridge Wind, LLC, a wholly owned  
7 subsidiary of Pattern Renewables 2 LP (“Pattern Development”), which is, in turn, a subsidiary  
8 of Pattern Energy Group 2 LP (“Pattern Energy”), the sole limited partner of Pattern  
9 Development. As of March 2020, Pattern Energy and Pattern Development are owned by the  
10 Canada Pension Plan Investment Board. The site certificate holder will be referred to herein as  
11 “Pattern.”

12 9.

13 If constructed and operated, the Project would result in adverse impacts to wildlife  
14 species, including bald eagles (*Haliaeetus leucocephalus*) and golden eagles (*Aquila chrysaetos*).  
15 In 2009 and/or 2010, surveys detected numerous bald and golden eagles and nest sites within  
16 1,000 to 10,000 feet of proposed wind turbine locations.

17 10.

18 On September 20, 2010, in a letter addressed to EFSC and ODOE, the United States Fish  
19 and Wildlife Service (“USFWS”) concluded that the Project has the potential to cause injury and  
20 mortality of individual eagles and to cause loss of nest sites over the life of the Project. In the  
21 same letter, the USFWS also concluded that the Project’s wind turbines should be sited as far as  
22 possible away from the areas where resident and migrating eagles are known to concentrate their  
23 activities. Accordingly, the USFWS recommended that no wind turbines for this Project should  
24 be sited any closer than six miles from a golden eagle nest, except for in “non-use locations.”  
25 The USFWS also recommended that turbine operations should be shut down during peak  
26 migration periods and that turbine lighting should be minimized to protect eagles.

27 ////

1 11.

2 Neither Pattern nor EFSC and ODOE have complied with any of the recommendations  
3 made by USFWS in its September 20, 2010 letter.

4 12.

5 In an August 17, 2018 filing, Pattern indicated to ODOE that it “is currently performing  
6 eagle use surveys [that] will . . . inform updates to eagle occurrence in the analysis area.” Pattern  
7 never disclosed any evidence produced from these surveys to ODOE or EFSC.

8 13.

9 No bird and bat use surveys have been conducted for the Project since 2009 or 2010,  
10 other than the possible exception of eagle use surveys, discussed above.

11 14.

12 No raptor nest surveys have been conducted for the Project since 2016. The raptor nest  
13 surveys conducted for the Project in 2015 and 2016 are no longer current or accurate.

14 15.

15 No surveys for threatened and endangered plants have been conducted for the Project  
16 since 2016.

17 16.

18 The Project site has never been field surveyed for wildlife and plant habitat mapping and  
19 categorization. Instead, only “desktop” habitat mapping and categorization have occurred. The  
20 most recent “desktop” habitat mapping and categorizations for the Project were conducted in  
21 2009.

22 17.

23 In a November 28, 2018 letter, the Oregon Department of Fish and Wildlife (“ODFW”)  
24 raised concerns about the significant length of time that has passed since the Project was first  
25 proposed, and expressed a need to reevaluate and update the analyses of the Project’s impacts on  
26 wildlife and habitat and to reexamine the potentially available mitigation measures. In that letter,  
27 ODFW noted that it had been more than ten years since the Project was first applied for and that

1 since then, appropriate practices and approaches had evolved based on new science as well as  
2 ODFW's experience with existing wind projects once they had become operational. ODFW also  
3 expressed concerns that the proposed habitat mitigation parcels may no longer meet the original  
4 intent for mitigation as outlined in the original mitigation plan for the Project.

5 18.

6 If constructed and operated, the Project would be visible from, and result in adverse  
7 scenic and recreational impacts to, one or more of the following designated "protected areas,"  
8 recreational areas, and important public vantage points: the Columbia River Gorge National  
9 Scenic Area, the Lower Deschutes Wild and Scenic River, the Lower Deschutes Wildlife Area,  
10 the White River Wildlife Area, the Badger Creek Wilderness Area, the Mt. Hood National  
11 Forest, the Deschutes River State Recreation Area, the Lewis and Clark National Historic Trail,  
12 the Oregon Pioneer National Historic Trail, the Ice Age Floods National Geologic Trail, and the  
13 Journey Through Time Scenic Byway (U.S. Highway 97).

14 19.

15 When a site certificate holder seeks an extension of a construction deadline for an unbuilt  
16 project, EFSC is required to fully review the project as if it were a new proposal and determine  
17 whether the project complies with all applicable laws.

18 20.

19 Since 2011, EFSC has amended the site certificate for the Project four times, including  
20 three extensions of the construction deadlines for the Project.

21 21.

22 On August 16, 2018, three days before the then-applicable construction start deadline,  
23 Pattern submitted an application ("Request for Amendment 4" or "RFA4" or "Request for  
24 Amendment") to amend the site certificate by extending the construction deadlines for a third  
25 time. In the Request for Amendment, Pattern proposed to extend the construction start deadline  
26 by two years, to August 19, 2020, and to extend the construction completion deadline by two  
27



1 years, to August 19, 2023. EFSC ultimately approved the RFA4 and amended the site certificate,  
2 thus extending the deadline to begin construction of the Project to August 19, 2020.

3 **THE AGENCY ORDERS AT ISSUE**

4 22.

5 On May 2, 2019, pursuant to EFSC’s rules, Petitioners filed with EFSC a formal request  
6 for a contested case proceeding. In the request, Petitioners asked EFSC to conduct a contested  
7 case on the Request for Amendment 4, and to admit Petitioners as parties to the proceeding. In  
8 addition to this request from Petitioners, EFSC also received two other requests for a contested  
9 case proceeding in this matter from other persons.

10 23.

11 On May 17, 2019, the Council voted on a motion made by Council Member Ann Gravatt  
12 to grant Petitioners’ request for a contested case proceeding. The motion failed by a 5 to 2 vote.

13 24.

14 On July 9, 2019, EFSC issued an order entitled “Order on Requests for Contested Case.”  
15 In this Order, EFSC denied all requests for a contested case, decided not to conduct a contested  
16 case proceeding, and also determined that Petitioners had raised certain issues that the Council  
17 believed warranted amendments to the proposed order on the Request for Amendment 4.  
18 Accordingly, in the Order on Requests for Contested Case, the Council directed ODOE to amend  
19 the proposed order on the Request for Amendment 4 and to amend the draft amended site  
20 certificate. ODOE subsequently prepared amendments in response to these requests.

21 25.

22 On August 5, 2019, pursuant to EFSC’s rules, Petitioners filed with EFSC a second  
23 request for a contested case proceeding. Per EFSC’s rules, this second request was limited to the  
24 amendments prepared by ODOE in response to the Council’s directions in the Order on Requests  
25 for Contested Case. In addition to Petitioners’ request, EFSC also received one other second  
26 request for a contested case proceeding in this matter from other persons.

1 26.

2 On August 23, 2019, EFSC issued an order entitled “Order on Requests for Contested  
3 Case on Amended Proposed Order.” In this Order, EFSC denied both requests for a contested  
4 case and decided not to conduct a contested case proceeding on the ODOE-prepared  
5 amendments.

6 27.

7 EFSC served the two above-discussed Orders (the Order on Requests for Contested Case  
8 and the Order on Requests for Contested Case on Amended Proposed Order) on Petitioners on  
9 September 30, 2019. On that date, EFSC also notified Petitioners that these Orders were subject  
10 to reconsideration pursuant to EFSC’s rules and/or judicial review pursuant to ORS 183.484.

11 28.

12 On November 29, 2019, Petitioners filed with EFSC a Petition for Reconsideration or  
13 Rehearing, in which Petitioners requested reconsideration of the two above-discussed Orders.

14 29.

15 On January 24, 2020, the Council voted to deny Petitioners’ Petition for Reconsideration  
16 or Rehearing, and to issue two separate written orders addressing that Petition.

17 30.

18 On February 14, 2020, EFSC issued an Order entitled “Final Order Regarding  
19 Application of OAR 345-027-0371(9).” EFSC served this Order on Petitioners on February 14,  
20 2020.

21 31.

22 Also on February 14, 2020, EFSC issued an Order entitled “Final Order Re: Petitions for  
23 Reconsideration or Rehearing.” In this Order, EFSC denied Petitioners’ Petition for  
24 Reconsideration or Rehearing. This Order cites and applies EFSC’s Final Order Regarding  
25 Application of OAR 345-027-0371(9). EFSC served the Final Order Re: Petitions for  
26 Reconsideration or Rehearing on Petitioners on February 14, 2020.

27 ////

1 32.

2 EFSC included in its Final Order Re: Petitions for Reconsideration or Rehearing a  
3 “Notice of the Right to Seek Judicial Review,” in which EFSC stated that pursuant to ORS  
4 183.484, “jurisdiction for judicial review of orders other than contested cases (including the  
5 aforementioned orders denying requests for a contested case) is conferred upon the Circuit Court  
6 for Marion County and upon the circuit court for the county in which the petitioner resides or has  
7 a principal business office” and that “petitions for judicial review of the aforementioned orders  
8 denying requests for contested case shall be filed within 60 days following the date of service of  
9 this order denying the petitions for reconsideration.”

10 33.

11 The four EFSC Orders discussed in this Petition are final orders subject to judicial review  
12 pursuant to ORS 183.484.

13 **THE NATURE OF THE PETITIONERS’ INTERESTS**

14 34.

15 Petitioners have significant interests in whether Respondent EFSC is lawfully and  
16 correctly implementing state statutes and rules governing energy siting and administrative  
17 procedures; whether there should be a contested case proceeding on the Request for Amendment  
18 4; whether and when Pattern should be required to update the wildlife and plant surveys, data,  
19 and other evidence for this Project; and whether and under what conditions Pattern should be  
20 allowed to harm protected resources, including wildlife, plants, and their habitat.

21 35.

22 Petitioners have significant interests in the protection and enhancement of the natural,  
23 scenic, and recreational resources threatened by this Project. Petitioners have invested time and  
24 important resources into trying to protect these resources from impacts such as those that would  
25 be created by this Project. Petitioners’ members and staff regularly lead and participate in  
26 recreational activities in the areas affected by this Project, and intend to continue these activities.  
27

1 These activities include hiking, running, walking, bicycling, horseback riding, rock climbing,  
2 swimming, boating, river rafting, kayaking, canoeing, fishing, the viewing of salmon and other  
3 fish and wildlife, birdwatching, botanical identification, the viewing of cultural resources,  
4 general sightseeing, and quiet enjoyment. Petitioners and their members also have significant  
5 interests in preventing harm or harassment of affected wildlife species, including bald and golden  
6 eagles, in the areas affected by this Project.

7 **ADVERSE EFFECTS ON PETITIONERS**

8 36.

9 Petitioners are adversely affected or aggrieved by EFSC's Orders in multiple ways. First,  
10 contrary to its own rules, EFSC denied Petitioners' request for a contested case proceeding, thus  
11 precluding Petitioners from pursuing discovery and adjudication of the issues raised by  
12 Petitioners. It would frustrate and limit Petitioners' ability to achieve their missions and their  
13 current program efforts if they are not able to correct EFSC's inappropriate refusal to hold a  
14 contested case. Second, EFSC harmed Petitioners by retroactively and impermissibly changing  
15 the standards for justifying a contested case, without affording Petitioners any opportunity to  
16 satisfy the new standards. Third, EFSC harmed Petitioners by effectively changing the  
17 procedural requirements of EFSC's rules without first undergoing rulemaking, thus harming  
18 Petitioners not only with respect to the Summit Ridge Project specifically, but also with respect  
19 to the rules themselves. Finally, EFSC's Orders, including the erroneous legal interpretations  
20 contained therein, adversely affect or aggrieve Petitioners' interests in ensuring the protection of  
21 resources, including the scenic, recreational, and wildlife resources threatened by this Project.

22 **THE GROUNDS UPON WHICH PETITIONERS CONTEND THE**  
23 **AGENCY ORDERS SHOULD BE REVERSED OR REMANDED**

24 **COUNT ONE**

25 37.

26 In denying Petitioners' requests for a contested case proceeding in this matter, EFSC  
27 erroneously interpreted one or more provisions of law; acted inconsistent with one or more

1 agency rules, officially stated agency positions, and/or prior agency practices without explaining  
2 the inconsistencies; and/or issued agency orders not supported by substantial evidence in the  
3 record.

4 **COUNT TWO**

5 38.

6 EFSC acted outside the range of discretion delegated to the agency by law and/or acted in  
7 violation of one or more statutory provisions by modifying its rules on reconsideration, without  
8 first undergoing the rulemaking procedures required by the APA and Siting Act.

9 **COUNT THREE**

10 39.

11 EFSC erred by issuing agency orders that are not supported by substantial evidence in the  
12 record.

13 **COUNT FOUR**

14 40.

15 EFSC erroneously interpreted the following provisions of law and/or acted inconsistent  
16 with the following agency rules and/or officially stated positions or prior agency practices related  
17 to these rules without explaining the inconsistencies:

- 18 (a). OAR 345-027-0071(9) (2019).
- 19 (b). OAR 345-027-0371(9) (2019).
- 20 (c). OAR 345-027-0371(9) (2020).
- 21 (d). OAR 345-021-0010(1)(p).
- 22 (e). OAR 345-021-0010(1)(q).
- 23 (f). OAR 345-022-0060(1).
- 24 (g). OAR 345-022-0070.
- 25 (h). OAR 345-024-0015.
- 26 (i). OAR 345-024-0015(4).
- 27

- 1 (j). OAR 345-025-0016.
- 2 (k). OAR 635-415-0025.
- 3 (l). Wasco County Land Use and Development Ordinance (“LUDO”) § 19.030.C.5.
- 4 (m). Wasco County LUDO § 19.030.C.5.a.
- 5 (n). Wasco County LUDO § 19.030.C.5.b.
- 6 (o). Wasco County LUDO § 19.030.C.5.c.
- 7 (p). Wasco County LUDO § 19.030.C.5.h.
- 8 (q). Wasco County LUDO § 5.020.
- 9 (r). Wasco County LUDO § 5.020.F.
- 10 (s). Wasco County LUDO § 5.030.
- 11 (t). Wasco County LUDO § 5.030.A.
- 12 (u). Wasco County LUDO § 5.030.J.
- 13 (v). Wasco County LUDO § 5.030.K.

14 41.

15 Pursuant to ORS 183.497, Petitioners request an award of reasonable attorney fees and  
16 costs incurred in this matter.

17 **REQUESTED RELIEF**

18 WHEREFORE, Petitioners request that this Court, exercising its authority under ORS  
19 183.480, 183.484, 183.486, and 183.497,

20 1. Declare that, in issuing (1) the Order on Requests for Contested Case, (2) the  
21 Order on Requests for Contested Case on Amended Proposed Order, (3) the Final Order  
22 Regarding Application of OAR 345-027-0371(9), and (4) the Final Order Re: Petitions for  
23 Reconsideration or Rehearing, EFSC erroneously interpreted one or more provisions of law;  
24 acted outside the range of discretion delegated to the agency by law; acted inconsistent with one  
25 or more agency rules, officially stated agency positions, and/or prior agency practices without  
26 explaining the inconsistencies; acted in violation of one or more statutory provisions; and/or  
27 issued agency orders not supported by substantial evidence in the record;

1           2.       Set aside and reverse or remand (1) the Order on Requests for Contested Case, (2)  
2 the Order on Requests for Contested Case on Amended Proposed Order, (3) the Final Order  
3 Regarding Application of OAR 345-027-0371(9), and (4) the Final Order Re: Petitions for  
4 Reconsideration or Rehearing;

5           3.       Declare EFSC's unlawful attempts to revise its rules invalid and void;

6           4.       Remand this matter to EFSC, and order EFSC to conduct a contested case  
7 proceeding on the Request for Amendment 4;

8           5.       In the alternative, remand this matter to EFSC, and order EFSC to afford  
9 Petitioners an opportunity to satisfy the new procedural standards for justifying a contested case  
10 proceeding adopted by EFSC in the Final Order Regarding Application of OAR  
11 345-027-0371(9) and the Final Order Re: Petitions for Reconsideration or Rehearing;

12          6.       Award Petitioners their reasonable attorney fees and costs; and

13          7.       Award Petitioners such other relief as the Court deems just and equitable.

14                     DATED: March 24, 2020

15   REEVES, KAHN, HENNESSY & ELKINS

16   */s/ Gary K. Kahn*

17   Gary K. Kahn, OSB #814810

18   Email: [gkahn@rke-law.com](mailto:gkahn@rke-law.com)

19   Attorney for Petitioners and Trial Attorney

20   LAW OFFICE OF KARL G. ANUTA, P.C.

21   */s/ Karl G. Anuta*

22   Karl G. Anuta, OSB #861423

23   Email: [kga@integra.net](mailto:kga@integra.net)

24   Attorney for Petitioners

25   FRIENDS OF THE COLUMBIA GORGE

26   */s/ Nathan J. Baker*

27   Nathan J. Baker, OSB #001980

   Email: [nathan@gorgefriends.org](mailto:nathan@gorgefriends.org)

   Senior Staff Attorney for Petitioner Friends

**Attachment C**



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FRIENDS OF THE COLUMBIA  
 GORGE, OREGON WILD, and  
 CENTRAL OREGON LANDWATCH,

Petitioners,

v.

OREGON DEPARTMENT OF  
 ENERGY; SUMMIT RIDGE WIND,  
 LLC; AYPAL POWER LLC; and  
 SUMMIT RIDGE WIND HOLDINGS,  
 LLC,

Respondents.

)  
 ) Case No. 20CV \_\_\_\_\_  
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 ) **PETITION FOR JUDICIAL REVIEW**  
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 ) (Oregon Administrative Procedures Act,  
 ) ORS ch. 183; Oregon Energy Facility Siting  
 ) Act, ORS ch. 469)  
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**PARTIES**

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4.

Respondent OREGON DEPARTMENT OF ENERGY (“ODOE”) is an agency of the State of Oregon. Pursuant to state law, ODOE provides clerical and staff support to the Oregon Energy Facility Siting Council (“EFSC”) in EFSC’s review of applications seeking permission to construct large energy projects throughout the State of Oregon. EFSC-issued permits are called “site certificates” pursuant to state law.

///

///

1 5.

2 Respondent SUMMIT RIDGE WIND, LLC (“SRW”) is a limited liability company  
3 registered in the State of Oregon. SRW is the site certificate holder for the EFSC-issued Site  
4 Certificate for the Summit Ridge Wind Farm (“Site Certificate”).

5 6.

6 Respondent AYPower LLC (“Aypa”) is a limited liability company registered in  
7 the State of Delaware. Aypa has been the sole member of SRW since approximately August 3,  
8 2020.

9 7.

10 Respondent SUMMIT RIDGE WIND HOLDINGS, LLC (“SRW Holdings”) is a limited  
11 liability company registered in the State of Oregon. SRW Holdings was the sole member of  
12 SRW from approximately January or February 2016 to approximately September 11, 2017.

13 **THE PROJECT AT ISSUE**

14 8.

15 This case involves the Summit Ridge Wind Farm (“Facility”), an unbuilt wind energy  
16 generation facility that, if constructed and operated, would have consisted of up to 72 wind  
17 turbines with a peak generating capacity of 194.4 megawatts, and that would have been sited  
18 within a site boundary of approximately 11,000 acres, generally located along the Lower  
19 Deschutes Wild and Scenic River in Wasco County, Oregon.

20 9.

21 In 2009, an application for a site certificate for the Facility was filed with EFSC.

22 10.

23 In 2011, EFSC issued the Site Certificate for the Facility.

24 ///

25 ///

26 ///

1 11.

2 SRW is the site certificate holder for the Facility. Since its creation in 2008, SRW has  
3 been the wholly owned subsidiary of four successive parent companies: first LotusWorks, Inc.,  
4 then SRW Holdings, then Pattern Development (“Pattern”), then Aypa.

5 12.

6 If constructed and operated, the Facility would result in adverse impacts to wildlife  
7 species, including bald eagles (*Haliaeetus leucocephalus*) and golden eagles (*Aquila chrysaetos*).  
8 In 2009 and/or 2010, raptor surveys detected numerous bald and golden eagles and nest sites  
9 within 1,000 to 10,000 feet of proposed wind turbine locations.

10 13.

11 On September 20, 2010, in a letter addressed to EFSC and ODOE, the United States Fish  
12 and Wildlife Service (“USFWS”) concluded that the Facility has the potential to cause injury and  
13 mortality of individual eagles and to cause loss of nest sites over the life of the Facility. In the  
14 same letter, the USFWS also concluded that the Facility’s wind turbines should be sited as far as  
15 possible away from the areas where resident and migrating eagles are known to concentrate their  
16 activities. Accordingly, the USFWS recommended that no wind turbines for this Facility should  
17 be sited any closer than six miles from a golden eagle nest, except for in “non-use locations.”  
18 The USFWS also recommended that turbine operations should be shut down during peak  
19 migration periods and that turbine lighting should be minimized to protect eagles.

20 14.

21 Respondents and SRW’s other previous parent companies have never complied with any  
22 of the recommendations made by USFWS in its September 20, 2010 letter.

23 15.

24 In an August 17, 2018 filing, SRW indicated to ODOE that it “is currently performing  
25 eagle use surveys [that] will . . . inform updates to eagle occurrence in the analysis area.” SRW  
26 never disclosed any evidence produced from these surveys to ODOE or EFSC.

27 ///

1 16.

2 No bird and bat use surveys have been conducted for the Facility since 2009 or 2010,  
3 other than the possible exception of eagle use surveys that SRW claimed were underway in its  
4 August 2018 filing.

5 17.

6 No raptor nest surveys have been conducted for the full Facility site since 2016. The  
7 raptor nest surveys conducted for the Facility in 2015 and 2016 are no longer current or accurate.

8 18.

9 No surveys for threatened and endangered plants have been conducted for the full  
10 Facility site since 2016.

11 19.

12 The full Facility site has never been field surveyed for wildlife and plant habitat mapping  
13 and categorization. Instead, only “desktop” habitat mapping and categorization have occurred.  
14 The most recent “desktop” habitat mapping and categorizations for the Facility were conducted  
15 in 2009.

16 20.

17 In a November 28, 2018 letter, the Oregon Department of Fish and Wildlife (“ODFW”)  
18 raised concerns about the significant length of time that had passed since the Facility was first  
19 proposed, and expressed a need to reevaluate and update the analyses of the Facility’s impacts on  
20 wildlife and habitat and to reexamine the potentially available mitigation measures. In that letter,  
21 ODFW noted that it had been more than ten years since the Facility was first applied for and that  
22 since then, appropriate practices and approaches had evolved based on new science as well as  
23 ODFW’s experience with existing wind projects once they had become operational. ODFW also  
24 expressed concerns that the proposed habitat mitigation parcels may no longer meet the original  
25 intent for mitigation as outlined in the original mitigation plan for the Facility.

26 ///

27 ///

1 21.

2 If the Facility were constructed and operated, it would be visible from, and result in  
3 adverse scenic and recreational impacts to, one or more of the following designated “protected  
4 areas,” recreational areas, and important public vantage points: the Columbia River Gorge  
5 National Scenic Area, the Lower Deschutes Wild and Scenic River, the Lower Deschutes  
6 Wildlife Area, the White River Wildlife Area, the Badger Creek Wilderness Area, the Mt. Hood  
7 National Forest, the Deschutes River State Recreation Area, the Lewis and Clark National  
8 Historic Trail, the Oregon Pioneer National Historic Trail, the Ice Age Floods National Geologic  
9 Trail, and the Journey Through Time Scenic Byway (U.S. Highway 97).

10 22.

11 When a site certificate holder seeks an extension of a construction deadline for an unbuilt  
12 energy project, EFSC is required to fully review the project as if it were a new proposal and  
13 determine whether the project complies with all applicable laws.

14 23.

15 From 2015 to 2019, EFSC amended the Site Certificate for the Facility four times,  
16 including three extensions of the construction deadlines for the Facility.

17 24.

18 On August 16, 2018, three days before the then-applicable construction start deadline,  
19 SRW submitted an application (“Request for Amendment 4” or “RFA4” or “Request for  
20 Amendment”) to amend the Site Certificate by extending the construction deadlines for a third  
21 time. In the Request for Amendment, SRW proposed to extend the construction start deadline by  
22 two years, to August 19, 2020, and to extend the construction completion deadline by two years,  
23 to August 19, 2023. EFSC ultimately approved the RFA4 and amended the Site Certificate, thus  
24 extending the deadline to begin construction of the Facility to August 19, 2020.

25 25.

26 Pattern sold all of its interests in SRW and the Facility to Aypa on or about August 3,  
27 2020.

1 26.

2 On August 21, 2020, Aypa notified ODOE by letter of its acquisition of Pattern's  
3 interests in SRW and the Facility.

4 27.

5 The terms and conditions of the Site Certificate for the Summit Ridge Wind Farm are  
6 binding on all Respondents.

7 28.

8 The Site Certificate contains numerous conditions of approval, including numerous  
9 conditions that, by their own terms and pursuant to the applicable law, were required to be  
10 satisfied prior to commencing construction of the Facility. The term "facility" as used in the Site  
11 Certificate is defined by the Site Certificate itself (and by the applicable law) as "an energy  
12 facility together with any related or supporting facilities."

13 29.

14 Prior to the August 19, 2020 deadline to commence construction of the Facility, SRW  
15 failed to comply with numerous conditions of approval of the Site Certificate that, by their own  
16 terms and pursuant to the applicable law, were required to be satisfied prior to commencing  
17 construction of the Facility.

18 30.

19 In addition to being required to satisfy pre-construction conditions, under ORS  
20 469.300(6) and OAR 345-001-0010(12) a site certificate holder has not lawfully started  
21 construction of an approved energy facility until it performs physical on-site work to build the  
22 facility, "excluding surveying, exploration or other activities to define or characterize the site,"  
23 valued at more than \$250,000. In order to demonstrate that construction has lawfully commenced  
24 in excess of the required \$250,000 threshold, under OAR 345-001-0000(50) a site certificate  
25 holder must also demonstrate that such on-site work "would not be built but for construction or  
26 operation of the energy facility," and such work cannot "include any structure existing prior to  
27

1 construction of the energy facility, unless such structure must be substantially modified *solely* to  
2 serve the energy facility.”

3 31.

4 On various occasions in 2019 and 2020, SRW Holdings and its manager, Steven  
5 Ostrowski (“Ostrowski”), purported to take actions in furtherance of satisfying pre-construction  
6 conditions required by the Site Certificate and/or in furtherance of commencing construction of  
7 the Facility. Upon information and belief, from approximately September 11, 2017 to  
8 approximately August 3, 2020, SRW Holdings lacked any ownership interest in SRW and the  
9 Facility, SRW Holdings was no longer approved by EFSC as the parent company for the site  
10 certificate holder, and SRW Holdings and Ostrowski lacked authority to act on behalf of SRW  
11 and the Facility.

12 32.

13 Upon information and belief, SRW has withdrawn or cancelled its previously filed  
14 application with the Bonneville Power Administration (“BPA”) to connect the Facility to the  
15 regional power grid at a BPA substation. In its Congressional budget for fiscal year 2021, BPA  
16 listed the Facility as “cancelled” as of 2019, and listed “no planned capital projects” for the  
17 Facility in either 2020 or 2021.

18 33.

19 SRW failed to lawfully commence construction of the Facility by the August 19, 2020  
20 construction start deadline.

21 34.

22 SRW also failed, prior to the August 19, 2020 construction start deadline, to submit to  
23 EFSC a request to amend the Site Certificate to extend the construction start deadline for a fourth  
24 time. If SRW had submitted such a request, EFSC would have been required to again review the  
25 Facility for current compliance with the applicable law, and the public, including Petitioners,  
26 would have been allowed to participated in that review process, for example by submitting  
27 written comments, by attending any public hearings held, and by formally requesting that EFSC



1 conduct a contested case proceeding in order to resolve the Facility’s current compliance with  
2 the applicable law.

3 35.

4 On August 20, 2020, Petitioners sent ODOE a complaint letter regarding the Facility.  
5 Among other things, Petitioners alleged in this complaint letter that construction of the Facility  
6 had not been lawfully commenced by the August 19, 2020 deadline and requested that ODOE  
7 confirm that the Site Certificate had expired and was terminated.

8 36.

9 Although it has been more than eleven years since the Facility was first applied for, upon  
10 information and belief, SRW and its four successive parent companies have never secured any  
11 buyer(s) for the power that would be produced by the Facility.

12 **THE AGENCY ORDERS AT ISSUE**

13 37.

14 This appeal challenges three agency Orders issued by ODOE, on August 10, 2020;  
15 August 21, 2020; and September 10, 2020.

16 38.

17 On August 10, 2020, ODOE issued and served upon various company representatives for  
18 SRW Holdings, Pattern, Aypa, and Gardner Infrastructure Advisors, LLC copies of an Order  
19 entitled “Preconstruction Compliance Evaluation for Summit Ridge Wind Farm Site Certificate.”  
20 In this Order, ODOE acknowledged the receipt of and evaluated “several compliance submittals  
21 from July 6 through August 6, 2020 for general and preconstruction site certificate conditions  
22 imposed in the [Site Certificate] identified as applicable to Phase 1 construction.” In this Order,  
23 ODOE described a purported “Phase 1 construction” as “includ[ing] improvements to  
24 approximately 0.8 miles of existing road.” The Order “confirms that, at this time, sufficient  
25 information has been provided to satisfy the intent of the applicable conditions” but also  
26 concludes that “there are several conditions pending complete compliance verification.” The  
27

1 Order includes an Attachment 1, in which ODOE evaluated numerous conditions of the Site  
2 Certificate and determined whether each condition had or had not been met. In Attachment 1,  
3 ODOE also purported to waive compliance with numerous pre-construction conditions as “not  
4 applicable to Phase 1.”

5 39.

6 The “Phase 1” construction concept (defined in the August 10, 2020 Order as consisting  
7 of “approximately 0.8 miles of existing road”) was neither proposed by SRW in the initial  
8 application for the Site Certificate, nor proposed in any subsequent requests for amendments to  
9 the Site Certificate. Nor was the “Phase 1” construction concept referenced in or approved by the  
10 Site Certificate, EFSC’s various amendments thereto, or any of EFSC’s Final Orders regarding  
11 the Facility.

12 40.

13 Applicable law requires applicants for site certificates and amendments thereto to detail  
14 the proposed construction schedule for each proposed energy facility within their applications for  
15 site certificates and any requests for amendment.

16 41.

17 On August 21, 2020, ODOE issued and served upon various company representatives for  
18 SRW Holdings, Pattern, Aypa, and Gardner Infrastructure Advisors, LLC an Order, also entitled  
19 “Preconstruction Compliance Evaluation for Summit Ridge Wind Farm Site Certificate.” This  
20 Order acknowledges the receipt of and evaluates “several compliance submittals from July 6  
21 through August 18, 2020 for general and preconstruction site certificate conditions imposed in  
22 the amended Summit Ridge Wind Farm site certificate.” The Order “review[s] . . . all general  
23 and preconstruction site certificate conditions and confirms that sufficient information has been  
24 provided to satisfy all condition requirements applicable to Phase 1.” The Order includes an  
25 Attachment 1, in which ODOE evaluated numerous conditions of the Site Certificate and  
26 determined whether each condition had or had not been met. In Attachment 1, ODOE also  
27 purported to waive compliance with numerous pre-construction conditions as “not applicable to

1 Phase 1.” This Order also states that ODOE “received notice of Phase 1 construction  
2 commencement on August 6, 2020.” The Order concludes that “because information and  
3 materials submitted by the certificate holder for general and preconstruction conditions  
4 applicable to Phase 1 have been reviewed by [ODOE] and determined sufficient to satisfy the  
5 requirements, and construction commenced prior to the August 19, 2020 deadline, the  
6 Department confirms that the site certificate has been activated.”

7 42.

8 Neither the Site Certificate, nor the applicable law, discusses or authorizes any concept of  
9 “activating” this Site Certificate or any other site certificate.

10 43.

11 On September 10, 2020, ODOE issued and served upon Petitioners, through their  
12 attorney, a copy of an Order entitled “ODOE Response to Complainants’ August 20, 2020 Letter  
13 re: Violations of Summit Ridge Wind Farm Site Certificate Conditions and Applicable Laws.”  
14 Among other things, this Order concludes that “[i]t is not necessary [for SRW] to meet all  
15 preconstruction requirements of [various conditions of the Site Certificate] for the entirety of the  
16 facility footprint,” that SRW was only “required to satisfy preconstruction conditions applicable  
17 to Phase 1, which included improvements to a private road,” that “[o]n August 3, 2020,  
18 certificate holder provided a contract scope of work demonstrating that the cost of road work  
19 exceeded \$259,000 . . . , which [ODOE] considers substantial, consistent with the definition of  
20 construction,” and that ODOE “does not have any evidence or reason to believe that the road  
21 modifications designed to support the loads of wind-turbine related construction vehicles would  
22 be needed for any other purpose than solely to serve the energy facility.” The Order concludes by  
23 “maintain[ing]” ODOE’s prior conclusions in its previous Orders that “preconstruction  
24 conditions applicable to Phase 1 activities had been satisfied and the site certificate was  
25 activated.”

26 ///

27 ///

1 **THE NATURE OF THE PETITIONERS' INTERESTS**

2 44.

3 Petitioners have significant interests in whether Respondent ODOE is lawfully and  
4 correctly implementing state statutes and rules governing energy siting and administrative  
5 procedures; whether construction of the Facility has lawfully commenced; whether the Site  
6 Certificate has expired; whether the Facility is actually under construction; whether it will be  
7 fully built and operated; whether and when SRW should be required to update the wildlife and  
8 plant surveys, data, and other evidence for this Facility; and whether and under what conditions  
9 SRW should be allowed to harm protected resources, including wildlife, plants, and their habitat,  
10 by constructing and operating the Facility.

11 45.

12 Petitioners have significant interests in the protection and enhancement of the natural,  
13 scenic, and recreational resources threatened by this Facility. Petitioners have invested time and  
14 important resources into trying to protect these resources from impacts such as those that would  
15 be created by this Facility. Petitioners' members and staff regularly lead and participate in  
16 recreational activities in the areas affected by this Facility, and intend to continue these activities.  
17 These activities include hiking, running, walking, bicycling, horseback riding, rock climbing,  
18 swimming, boating, river rafting, kayaking, canoeing, fishing, the viewing of salmon and other  
19 fish and wildlife, birdwatching, botanical identification, the viewing of cultural resources,  
20 general sightseeing, and quiet enjoyment. Petitioners and their members also have significant  
21 interests in preventing harm or harassment of affected wildlife species, including bald and golden  
22 eagles, in the areas affected by this Facility.

23 **ADVERSE EFFECTS ON PETITIONERS**

24 46.

25 Petitioners are adversely affected or aggrieved by ODOE's Orders in multiple ways.  
26 ODOE unlawfully purported to waive numerous preconstruction conditions for the Facility,  
27

1 incorrectly concluded that construction of the Facility was lawfully commenced, and concluded  
2 that the Site Certificate for the Facility was “activated,” rather than expired and terminated.  
3 ODOE’s determinations violate the applicable law and the language of the Site Certificate. As a  
4 result of these determinations, ODOE has effectively given SRW at least three additional years  
5 to construct the Facility than would otherwise have been allowed. Moreover, ODOE has  
6 unlawfully allowed SRW to bypass the required procedures for extending a construction start  
7 deadline for a project. Had those required procedures been followed here, EFSC would have  
8 been required to evaluate the Facility’s current compliance with applicable law, and the public at  
9 large, including Petitioners, would have been allowed to participate in EFSC’s decision-making  
10 processes and affect the result. ODOE’s Orders, including the erroneous legal interpretations  
11 contained therein, adversely affect or aggrieve Petitioners’ interests in ensuring the protection of  
12 resources, including the scenic, recreational, and wildlife resources threatened by this Facility.

13 **THE GROUNDS UPON WHICH PETITIONERS CONTEND THE**  
14 **AGENCY ORDERS SHOULD BE REVERSED OR REMANDED**

15 **CLAIM FOR RELIEF**

16 **(Violations of Oregon Administrative Procedures Act**  
17 **and Oregon Energy Facility Siting Act)**

18 47.

19 In issuing the three challenged Orders, ODOE acted in violation of the Oregon  
20 Administrative Procedures Act and the Oregon Energy Facility Siting Act by erroneously  
21 interpreting one or more provisions of law; acting outside the range of discretion delegated to the  
22 agency by law; acting inconsistent with one or more agency rules, officially stated agency  
23 positions, and/or prior agency practices without explaining the inconsistencies; acting in  
24 violation of a statutory provision; and/or issuing agency orders not supported by substantial  
25 evidence in one or more of the following ways:

26 (a) By erroneously determining that construction of the Facility was lawfully  
27 commenced prior to the construction start deadline of August 19, 2020;

1 (b) By failing to determine that SRW did not satisfy one or more of the following  
2 mandatory pre-construction conditions of the Site Certificate prior to the construction start  
3 deadline of August 19, 2020: Conditions 2.14, 3.0, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 5.8, 5.10, 5.11,  
4 5.12, 5.13, 5.14, 6.1.a, 7.12, 8.2, 8.4, 10.1, 10.4.a, 10.4.b, 10.4.c, 10.4.d, 10.4.e, 10.4.f, 10.7.a,  
5 10.7.b, 10.7.c, 10.13, 10.14, 11.1, 11.2, 11.3, 12.2.a, 12.2.b, 12.2.c, 12.2.d, 13.3.a, 14.1, and 14.7;

6 (c) By unlawfully waiving or purporting to waive binding conditions of the Site  
7 Certificate;

8 (d) By failing to determine that SRW did not meet the mandatory requirements of  
9 OAR 345-025-0006(8) prior to the construction start deadline of August 19, 2020;

10 (e) By unlawfully acting on behalf of, or purporting to act on behalf of, EFSC in  
11 approving a bond or letter of credit in a form and amount satisfactory to EFSC to restore the  
12 Facility site to a useful, non-hazardous condition;

13 (f) By unlawfully approving a “phased” construction of the Facility outside of and in  
14 violation of the required decision-making procedures for amending a site certificate and/or  
15 amending EFSC’s rules;

16 (g) By failing to determine that the “phased” construction of the Facility is  
17 inconsistent with the applicable law, inconsistent with the Site Certificate, inconsistent with the  
18 application for the Site Certificate and/or the requests for amendments to the Site Certificate, and  
19 inconsistent with EFSC’s Final Orders regarding the facility;

20 (h) By unlawfully extending the deadline to commence construction of the Facility  
21 outside of and in violation of the required decision-making procedures for amending a site  
22 certificate;

23 (i) By violating the Oregon Legislature’s expressly stated legislative intent to  
24 prohibit “lengthy site banking” of sites for EFSC-approved energy facilities;

25 (j) By failing to determine that SRW did not perform physical on-site work to build  
26 the Facility valued in excess of \$250,000 prior to the construction start deadline of August 19,  
27 2020;

1 (k) By failing to determine that the road work performed at the site in August 2020  
2 was inconsistent with the Site Certificate, inconsistent with the application for the Site Certificate  
3 and/or the requests for amendments to the Site Certificate, and inconsistent with EFSC's Final  
4 Orders regarding the facility;

5 (l) By erroneously determining that all components of the road work performed at  
6 the site in August 2020 would not have been built but for construction or operation of the energy  
7 facility;

8 (m) By erroneously determining that the existing road at the site was substantially  
9 modified in August 2020 and/or that all modifications were solely to serve the wind turbines  
10 approved by EFSC;

11 (n) By failing to determine that various actions purportedly taken in furtherance of  
12 satisfying pre-construction conditions required by the Site Certificate and/or in furtherance of  
13 commencing construction of the Facility were not taken by the previously approved construction  
14 team at Pattern, but rather were taken by SRW Holdings and/or its manager, Steven Ostrowski,  
15 who at the time these actions were taken lacked authority to act on behalf of SRW and the  
16 Facility;

17 (o) By failing to conclude that SRW has violated one or more of the following  
18 conditions of the Site Certificate: Conditions 6.31, 8.2, 8.4, 9.1, 10.1, 10.6, 11.4, and 11.6;

19 (p) By failing to determine that the Site Certificate has expired and must be  
20 terminated;

21 (q) By erroneously determining that the Site Certificate has been "activated";

22 (r) By allowing further on-site work and/or construction activities for the Facility to  
23 continue in 2021, and by allowing the subsequent operation of the Facility; and

24 (s) By acting in ways as yet unknown to Petitioners that violated the applicable  
25 statutes, rules, Site Certificate, and EFSC Final Orders.

26 ///

27 ///

1 48.

2 Pursuant to ORS 183.497, Petitioners request an award of reasonable attorney fees and  
3 costs incurred in this matter.

4 **REQUESTED RELIEF**

5 WHEREFORE, Petitioners request that this Court, exercising its authority under ORS  
6 183.480, 183.484, 183.486, 183.497, and 469.563,

7 1. Declare that, in issuing the challenged Orders, ODOE (1) erroneously interpreted  
8 one or more provisions of law; (2) acted outside the range of discretion delegated to the agency  
9 by law; (3) acted inconsistent with one or more agency rules, officially stated agency positions,  
10 and/or prior agency practices without explaining the inconsistencies; (4) acted in violation of a  
11 statutory provision; and/or (5) issued agency Orders not supported by substantial evidence;

12 2. Set aside and reverse or remand each or all of the challenged Orders;

13 3. Declare that the Site Certificate for this Facility has expired and is terminated;

14 4. Restrain and enjoin the construction and operation of the Facility without a new  
15 EFSC-issued site certificate;

16 5. Award Petitioners their reasonable attorney fees and costs; and

17 6. Award Petitioners such other relief as the Court deems just and equitable.

18 DATED: October 9, 2020

19 LAW OFFICE OF KARL G. ANUTA, P.C.

20 /s/ Karl G. Anuta

21 Karl G. Anuta, OSB #861423

22 Email: [kga@integra.net](mailto:kga@integra.net)

23 Attorney for Petitioners and Trial Attorney

24 REEVES, KAHN, HENNESSY & ELKINS

25 /s/ Gary K. Kahn

26 Gary K. Kahn, OSB #814810

27 Email: [gkahn@rke-law.com](mailto:gkahn@rke-law.com)

Attorney for Petitioners

///



FRIENDS OF THE COLUMBIA GORGE

*/s/ Nathan J. Baker*

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Nathan J. Baker, OSB #001980

Email: [nathan@gorgefriends.org](mailto:nathan@gorgefriends.org)

Senior Staff Attorney for Petitioner Friends

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**Attachment D**

August 21, 2020

Mr. Maxwell Woods, Senior Policy Advisor  
Oregon Department of Energy  
550 Capital Street NE, First Floor  
Salem, OR 97301

**RE: Summit Ridge Wind Farm – Notice of Ownership Transfer**

Dear Mr. Woods,

Per our previous discussions, this letter is to confirm that Pattern Renewables 2 LP recently sold the Summit Ridge Wind Farm (“Facility”), including the ownership of all membership interests in Summit Ridge Wind, LLC to Aypa Power LLC (“Aypa”). Although there was significant uncertainty until recently regarding the likelihood and date of the transfer of ownership, the sale closed on August 3, 2020, at which time Summit Ridge Wind, LLC became the wholly-owned subsidiary of Aypa.

Summit Ridge Wind, LLC hereby provides the Department of Energy with this confirming notice of the transfer pursuant to OAR 345-027-0400.

Transferee:

Aypa Power LLC  
c/o Christie Kneteman, EVP and General Counsel  
50 Fountain Plaza, Suite 1400, PMB #327, Buffalo, NY 14202  
Phone: (416) 779-6681  
Email: ckneteman@aypa.com

Transfer Date:

August 3, 2020

Although Summit Ridge Wind, LLC will remain the Facility owner and operator, Summit Ridge Wind, LLC will provide additional information related to Aypa in its formal Request to Transfer, which will be filed consistent with the requirements of OAR 345-027-0040(4).

Please let me know if you have questions or require additional information at this time.

Sincerely,

Summit Ridge Wind, LLC

By:

  
\_\_\_\_\_  
Moe Hajabed, Chief Executive Officer