

Agenda Item B - Attachment 2
Hearing Officer's Proposed Contested Case Order

Contested Case Issues – Reference Table

Issue No.	Issue Statement
1	Whether the ASC impermissibly includes development within the Fort Rock Planning Area that is more than 600 feet from existing roads in violation of Lake County Zoning Ordinance (LCZO) §24.01(A)(1) and Lake County Comprehensive Plan (LCCP) Goal 2, Policies 10 and 11.
2	Whether the ASC failed to demonstrate compliance with the conditional use permit requirements for non-farm use in the A-2 zone as required by LCZO 24.19 because the potential impacts including fugitive dust, invasive weeds, competition for water resources, wildlife displacement, and increased thermal energy (heat blooms) would result in a failure to demonstrate that the proposed facility is compatible with farm uses, consistent with the intent and purposes of ORS 215.243, does not seriously interfere with accepted farming practices on adjacent lands, and does not materially alter the stability of the overall land use pattern of the area.
3	Whether the ASC failed to demonstrate the proposed development will not unduly diminish agriculture from impacts of fugitive dust, invasive weeds, and wildlife displacement caused by removal of native vegetation, as well as heat blooms caused by the proposed facility, or unduly increase related public service costs in violation of LCZO §24.01(A)(1) and LCCP, Goal 2, Policy 17.
4	Whether the ASC failed to demonstrate grounds justifying an exception to LCCP Goal 3, identifying a preference for the preservation of agricultural land, as required by the LCCP and ORS 469.504(2).
5	Whether the proposed project as identified in the ASC diminishes the value of the limited parties' private property and business interests in violation of LCZO §24.01(A)(1) and LCCP Goal 2, Policy 18.
6	Whether the ASC failed to demonstrate that the design, construction, and operation of the proposed facility is not likely to result in significant adverse impacts to soil, taking into account Applicant's proposed mitigation, in violation of OAR 345-022-0022.
7	Whether the application proposes development that exceeds the existing capacity of public and private utilities or facilities, including county roads to provide water needed for the construction of the facility, without Applicant providing funds for the increased services, in violation of LCZO §24.01(A); LCCP Goal 11, Policy 1; and LCCP Goal 13, Policy 14.
8	Whether the application failed to demonstrate that the proposed development is compatible with existing uses and will not diminish living conditions in violation of LCZO §24.01(A)(1) and LCCP Goal 9, Policy 1.
9	Whether the Department's Proposed Order erred by imposing a condition limiting the Applicant to 5,000 gallons of water per well per day rather than limiting the Applicant's water use to a total of 5,000 gallons per day.

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON DEPARTMENT OF ENERGY, ENERGY FACILITY SITING DIVISION**

IN THE MATTER OF:) PROPOSED ORDER
)
THE APPLICATION FOR SITE)
CERTIFICATE FOR THE OBSIDIAN)
SOLAR CENTER) OAH Case No. 2020-ABC-03504

HISTORY OF THE CASE

This matter involves the Application for a Site Certificate (ASC) for the Obsidian Solar Center (proposed facility) submitted by Obsidian Solar Center, LLC a subsidiary of Obsidian Renewables, LLC (Obsidian or Applicant) to the Energy Facility Siting Council (Council or EFSC) on October 17, 2019. On October 25, 2020, Council appointed Senior Administrative Law Judge (ALJ) Joe L. Allen of the Office of Administrative Hearings (OAH) as the hearing officer in this matter. On January 28, 2020, the Department referred this matter to the OAH for contested case proceedings. On March 12, 2020, the Oregon Department of Energy, Energy Facility Siting Division (ODOE or Department) issued a Draft Proposed Order (DPO) and public notice of the comment period on the DPO. Thereafter, on July 20, 2020, ALJ Allen conducted a public hearing via a combination of in-person and video conference appearance.¹ Members of the public had the opportunity to provide oral and written comments at the public hearing. The ALJ held the record open until July 22, 2020 to allow the Applicant an opportunity to respond to comments made at the DPO hearing.

On October 9, 2020, the Department issued a *Proposed Order and a Public Notice of Contested Case* (Department's Proposed Order). The Department set November 9, 2020 at 5:00 p.m. Pacific Time as the filing deadline for submitting petitions for party or limited party status in the above-captioned matter. Pursuant to a Notice of Petitions to Request Party Status; Order Rescheduling Pre-Hearing Conference (Notice) issued November 23, 2020, the ALJ notified the Department and Applicant of the petitions for party status or limited party status received in this matter.

On December 17, 2020, ALJ Allen convened a prehearing conference by telephone to address the petitions for party/limited party status and the responses to the petitions from Applicant and the Department.² At the conference, the ALJ provided petitioners for party status

¹ The video conference option was implemented in response to the COVID-19 pandemic and Oregon Governor Kate Brown's subsequent executive orders temporarily closing most public facilities and implementing social distancing requirements.

² The following persons participated in the December 17, 2020 prehearing conference: For the Department, Senior Assistant Attorney General (AAG) Patrick Rowe and Department representatives

an opportunity to address whether they had satisfied the eligibility requirements for party/limited party status. The ALJ also provided Applicant and the Department the opportunity to respond. At the prehearing conference, the ALJ also provided petitioners for party status the opportunity to clarify their personal interests in the outcome of the proceeding and the issues identified in their petition through supplemental briefing in accordance with a proposal made by the Department in its written response to the petition. Likewise, the ALJ provided Applicant and the Department the opportunity to provide written responses to the supplemental petition. The ALJ granted petitioners leave to file a supplemental petition until December 31, 2020. The ALJ granted the Department and Applicant leave to file responses to the supplemental petition until January 8, 2021. Following the prehearing conference, the parties each submitted supplemental briefs according to that schedule.

On February 8, 2021, the ALJ issued an *Order on Petitions for Party Status and Issues for Contested Case* granting limited party status to Jerald Simmons, Leeroy and Nancy Horton, Patrick Barker, Larry Turnbow, Jeremiah and Mariam Thorsted, Dave Hogan, and Aaron Borrer (collectively, the Limited Parties). Thereafter, on February 11, 2021, the ALJ issued a Notice of Prehearing Conference; Prehearing Conference Agenda on Case Management Matters; Proposed Contested Case Schedule setting a case management conference for March 3, 2021.

On March 3, 2021, ALJ Allen convened a telephonic Case Management prehearing conference. At that time, it was noted that no party/petitioner filed an appeal to Council from the ALJ's *Order on Petitions for Party Status and Issues for Contested Case*. As such, all petitioners were granted limited party status in this matter. Following the Case Management conference, the ALJ issued an *Order on Case Management Matters and Contested Case Schedule (Case Management Order)*.

Pursuant to the established contested case schedule, on April 19, 2021, the Limited Parties jointly filed the Limited Parties' Motion to Compel Discovery Responses as well as the Declaration of Arden J. Olsen with attached Exhibits 1 through 4. Also on that date, Obsidian filed Applicant's Request for Discovery Order for Production by Limited Parties with attached Exhibits 1 and 2. On May 3, 2021, Obsidian filed Applicant's Objection to Limited Parties' Motion to Compel Discovery Responses and Declaration of Derek D. Green in Support of Applicant's Objection to Limited Parties' Motion to Compel Discovery Responses with Exhibits A through D. Similarly, on May 3, 2021, the Limited Parties jointly filed Limited Parties' Objection to Request for Discovery Order. The ALJ issued rulings denying each motion on May 24, 2021.

The parties filed a draft Stipulated Protective Order on May 20, 2021 for the ALJ's consideration. The ALJ reviewed, approved, and issued the protective order on that same date.

On June 7, 2021, the ALJ convened a telephonic prehearing conference to address

Kellen Tardaewether, Todd Cornett, and Sara Esterson; for Obsidian, Michelle Slater along with attorneys Derek Green, Elaine Albrich, and Olivier Jamin; for petitioners requesting party status, Attorneys Micheal Reeder, Aaron Noteboom, and Arden Olson. In addition, the following petitioners for party/limited party status appeared at the conference: Jerald Simmons, Leeroy and Nancy Horton, Patrick Barker, as well as Jeremiah and Miriam Thorsted.

inquiries from the parties and Department regarding exhibit marking conventions and submission of the Decision Making Record and Administrative Project Record (collectively, the Project Record) into evidence in advance of the date for submitting written direct testimony and exhibits on June 28, 2021. At that conference, the parties stipulated to the admission of the entirety of the two records into evidence. The ALJ accepted those records into evidence and instructed the parties to use current Department assigned naming conventions when referencing those exhibits in written direct testimony. The ALJ also assigned marking conventions for each party to use when submitting exhibits not contained in the Project Record. In addition, the ALJ and parties agreed to an additional prehearing conference to be held July 7, 2021 to hear objections to any additional exhibits offered through direct written testimony.

The limited parties filed written direct testimony and exhibits on June 28, 2021.³ On that date, the limited parties also filed Petitioners' Hearing Memorandum and Petitioners' Proposed Site Certificate Conditions.⁴ Neither Obsidian nor the Department filed written direct testimony or exhibits at that time. Nonetheless, Obsidian filed Applicant Obsidian Solar Center LLC's Proposed Site Certificate Condition to Amend the Proposed Order's Water Right Condition 2. On July 7, 2021, the ALJ convened a prehearing conference to hear objections to the limited parties' written direct testimony and exhibits. All parties appeared through counsel.⁵ Following objections and argument from the parties, the ALJ issued rulings set forth in the Evidentiary Rulings section of this Proposed Order. At that time, the ALJ granted extensions to the contested case schedule, pertaining to submission of written rebuttal and sur-rebuttal testimony and exhibits.⁶ At the Department's request, the ALJ established July 26, 2021 as the filing date for hearing memoranda from Applicant and/or the Department. The ALJ also scheduled an additional prehearing conference, using the Webex platform, for July 30, 2021 to address objections to rebuttal testimony and exhibits.

On July 26, 2021, Applicant filed written rebuttal testimony and exhibits along with Applicant's Opening Memorandum. The Department filed its written rebuttal testimony and exhibits on the same date. The Department also filed Oregon Department of Energy's Response

³ The limited parties' written direct testimony and exhibits are detailed in the Evidentiary Rulings section of this Proposed Order.

⁴ The limited parties' hearing memorandum was erroneously marked as Exhibit R20. At the July 7, 2021 prehearing conference, counsel for the limited parties agreed that document presented argument rather than evidence and withdrew the hearing memorandum from its list of exhibits. The memorandum was otherwise admitted into the record. Similarly, the limited parties marked their proposed site conditions as Exhibit R21. As those proposed conditions are permitted by the applicable administrative rules, respond to proposed conditions set out in the Department's Proposed Order, and were contemplated by the parties in advance of evidentiary filings, the ALJ found no reason to exclude them from the exhibit offerings.

⁵ AAG Rowe appeared on behalf of the Department. Ms. Tardaewether also appeared for the Department. Messrs. Olson and Noteboom, Attorneys at Law, appeared on behalf of the limited parties. Mr. Green appeared for Applicant. Michelle Slater also appeared for Applicant.

⁶ Due to the ongoing COVID-19 pandemic, the ALJ also converted the hearing from an in-person format to a virtual conference proceeding using Cisco's Webex platform.

to Petitioners' Proposed Site Conditions as well as Oregon Department of Energy's Response to Petitioners' Hearing Memorandum and Direct Testimony.⁷ Finally, the limited parties filed Response to Applicant's Proposed Site Conditions.

On July 30, 2021, ALJ Allen convened a prehearing conference using the Webex virtual conference platform. AAG Rowe appeared for the Department. Mr. Olson and Mr. Noteboom appeared for the limited parties. Ms. Albrich and Mr. Green appeared as counsel for Applicant. Ms. Slater appeared as Applicant's representative. Andrew Self also appeared with Applicant to provide any technological support needed by counsel. The parties presented objections and responses to the proposed rebuttal evidence. The ALJ's rulings on the parties' objections are set forth in the Evidentiary Rulings section of this Proposed Order.

On August 9, 2021, the limited parties filed written sur-rebuttal testimony and exhibits. Those exhibits are set forth in the Evidentiary Rulings section of this Proposed Order along with any rulings on objections. On that date, the limited parties also filed Petitioners' Revised Exhibit and Witness Lists as well as Petitioners' Designation of Witnesses for Cross-Examination.⁸ On that date, Applicant filed Obsidian Solar Center LLC's Response to Oregon Department of Energy's Proposed Site Conditions along with Applicant Obsidian Solar Center LLC's Request for Cross-Examination. Also on August 9, 2021, the Department filed Oregon Department of Energy's Request for Cross-Examination of Witnesses.

Thereafter, in accordance with the contested case schedule, Applicant filed Obsidian Solar Center, LLC's Response to Cross-Examination Requests.⁹ In that response, Applicant objected to the limited parties' request to cross-examine Richard Morehouse on the basis that Mr. Morehouse should not be subject to cross-examination because he had not submitted any sworn testimony in this matter. The Department filed Oregon Department of Energy's Response to Limited Parties' Request for Cross-Examination on the same date. Similar to Applicant, the Department argued that Mr. Morehouse was not subject to cross-examination because he had not submitted sworn testimony in this matter. On August 17, 2021, the limited parties' filed Petitioners' Reply to Obsidian's and ODOE's Responses on Cross-Examination of Richard Morehouse. Applicant and the limited parties' each requested, via email on August 17, 2021, the opportunity to present oral argument on this issue. The ALJ granted the request.

On August 20, 2021, ALJ Allen convened an additional telephonic prehearing conference to address the objections to the limited parties' designation of Mr. Morehouse for cross-

⁷ Applicant and the Department's rebuttal exhibits are detailed, along with objections and rulings, in the Evidentiary Rulings section of this order.

⁸ Throughout these proceedings, the limited parties refer to themselves collectively as "Petitioners" consistent with their initial Petitions for Party Status. This Proposed Order refers to the collective group as the "limited parties" for all proceedings following granting of limited party status to each as identified herein. Those terms should be read as interchangeable.

⁹ In support of this filing, Applicant also filed a Second Declaration of Ken Hamlington.

examination.¹⁰ After oral argument from each party, the ALJ determined that cross-examination of Mr. Morehouse was inappropriate because he had offered no sworn testimony in this matter.¹¹ The ALJ therefore denied the limited parties request to cross-examine Mr. Morehouse.¹² At the conference, counsel for the limited parties’ also made an oral motion seeking clarification on the allocation of the burden of proof in this matter based on the language of OAR 345-021-0100(2). In response, the ALJ provided the Department the opportunity to brief the issue and reserved ruling on the motion until a later date. The Department filed Oregon Department of Energy Brief Re: Burden of Proof on August 25, 2021. The ALJ’s determination of the allocation of the burden in this matter is addressed more fully below.

Throughout the prehearing proceedings, the ALJ issued written updates to Council, and parties, via email on February 16, April 16, June 15, and August 16, 2021.

A cross-examination hearing was held on August 30, 31, and September 1, 2021 via the Webex virtual conference platform.¹³ Mr. Green and Ms. Albrich appeared on behalf of Applicant with Ms. Slater appearing as its representative. Mr. Olson and Mr. Noteboom appeared on behalf of the limited parties. Ginger Fullerton appeared with Mr. Olson to provide technical assistance. Jerald Simmons, Leeroy and Nancy Horton, Patrick Barker, Larry Turnbow, Jeremiah and Marian Thorsted, and Aaron Borrer appeared for portions of the hearing over the three days of cross-examination. AAG Rowe appeared on behalf of ODOE with Sarah Esterson and Todd Cornett. The following individuals testified at the cross-examination hearing:

Laura Hutchison;
Kevin Leehman;
James Lyon;
Alan Parks;
Michael Blair Edwards;
James K. Walls;

¹⁰ One final prehearing conference was held on August 27, 2021, via virtual conference. The purpose of that conference was to allow the parties to test the Webex virtual conference platform in advance of the hearing. No substantive matters were addressed at that conference.

¹¹ That ruling was based, in part, on the fact that the limited parties had the opportunity to depose Mr. Morehouse during the discovery phase of this proceeding but elected not to do so based on counsel’s assumption that either ODOE or Applicant would identify him as a witness through written direct or rebuttal testimony.

¹² In the alternative, the limited parties objected to the admission of a letters from Mr. Morehouse that appear in the project record at ODOE-OSCAPDoc20 ASC Applicant Responses to Additional RAIs_Combined 2020-02-24 to 2020-03-09, page 21 of 485 and ODOE-OSCAPDOC4-35 DPO Public Comment_Moorehose 2020-07-20, page 1 of 1. The ALJ overruled that objection as untimely.

¹³ For ease of reference, consistency with OAH Proposed Order format, and a bit of brevity, this order refers to written direct, rebuttal, and sur-rebuttal testimony by exhibit/page number (*e.g.*, R1 at [page number], for written direct testimony of Leeroy Horton). References to testimony provided at the cross-examination hearing are denoted by “Test. of [witness name].” This order does not make reference to transcripts prepared after the fact at the direction of the Department.

Nicholas Johnson;
David Todd Gregory;
Greg Barron-Gafford, PhD;
Darwin Johnson;
Kenneth Hamlington;
Craig Foster; and
Donald Gallagher.

The evidentiary record closed at the conclusion of the cross-examination hearing on September 1, 2021. The ALJ held the record open for submission of written closing arguments. On September 24, 2021, ODOE filed Oregon Department of Energy's Closing Argument. Obsidian filed Applicant Obsidian Solar Center, LLC's Closing Brief with Appendix 1 and Attachment 1, consisting of at least a portion of exhibit K to the ASC. Also on that date, the limited parties filed their Proposed Findings of Fact and Conclusions of Law. Thereafter, on October 15, 2021, ODOE filed Oregon Department of Energy's Response to Limited Parties Closing Argument. Obsidian filed Applicant's Response to Closing Arguments on that same date, with Attachments A and B. Also on October 15, 2021, the limited parties filed Petitioners' Responses to ODOE an Obsidian's Closing Argument. The ALJ closed the record and took the matter under advisement on that date.

BURDEN OF PROOF

The March 10, 2021 *Case Management Order* provides the following related to the allocation of the burden of proof in this matter:

1. ORS 183.450(2): The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position. Here, the Applicant had the initial burden to establish that each of the siting standards has been satisfied. In the Proposed Order, the Department found that, subject to compliance with the recommended site certificate conditions, the proposed transmission line complies with ORS 469.300 to 469.520, and the applicable siting standards. Therefore, in this contested case, those with specific challenges to findings, conclusions and/or recommended site certificate conditions in the Department's Proposed Order bear the burden of proof. The party or limited party must show how the Applicant failed to meet its burden with regard to the siting standards and/or how the Department erred in its findings, conclusions and/or recommended site certificate conditions.

A party or limited party challenging a finding or conclusion in the Proposed Order must provide factual testimony or evidence to substantiate the claim asserted. Unsubstantiated factual argument(s) or legal conclusions are insufficient to demonstrate the Applicant's failure to establish compliance with any applicable standard.

(*Case Management Order* at 3.)

At the August 20, 2021 prehearing conference, the limited parties made an oral motion seeking clarification on the allocation of the burden of proof in this matter based on the language of OAR 345-021-0100(2). As discussed above, the ALJ permitted the Department an opportunity to respond through written briefing. The Department filed that brief with the OAH on August 25, 2021. In addition, the Department revised its interpretation of the applicable administrative rule in its response to the limited parties closing argument which states:

For the Energy Facility Siting Council to issue a site certificate, an applicant must demonstrate that a preponderance of evidence on the record supports a conclusion that the facility complies with statutory requirements and applicable standards adopted by the Council. ORS 469.503(1); OAR 345-022-0000(1).

In other words, the applicant must prove to the Council that the evidence on the record (the entire record, including that leading up to a proposed order and through any contested case) demonstrates it is more probable than not the proposed facility will comply with all applicable laws and Council standards.

In an EFSC contested case proceeding:

[T]he applicant maintains the burden of proving the facility complies with applicable statutes, administrative rules, and local government ordinances. (OAR 345-021-0100(2))^[.]

[A] person raising an issue in a contested case bears the burden of presenting evidence to support all facts alleged or positions taken in raising the issue. (ORS 183.450(2)).

(Oregon Department of Energy’s Response to Limited Parties Closing Argument at 2, footnote omitted, emphasis original.)

The limited parties allocate for the following determination of the allocation of the burden in this matter:

Pursuant to OAR 345-021-0100(2), Obsidian has the burden of proving, by a preponderance of the evidence in this record, that its proposed facility complies with all applicable statutes, administrative rules, and local government ordinances.

([Limited parties’] Proposed Findings of Fact and Conclusions of Law at 1.)

Those positions are fundamentally similar. Nonetheless, to provide clarity and consistency in these proceedings, this Proposed Order provides the following determination of the appropriate allocation of the burdens in this matter.

To determine the appropriate allocation of the burden of proof that governs this contested case, this tribunal looks to both ORS 183.450 pertaining to evidentiary standards in contested

cases generally, and OAR 345-021-0100(2), identifying the burden of proof in contested cases on an application for site certificate specifically. As identified above, no party/limited party in this matter disputes this position.

ORS 183.450(2) provides,

All evidence shall be offered and made a part of the record in the case, and except for matters stipulated to and except as provided in subsection (4) of this section no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. *The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.*

(Emphasis added.)

OAR 345-021-0100(2) provides, “[t]he applicant has the burden of proving, by a preponderance of the evidence *in the decision record*, that the facility complies with all applicable statutes, administrative rules and applicable local government ordinances.” Emphasis added. The term “decision record” is not defined in statutes or administrative rules pertaining to contested case proceedings on an ASC. Nonetheless, OAR 345-015-0240 defines the *decision-making record* and provides:

The decision-making record on an application for a site certificate includes the *decision record* for the Department of Energy’s proposed order *and* the record of the contested case proceeding.

(Emphasis added.) This provision of EFSC’s procedural rules distinguishes between the decision record prior to issuance of the Department’s Proposed Order and the record established at a contested case hearing, including the Department’s Proposed Order. Moreover, OAR Chapter 345 Division 015 contains a total of six references to the term “decision record”, none of which provide additional clarity. *See also* OAR 345-015-0085(3), -0180(3), -0200(7), -0220(6), and -0320(6). Within the same chapter and division of EFSC’s procedural rules the term “decision-making record” appears only once, as cited above. The lack of clarity creates some confusion in this matter. Nonetheless, that lack of clarity need not be resolved by the ALJ because the parties’ stated positions on this issue both appear consistent with the applicable statute and administrative rule on this issue and the Department’s interpretation is plausible and not inconsistent with the wording of the rule itself, the rule’s context, or any other source of law. *See Don’t Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142 (1994).

In *Marvin Wood Products v. Callow*, 171 Or App 175, 179 (2000), the Oregon Court of Appeals described the burden of proof, stating, “Conceptually, the burden of proof encompasses two distinct burdens: the burden of producing evidence of a particular fact (*i.e.*, the burden of production), and the burden of convincing the trier of fact that the alleged fact is true (*i.e.*, the burden of persuasion).” Internal citation omitted.

ORS 183.450(2) and OAR 345-021-0100(2), together, identify the appropriate allocation of the burdens applicable to EFSC contested case proceedings on an ASC. Applicant bears the burden of proving that the proposed facility complies with all *applicable* statutes, administrative rules, and local government ordinances. The party/limited party raising an issue in this contested case by challenging the Department's Proposed Order bears the burden of producing evidence in support of the facts alleged and/or positions taken on any properly raised issue. That party/limited party also bears the burden of persuading the trier of fact that the alleged facts are true or the proffered position on the issue is correct. Neither Applicant nor the Department is required to disprove an opposing party/limited party's allegations and argument that Applicant has not met a particular statutory/regulatory requirement or Council siting standard. Rather, the party/limited party asserting a deficiency in the findings and/or conclusions in the Department's Proposed Order on the ASC bears the burden of establishing the claim or alleged facts.

Thus, Applicant maintains the burden to show, by a preponderance of the evidence in the decision record, that the proposed facility complies with the Council's siting standards and other applicable statutes and rules. The Department's Proposed Order, as conditioned, determined that the decision record on the ASC indicates Applicant satisfied the requirements for issuance of the requested site certificate. That determination creates a rebuttable presumption that Applicant has satisfied its burden to show that the proposed facility will, more likely than not, comply with all applicable statutes, administrative rules, and local government ordinances.¹⁴ Thus, with regard to provisions of the Department's Proposed Order not challenged in this contested case, the presumption stands and Applicant is not required to make additional showings at the contested case hearing to meet its initial burden. With regard to those provisions of the Department's Proposed Order challenged through the petitions for party status/requests for contested case hearing, a limited party with standing on a particular issue bears the burden of producing evidence sufficient to establish his/her claim with regard to that issue (i.e., the alleged deficiency in the Department's Proposed Order) in order to rebut the presumption created by the Department's Proposed Order. Applicant has no obligation to disprove unsubstantiated claims and/or allegations raised by the limited parties.

ISSUES

1. Whether the ASC impermissibly includes development within the Fort Rock Planning Area that is more than 600 feet from existing roads in violation of Lake County Zoning Ordinance (LCZO) §24.01(A)(1) and Lake County Comprehensive Plan (LCCP) Goal 2, Policies 10 and 11.

¹⁴ Conceptually, it is possible that an applicant, as a party in a contested case, is not afforded the presumption because the Department's Proposed Order recommends Council deny an application for site certificate based on a failure to demonstrate the proposed facility will, more likely than not, comply with all applicable statutes, administrative rules, and local government ordinances. In such an instance, at a contested case hearing, the applicant challenging the Department's Proposed Order would bear the burden to show evidence in the decision record supports issuance of the proposed certificate. Moreover, an applicant challenging site certificate conditions proposed by the Department would bear the burden to show such conditions are unnecessary because the decision record alone supports issuance of the requested site certificate. Such is not the case here and Applicant is entitled to a presumption based on the ASC as conditioned.

2. Whether the ASC failed to demonstrate compliance with the conditional use permit requirements for non-farm use in the A-2 zone as required by LCZO 24.19 because the potential impacts including fugitive dust, invasive weeds, competition for water resources, wildlife displacement, and increased thermal energy (heat blooms) would result in a failure to demonstrate that the proposed facility is compatible with farm uses, consistent with the intent and purposes of ORS 215.243, does not seriously interfere with accepted farming practices on adjacent lands, and does not materially alter the stability of the overall land use pattern of the area.

3. Whether the ASC failed to demonstrate the proposed development will not unduly diminish agriculture from impacts of fugitive dust, invasive weeds, and wildlife displacement caused by removal of native vegetation, as well as heat blooms caused by the proposed facility, or unduly increase related public service costs in violation of LCZO §24.01(A)(1) and LCCP, Goal 2, Policy 17.

4. Whether the ASC failed to demonstrate grounds justifying an exception to LCCP Goal 3, identifying a preference for the preservation of agricultural land, as required by the LCCP and ORS 469.504(2).

5. Whether the proposed project as identified in the ASC diminishes the value of the limited parties' private property and business interests in violation of LCZO §24.01(A)(1) and LCCP Goal 2, Policy 18.

6. Whether the ASC failed to demonstrate that the design, construction, and operation of the proposed facility is not likely to result in significant adverse impacts to soil, taking into account Applicant's proposed mitigation, in violation of OAR 345-022-0022.

7. Whether the application proposes development that exceeds the existing capacity of public and private utilities or facilities, including county roads to provide water needed for the construction of the facility, without Applicant providing funds for the increased services, in violation of LCZO §24.01(A); LCCP Goal 11, Policy 1; and LCCP Goal 13, Policy 14.

8. Whether the application failed to demonstrate that the proposed development is compatible with existing uses and will not diminish living conditions in violation of LCZO §24.01(A)(1) and LCCP Goal 9, Policy 1.

9. Whether the Department's Proposed Order erred by imposing a condition limiting the Applicant to 5,000 gallons of water per well per day rather than limiting the Applicant's water use to a total of 5,000 gallons per day.

EVIDENTIARY RULINGS

As addressed above, in addition to the stipulated project record, the parties¹⁵ in this

¹⁵ As used in this order, the term "parties" refers to Applicant and the Department as full parties to the proceedings and the limited parties identified above.

matter filed written direct, rebuttal, and sur-rebuttal testimony, with accompanying exhibits, in advance of the cross-examination hearing. Each party marked the declarations/affidavits of testifying witnesses according to the marking conventions provided by the ALJ. The parties' offerings are as follows:

Limited parties' Exhibits:¹⁶

- R2 Declaration of LeeRoy Horton, with attached exhibits A through D;
- R3 Declaration of Jerald Simmons;
- R4 Declaration of Patrick Barker;
- R5 Declaration of Larry Turnbow;
- R6 Declaration of Jeremiah Thorsted;
- R7 Declaration of Mariam Thorsted;
- R8 Declaration of David Hogan, with attached exhibit 1;
- R9 Declaration of Aaron Borrer;
- R10 Declaration of Hugh Barrett, Rangeland Management Consultant, with attached exhibit 1;¹⁷
- R11 Declaration of Terry Craigg, Soil Scientist;¹⁸
- R12 Declaration of Gregory W. Moore, MAI, with attached exhibits A through E;¹⁹
- R13 Declaration of Dean Apostol, Scenic and Visual Resource Specialist, with attached exhibits A and B;²⁰
- R14 Declaration of Jim Lord, Professional Engineer (P.E.), with attached exhibits 1 and 2;²¹
- R15 Declaration of Brian Meiering, Professional Wetland Scientist (PWS), with attached exhibits 1 and 2;²²
- R16 Declaration of Jake Obrist, Public Works Manager for the City of La Pine, Oregon, with attached exhibit A;
- R17 Declaration of Julian W. Marrs, with attached exhibits A and B;
- R18 Declaration of Aaron J. Noteboom, with attached exhibits 1 and 2;
- R19 Declaration of Arden J. Olson, with attached exhibits A through D;
- R21 Petitioners' Proposed Site Certificate Conditions;

¹⁶ As addressed in the History of the Case above, the limited parties' withdrew Exhibits R1 and R20, their exhibit/witness list and Hearing Memorandum respectively, due to the lack of evidentiary value of the documents.

¹⁷ The limited parties designated Mr. Barrett as a rangeland expert.

¹⁸ The limited parties designated Mr. Craigg as a soils expert.

¹⁹ Member, Appraisal Institute.

²⁰ The limited parties designated Mr. Apostol as a visual impact expert.

²¹ The limited parties designated Mr. Lord as an engineering expert.

²² The limited parties designated Mr. Meiering as their wildlife expert in this matter.

- R22 Sur-Rebuttal Declaration of Hugh Barrett;
- R23 Sur-Rebuttal Declaration of Terry Craig;
- R24 Sur-Rebuttal Declaration of Gregory W. Moore, MAI;
- R25 Sur-Rebuttal Declaration of LeeRoy Horton;
- R26 Sur-Rebuttal Declaration of Arden J. Olson;
- R27 Declaration of Aaron J. Noteboom;
- R28 Excerpts of 2020-2021 Uniform Standards of Professional Appraisal Practice (USPAP); and
- R29 Article: *Controlling Ground Squirrel Damage to Forages and Field Crops, Ditches and Dams*. F.C. Rulofson, P. Test, and W.D. Edge.

The Department raised a general objection to the limited parties' Exhibits R2 through R19 as not in compliance with the ALJ's instructions in the *Case Management Order*. That order required "[w]ritten testimony must reference the issue or issues to which the proffered testimony relates." *Case Management Order* at 8. In response, the Department proposed allowing counsel for the limited parties to identify the issues covered by each witness's testimony. Counsel for the limited parties agreed and provided the following association, after which the Department withdrew its objection:

- Exhibit R2 – Issues 2-6, and 8;
- Exhibit R3 – Issues 5 and 8;
- Exhibit R4 – Issues 2-5, and 8;
- Exhibit R5 – Issues 3-5, 7, and 8;
- Exhibit R6 – Issues 2, 3, and 5;
- Exhibit R7 – Issues 2-6, and 8;
- Exhibit R8 – Issues 2, 3, 5, and 8;
- Exhibit R9 – Issues 2-5, 7, and 8;
- Exhibit R10 – Issues 2, 3, and 6;
- Exhibit R11 – Issues 2, 3, and 6;
- Exhibit R12 – Issues 3 and 5;
- Exhibit R13 – Issues 4, 5, and 8;
- Exhibit R14 – Issues 1-3, and 8;
- Exhibit R15 – Issues 2 and 3;
- Exhibit R16 – Issues 2, 3, and 8;
- Exhibit R17 – Issue 3;
- Exhibit R18 – Issue 1; and
- Exhibit R19 – Issues 2, 3, and 8.

Exhibits R2 through R9 and R17 through R19 and R21 through R24, R28 and R29 were admitted into the record without objection. Exhibits R10 through R16 were admitted into the record over Applicant's objections that the limited parties failed to designate expert witnesses timely. Exhibits R25 through R27 were admitted over Applicant's objections of relevance.

ODOE's Exhibits:

- D1 Written Rebuttal Testimony of Sarah Reif and Jon Muir, ODFW, on Behalf

- of the Oregon Department of Energy;²³
- D2 Written Rebuttal Testimony of Michael Blair, ODEQ, for the Oregon Department of Energy;²⁴ and
- D3 Written Rebuttal Testimony of Frank Messina, ODEQ, for the Oregon Department of Energy.²⁵

ODOE's Exhibits D1 through D3 were admitted in the record without objection.

Applicant's Exhibits:

- A1 Prepared Rebuttal Testimony of Craig Foster [Wildlife Biologist] on Behalf of Obsidian Solar Center LLC;
- A2 Prepared Rebuttal Testimony of Aaron DeJoia [Environmental Soil Scientist and Agronomist] on Behalf of Obsidian Solar Center LLC;
- A3 Prepared Rebuttal Testimony of Donny Gallagher [Director of Engineering, Swinerton Renewables] on Behalf of Obsidian Solar Center LLC;
- A4 Prepared Rebuttal Testimony of Greg Barron-Gafford, PhD [Earth Scientist] on Behalf of Obsidian Solar Center LLC;
- A5 Declaration of Alan Parks;
- A6 Declaration of Jim Walls, Founding Director of Lake County Resources Initiative (LRCI);
- A7 Declaration of Nick Johnson, Executive Director of LRCI;
- A8 Declaration Tom Andrews;
- A9 Declaration of Kevin Leehmann, President of the High Desert Rangeland Fire Protection Association;
- A10 Declaration of Ken Hamlington;
- A11 Declaration of D. Todd Gregory;
- A12 Declaration of Kirk Moore, Applicant's Senior Analyst for Renewable Development;
- A13 Declaration of Laurie Hutchinson; Project Director for Applicant;
- A14 Prepared Rebuttal Testimony of Jim Lyon [MAI] on Behalf of Obsidian Solar Center LLC;
- A15 Prepared Rebuttal Testimony of Darwin Johnson [Planning Director, Lake County Planning Department] on Behalf of Obsidian Solar Center LLC;
- A16-A Article: *An Exploration of Property-Value Impacts Near Utility-Scale*

²³ ODOE initially offered Exhibit D1 at Written Rebuttal Testimony of Sarah Reif. ODOE was granted leave to amend Exhibit D1 after self-disclosing that, after filing the document, ODOE learned that Mr. Reif had consulted with Mr. Muir in preparing her written testimony. Ms. Reif is a Natural Resource Specialist with the Oregon Department of Fish and Wildlife (ODFW), and works as the Statewide Energy Coordinator for that agency. Mr. Muir is a Wildlife Biologist with ODFW. No party objected to this amendment.

²⁴ Mr. Blair is the Stormwater Program Coordinator for the Oregon Department of Environmental Quality.

²⁵ Mr. Messina is an air quality inspector and permit writer for the Oregon Department of Environmental Quality.

Solar Installations. Leila Al-Hamoodah, Kavita Koppa, Eugenie Schieve, D. Cale Reeves, Ben Hoen, Joachim Seel and Varun Rai. (May 2018.); and A16-B Article: *Property Value Impacts of Commercial-Scale Solar Energy In Massachusetts and Rhode Island.* Vasundhara Gaur, and Corey Lang, Department of Environmental and Natural Resource Economics University of Rhode Island. (September 29, 2020.)

Applicant's Exhibits A1 through A4, A10, A11, A14, A16-A, and A16-B were admitted into the record without objection. The ALJ admitted Exhibits A5 through A9, A12, and A13 over the limited parties' relevance objections. The limited parties also objected to the admission of Exhibit A15 on the grounds that, in its original form, it did not constitute sworn testimony. Applicant acknowledged the inadvertent error and submitted a corrected Exhibit A15 on August 3, 2021. No renewed objection was received and the ALJ admitted Exhibit A15 into the record.

The ALJ also considered the following documents in ruling on the issues in this contested case: Petitioners' Proposed Site Certificate Conditions and Applicant Obsidian Solar Center LLC's Proposed Site Certificate Condition to Amend the Proposed Order's Water Right Condition 2.

FINDINGS OF FACT

Overview of the proposed facility.

1. Applicant is owned by Obsidian Renewables, LLC and Lindgren Development, Inc. (OSCAPPDoc4-01 ASC Exhibit A 2019-10-17 at 6.) Lindgren Development, Inc. is owned by Swinerton, Inc. which also owns Swinerton Renewable Energy (SRE) and Swinerton Builders. (Ex. A3 at 2-4.)

2. Applicant proposes to construct a photovoltaic (PV) solar power generation facility and related or supporting facilities (the proposed facility) in Lake County, Oregon. The proposed facility will consist of up to 3,921 acres and provide a nominal generating capacity of up to 400 megawatts (MW) alternating current (ac) (up to 680 MW direct current (dc)). The proposed facility will have an average generating capacity of up to 200 MWac. (OSCAPPDoc4-01 ASC 2019-10-17 Exhibit-A at A1, and Exhibit-B at B1.)

3. Applicant initially proposed 7,000 acres for potential development across four areas of the proposed facility and associated generation tie (gen-tie) transmission line corridors. After completing necessary resource studies Applicant reduced the site boundary to avoid and minimize impacts to resource. (OSCAPPDoc4-01 ASC 2019-10-17 Exhibit-B at B2.)

4. The proposed facility will consist of up to 1.7 million PV modules (solar panels), using up to 246,444 posts, with 160 transformers, and 160 inverters. (OSCAPPDoc4-01 ASC 2019-10-17 Exhibit-B at B5, see also Figure B-1.)

5. Applicant intends to engage SRE to provide general contractor, design and engineering, and operation and maintenance services for the facility. SRE has built more than

120 solar projects, including at least 18 in Oregon generating in excess of 200 MWac. Seventeen of SRE's solar projects are located in eastern Oregon. (Ex. A3 at 2.)

6. The power generated by the proposed facility will run from a collector substation via an overhead 115-kV gen-tie transmission line to a new 115/500-kV substation near the point of interconnection with the Portland General Electric 500-kV transmission line. The proposed facility will include a double-circuit 115 kV overhead gen-tie transmission line of approximately 2 miles. The gen-tie transmission line will be located in a 60-foot-wide corridor within the site boundary. (OSCAPPDoc4-01 ASC 2019-10-17 Exhibit-B at B10.)

7. The ASC identifies two potential layouts, one with battery storage facilities and one without, within the proposed facility footprint. Applicant estimates construction of the proposed facility will take approximately two years to complete. (OSCAPPDoc4-01 ASC 2019-10-17 Exhibit-B.)

8. The proposed facility will include approximately 50 miles of internal and perimeter road. The proposed facility will also include approximately 18 miles of 7-foot high perimeter fencing. (OSCAPPDoc4-02 ASC Exhibit B 2019-10-17 at 7, 11, and 13.)

9. The site of the proposed facility includes geographic areas referred to as Area A and Area D, along with the designated transmission line corridor. Within the boundary of the proposed facility, approximately 332 acres are identified as avoidance areas where no disturbance will occur due to the sensitivity of environmental resources. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 15, 17.)

10. The proposed facility is approximately 10 miles east of the unincorporated community of Fort Rock and 6 miles northwest of Christmas Valley, which is also an unincorporated community in northern Lake County, Oregon. Area A contains approximately 3,900 acres, located primarily on private land with some overlap on approximately 640 acres of public land currently owned by the Oregon Department of State Lands (DSL). Oil Dri North Road runs along the eastern border of Area A as well as a portion of the northern border. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 15.)

11. The proposed facility is located in Oregon's high desert. The soils in the area of the proposed facility site consist primarily of ashy loamy sand / fine sand. Those soils fall within hydrologic soil groups A and B, indicating a low to moderately low runoff potential when saturated due to the free transmission of water through the soil. (OSCAPPDoc4-09 ASC Exhibit I 2019-10-17 at 6-7.)

12. Soils within the proposed facility site belong predominantly to wind erodibility group 1, indicating they are most susceptible to erosion from wind. (OSCAPPDoc4-09 ASC Exhibit I 2019-10-17 at 6-7.)

13. The soil erodibility factor for the predominant soils within the proposed facility site range from 0.2 to 0.28, indicating a moderate level of water erosion potential. (OSCAPPDoc4-09 ASC Exhibit I 2019-10-17 at 6-7.)

14. According to the National Resource Conservation Service (NRCS), the predominant soil types within the proposed facility belong to land capability class VI. Class V through VIII soils with no history of irrigation are considered non-arable and are not suitable for cultivation. (OSCAPPDoc4-09 ASC Exhibit I 2019-10-17 at 8-9; *see also* Exhibit K 2019-10-17 at 7.)

15. Within the proposed facility, Area A will contain the solar panel blocks, battery storage enclosures, inverter/transformer units, collector substations, above and belowground electrical collection system, and operations and maintenance buildings, all within the perimeter fencing. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 15.)

16. Area D is approximately two miles west of Area A and is located on about 44 acres of private land. The 115/500 kV step-up substation and point of interconnection will be included in Area D of the proposed facility. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 15.)

17. Primary access to Area A would be provided from Oil Dri Road (County Road S-14 G), a local access road that provides connection between Christmas Valley Road and Country Road 5-12 A. Secondary access to Area A would be located north of County Road 5-12A. Primary access to Area D would be provided from Connley Lane (County Road 5-10 C). (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 13.)

18. Internal roads would be a minimum of 12 feet in width; the perimeter road would be 20 feet wide with additional space to provide at least a 30-foot, noncombustible, defensible space clearance to help prevent the spread of any fires from within or outside of the site boundary. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 13.)

19. The proposed facility will include a double-circuit 115 kV transmission line, extending approximately one-half mile within a private property transmission easement and approximately one and one-half miles within the existing right-of-way for Connelly Lane, connecting Area A to Area D. The Department's Proposed Order requires that the private property easement must be secured prior to start of construction. The proposed transmission line will be supported by approximately 37 monopole structures, up to 6 feet in diameter, spaced approximately 300 feet apart, and approximately 70 feet in height. The supports will be set on concrete foundations up to 20 feet deep, which may have directional anchoring system structures. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 14-18.)

20. Richard Morehouse owns approximately 3,000 acres of the propose facility site. The portion of the proposed facility site owned by Mr. Morehouse has no water right for irrigation. Without irrigation water, the majority of Mr. Morehouse's land is of little to no value for commercial agriculture or grazing. Mr. Morehouse is unable to obtain water rights for irrigation on the property due to a permanent moratorium on new irrigation rights in the area in place since approximately 1984. (OSCAPPDoc4-35 DPO Public Comment Morehouse 2020-07-20; Ex A5 at 2.)

21. Applicant anticipates having a rolling construction schedule, with modest construction activities in the beginning, increasing to an average rate of 0.8 MW per day. Over the course of the estimated two year construction schedule, Applicant expects to have crews working on approximately 60-acre sections at any given time. (OSCAPPDoc4 02 ASC Exhibit B 2019-10-17 at B-1; OSCAPPDoc4 21 ASC Exhibit U 2019-10-17 at U-2.)

22. Applicant intends to mow vegetation in solar module installation areas to within 6 inches of the ground surface, rather than grading the site, or to allow construction vehicles to drive on and crush vegetation in the site, leaving the root system intact. Posts for supporting the solar panels will be driven into the soil hydraulically. Construction activities are not likely to have an adverse impact on soil compaction. (OSCAPPDoc4-09 ASC Exhibit I 2019-10-17 at 12-13.)

23. Removal of native vegetation and disturbance of surface soil is likely to exacerbate wind erosion of soils within the proposed facility site during the construction period and sometime thereafter until vegetation can be reestablished. Solar panels and support posts will likely serve as impediments to wind shear, reducing soil erosion to some degree. (OSCAPPDoc4-09 ASC Exhibit I 2019-10-17 at 14.)

Special advisory group appointment and identification of applicable substantive criteria.

24. For small solar projects in Lake County, the county has jurisdiction to review and, if it chooses, approve a project under the LCZO. Larger projects such as the proposed facility fall within the jurisdiction of EFSC. (Ex. A15 at 3.)

25. Because the proposed facility will be located within Lake County, EFSC designated the Lake County Board of Commissioners (LCBC) as the Special Advisory Group (SAG), required by ORS 469.480(1), on February 23, 2018. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 46; OSCNOIDoc4-2 Lake County Special Advisory Group Appointment Order 2018-02-23; Ex. A15 at 3.)

26. On March 29, 2018, the SAG identified the following articles and sections of the LCZO as applicable substantive criteria for the ASC:

Article 3 Agricultural Use Zone: A-2:

Section 3.02 Permitted Uses – Subsection C;

Section 3.04 Conditional Uses – Subsection B;

Section 3.05 Dimensional Standards – Subsections F, G and H;

Article 18 Significant Resource (SR) Combining Zone:

Section 18.05 Reduced Preservation Review Criteria – Subsection D;

Article 20 Supplementary Provisions:

Section 20.01 Supplementary Provisions;

Section 20.08 Vision Clearance Area;

Section 20.09 Riparian Habitat – Subsections A, B and C;

Section 20.12 Fences;

Section 20.13 Compliance with and Consideration of State and Federal Agency Rules and Regulations;
Article 24 Conditional Uses:
Section 24.01 Authorization to Grant or Deny Conditional Uses – Subsections A;
Section 24.18 Renewable Energy Facilities;
Section 24.19 Criteria for Nonfarm Uses, Excluding Farm Related or Accessory Uses, in an A-1 or A-2 Zone[.]

(OSCNOIDoc14-3 Lake County SAG Comments 2018-03-29; *see also* OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 46-47.)

27. In addition, the SAG identified select provisions of the Lake County Comprehensive Plan (LCCP) as applicable substantive criteria applicable to the ASC as follows:

Goal 2 Planning Process – Policies 17 and 18;
Goal 3 Agricultural Lands – Policy 12;
Goal 5 Open Space, Scenic and Historic Areas and Natural Resources – Policies 3, 4, 5, 8, 10, 13, 14 and 16;
Goal 6 Air, Water and Land Resource Quality – Policies 1, 3, 4, 5 and 11;
Goal 9 Economic Development – Policies 1, 6 and 8;
Goal 11 Public Services and Facilities – Policies 1, 4 and 6;
Goal 12 Transportation – Policy 8;
Goal 13 Energy Conservation – Policies 1 and 3;
Goal 14 Urbanization – Policy 9[.]

(OSCNOIDoc14-3 Lake County SAG Comments 2018-03-29; *see also* OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 47.)

28. The LCBC appointed Darwin Johnson, Director of the Lake County Planning Department (LCPD), as the contact person for purposes of its SAG obligations to EFSC and the Department. The LCBC authorized Mr. Johnson to respond to all inquiries on its behalf. (Ex. A15 at 3; *see also* OSCNOIDoc14-3 Lake County SAG Comments 2018-03-29 at 3.)

29. Mr. Johnson has served as the Director of LCPD for more than 10 years. In that role, he provides technical assistance to the Lake County Planning Commission (LCPC) and the LCBC. Mr. Johnson is responsible for the administration and implementation of the LCZO and LCCP, as well as the review of land use and land division applications. LCZO contains siting criteria for renewable energy facilities within Lake County. (Ex. A15 at 2.)

Land use, statewide and local planning goals.

30. The land upon which Applicant proposes to construct the facility is zoned for agricultural use (A-2). Under the LCZO, the purpose of A-2 zoning is to preserve grazing and other agricultural uses on the land. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 47.)

31. The LCCP establishes the county's overarching policy choices and the LCZO implements those policies. According to the SAG, Lake County has approved multiple solar energy projects. In doing so, LCBC primarily relies upon the LCZO which, in its interpretation, implements the LCCP. (OSCNOIDoc14-3 Lake County SAG Comments 2018-03-29; Ex. A15 at 3-4.)

32. According to the SAG, the LCCP is not directly applicable to conditional land use applications unless the SAG identifies one or more provisions of the LCCP as applicable criteria for a particular land use application. In determining which, if any, provisions of the LCCP constitute applicable criteria, the LCPC considers multiple factors such as the nature of the conditional use proposed, the project location, the resource designation of the proposed location, and the inventoried resources at that location, if any. (Ex. A15 at 5.)

33. In the opinion of the SAG, only those policies specifically identified through comments provided on March 29, 2018, constitute applicable criteria for the ASC. From the SAG's perspective, neither Applicant nor the Department were required to evaluate compliance with provisions of the LCCP not identified as applicable criteria. (Ex. A15 at 6.)

34. The SAG reviewed Exhibit K to the ASC and determined that Applicant and the Department properly addressed all applicable criteria from the LCCP identified on March 29, 2018 and correctly determined compliance with LCZO §24.01(A)(1). (Ex. A15 at 6; test. of Johnson.)

35. According to Mr. Johnson, the LCPC is required to weigh various factors when making a determination of suitability for non-farm use on agricultural lands. In this matter, the LCPC previously found the proposed facility site unsuitable for agricultural uses, due to poor soil conditions and a moratorium on water rights, when it approved two smaller solar projects proposed to be located on the same land owned by Mr. Morehouse. (Ex. A15 at 9.)

36. The LCPC determined Applicant properly inventoried accepted farming practices in the area surrounding the proposed facility site and identified potential impacts to those practices. The LCPC also determined that the ASC, as conditioned in the Department's Proposed Order, adequately addresses potential impacts through proposed minimization and mitigation techniques. (Ex. A15 at 8.)

37. Based on the size of the proposed facility, Applicant understood an exception to Statewide Planning Goal 3 (Goal 3) would be required. In the ASC, Applicant stated its purported reasons justifying the exception as:

The proposed facility will not have significant adverse impacts on accepted farm use within the surrounding area (referred to as the analysis area). According to the ASC, the following reasons justify removing approximately 3,900 acres within the proposed facility site for a defined period of time to promote other policies of importance within the county and across the state and region:

- The Goal 3 exception does not seek to permanently remove land from agricultural use. Per the terms of the lease and the proposed Site Certificate conditions, the land would be returned to agricultural use following retirement and restoration of the Facility.
- Up to 3,921.3 acres of solar generation promotes rural economic development by creating jobs and adding to the tax base of Lake County. For additional information, refer to “Economics” under Section K.5.4.2.
- The availability of reliable renewable energy that will be produced by the solar array will help attract, recruit, and retain energy-dependent businesses to Oregon that have renewable energy procurement policies.
- The Facility will promote the renewable energy policies of Lake County and support the Lake County Resources Initiative.
- The land within the Facility site boundary is of low value for agricultural production given the quality of the underlying soils and the lack of available irrigation water rights. The temporary loss of this land is insignificant when considering the other available agricultural land in Lake County[.]
- Oregon’s Renewable Portfolio Standard (RPS) establishes a requirement for how much of Oregon’s electricity must come from renewable resources like solar. The current RPS is set at 50 percent by 2040. In addition to Oregon’s RPS, private companies have their own renewable energy procurement policies, which increase the demand for renewable energy in Oregon. These public and private policies are intended to reduce greenhouse gas emissions, mitigate climate impact, and reduce reliance on carbon-based fuels. Solar generation, like the proposed solar array, helps further these public and private policies and outweigh temporarily removing up to 3,921.3 acres from Goal 3 protection.

(OSCAPPDoc4-11 ASC Exhibit K 2019-10-17 at 37-38.)

38. To address concerns of environmental impacts from the proposed facility, Applicant referred Council to exhibits filed with the ASC including I (Soils), J (Wetlands), P (Fish and Wildlife), Q (Threatened and Endangered Species), as well as portions of Exhibit U (Public Services) pertaining to wastewater and storm water. (OSCAPPDoc4-11 ASC Exhibit K 2019-10-17 at 38-39.)

39. With regard to economic impacts of the proposed facility, the ASC states, in part:

* * * The Facility will contribute to the rural economic development and add to the tax base in Lake County, and thus the economic consequences associated with removing these acres from agricultural use will not rise to the level of [“]significant.[”] Based on 2012 Census data, Lake County has 657,055 acres in farms, with approximately 67 percent in pastureland, 20 percent in cropland, and

the remainder in woodland or other uses * * *. The Facility will use, for the life of the project, approximately 3,921.3 acres of land that otherwise would be used for occasional grazing and thus considered agricultural. This amounts to only 0.32 percent of the privately owned land in the county, or 0.6 percent of the acres in farms while adding to the Lake County tax base. Further, the underlying landowners will benefit from the lease payments for the acreage. In addition, approximately 150 new temporary jobs will be created on site during construction, and 6 to 10 new permanent jobs during operation, and indirect benefits come from construction workers living, eating, and working in the vicinity.

Applicant has negotiated a Strategic Investment Program (SIP) Agreement with Lake County dated December 5, 2018. Under the SIP Agreement, for the first 15 years, the first \$50,000,000 in real market value is taxable at its assessed value (plus an annual three percent increase). During that 15-year period, the Facility owner will pay to the County an annual Community Service Fee (CSF) of \$2,000 per MWac of nameplate installed capacity. If the Facility is fully built-out at 400 MWac nameplate installed capacity, the total annual CSF would be \$800,000, or a total of \$12 million over the applicable 15-year period. Over the life of the Facility, total tax revenue plus in lieu of tax revenue *[sic]* is estimated to be about \$30 million. In addition, the project has committed to making a one-time contribution on behalf of the North Lake County School District of up to \$4 million (\$10,000 per MWac capacity).

(OSCAPPDoc4-11 ASC Exhibit K 2019-10-17 at 39.)

40. With regard to potential social consequences of the proposed facility, the ASC states in part:

[T]he solar array, will not adversely impact protected areas * * * scenic resources, cultural resources, [or] recreation * * * with existing Site Certificate conditions, the solar array will not result in adverse impacts on public or community services such as health care, education, housing, water supply, waste disposal, transportation, or fire and safety.

(OSCAPPDoc4-11 ASC Exhibit K 2019-10-17 at 39-40.)

41. Applicant also pointed out that the significant amount of energy to be produced by the proposed facility will generate reliable renewable energy for sale to the public and promote Oregon's commitment to rural economic development. (OSCAPPDoc4-11 ASC Exhibit K 2019-10-17 at 40)

42. Rather than seek local land use approvals from LCPC, Applicant elected to seek a determination from Council as to the allowable use under 345-021-0010(1)(k)(C). (OSCAPPDoc4-11 ASC Exhibit K 2019-10-17 at 10.)

43. While Mr. Johnson recognizes that, in this instance, determination of appropriateness of an exception to Goal 3 falls within Council's jurisdiction, based on his prior experience, Mr. Johnson believes Applicant provided sufficient reasons in the ASC to justify an exception to Goal 3. (Ex. A15 at 9.)

44. Upon review of the information in the ASC, the Department determined Applicant provided sufficient reasons to justify the requested Goal 3 exceptions. Specifically, the Department determined the proposed facility, as conditioned, would have minimal impacts on agriculture in the area and would provide local economic benefits. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 76-77.)

45. The Department also determined the proposed facility has been designed to avoid and where necessary, to mitigate impacts to soils, wetlands, fish and wildlife habitats, and threatened and endangered species through proposed conditions and recommended Council find that the proposed facility, as conditioned in the Departments Proposed Order, would not cause significant adverse environmental impact. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 79.)

46. The Department also determined, based on the totality of the ASC and as conditioned, the proposed facility would not have significant adverse economic impacts on public or private services based, in part, on the significant economic benefits to be realized by the community. The Department also determined that the ASC, as conditioned, demonstrated the proposed facility would not cause significant adverse social or energy consequences. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 80-81.)

47. Finally, the Department found the proposed facility would be compatible with accepted farm practices and that the economic benefits of the proposed facility would offset potential impacts to non-arable land. In addition, the Department determined any potential impacts to adjacent farm practices would be limited to temporary construction impacts associated with dust, construction-related traffic, and increases in local population and resource demand during the two-year construction period, and that such impacts would be minimized through compliance with the Department's proposed conditions. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 81.)

The limited parties' real property and business operations and related concerns.

48. For approximately 28 years, Leeroy and Nancy Horton have owned and operated a farm consisting of approximately 2,400 acres located at 58818 N. Oil Dri Rd., Christmas Valley, Oregon (Horton property). In addition, Mr. Horton manages another 2,240 acres in the same vicinity for Dave Hogan, principal of Misty Meadow Dairy in Tillamook, Oregon. The proposed facility site borders approximately 1,400 acres of the Horton property. (Ex. R2 at 1, 4.)

49. Mr. Hogan grows alfalfa, grain, and grass hay. Mr. Hogan holds organic certifications on approximately 940 acres of his property. He also raises livestock including approximately 4,000 sheep and 100 cows/calves. (Ex. R2 at 1, 8, and 10.)

50. Hay produced on the Horton property is often exported to Japan and South Korea, due to its high quality. Annual revenue from hay production on the property averages approximately \$885,000. Annual revenue from livestock production on the Horton property averages about \$500,000. (Ex. R2 at 10.)

51. Like the proposed facility site, the Horton property is situated in Oregon's high desert. Operating an agriculture business in the area of the Horton property presents significant challenges including high winds, blowing dust, and limited water availability. High winds often create significant amounts of airborne dust that obscures visibility on private land and public roads on and near the Horton property. After a significant wind event, Mr. Horton often finds dust and dirt covering his hay, barns, and livestock pastures. (Ex. R2 at 1-2, 5.)

52. Damage to crops on the Horton property from blowing dust include loss of new leaves for emergent alfalfa seedlings, which results in loss of production at harvest. Significant wind events can shear new alfalfa seedlings from the soil completely, resulting in a need to replant at least a portion of the crop. Mr. Horton has experienced such losses from high wind dust blows several times during the 28 years he has farmed the property. (Ex. R2 at 6-7.)

53. Mr. Horton believes the dust control measures proposed by Applicant in the ASC are insufficient to control fugitive dust from escaping the proposed facility site. He is concerned that the anticipated increase in airborne dust will negatively impact his farming operations by causing health problems for livestock and reduced crop yields for feed and market crops. (Ex. R2 at 5, 10.)

54. Mr. Horton is also concerned that construction on the proposed facility site will result in the introduction of or increase to invasive weed species, including non-native weeds such as Russian thistle. Mr. Horton believes Applicant will need to employ chemical retardants to control invasive weed species and is concerned that such chemicals will drift onto his neighboring fields resulting in a loss of organic certification on portions of the Horton property. Mr. Horton calculated the economic impact of such a loss to be approximately \$275 per acre per growing season, or about \$258,500 per season. Mr. Horton determined it may take a minimum of three years, under optimal conditions, to regain the organic certification. (Ex. R2 at 7-8.)

55. Mr. Horton is also worried that construction of the proposed facility will result in displacement of rodents in the area, including jackrabbits. Mr. Horton believes that eliminating the sagebrush within the proposed facility site will drive the jackrabbit population in that area to his fields and barns for shelter and food. (Ex. R2 at 11.)

56. In prior years, Mr. Horton has observed jackrabbits driven onto his property by decreasing temperatures. On more than one such occasion, Mr. Horton observed more than 800 jackrabbits migrate onto his property and eat crops and hay from fields, barns, and feed bunkers causing significant damage and contamination through fecal matter left behind. (Ex. R2 at 7-8.)

57. Mr. Horton also has significant concerns about the potential temperature increase on and near the proposed facility site, due to a perceived "heat island" effect that Mr. Horton believes will be caused by the large number of solar panels. Mr. Horton is concerned that heat

absorbed by the solar panels will increase nighttime temperatures over the proposed facility site, reducing moisture in the air and similarly the morning dew upon which Mr. Horton relies to grow high-quality alfalfa. (Ex. R2 at 12-13.)

58. Mr. Horton's conclusions are derived, in large part, from a study conducted by Barron-Gafford, *et al.*, (2016, October) The Photovoltaic Heat Island Effect: Larger solar power plants increase local temperatures, *Scientific Reports*. (Ex. R2 at 13; see also OSCAPDoc4-24.2 DPO Public Comment_Reeder and Fort Rock Neighbors 2020-07-20 at 19-25.)

59. Greg Barron-Gafford, PhD is an earth scientist and bio-geographer. He currently serves as a professor and Associate Director of the Community and School Garden Program at the University of Arizona's School of Geography, Development and Environment. (Ex. A4 at 2; test. of Barron-Gafford.)

60. Dr. Barron-Gafford leads a team of graduate students studying the effects of vegetation and climate change on plant and ecosystem functions. As a component of this field of study, Dr. Barron-Gafford and his team study how semi-arid plants and ecosystems respond to threats from drought, climate change, livestock grazing, and human pressures such as the introduction of renewable energy production. (Ex. A4 at 2; test. of Barron-Gafford.)

61. Dr. Barron-Gafford and his team produced the first experimental and empirical examination of the presence of a heat island effect associated with photovoltaic power plants, which has been cited by Mr. Horton in this matter. The majority of projects studied by Dr. Barron-Gafford had been located in environments similar to the proposed facility site. (Ex. A4 at 3-14.)

62. Based on his experience and study results, Dr. Barron-Gafford found no evidence to support Mr. Horton's concerns regarding negative impacts on morning dew or overall moisture content in the air surrounding the proposed facility site. According to Dr. Barron-Gafford, any heat island effect created by a solar array dissipates in the evening as the panels cool and the warm air immediately above the array mixes with cooler evening air, resulting in no loss of overall moisture content in the air. Thus, according to Dr. Barron-Gafford, relative humidity in the early morning hours would remain unchanged. (Ex. A4 at 6-7; test. of Barron-Gafford.)

63. In or about 2018, Mr. Horton offered to purchase 800 acres of the proposed facility site owned by Mr. Morehouse to incorporate into his farming and ranching operations. Mr. Horton believes he could have obtained a new water right or transferred one of his own existing water rights for irrigation on the Morehouse property. (Ex. R2 at 14.)

64. David and Rita Hogan own Golden Acres, an agricultural operation abutting the proposed facility cite and currently managed by Mr. Horton. Golden Acres produces feed for Misty Meadow Dairy. (Ex. R8 at 1.)

65. In Mr. Hogan's experience, one of the most significant challenges to farming in Christmas Valley is damage to crops caused by sage rats and rabbits. Mr. Hogan fears that

construction of the proposed facility will drive rabbits and rats to move onto his adjacent farmlands while simultaneously driving their natural predators, coyotes, away from those lands, thereby increasing rodent populations in the area. (Ex. R8 at 1.)

66. Mr. Hogan understands the portion of the proposed facility site abutting his property and currently owned by Mr. Morehouse lacks water rights. Nonetheless, Mr. Hogan believes the land can still be put to productive agricultural uses. (Ex. R8 at 2.)

67. Mr. Hogan also apprehensive about construction of the proposed facility because he believes it will create increased airborne dust that will migrate onto his farmland and suffocate his crops. (Ex. R8 at 2.)

68. Jeremiah and Miriam Thorsted own a residence located at 60151 Oil Dri Rd. in Christmas Valley. Mr. and Mrs. Thorsted raise and manage livestock, including lambs and cattle, and grow alfalfa on approximately 1,200 acres leased from Mrs. Thorsted's parents, Mr. and Mrs. Horton. (Exs. R6 at 1 and R7 at 1.)

69. Mrs. Thorsted is concerned about the impact of increased dust from construction of the proposed facility on livestock. Mrs. Thorsted fears that fugitive dust will cause respiratory and other health problems for livestock, resulting in reduced market value. Mrs. Thorsted is also concerned that increased dust in the area will impact the purity of wool harvested from lamb operations near the proposed facility. (Exs. R6 at 2 and R7 at 2.)

70. Moreover, Mrs. Thorsted believes increased dust from construction of the proposed facility will also have negative impacts on herself, her family, and employees due to intrusions into their land and homes. (Ex. R7 at 2.)

71. Mrs. Thorsted is also concerned that removing sagebrush from the proposed facility site will cause coyotes to migrate onto closer to her family's livestock operation, posing increased risks to both livestock and herding dogs used in the operation. (Ex. R7 at 2.)

72. Between May and October of each year, Mr. and Mrs. Thorsted and/or their employees routinely move large farming equipment to various plots in the area around the proposed facility site. Mr. Thorsted is concerned that increased construction traffic on local roads will hamper their ability to move large farming equipment safely and efficiently. (Ex. R6 at 2.)

73. Jerald Simmons owns a residence located at 61040 N. Oil Dri Rd., approximately one mile to the north and east the proposed facility site. Mr. Simmons' residence is situated in an elevated location that provides a view of the valley below, which includes the proposed facility site. Mr. Simmons has resided at this residence for approximately five years. He has been a resident of Christmas Valley for over 20 years. (Ex. R3 at 1.)

74. Mr. Simmons is concerned that the increased dust created by construction of the proposed facility will impair visibility on local roads, including the portion of N. Oil Dri Road adjacent to his residence. (Ex. R3 at 2.)

75. Mr. Simmons is also concerned that the increased construction traffic on N. Oil Dri Rd. and other county roads will cause significant degradation to those roads. Mr. Simmons believes Lake County lacks sufficient funds to manage the likely road damage. (Ex. R3 at 2.)

76. Mr. Simmons is also worried that, because significant portions of N. Oil Dri Rd. is unpaved, increased traffic will result in reduced visibility posing increased safety risks to local residents and farming operations that rely on that road. (Ex. R3 at 2.)

77. Mr. Simmons is also troubled by the potential displacement of large wildlife species, such as elk, that typically migrate through the proposed facility site. (Ex. R3 at 2.)

78. Patrick Barker own property located at 61210 Oil Dri Rd. The proposed facility site is approximately one-half mile west and three-quarter miles south of Mr. Barker's property. Mr. Barker is concerned that the proposed facility will negatively impact his property values by reducing the current natural viewshed. (Ex. R4 at 1.)

79. Mr. Barker is also concerned that increased traffic during construction of the proposed facility will negatively impact local county roads, including N. Oil Dri Rd. through degradation of paved surfaces and increase danger due to dust on unpaved road segments. (Ex. R4 at 1.)

80. Mr. Barker also has concerns about wildlife displacement into areas surrounding the proposed facility site. Mr. Barker has previously observed large herds of elk, numbering as high as 350, migrating through the proposed facility site. Mr. Barker believes the proposed facility will divert elk migration onto local roads and farmland, creating safety issues and crop damage. (Ex. R4 at 1.)

81. Larry Turnbow has resided in Christmas Valley since 1965 and has owned property near N. Oil Dri Rd. for approximately 20 years. That property is located about one and one-half miles from the proposed facility site. (Ex. R5 at 1.)

82. Mr. Turnbow is concerned that construction of the proposed facility will result in significant soil disturbance and create a "dust bowl." (Ex. R5 at 1.) Mr. Turnbow also believes that increased construction traffic on N. Oil Dri Rd. and other roads in the vicinity will increase road dust impacting nearby residences and farming operations. (Ex. R5 at 1.)

83. Mr. Turnbow is also concerned that increased construction traffic will damage local roads. Mr. Turnbow believes Lake County lacks sufficient funding to maintain and repair existing local roads. (Ex. R5 at 1.)

84. In addition, Mr. Turnbow has concerns about how the proposed facility will impact local wildlife, particularly elk. Mr. Turnbow has observed large herds of elk on the proposed facility site over the years and believes construction of the proposed facility will drive those animals onto surrounding properties resulting in damage to crops and structures. (Ex. R5 at 1.)

85. Mr. Turnbow is also concerned that the proposed facility will impair the value of his real property by altering the view from a natural to industrial landscape. (Ex. R5 at 1.)

86. Aaron Borrer resides at 67910 Derick Cave Road, Fort Rock, Oregon. He owns and operates Nine Peaks Ranch, a commercial cattle breeding operation located on a combination of owned and leased land approximately one-half mile north of the proposed facility site. Nine Peaks Ranch provides approximately 120 breeding bulls annually to commercial cattle ranchers in Oregon and California. From the bulls provided by Nine Peaks Ranch, Mr. Borrer's customers produce more than 12,000 head of cattle annually. (Ex. R9 at 1.)

87. Each year in October, Nine Peaks Ranch sells its seed stock bulls through a cattle auction held on the property. The auction is held on a single day and typically lasts about two hours. On average, more than 100 ranchers from Oregon and California attend the auction, the proceeds from which make up approximately three-quarters of Mr. Borrer's annual income. (Ex. R9 at 2.)

88. Mr. Borrer is concerned that increased dust from the construction of the proposed facility will have adverse health effects on his cattle. He is also concerned that increased traffic on local roads from construction vehicles may prevent customers from reaching the auction in October. Mr. Borrer believes portions of N. Oil Dri Rd. are unsuitable and unsafe for more than a single large vehicle at any one time. Mr. Borrer is worried that competing traffic interests will result in accidents along narrow stretches of N. Oil Dri Rd., which he uses to transport cattle. (Ex. R9 at 2-3.)

89. Mr. Borrer is concerned about Applicant's plan to fence the entire perimeter of the proposed facility and the resulting impact on migratory elk as they attempt to reach their traditional winter feeding grounds. Mr. Borrer believes the perimeter fencing will force nocturnal elk migrations onto local roads, creating additional traffic safety issues. (Ex. R9 at 4.)

90. Mr. Borrer was interested in purchasing a portion of the proposed facility site currently owned by Mr. Morehouse to use for agriculture. Mr. Borrer understands there are currently no water rights attached to Mr. Morehouse's property and believes he could transfer one of his existing water rights to the property for irrigation. Mr. Borrer refrained from approaching Mr. Morehouse after a neighbor informed him that Mr. Morehouse had signed a lease with Applicant. (Ex. R9 at 4.)

Other residents in the area.

91. Kenneth Hamlington has been a resident of the Fort Rock area since approximately 1992. The following year, Mr. Hamlington purchased irrigated property and began farming hay. Mr. Hamlington farmed hay and raised sheep and horses in the area for more than 20 years, before retiring. (Ex. A10 at 2.)

92. Mr. Hamlington is aware that farming activities in the Fort Rock area generate significant amounts of dust, which he and other farmers in the area have learned to deal with. In

Mr. Hamlington's experience, winds in the area predominantly blow from west and south which leads him to believe dust from Mr. Horton's farming operations are more likely to cause fugitive dust on the proposed facility site than vice versa. (Ex. A10 at 3.)

93. Mr. Hamlington is familiar with the proposed facility site, as he has been married to one of Mr. Morehouse's daughters since 2004. Based on his knowledge and experience, Mr. Morehouse's property is not well suited for cattle grazing because it lacks water and has a high sand content to the soil. Moreover, Mr. Hamlington understands the property has one source of drinking water, located approximately one mile away. (Ex. A10 at 2.)

94. Mr. Hamlington also served on the Lake County Planning Commission for more than 10 years. In that role, he evaluated several proposed solar projects of varying size. Mr. Hamlington believes large-scale solar projects in the area will provide long-term financial benefits from increase tax revenues. (Ex. A10 at 2, 5.)

95. Alan Parks was born and has resided in the Fort Rock area for most of his life. Mr. Parks resides at 59234 Fort Rock Rd., Silver Lake, Oregon. Since 1981, Mr. Parks has farmed alfalfa and raised cattle on land approximately two miles from the proposed facility site. (Ex. A5 at 1-2.)

96. As part of his operation, Mr. Parks farms approximately 1,000 acres of irrigated land. In addition, he grazes cattle on non-irrigated land, at least a portion of which is located within previously designated Area B of the proposed facility site. Mr. Parks also leases land from the U.S. Bureau of Land Management (BLM) for cattle grazing. (Ex. A5 at 2; test. of Parks.)

97. In Mr. Parks' experience, non-irrigated sagebrush land, similar to the proposed facility site, requires more than 100 acres to feed a cow-calf pair through a grazing season. In contrast, an irrigated crop of crested wheatgrass can support a cow-calf pair on as few as 35 acres through a grazing season. Mr. Parks therefore believes the land located within the proposed facility site is of little to no value for cattle grazing because it has no water right and a permanent moratorium on water rights has been in place in the area since 1984. (Ex. A5 at 2-3.)

98. As a farmer in the Fort Rock area, Mr. Parks has experience with rodents and big game in the area, including jackrabbits, ground squirrels, deer, and elk. In his experience, jackrabbit populations fluctuate in the area and are on ongoing issue for farmers. Moreover, Mr. Parks' experience with ground squirrels indicates they prefer to live in the outer edges of irrigated alfalfa fields, rather than surrounding sagebrush habitat. According to Mr. Parks, jackrabbits and ground squirrels are everyday issues that farmers must deal with. (Ex. A5 at 4.)

99. Mr. Parks is also aware that elk in the area tend to migrate toward feed stock, including haystacks on irrigated land. In response, many of the area farmers obtain funding from the Oregon Department of Fish and Wildlife (ODFW) to install fencing to protect haystacks and other crops. In addition, farmer obtain nuisance/damage tags from ODFW to hunt elk on private lands in order to drive herds elsewhere. (Ex. A5 at 4.)

100. In Mr. Parks' experience, dust is a way of life for farmers and ranchers in the area. The process of tilling and planting each quarter section (constituting approximately 160 acres) takes approximately two weeks and generates significant amounts of dust from soil disturbance. (Ex. A5 at 5; test. of Parks.)

101. Mr. Parks is familiar with another solar project developed²⁶ a few years ago for which he initially had concerns over additional dust it might create. In that instance, Mr. Parks opposed the construction methods utilized because the developer graded the entire site, removing all native vegetation, prior to construction. Despite Mr. Parks' initial concerns, he found that the project did not generate significant amounts of dust on neighboring properties. (Ex. A5 at 5.)

102. Based on his experience with other solar projects, Mr. Parks believes the proposed facility will be compatible with existing agricultural practices in the area. Mr. Parks also believes that using unproductive agricultural land to generate electricity through solar power will provide benefits to the surrounding communities by increasing county tax revenue that will flow to local schools, healthcare facilities, emergency services, and infrastructure projects such as road improvements. (Ex. A5 at 2-3.)

103. Tom Andrews is a resident of Lake County and has served as the Lakeview Airport Manager, Lake County for approximately eight years. Mr. Andrews is familiar with Applicant and its contractor, Swinerton, through development of the Airport Solar project, constructed on airport property and completed in 2019, and an adjacent project constructed on private lands around the same time. Mr. Andrews has served as the primary contact for Lake County during construction and operation of the Airport Solar project. (Ex. A8 at 1-2.)

104. In Mr. Andrews' experience, both Applicant and Swinerton have proven to be good community partners by maintaining good communication with the community and compliance with construction obligations. (Ex. A8 at 2.)

105. Though located next to an airport and agricultural land, Mr. Andrews has observed no negative impacts from construction or operation of the Airport Solar project on adjacent lands. (Ex. A8 at 2.)

106. James Walls is a resident of Lake County and the founding Executive Director and current Chairman of the Board for the Lake County Resources Initiative (LCRI), which seeks to improve prosperity in Lake County through renewable energy projects including large utility-scale development and smaller scale projects for use of by local farms, ranches, homes, and businesses. LCRI has assisted with design and development of more than 85 renewable energy projects within the county resulting significant savings for community members. (Ex. A6 at 1.)

107. LCRI favors solar development projects that are compatible with agricultural uses in the surrounding community. Those developments include projects on unproductive, non-irrigated sagebrush lands, such as the proposed facility site, that allow local farmers and ranchers to diversify their income streams in order to focus on more productive agricultural lands. (Ex.

²⁶ The location of this project was not specified in the record.

A6 at 2.)

108. In Mr. Walls' experience, solar development projects bring significant tax revenue and create well-paying jobs within the community. In his experience, approximately 75-80 percent of all labor in such projects is derived from local residents. (Ex. A6 at 2.)

109. Mr. Walls is familiar with Applicant and its contractor, Swinerton, through previous development projects, including Black Cap Solar. In his experience, both Applicant and Swinerton have proven to be good community partners in Lake County. (Ex. A6 at 2; test. of Walls.)

110. In addition to providing jobs and increased tax revenue to the local community, Applicant developed programs for Lakeview High School providing operational data for use in math and engineering courses. Moreover, Applicant worked with LCRI to construct a barn on the Black Cap project for use by students of the FFA/4-H programs who did not have land upon which to raise their own livestock. The facility was powered by energy generated by the Black Cap project. (Ex. A6 at 2.)

111. In the past, LCRI has opposed solar development projects it determined were not consistent with community goals within Lake County. (Ex. A6 a 3.)

112. Nicholas Johnson is a resident of Lake County and the current Executive Director of LCRI. Mr. N. Walls also has prior experience with Applicant through development of other solar projects in the area. In Mr. Johnson's experience, Applicant provides jobs with good salaries to local residents and works hard to address concerns raised by community members. (Ex. A7 at 1-2.)

113. Mr. Johnson believes the proposed facility will create economic benefits to the surrounding community through increased tax revenues, which in turn will assist with needed improvements to public services including health and emergency services, funding for local schools, and funds for local road maintenance. Mr. Johnson also believes the proposed facility is in line with Lake County's goal to become a renewable energy exporter. (Ex. A7 at 2.)

State and local agency input.

114. As part of the application and DPO process, ODOE invited comment from various state agencies and local entities. In response to the DPO, ODOE received comments from the State Historic Preservation Office (SHPO), the Oregon Department of Aviation (ODA), ODFW, the designated SAG, and the Fort Rock/Silver Lake Soil and Water Conservation District (SWCD). (OSCAPPDoc4 DPO Comments-All Combined 2020-03-13 to 2020-07-20 at 4, 7, 26, 31, 40, 41, 243,-245, 247-249, 253, 254, and 257.)

115. In 2017, ODFW Statewide Energy Coordinator Sarah Reif and Wildlife Biologist Jon Muir reviewed portions of the ASC, including Applicant's plans for habitat mitigation and control of noxious weeds, and met with Applicant and the Department to advise on appropriate biological surveys, habitat categorization, site-specific impacts and considerations, and habitat

mitigation planning in accordance with ODFW's Wildlife Habitat Mitigation Policy. (Amended Ex. D1 at 1-3.)

116. According to ODFW data, elk and mule deer travel through the proposed facility site on their way to feeding and rest grounds on either side of the Fort Rock Valley. ODFW is aware that elk traveling through the area pose a nuisance to local agricultural operations on private lands. ODFW responds to such issues in a variety of ways including assistance with alfalfa seed purchases for farmers whose crops are damaged, haystack fencing and netting to protect harvested hay, and hunting tags designed to pressure elk herds to move away from agricultural lands. (Amended Ex. D1 at 5-7.)

117. According to ODFW, Applicant's proposed habitat mitigation site is within herd range for potentially affected mule deer and elk. (Amended Ex. D1 at 7.)

118. No public entity filed a petition for party status in this matter. (*See Order on Petitions for Party Status and Issues for Contested Case* issued February 8, 2021 at 1-2.)

Erosion and sediment control plan.

119. Applicant was required to obtain coverage under the National Pollutant Discharge Elimination System (NPDES) General Permit 1200-C from DEQ for storm water discharge to surface waters from its construction activities on the proposed facility site. (OSCAPPD04-09 ASC Exhibit I at 18 and 27-28.)

120. As part of the NPDES 1200-C permit application, Applicant submitted an Erosion and Sediment Control Plan (ESCP) that outlined the measures and best management practices (BMPs) Applicant would employ to minimize soil erosion on the proposed facility site. Among those measures, Applicant proposed in relevant part:

- **Limit Disturbance Areas:** Applicant will limit soil disturbance from grading, excavation, drilling, and pile driving solely to what is required for the safe construction and operation of the Facility.
- **Erosion Control BMPs/Measures:** Applicant will use silt fencing, hay bales (certified weed-free), fiber rolls, or other methods to avoid or reduce erosion and sediment transport, as described in the ESCP.
- **Restoration of Temporary Work Areas:** Temporary roads or work areas not otherwise needed for maintenance and operations will be restored to pre-construction conditions, to the extent practicable.
- **Minimize Open Excavations:** Applicant will minimize the amount of time that any excavations remain open and/or unprotected from erosion. Stockpiles, spoils piles, and other unvegetated areas will be covered with erosion-control fabric as necessary.
- **Fugitive Dust Control:** Applicant will control fugitive dust in accordance with DEQ regulations. Water will be sprayed on areas with exposed or destabilized soils to suppress wind erosion. As much as is feasible, vehicles

will drive on established access roads with stabilized soils. Work will be halted during especially windy times.

* * * * *

- **Stabilize Construction Entrance and Exit:** Applicant will stabilize the entrance and exit points for the Facility site to avoid or reduce the soil transport onto paved county roads.
- **Speed Limit:** Applicant will impose a 15 mile per hour speed limit within the site boundary to reduce dust emissions, maintain safety, and protect wildlife.
- **Minimize Soil Compaction:** Applicant will minimize compaction of soils and rutting through appropriate use of construction equipment (e.g., low ground-pressure equipment and temporary construction mats).

* * * * *

- **Noxious Weed Control:** Applicant will identify, control, and minimize the spread of non-native invasive species and noxious weeds, to the extent practicable, as described in the Revegetation and Noxious Weed Control Plan * * *. All vehicles and construction equipment will be cleaned of noxious weed seeds or other plant parts before arriving on the Facility site. Vehicle washing will occur in designated areas within the site boundary only.

(OSCAPPDoc4-09 ASC Exhibit I at 18 and 29-40; emphasis in original.)

121. Section 2.2.20 of the NPDES 1200-C permit requires Applicant to stabilize exposed portions of the proposed facility site and provides:

Implement and maintain stabilization measures (e.g., seeding protected by erosion controls until vegetation is established, sodding, mulching, erosion control blankets, hydromulch, gravel) that prevent erosion from exposed portions of the site. Initiate the installation of temporary stabilization measures (e.g. blown straw and a tackifier, loose straw, compost mulch, temporary vegetative cover, crushed rock or gravel base), final vegetation cover, or permanent stabilization measures immediately whenever any land disturbing activities have permanently ceased or will be temporarily inactive on any portion of the site for 14 or more calendar days. Document the day the activities cease and the location on site in the visual monitoring report (see Section 6.5.e). Complete the installation of stabilization measures as soon as practicable, but no later than seven calendar days after stabilization has been initiated.

(Ex. D2 at 2.)

122. In addition, the NPDES 1200-C permit provides final stabilization criteria for

soils within the proposed facility site not covered by permanent structures and reads:

Prior to permit termination, registrants must:

- a. Establish uniform (i.e., evenly distributed, without large bare areas) perennial vegetation that provides 70 percent or more cover on all exposed areas.
Limited allowable exceptions include:
 - i. For sites where it is difficult to establish 70 percent coverage (e.g. arid, semiarid, or drought stricken areas), the registrant must cover exposed soil between planted or seeded areas with bio or photo degradable controls designed to prevent erosion without active maintenance, or propose a site-specific plan to DEQ for approval.
 - ii. Disturbed areas on farm use land as defined in ORS 308A.056 (e.g. pipelines across crop or range land, or staging areas for highway construction) that are restored to their preconstruction farm use are not subject to final vegetative stabilization criteria.
 - iii. Stabilization may not be required if the intended function of a specific area of the site necessitates that it remain disturbed, and only the minimum area needed remains disturbed (e.g., dirt access roads, utility pole pads, areas being used for storage of vehicles, equipment, materials)
- b. Implement temporary bio or photo-degradable non-vegetative stabilization measures (e.g. mulch or rolled erosion control products) to provide effective cover while vegetation is being established, to prevent erosion of the seeded or planted area;
- c. Ensure that final vegetative cover or permanent stabilization is established before temporary sediment controls are removed unless doing so conflicts with local requirements;
- d. Ensure there is no reasonable potential for discharge from the site of construction-related sediment or turbidity to surface waters;
- e. Remove and properly dispose of all construction materials, waste and waste handling devices, and remove all equipment and vehicles that were used during construction, unless intended for long-term use following the termination of permit coverage;
- f. Remove all temporary stormwater controls that were installed and maintained during construction, except those that are intended for long-term use following the termination of permit coverage;

- g. Remove sediment from permanent (post-construction) structural stormwater facilities by over excavating and replacing with growth media before vegetating; and
- h. Remove all potential pollutants, including any sediment being retained by temporary erosion and sediment controls, and discontinued pollutant-generating activities associated with construction, unless needed for long-term use following the termination of permit coverage

(Ex. D2 at 3.)

123. As required by the NPDES 1200-C permit, Applicant also submitted information regarding ongoing monitoring of the potential or actual impact on soils within the proposed facility site, which provided, in pertinent part:

During construction, erosion and sediment control measures will be visually monitored at the intervals and locations required by the 1200-C permit * * *. The inspections will verify that BMPs and other applicable measures are being implemented according to ESCP and are effectively minimizing erosion. Inspection reports will be submitted to the DEQ, as required, that describe site conditions, any erosion or sedimentation problems encountered, and any corrective actions taken to resolve the observed problems.

(OSCAPPDoc4-09 ASC Exhibit I at 20.)

124. Applicant has also designated over 200 acres within Area A of the proposed facility site as avoidance areas, which will remain undisturbed by construction activities to further reduce impacts to soils and other natural resources. (OSCAPPDoc4-09 ASC Exhibit I 2019-10-17 at 17.)

125. While covered by the NPDES 1200-C permit, Applicant will be subject to monitoring, reporting, and inspection requirements established by DEQ. Failure to comply with the terms of the permit may result in DEQ enforcement action which may include one or more orders for corrective action and assessment(s) of civil penalties. (Ex. D2 at 3-4.)

126. DEQ considers the measures in Applicant's proposed ESCP to be appropriate to achieve the goals of the NPDES permit. (Ex. D2 at 4.)

Dust abatement management plan.

127. As part of the ASC and in response to concerns raised at the DPO hearing, Applicant also submitted to the Department a draft Fugitive Dust Abatement and Management Plan (DAMP) designed to identify the tools and practices to be implemented during construction and operation of the proposed facility in order to minimize the impacts of dust escaping from the proposed facility site. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09

128. In the DAMP, Applicant proposes several dust control measures including:

- Maintain[ing] the natural topography and vegetation of the site to the extent possible, including by limited grading and limited establishment of temporary access roads;
- Turn[ing] off equipment when it is not in use;
- Mowing and rolling techniques will be used wherever possible to maintain plant root systems for soil stabilization;
- The primary vehicular access roads/driveways within the project site will be stabilized with water for the duration of construction sufficient to eliminate visible and sustained dust from vehicular travel and wind erosion;
- Unless other limitations apply, traffic speeds within the site will be limited to 15 miles per hour with the exception that vehicles may travel up to 25 miles per hour on stabilized unpaved roads within the site as long as such speeds do not create significant visible dust emissions. Traffic speed signs shall be displayed prominently at all site entrances and exits;
- Unless other limitations apply, construction equipment and vehicles containing construction deliveries will limit their speed on gravel access roads to 25 miles per hour;
- Contractor shall install a minimum of two Dust Control Hotline signs * * * one on Oil Dri Road and one on the primary access route to the Facility, providing direct access to the dust control coordinator;
- The speed limit for construction vehicles preparing or installing the transmission line between the main project site and the step-up substation site shall be limited to 15 miles per hour except that speeds will be reduced to no more than 10 miles per hour within 200 feet of a residence;
- All dirt or gravel vehicular access road(s) used as primary access routes for deliveries of parts, equipment, or personnel to the project site shall be stabilized with water for the duration of construction sufficient to eliminate significant and sustained visible dust from vehicular travel and wind erosion;

- When wind speeds exceed [] miles per hour, construction contractors will minimize new disturbances to the extent possible and/or mobilize additional water trucks to minimize fugitive dust from exposed surface;²⁷
- When feasible, use a water truck to maintain moist disturbed surfaces and actively spread water during visible dusting episodes to minimize significant visible dust emissions [for earth moving activities];
- Minimize disturbance areas to the maximum extent feasible;
- For non-road or parking area earthen surfaces, stabilize surfaces by gravel, chemical or other means to prohibit significant and sustained visible fugitive dust from wind erosion;
- Soil load shall be kept below 6 inches of the freeboard of the truck;
- Drop heights shall be minimized when loaders dump soil into trucks;
- Gate seals should be tight on dump trucks; and
- Haul trucks will be covered with a tarp or other suitable cover.

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 Attachment 2 at 2-3.)

129. Applicant also proposed stand-by measures in the DAMP to be implemented immediately, in the event primary dust control measures proved inadequate to control dust emissions at acceptable levels. Those measures include:

[A]dditional watering of disturbed areas or soil piles, application or additional applications of soil stabilizers, covering excavated soil piles, temporarily reducing the permitted speed limits, or temporarily suspending the source of the dust emission until wind speed is reduced

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 Attachment 2 at 3.)

130. According to Applicant, the DAMP is intended to work in concert with its ESCP and BMPs, contained in the NPDES 1200-C permit, as well as the Applicant's Revegetation and Noxious Weed Control Plan (RNWCP). (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 Attachment 2 at 1; Ex. A3 at 7.)

131. Air quality inspector and permit writer for DEQ, Frank Messina, reviewed the

²⁷ In the draft DAMP, Applicant indicates that the final wind speed determination applicable to this requirement will be determined based on analysis of available historic wind speed data from the Bureau of Reclamation AgriMet for the Christmas Valley, Oregon weather station. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 Attachment 2 at 2, fn 1.)

DAMP and recommended that Applicant consider applying a soil binding agent such as magnesium chloride to highly traveled roads within the proposed facility site to further minimize fugitive dust from construction traffic. Mr. Messina also recommended that Applicant ensure sufficient water is onsite during construction to fulfill dust suppression measures specified in the DAMP. (Ex. D3 at 3.)

Revegetation and noxious weed control plan.

132. As an additional part of the ASC, Applicant provided a Revegetation and Noxious Weed Control Plan (RNWCP), developed in conjunction with the Lake County Cooperative Weed Management Area program, intended to identify the objectives, methods, and success criteria to be used to direct revegetation efforts in areas of soil disturbance not covered by permanent structures and to control noxious weeds on the proposed facility site. In the RNWCP, Applicant identified its two primary goals as encouraging revegetation within the site boundary to reduce the potential for windblown and water erosion by reestablishing vegetation ground cover and root structure, as well as avoiding or controlling the introduction and spread of noxious weeds. In the RNWCP, Applicant acknowledged that it is responsible for meeting success criteria established either by DEQ's NPDES 1200-C permit or conditions included by Council in the site certificate. Applicant identified its intent to accomplish revegetation with native plant species to the extent practicable. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 429.)

133. Applicant identified its intent to leave most areas of the proposed facility site undisturbed prior to construction and to allow construction vehicles to drive over vegetation where possible, rather than removing it. Where necessary for grading or trenching, Applicant stated its intent to remove vegetation to within several inches of the ground, preserving root structures and topsoil throughout the majority of the proposed facility site. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 429-430.)

134. In the RNWCP, Applicant identified its intent to allow crushed vegetation to restore passively, without reseeding. Applicant also recognized that it will be necessary to implement measures to prevent and control noxious weeds within the proposed facility site. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 430.)

135. Where soil disturbances are not covered by permanent structures, Applicant intends to engage in active restoration methods including reseeding to ensure noxious weeds do not overtake those areas and for soil stabilization. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 430.)

136. The RNWCP identifies the following soil management practices to be implemented and maintained until success criteria in the plan are achieved:

- Establish stable surface and drainage conditions and use standard erosion control devices and techniques to minimize soil erosion and sedimentation, including the installation of silt fencing, straw bales, mulch, straw wattle, erosion control fabric, and slope breakers, as

appropriate. Applicant will use certified weed-free straw bales, straw mulch, hydromulch, and/or other appropriate weed-free mulch materials.

- Due to the limited extent of grading during construction, and due the relatively narrow areas (approximately 3 feet wide) where trenching will occur, Applicant does not foresee the need to strip and segregate topsoil. However, if large areas of soil disturbance (e.g., 50 by 50 feet or larger) that require revegetation are identified during construction, Applicant may implement topsoil stripping and segregation to preserve topsoil. In such instances, Applicant would strip topsoil (generally defined as the upper 6 to 12 inches of soil) from subsoil, segregate it into stockpiles, and then reapply the topsoil to its original location after construction.

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 430.)

137. As Applicant expects to engage in construction on approximately 60-acre parcels of the proposed facility site at any one time, the RNWCP identifies Applicant's plan to revegetate each such area as construction moves to the next 60-acre plot, with the caveat that such revegetation may be delayed based on seasonal considerations. For any such area, Applicant intends for reseeding to be conducted as soon as weather permits. In the interim, the RNWCP indicates Applicant will stabilize those areas with mulch or other methods designed to minimize erosion. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 430-431.)

138. The RNWCP identifies Applicant's intent to consult with ODFW and, if necessary, local landowners and the Lake County Cooperative Weed Management Area program to develop and refine the seed mixture to be used on the proposed facility site. Applicant developed the seed mixture proposed in the RNWCP through consultation with the National Resources Conservation Service and the Lake County Cooperative Weed Management Area program. According to the RNWCP, that seed mixture may also be modified in consultation with relevant public agencies if it is determined that non-native species such as crested wheatgrass may be necessary to control noxious weeds. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 430-431.)

139. Applicant's proposed seed mixture in the RNWCP identifies a near equal distribution of bluebunch wheatgrass, thickspike wheatgrass, Indian ricegrass, basin wild rye, and crested wheatgrass. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 431.)

140. The RNWCP also identifies Applicant's intent to apply the proposed seed mixture through a combination of broadcast, drill, and hydro seeding depending on the topography of a given section of the proposed facility site. Applicant also intends to apply one or more weed-free mulch materials after seeding to encourage establishment. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 432.)

141. According to the RNWCP, Applicant intends to conduct reseeding activities on each section of the proposed facility site in November to early March to allow for germination of the seed mixture by April. Where necessary, Applicant will reseed in February to early April for

construction activities completed in winter months. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 432.).

142. Applicant's RNWCP recognizes that non-native invasive weed species can rapidly colonize disturbed areas of the proposed facility site and can have significant adverse impacts on surrounding agricultural operations and wildlife habitat. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 432.)

143. The RNWCP also identifies three categories of noxious weeds as designation by Lake County (A, B, and C). In conjunction with Lake County, Applicant identified diffuse knapweed and spotted knapweed as those of highest concern. According to the plan, the Lake County Cooperative Weed Management Area program has offered to coordinate with Applicant during construction and operation of the proposed facility to further refine noxious weed control measures. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 434.)

144. To prevent the introduction of noxious weed species and control existing species on the proposed facility site, Applicant proposes the following measures in the RNWCP:

Environmental training: Conduct environmental awareness and sensitivity training before soil and vegetation disturbance activities to educate all personnel regarding environmental concerns and requirements, including weed identification (particularly diffuse knapweed), prevention, and control methods. Qualified personnel will conduct this training.

Pre-construction surveys: Conduct surveys for designated noxious weeds within proposed Facility disturbance areas concurrently with other pre-construction surveys, such as pre- construction surveys for migratory bird nests.

Signage: Demarcate any problem noxious weeds areas on the site (e.g., infestations of ODA or Lake County category A species, or potentially large but well-defined areas of ODA or Lake County category B, C, or T species) with signs, as appropriate.

Pretreatment: Prior to vegetation or soil disturbance, Applicant may treat areas of known noxious weeds with herbicides or manually remove them, if practicable.

Treatment during construction: During construction, Applicant may treat identified new noxious weed populations, as necessary. Treatment methods and timing will be based on species-specific and area-specific conditions (e.g., proximity to water, agricultural areas, topography, land use, and time of year) and will be coordinated with and follow requirements and guidelines of Lake County or the ODA.

Clean vehicles/equipment: Personnel will thoroughly clean all vehicles and equipment of soil and plant material before mobilizing to the Facility site, and

will clean all clearing and grading equipment prior to leaving any identified noxious weed sites.

Cleaning station: If some vehicles or equipment cannot be cleaned prior to mobilization to the Facility site, and pre-construction surveys have identified multiple problem noxious weed areas, Applicant will construct a fixed water cleaning station at the point of Facility site entry for construction equipment and vehicles. The Facility environmental inspectors and management staff will determine the need for a fixed water cleaning station, taking the findings of pre-construction surveys into consideration. The water cleaning station will use high-pressure water over a non-permeable synthetic fabric so that the soil and plant material from the cleaning operation can be removed and disposed of without contaminating the underlying soil. Cleaning efforts will be concentrated on tracks, feet, or tires and on the undercarriage, with special emphasis on axles, frames, cross members, motor mounts, the underside of running boards, and front bumper/brush guard assemblies.

Mobile cleaning stations: As needed, construction crews will clean seeds, roots, and rhizomes off equipment and vehicles used to move vegetation and topsoil in identified noxious weed-infested areas during the clearing phases before proceeding to other parts of the Facility site. In most infestation locations, personnel will clean vehicles with compressed air.

Weed-free stray bales: The contractor will ensure that all straw bales used for sediment and erosion controls, mulch distribution, and restoration seed mixes—if used—are certified as weed-free from the supplier.

Post-construction monitoring: After construction, during operation, Facility staff will monitor for noxious weeds and treat weeds, as appropriate. If needed, a state-licensed weed control contractor will be used to treat noxious weeds.

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 434-435.)

145. According to the RNWCP, Applicant will employ manual (hand pulling/clipping) or chemical (herbicide) control methods for identified noxious weeds within the proposed facility site. Choice of control method employed will take into account proximity to agricultural lands. Applicant intends to notify neighboring landowners of the proposed herbicide treatment and obtain approval prior to application of those products. Such herbicides will be applied by a state-licensed weed control contractor hired by Applicant. Applicant will also limit application to times when wind speed does not exceed 15 miles per hour for granular and 10 miles per hour for liquid herbicides. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 436.)

146. The RNWCP also includes monitoring and success criteria by which Applicant will determine the effectiveness of its weed control methods. According to the plan, those criteria will be established by both the conditions of the site certificate and the NPDES 1200-C permit requirements for final vegetative stabilization as established by DEQ. (OSCAPPDoc2

147. Applicant intends to employ an adaptive management approach to controlling dust and noxious weeds, as well as revegetating the proposed facility site. This approach would involve using all acceptable methods contained within the ESCP, DAMP, and RNWCP along with BMPs to adjust methods in real-time depending on site assessments in order to achieve optimal results. (Test. of Gallagher.)

148. Aaron Dejoia is an environmental soil scientist and agronomist with Pilgrim Construction, LLC.²⁸ Mr. Dejoia has over 20 years of experience developing and implementing land reclamation plans for drastically disturbed lands, in more than 40 states including Oregon and Washington. (Ex. A2 at 2-3.)

149. Mr. Dejoia also has significant experience with revegetation of solar project sites including post-construction vegetation management and monitoring. Based on his review of Applicant's ESCP, DAMP, and RNWCP, as well as the NRCS soil survey for Lake County, Mr. Dejoia believes the proposed facility site can be successfully revegetated in a timely manner following construction. (Ex. A2 at 3-5.)

150. Mr. Dejoia agrees with the limited parties' concerns that the proposed facility site presents potential for significant fugitive dust and invasive weed infestations if not properly managed. Nonetheless, Mr. Dejoia believes proper planning and execution of mitigation measures will allow the proposed facility to be constructed and revegetated while minimizing negative impacts to neighboring lands from dust and invasive weeds. (Ex. A2 at 6.)

151. In Mr. Dejoia's experience, the limited parties' concerns are not unique to the proposed facility site. Rather, such concerns are commons for solar projects in similar environments. Mr. Dejoia believes a holistic approach to managing dust, weeds, and revegetation concerns, such as that presented by Applicant's DAMP, ESCP, and RNWCP will minimize any potential impacts. (Ex. A2 at 6-7.)

152. In Mr. Dejoia's professional opinion, the adaptive management approach proposed by Applicant will allow active management of the limited parties' concerns and present the best opportunity for success. (Ex. A2 at 7.)

153. Mr. Dejoia also believes that, if implemented correctly through adaptive management plans, the methods proposed by Applicant in the DAMP, ESCP, and RNWCP may result in less dust from the proposed facility site post-construction than currently experienced. (Ex. A2 at 10.)

154. According to Mr. Dejoia, it may take up to five years to obtain full reclamation of the site by restoring vegetative cover that is self-sustaining and free from noxious weed species and the site will require ongoing adaptive management techniques. (Ex. A2 at 16-17.)

²⁸ Mr. Dejoia holds the following certifications: Certified Professional Soil Scientist, Certified Professional Agronomist, Certified Crop Advisor, and North Dakota Professional Soil Classifier. (Ex. A2 at 2.)

Wildlife habitat and Applicant's draft monitoring plan.

155. As part of the ASC, Applicant performed a wildlife habitat assessment in the area of and surrounding the proposed facility site. As part of that assessment, Applicant identified multiple pygmy rabbit burrow complexes and raptor nesting locations. (OSCAPPDoc4-16 ASC Exhibit P 2019-10-17 at 8-11.)

156. Applicant also found that the entirety of the proposed facility site was situated within elk winter range mapped by ODFW. In addition, Applicant found portions of the proposed facility site were within mule deer winter range as mapped by ODFW. Both such habitats are designated as Category 2 (essential and limited) habitat under ODFW's Oregon Habitat Mitigation Policy. (OSCAPPDoc4-16 ASC Exhibit P 2019-10-17 at 12.)

157. Applicant determined that approximately 94 percent of the habitat mapped within and around the proposed facility site consist of sagebrush shrub land, with big sagebrush accounting for as much as 30 percent of habitat within the proposed facility site. (OSCAPPDoc4-16 ASC Exhibit P 2019-10-17 at 13.)

158. Applicant also determined rabbitbrush to be a prominent part of the sagebrush habitat in and around the proposed facility site, accounting for up to 25 percent of the habitat within the area. Applicant found several herbaceous plant species within the proposed facility site and surrounding area including saltgrass, clasping pepperweed, and cheatgrass. Applicant identified the sagebrush shrubland as important habitat for certain species including rabbits and hawks. (OSCAPPDoc4-16 ASC Exhibit P 2019-10-17 at 13.)

159. In response to concerns raised by certain landowners in the area of the proposed facility regarding small mammals and coyotes, Applicant contracted with Foster Natural Resource Contracting to assist in developing mitigation plans, including field surveys and habitat mapping. Craig Foster, wildlife biologist and former ODFW employee for over 35 years performed the requested surveys for Applicant. During his tenure with ODFW, Mr. Foster spent more than 25 years working in Lake County performing wildlife inventories of game and non-game species, responding to complaints of wildlife damage, and implementing wildlife habitat improvement projects. (Ex. A1 at 2, 4.)

160. Mr. Foster has extensive experience determining herd ranges for both elk and mule deer in the Fort Rock area. Mr. Foster has also completed wildlife mitigation plans for two solar projects. Mr. Foster also serves as president of the Lake County Cooperative Weed Management Area. (Ex. A1 at 3.)

161. Mr. Foster determined that, based on their requirement for protective shrub cover (e.g., sagebrush) with open grass undergrowth to survive, jackrabbits are unlikely to migrate to agricultural fields, from the proposed facility site during construction. Rather, any jackrabbits displaced by construction activities are more likely to migrate to suitable habitat located north and west of the proposed facility site. Agricultural fields located south and east of the proposed facility site lack suitable habitat for rabbits to survive. In addition, because habitat south of the

proposed facility site consist of a significant number of juniper, a preferred habitat for avian predators, any jackrabbits displaced by construction are less likely to migrate in that direction. (Ex. A1 at 5-6; test. of Foster.)

162. In addition, preservation of some jackrabbit habitat within the proposed facility site would make it less likely for mass dispersal of that species in any direction. Mr. Foster determined that development of the proposed facility would likely result in an overall reduction of jackrabbit population in the area of the proposed facility within two years. (Ex. A1 at 7-8; test. of Foster.)

163. Mr. Foster also determined that it is unlikely that development of the proposed facility will increase the number of ground squirrels in neighboring alfalfa fields because they do not prefer sagebrush habitat over developed alfalfa fields. As such, the highest density of ground squirrels in the area likely exist in irrigated fields, rather than undeveloped sagebrush such as the proposed facility site. Moreover, ground squirrels are territorial, discouraging additional migration into fields already occupied. (Ex. A1 at 9-10; test. of Foster.)

164. Applicant submitted a draft Wildlife Monitoring Plan (WMP) as part of the ASC identifying how it intended to avoid or reduce impacts to wildlife in and around the proposed facility site during construction and operation of the facility. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 415-421.)

165. As part of the efforts taken to avoid or reduce impacts to wildlife, the WMP identified the following:

- (a) Elimination of Area B from the site boundary (approximately 3,080 acres);
- (b) Elimination of Area C from the site boundary (approximately 440 acres);
- (c) Avoiding an active pygmy rabbit burrow complex totaling 0.36 acres; and
- (d) Avoiding a 10.47-acre area of sagebrush shrubland, dune, and playa habitats that includes two active pygmy rabbit burrow complexes, which will provide connectivity between the complexes and to adjacent sagebrush shrubland habitats on federal lands.

(OSCAPPDoc2 Propose Order with Attachments 2020-10-09 at 418.)

166. In addition, according to the WMP, Applicant removed Area B from consideration for development due, in part, to the large amount of suitable pygmy rabbit habitat within that parcel. The WPM identifies other avoidance areas in the vicinity that is likely to maintain habitat connectivity for this species. (OSCAPPDoc2 Propose Order with Attachments 2020-10-09 at 418.)

167. The WMP also identifies Applicant's proposed monitoring plan for mortality events of birds and bats within the facility during all seasons of the first operational year.

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 419-420.)

168. In its Proposed Order, the Department amended the WMP to include a requirement that Applicant notify landowners, within 500-feet of the proposed facility site, of programs available through ODFW intended to mitigate damage to lands from big game intrusion, including elk. According to the WMP as amended, this requirement applies during any year Applicant is engaged in construction activities. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 420.)

169. Finally, the WMP contains a provisions permitting future amendments which reads:

The WMP may be amended from time to time upon approval by Energy Facility Siting Council * * *, who may delegate its authority to review and authorize amendments to Oregon Department of Energy * * *. ODOE must notify EFSC of all amendments and EFSC retains the authority to approve, reject, or modify any amendments to this WMP agreed to by ODOE.

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 420.)

Construction traffic management plan.

170. As part of the ASC, Applicant submitted an analysis from Kittelson & Associates, a transportation engineering and planning firm, assessing the potential transportation impacts of the proposed facility within a 15 mile radius and recommending measure to mitigate those impacts. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 517.)

171. That analysis anticipated at least 252 vehicle trips per workday over the estimated two year construction period for the proposed facility. It also estimated up to 10 vehicle trips per day during the operational life of the facility. The Kittelson assessment determined the potentially impacted roadways as County Roads 5-10, 5-12 and 5-12A, 5-14 and 5-14G. The assessment also identified the primary access roads for Area A of the proposed facility site as County Roads 5-12 and 5-12A, and secondary access to that site as County Roads 5-10, 5-14 and 5-14G. Primary access to Area D was identified as County Road 5-10. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 521-522, 524; *see also* OSCAPPDoc4-21 ASC Exhibit U 2019-10-17 at 9.)

172. The Kittelson assessment found the additional estimated traffic to be within the carrying capacity of the existing roads and proposed adding additional traffic signage to several locations along County Roads 5-10 and 5-12. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 521.)

173. Based on information provided in the ASC, including the Kittelson assessment, the Department prepared a draft Construction Traffic Management Plan (CTMP) that provided best management practices to reduce traffic impacts, taken from Applicant's ESCP, and required Applicant coordinate with Lake County to establish primary and secondary delivery routes.

Consistent with representations in the ASC, the draft CTMP estimated a total of 400 daily trips to/from the facility using local county roads, with approximately 160 of those trips coming from roundtrip deliveries of materials and equipment to the facility. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 532-535.)

174. The draft CTMP required Applicant to consult with Lake County in order to:

Establish primary and secondary deliver routes based on road conditions known by the County prior to construction.

Execute a road use agreement or funding agreement with Lake County Road Department (or County Road Superintendent) to ensure that damage or wear to state or county roads that is caused by facility construction related traffic and road use is repaired by the certificate holder. The road use or funding agreements shall establish and provide financial security regarding county road use, maintenance, and repair from construction-related impacts. Regardless of existing pavement or gravel conditions, the road use or funding agreements shall establish that roadway segments will be reviewed prior to any added construction traffic and establish a system for monitoring safety or degradation to road base or surface prior to and during construction.

Fund or install permanent new traffic signs (to LCZO specifications) at the intersection of Fort Rock Road and County Road 5-12 and define stopping locations and establish clear right-of-way and turning movement priority. Traffic signs must be consistent with the provisions outlined in Attachment U-1 Kittelson Traffic Impact Assessment, attached to the Final Order, or as agreed to by the Department in consultation with Lake County; and

Locate and place signs for low-speed zones near access points, route intersections and pull-outs to reduce the risk of accidents.

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 535.)

175. Beginning in June 2021, Applicant began negotiating with the Lake County Road Superintendent, Kevin Hock, and the LCBC/SAG to develop a road use and maintenance agreement applicable to the construction period for the proposed facility. While the parties to that negotiation developed draft terms, negotiations stalled due to a severe fire season in Oregon, coupled with limitations necessitated by the COVID-19 pandemic. (Ex. A13 at 1-2; test. of Hutchison.)

176. The draft terms for the road use agreement identify multiple road segments of concern along the primary and secondary access routes for areas A and D of the proposed facility. (Ex. A13 at 3; test. of Hutchison; *see also* Ex. R27 at 11-14.)

177. The draft terms of the road use agreement provide, in pertinent part:

Current Conditions and Proposed Improvement or Repair

Road Segment 1 – This 12-mile stretch of Fort Rock Rd./County Road 5-10 has a decent base. Lake County Road Master Kevin Hock has proposed that it be chipped and sealed either prior to or just after solar construction. It is currently scheduled to be chipped and sealed within the next 36 months at a cost of approximately \$20k/mile (\$240k total).

Road Segment 2 – This 4-mile stretch of County Road 5-12 has a base that is insufficient for extensive heavy truck use and Mr. Hock believes it will be beat-up beyond a simple repair over the course of construction. His preferred course of action is to reclaim the road after construction is completed then chip and seal to provide a new top-coat. These maintenance and repair activities will cost approximately \$220k.

Road Segment 3 – This 5-mile stretch of County Road 5-12 is gravel. Mr. Hock believes this section to be relatively straightforward to maintain and repair during and post-construction.

Section 4 – This final 3-mile stretch on Oil Dry *[sic]* [Rd.] is on relatively new top pavement with an adequate base for current agricultural use.

In recognition that use of the Primary Haul Route for Project construction will accelerate wear and tear of the roads and accelerate the need for repairs, Obsidian proposes to enter into a road use and maintenance agreement that includes the following material terms[:]

- Obsidian will use its best efforts and will require its contractors and subcontractors to use their best efforts, to have all heavy-load construction traffic to follow this primary haul route.
- Obsidian will move its main entrance to the site to the new location, if possible, within design restrictions.
- Obsidian will pay 25% of the cost to chip and seal Road Segment 1.
- Obsidian will pay 80% of the cost to reclaim, chip and seal Road Segment 2.
- Obsidian would like to work with Lake County on additional safety signage along Oil Dri Road and possibly other areas relating to game crossing and increased traffic. Obsidian will pay for additional safety signage.
- Obsidian will, on an as needed basis, make repairs to Road Segment 3 during construction, and following the completion of construction will return Road Segment 3 in at least as good condition as at the start of construction. Obsidian will be responsible for dust control during construction. A

designated contact for dust complaints will be supplied to Lake County and contact information will be posted along Road Segment 3.

- Obsidian will reconfigure its design to avoid Section 4 with heavy truck traffic. If design or permitting constraints should require the use of the entrance further south on the paved portion of Oil Dri [Rd.] Obsidian will negotiate in good faith with Lake County to pay an incremental portion of the maintenance costs.
- Any dust palliative or binder to be used by Obsidian (or its contractor or subcontractor) for mitigation of fugitive dust on Lake County roads will be approved by the County before use.
- If, during construction, either party becomes aware of an ongoing and substantial variation in heavy truck traffic other than on the designated primary haul route, Obsidian and the County will meet and discuss in good faith what, if any, changes need to be made to the road use and maintenance agreement.
- If the project to be constructed will be less than the full 400 MW, Obsidian's payment obligations with respect to Road Segments 1 and 2 will be proportionately reduced (e.g., if the project size is 200 MW, or 50% of expected, then Obsidian's obligation for Road Segment 2 will be 20% of the cost rather than 40% of the cost)

(Ex. A13 at 13-14.)

178. Rather than using magnesium chloride to stabilize roads for dust suppression within the proposed facility site, Mr. Hock prefers products such as Lignosulfonate or Earthbind for use on highly traveled dirt roads within the county. (Test. of Hutchison; *see also* Oregon Department of Energy's Closing Brief at 19.)

Draft Fire Protection and Emergency Response Plan.

179. In March 2020, the Department prepared a draft Fire Protection and Emergency Response Plan to be included in its Proposed Order. That plan identifies the fire protection agencies available to respond to incidents at the proposed facility site as the Christmas Valley Rural Fire Protection District and the High Desert Rangeland Fire Protection Association (RFPA). The plan also identifies the local emergency responders and medical facilities most likely impacted in the area as North Lake County Emergency Medical Service (ambulance), La Pine Community Health Center, and St. Charles Health Systems. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 537-540.)

180. Kevin Leehmann, board president and fire manager with the RFPA, is a longtime resident of Lake County. Mr. Leehmann also serves as a firefighter and paramedic for the La Pine Fire District. In addition to his duties related to fire protection within Lake County, Mr.

Leehmann operates 24 Ranch, a cattle ranch and alfalfa farm located in Summer Lake, Oregon (within Lake County). (Ex. A9 at 1-2; test. of Leehmann.)

181. On behalf of RFPA, Mr. Leehmann has engaged in negotiations with Applicant about voluntary membership in RFPA, including possible donations of firefighting equipment and the option to locate certain firefighting equipment at the proposed facility site for use by RFPA in the event of a fire emergency. During a recent fire in the area, Applicant donated approximately \$2,500 to the RFPA to help with local firefighting efforts. (Ex. A9 at 1-2; test. of Leehmann.)

182. The draft plan developed by the Department requires Applicant to implement to following measures:

3.0 Fire Prevention Measures: Construction and Operation

To reduce the risk of fire during construction and operation:

- Personnel will be trained in proper fire prevention and control procedures;
- Personnel will be instructed to not leave vehicles and equipment running when not in use (i.e., no idling);
- Any potential incipient fires during construction or operation will be controlled by trained Facility staff. In most cases, Applicant expects to contain fires (but not extinguish) and let them burn out. If needed, additional fire prevention measures will be coordinated with the local service providers;
- Fire suppression: Although stringent fire prevention measures will be in place during construction, the certificate holder is planning for approximately 1 percent of the total consumed water (up to 343,000 gallons total over two years, assuming worst-case conditions, or 686 gallons per construction workday) to be used for fire suppression during Facility construction activities. If more water is required for fire suppression, the certificate holder will halt other activities and divert water amounts to this activity, as needed.

During construction and operation, facility personnel will follow the SOLV Vegetation Management and Fire Prevention Plan (included below), by SOLV, Swinerton Builder's. Provisions in the SOLV Vegetation Management and Fire Prevention Plan include:

- Before the start of each daily shift, at approximately 07:00 a.m. local time, the Technician in charge will check the fire danger posting by the National Weather Service for any Red Flag Warnings for that day. If there is a Red Flag Warning for that day, all mowing activities done with power mowers using metal blades will be halted. The only vegetation mitigation that is

allowed during a Red Flag Warning is that done with a string trimmer using nylon string that won't cause sparks.

- If SOLV is performing light work (e[.]g[.] one to two mowers per site), one operator will be designated to turn off the mower at twenty-minute intervals to perform a visual scan of the area mowed, walking approximately 20 yards in each direction and ensuring nothing is burning.
- If fire breaks out onsite, refer to the pocket card and call SOLV's OCC, they will directly contact the emergency services in the area. Use air horns or other methods to alert site personnel of danger. After assessing personal safety, assess if any countermeasures are safe. For example, use fire extinguisher, must be available, and fire is in the incipient period to mitigate small vegetation fire or small equipment fire.

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 540-541.)

183. The draft plan also requires Applicant to implement certain design features to proactively address potential fire risk and provides"

Design features to reduce the risk of fire from and to the facility:

- Facility perimeter roads within the fenceline will be 20 feet wide with a maintained 10- foot vegetation-free buffer zone (30 feet total vegetation free area) to act as fire breaks and help prevent the spread of potential fires to and from neighboring areas, and would allow for access by emergency vehicles.
- Facility internal array access roads within the fenceline will be 12-feet wide and maintained to act as fire breaks and help prevent the spread of potential fires to and from neighboring areas and would allow for access by emergency vehicles.
- Facility electrical equipment will meet all applicable National Electric Code and Institute of Electrical and Electronics Engineers standards to reduce potential fire risk.
- Facility will be electronically monitored through supervisory and data acquisition system. The Facility will have a supervisory control and data acquisition (SCADA) system. Alarming is one of the primary functions of the SCADA. The SCADA HMI software platform will be programmed with various multi-level priority alarms and programming will dictate who receives notice. For a high priority alarm, for example, the software can push a notice through email or SMS (text message) to all operators, operational managers, and asset managers, and perhaps even the Facility owners. Alarms will be provided for electrical hazards, fire, and other operational issues.

Facility operator is immediately notified by alerts generated by the monitoring platform when any equipment goes off-line for any reason. This enables immediate safety responses to be initiated in the event the equipment functionality is compromised by fire.

- The Facility will have signage that includes safety information at all entrances to the Facility for emergency responders to identify the location of system disconnects, location of electrical conduit, and the ability to isolate and shutdown electrical power coming from the PV array.

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 542-543.)

184. Additionally, the draft plan proposes requirements for onsite medical providers to minimize the use of emergency medical transport services and provides:

During construction, the certificate holder will retain emergency medical technicians on site and will arrange for medical transport during medical emergencies that occur at the Facility. Patients with minor injuries will be treated on site or transported by vehicle to La Pine Community Health Center in the community of Christmas Valley. Patients with moderate injuries will be transported by vehicle to St. Charles Medical Center in Bend. For severe injuries, the certificate holder may use the services of the Air Ambulance to transport patients to Bend.

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 at 542.)

ODOE's proposed site certificate conditions in the Department's Proposed Order.

185. The Department's Proposed Order contained several proposed conditions under EFSC standards that, together with the complete ASC, led the Department to determine that the proposed facility, as conditioned, will comply with the Council standards and all applicable substantive criteria identified through the application process. Specifically, as relevant to the Council standards implicated in this contested case, the Department proposed 10 conditions under the General Standard of Review; 2 conditions under the Soil Protection Standard; 7 under the Land Use Standard; 11 conditions under the Fish and Wildlife Habitat Standard; 4 conditions under the Public Services Standard; and 2 conditions under the Water Rights Standard. In all, the Department proposed a total of 57 separate conditions to be included in the final site certificate for the proposed facility.²⁹ (OSCAPPDoc2 Proposed Order with Attachments 2020-

²⁹ The Department also proposed several conditions under Council standards not implicated by the limited parties' issues in this contested case, including five conditions the Organizational Expertise Standard; four conditions under the Structural Standard; five under the Retirement and Financial Assurance Standard; one condition under the Threatened and Endangered Species Standard; two under the Historical, Cultural, and Archeological Resource Standard; and one condition each under the Waste Minimization Standard and the Siting Standards for Transmission Line Corridors. Finally the Department proposed two conditions for the Noise Control Standard. (OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 Attachment A at 199-218.)

10-09 Attachment A at 199-218.)

186. The limited parties in this matter challenge the sufficiency of eight of the Department's proposed site certificate conditions; Soil Protection Condition 1, Land Use Condition 2, Fish and Wildlife Habitat Conditions 1 and 2, Public Services Conditions 1 through 3, and Water Rights Condition 2. (Petitions' Hearing Memorandum at 77-83.)³⁰

187. The Department's first proposed condition under Council's Soil Protection Standard reads:

Recommended Soil Protection Condition 1:

- a. Prior to obtaining the DEQ-issued NPDES 1200-C permit, the certificate holder shall evaluate the results of the preconstruction Geotechnical Investigation to develop appropriate, site-specific erosion and dust control measures, to be reflected in the Erosion and Sediment Control Plan.
- b. Prior to construction of the facility, the certificate holder shall provide a copy to the Department of its DEQ-issued NPDES 1200-C permit, including final Erosion Sediment Control Plan and associated drawings (as provided in Attachment I-1 of the Final Order on the ASC).
- c. During construction of the facility, the certificate holder shall conduct all work in compliance with a final Erosion and Sediment Control Plan that is satisfactory to the Oregon Department of Environmental Quality as required under the National Pollutant Discharge Elimination System Construction Stormwater Discharge General Permit 1200- C.
- d. The certificate holder must provide copies of completed Erosion and Sediment Control Inspection Forms (forms) for Department review during construction inspections and, if requested by the Department based on continuous erosion and dust issues and corrective actions at the site, must provide form copies to the Department within 7-days of inspections, in electronic format, to allow the Department, in consultation with Oregon Department of Environmental Quality and Lake County Public Works Department, the ability to recommend additional site controls.

³⁰ As an alternative to the eight conditions proposed by the Department, the limited parties propose 21 site certificate conditions, in addition to those not challenged in the Department's Proposed Order. (See Ex.R21 at 2-16.) Because this Proposed Order determines that the ASC, as conditioned by the Department (including post hearing amendments), demonstrates the facility complies with all applicable statutes, administrative rules, local ordinances, Council standards, and other applicable substantive criteria, it is unnecessary to address those proposed conditions, or Applicant's opposition thereto, in any detail.

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 Attachment A at 5-6; underline and strikethrough omitted.)

188. In its closing argument, the Department recommended additional revisions to the above proposed condition as follows:

Recommended Amended Soil Protection Condition 1:³¹

- a. Prior to obtaining the DEQ-issued NPDES 1200-C permit, the certificate holder shall:
 - i. Evaluate the results of the preconstruction Geotechnical Investigation to develop appropriate, site-specific erosion and dust control measures, to be reflected in the Erosion and Sediment Control Plan (ESCP).
 - ii. Demonstrate to the Department that all revegetation protocols identified in the ESCP are consistent with the requirements and success criteria of the RNWCP and DAMP, and that protocols address dust abatement, erosion and sediment control, noxious and invasive weeds and are inclusive of a successional seed mix and sequence. Any changes in the protocols, based on adaptive management during construction, must be determined by the Department, in consultation with ODFW, ODEQ or third-party consultant, to be appropriate to meet the revegetation, dust and erosion control requirements in the ESCP, DAMP and RNWCP.
- b. Prior to construction of the facility, the certificate holder shall provide a copy to the Department of its DEQ-issued NPDES 1200-C permit, including final ESCP and associated drawings (as provided in Attachment I-1 of the Final Order on the ASC).
- c. Prior to construction of the facility, the certificate holder shall submit to the Department a construction schedule that considers site-specific soil factors and demonstrates that site preparation and disturbance activities are scheduled to occur in a manner that allows for predisturbance site preparation (e.g., seeding) within the appropriate season and with sufficient time to allow for increased success during construction and upon site restoration.
- d. Prior to construction of the facility, the certificate holder shall develop a phased site preparation and disturbance plan that limits overall site disturbance to 60 acres or less within any disturbance timeframe. Subsequent disturbance may not commence until the previous phase of disturbed area has

³¹ Additions underlined, omission strikethrough in original.

- been adequately stabilized with vegetation, erosion, or other stabilization materials, as determined by the onsite monitor per sub(e) of this condition, in consultation with the Department. The phased plan shall consider peak farming activity schedules (e.g. harvest, deliveries, etc[.]) of adjacent landowners, based on documented landowner consultation. The phased site preparation and disturbance plan must be prepared by an engineer, soil scientist or individual with similar technical qualifications and reviewed and approved by the Department in consultation with Oregon Department of Agriculture (soil/vegetation specialist) or other third-party specialist.
- e. During construction of the facility, the certificate holder shall obtain a monitor with relevant experience during all construction activities to monitor the requirements of the 1200-C, RNWCP and DAMP. The monitor shall maintain daily field logs, to be made available upon request by the Department, documenting compliance with the phased site preparation and disturbance plan, the success of predisturbance seeding, 1200-C, RNWCP and DAMP requirements. Daily field logs shall clearly identify any necessary corrective actions. All corrective actions must be reported to and timely implemented by the certificate holder.
 - f. During construction of the facility, the certificate holder shall conduct all work in compliance with a final ESCP that is satisfactory to the Oregon Department of Environmental Quality as required under the National Pollutant Discharge Elimination System Construction Stormwater Discharge General Permit 1200[.]
 - g. The certificate holder must provide copies of completed Erosion and Sediment Control Inspection Forms (forms) for Department review during construction inspections and, if requested by the Department based on continuous erosion and dust issues and corrective actions at the site, must provide form copies to the Department within 7-days of inspections, in electronic format, to allow the Department, in consultation with Oregon Department of Environmental Quality and Lake County Public Works Department, the ability to recommend additional site controls.

(Oregon Department of Energy's Closing Argument at 16-17.)

189. In addition, the Department proposed several conditions under Council's Land Use Standard, the second of which provides:

Recommended Land Use Condition 2:

Prior to construction of the facility, the certificate holder shall demonstrate to the Department and Lake County Planning Department through mapping or other engineering drawing that the final facility layout complies with the following county yard setback and vision clearance area requirements:

- a. 50-foot minimum sideyard setback distance from permanent foundations (inverter/transformer units, collector/step-up substations, O&M buildings, battery storage enclosures) to adjacent non-participating property boundaries.
- b. 20-foot minimum front and rear yard setback distance from permanent foundations (inverter/transformer units, collector/step-up substations, O&M buildings, battery storage enclosures) to adjacent non-participating property boundaries.
- c. 45-foot minimum setback from the centerline of any county or other public or street right-of-way to permanent foundations (inverter/transformer units, collector/step-up substations, O&M buildings, battery storage enclosures).
- d. 20-foot minimum triangular vision clearance area at access road driveways constructed by the facility that provide access to a public roadway.
- e. 2.5-foot height restriction on planting, fence, wall, structure, or temporary or permanent obstruction, measured from the top of the curb or, where no curb exists, from the established street center line grade, except that trees exceeding this height may be located in this area, provided all branches and foliage are removed to a height eight (8) feet above grade.

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 Attachment A at 6-7; underline and strikethrough omitted.)

190. Next, the Department's Proposed Order contains multiple proposed conditions under Council's Fish and Wildlife Habitat Standard, the first of which reads:

Recommended Fish and Wildlife Habitat Condition 1:

The certificate holder shall:

- a. Prior to construction of the facility, the certificate holder shall finalize and submit the Revegetation and Noxious Weed Control Plan, based upon the draft plan provided in Attachment P-3 of the Final Order on the ASC, for review and approval by the Department, in consultation with ODFW and Lake County Weed Control Supervisor. The scope of finalizing the plan shall, at a minimum, include the following:
 1. Final assessment of temporary habitat impacts (in acres), based on habitat quality of habitat subtype, and final facility design,

presented in tabular format.

2. Survey and sampling protocol for evaluating the success criteria against paired monitoring and reference sites determined to represent a statistically significant number of sites based on pre-disturbance habitat quality and diversity of habitat temporarily impacted.
 3. Approval of appropriate revegetation seed mix from ODFW.
 4. Confirmation of revegetation and noxious weed monitoring frequency, to occur annually for the first 5-years following construction, unless otherwise agreed to by the Department in consultation with ODFW, Lake County or the Cooperative Weed Management Area[.]
 5. Assurance that the success criteria for vegetation cover is based upon desirable, native vegetation.
- b. During construction and operation of the facility, the certificate holder shall implement the requirements of the plan; monitor and report results of revegetation activities to the Department, as required by the plan.

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 Attachment A at 10.)

191. After consideration of the evidence and argument presented at hearing, the Department proposed further amendment to its recommended provisions of Wildlife Habitat Condition 1 as it relates to Applicant's revegetation and weed control efforts to read as follows:

Recommended Amended Fish and Wildlife Habitat Condition 1:³²

The certificate holder shall:

- a. Prior to construction of the facility, the certificate holder shall finalize and submit the Revegetation and Noxious Weed Control Plan, based upon the draft plan provided in Attachment P-3 of the Final Order on the ASC, for review and approval by the Department, in consultation with ODFW and Lake County Weed Control Supervisor, including consideration of whether cheatgrass and Russian thistle should be addressed in the RNCWP. The scope of finalizing the plan shall, at a minimum, include the following:
 1. Final assessment of temporary habitat impacts (in acres), based on habitat quality of habitat subtype, and final facility design, presented in tabular format.

³² Additions underlined, omission strikethrough in original.

2. Survey and sampling protocol for evaluating the success criteria against paired monitoring and reference sites determined to represent a statistically significant number of sites based on pre-disturbance habitat quality and diversity of habitat temporarily impacted.
 3. Approval of appropriate revegetation seed mix from ODFW.
 4. Confirmation of revegetation and noxious weed monitoring frequency, to occur annually for the first 5-years following construction, unless otherwise agreed to by the Department in consultation with ODFW, Lake County or the Cooperative Weed Management Area
 5. Assurance that the success criteria for vegetation cover is based upon desirable, native vegetation.
- b. During construction and operation of the facility, the certificate holder shall implement the requirements of the plan; monitor and report results of revegetation activities to the Department, as required by the plan.

(Oregon Department of Energy's Response to Petitioners' Proposed Site Certificate Conditions at 3-4.)

192. In conjunction with the proposed amendment to Fish and Wildlife Habitat Condition 1, the Department also proposed amendments to Applicant's RNWCP and WMP, which appears in the Department's recommended Fish and Wildlife Habitat Condition 11 (Attachment P-2 to the Department's Proposed Order), as follows:

Recommended Amended Provision of draft RNWCP:

Proposed Order Attachment P-3 p. 11 should be amended as follows, "Once ~~Applicant~~ the Department determines that revegetation and noxious weed control is successful, ~~it~~ Applicant will report this in the relevant annual report."

Recommended Amended Provision of draft WMP:

1. Proposed Order Attachment P-2 Section 4 should be amended as follows:²

4.0 Wildlife Displacement Monitoring and Landowner Notification for Elk Damage Programs

Prior to construction, the applicant shall hire a qualified wildlife specialist to conduct a baseline assessment of mammal populations, based on a protocol reviewed and approved by ODFW, on properties adjacent to the site boundary, within public rights of way or as permitted by the landowner.

If landowner complaints of wildlife damage due to displacement from facility construction or operation are received by the applicant and supported by sufficient evidence, applicant's wildlife consultant shall complete a secondary assessment of landowner property, if permitted. If wildlife specialists determine that crop damage or other increases in costs are directly attributable and can be correlated to the construction or operation of the facility, applicant must demonstrate execution, or attempts therein, of an agreement with the landowner to identify and implement appropriate mitigation to recover the damage or remediation (removal of species).

(Oregon Department of Energy's Response to Petitioners' Proposed Site Certificate Conditions at 4.)

193. The Department's second proposed condition under the Fish and Wildlife Habitat Standards contained states:

Recommended Fish and Wildlife Habitat Condition 2:

The certificate holder shall:

- a. Prior to construction of the facility, the certificate holder shall finalize and submit a Habitat Mitigation Plan, based upon Option 3 of the draft plan provided in Attachment P-1 of the Final Order on the ASC, for review and approval by the Department, in consultation with ODFW.

HMP Option 3 is the only mitigation that may be utilized without amendment of the HMP due to insufficient evidence available to demonstrate that Options 1 and 2 meet the requirements of OAR 345-022-0060.

In the finalization of the plan, the Department may request reporting requirements including specific information, frequency and format. Components of the plan to be finalized shall include, at a minimum, a final assessment of permanent habitat impacts (in acres) based on habitat quality of habitat subtype, and final facility design, presented in tabular format.

- b. During construction and operation of the facility, the certificate holder shall implement the requirements of the plan as approved under sub(a) of this condition.

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 Attachment A at 11.)

194. The Department's first proposed condition under Council's Public Services Standard states:

Recommended Public Services Condition 1:

Prior to construction of the facility, the certificate holder shall:

- a. Place a roadside sign along North Oil Dri Road and at facility entrance, including the contact information (cell number) for an onsite representative for dust complaints.
- b. Finalize the Dust Abatement and Management Control Plan included as Attachment U-4 to the Final Order on the ASC, in consultation with the Department.

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 Attachment A at 16.)

195. After hearing, the Department proposed amending Public Services Condition 1 as follows:

Recommended Amended Public Services Condition 1:³³

Prior to construction of the facility, the certificate holder shall:

- a. Place a roadside sign along North Oil Dri Road and at facility entrance, including the contact information (cell number) for an onsite representative for dust complaints.
- b. Finalize the Dust Abatement and Management Control Plan (DAMP) included as Attachment U-4 to the Final Order on the ASC, in consultation with the Lake County Planning and Road Departments, Oregon Department of Environmental Quality and the Department. Consultation, at a minimum, shall include:
 - i. Submission of the draft DAMP, with a cover letter/description of construction schedule, activities and final facility design, to the above referenced state and local government representatives, with a request for review and comment within 45 days. The draft DAMP shall include reasonable available control measures including application of binders/dust suppressants (e.g., Earth Bind, ligano sulfonate) on highly trafficked roads. The DAMP shall also include a description of conditions that would warrant application of additional water or suppressants and shall provide evidence that the certificate holder/contractor has reasonable access to additional suppressants/water controls for facility construction.
 - ii. Within 60-days of submission or as otherwise feasible, meet with the Department to evaluate comments and finalize the DAMP. Receive written confirmation from the Department that the DAMP may be finalized.

³³ Additions underlined, omission strikethrough in original.

- iii. Provide copies of the final DAMP and construction schedule to all property owners of record within 500 feet of the boundary of the property for which the site boundary is located.

(Oregon Department of Energy's Closing Argument at 18-19, footnote omitted.)

196. Next, the Department's second proposed condition under the Public Services Standard reads:

Recommended Public Services Condition 2:

During construction of the facility, certificate holder shall:

- a. Implement the requirements of the Dust Abatement and Management Control Plan, as finalized per sub(b) of the condition.
- b. Report to the Department, as soon as possible, any reported dust nuisance complaints received by the onsite representative, including date, time, complainant name and measures implemented to resolve the issue, or explanation if measures not implemented [OAR 345-025-0006(6)].

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 Attachment A at 16.)

197. The Department's third proposed condition under that standard provides:

Recommended Public Services Condition 3:

- a. Prior to construction of the facility, the certificate holder shall submit to the Department for review and approval in consultation with Lake County Planning and County Road Department, a Construction Traffic Management Plan that includes, at a minimum, the best management practices, County road use agreement, and traffic sign coordination provided in Attachment U-2 of the Final Order on the ASC;
- b. During construction of the facility, the certificate holder shall implement the Construction Traffic Management Plan, as approved by the Department in consultation with Lake County.

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 Attachment A at 16; underline and strikethrough omitted.)

198. In addition to the proposed amendments to the proposed site certificate conditions challenged by the limited parties, the Department proposed additional revisions to Public Services Condition 4 based on evidence and argument at hearing. (See Oregon Department of Energy's Closing Argument at 40.)

199. In the Department's Proposed Order, proposed Public Services Condition 4

provides:

Recommended Public Services Condition 4:

- a. Prior to construction of the facility, the certificate holder shall submit a Final Construction Fire Protection and Emergency Response Plan to the Department, consistent with the components included in the draft plan provided in Attachment U-3 of the Final Order on the ASC, for review and approval. The plan shall also include an updated Emergency and Fire contact list.
- b. Prior to operation of the facility, the certificate holder shall submit an Operational Fire Protection and Emergency Response Plan to the Department, consistent with the components included in the draft plan provided in Attachment U-3 of the Final Order on the ASC. The plan shall also include an updated Emergency and Fire contact list.

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 Attachment A at 16.)

200. In closing arguments, the Department proposed expanding Proposed Public Services Condition 4 as follows:

Recommended Amended Public Services Condition 4:³⁴

- a. Prior to construction of the facility, the certificate holder shall submit a Final Construction Fire Protection and Emergency Response Plan to the Department, consistent with the components included in the draft plan provided in Attachment U-3 of the Final Order on the ASC, for review and approval. Plan finalization shall include documentation of coordination with local fire protection and emergency services; qualifications and contact information for the onsite emergency medical technician; and executed agreement, or similar conveyance, for onsite emergency transport service. The plan shall also include an updated Emergency and Fire contact list.
- b. Prior to operation of the facility, the certificate holder shall submit an Operational Fire Protection and Emergency Response Plan to the Department, consistent with the components included in the draft plan provided in Attachment U-3 of the Final Order on the ASC[.]. The plan shall also include an updated Emergency and Fire contact list.

(Oregon Department of Energy's Closing Argument at 40.)

201. In their prehearing memorandum, the limited parties challenge the Department's Proposed Water Rights Condition 2 as permitting more water from groundwater wells than permitted by OWRD statutes. (Petitioners' Hearing Memorandum at 83.)

³⁴ Additions underlined, omission strikethrough in original.

202. The Department's Proposed Order contains the following language:

Recommended Water Rights Condition 2:

The certificate holder shall:

- a. Following installation of any onsite groundwater well, but prior to water withdrawal for facility water use, install a totalizing flowmeter or dedicated measuring tubes for tracking of daily water use not to exceed 5,000 gallons per well.
- b. During construction and operation, maintain totalizing flowmeters or dedicated measuring tubes.
- c. Within 30 days after well completion for each new exempt well under ORS 537.545, the certificate holder shall follow the recording requirements under OAR 690-190-0100. If the certificate holder is not the landowner, the certificate holder shall facilitate the landowner submission of required materials to Oregon Water Resources Department. The certificate holder shall submit to the Department a copy of the file submitted to Oregon Water Resources Department.

(OSCAPPDoc2 Proposed Order with Attachments 2020-10-09 Attachment A at 19; underline and strikethrough omitted.)

203. In closing arguments, the Department and Applicant each acknowledge that the language of provision (a) of Water Rights Condition 2 contains an inaccurate statement of permissible water use and concede that amendment is necessary. (Oregon Department of Energy's Closing Argument at 43; Applicant Obsidian Solar Center, LLC's Closing argument at 81-82.)

CONCLUSIONS OF LAW

1. The limited parties failed to show that the ASC impermissibility includes development within the Fort Rock Planning Area that is more than 600 feet from existing roads in violation of Lake County Zoning Ordinance (LCZO) §24.01(A)(1) and Lake County Comprehensive Plan (LCCP) Goal 2, Policies 10 and 11.

2. The ASC as conditioned in the Department's Proposed Order complies with the conditional use permit requirements for non-farm use in the A-2 zone as required by LCZO §24.19. The limited parties failed to establish the proposed facility, as conditioned, will seriously interfere with accepted farming practices on adjacent lands, or that the facility will materially alter the stability of the overall land use patterns of the area.

3. LCCP Goal 2 Policy 17 is implemented through LCZO §§24.01 and 24.19. The

ASC, as conditioned, demonstrates the proposed facility will comply with LCZO §24.01 and 24.19.

4. The ASC provides sufficient information regarding Applicant's purported bases to allow Council to take an exception to LCCP Goal 3, in accordance with ORS 469.504.

5. The limited parties failed to establish that the proposed facility as set forth in the ASC and conditioned in the Department's Proposed Order will result in diminution of value to their private property and/or business interests.

6. The proposed facility as set forth in the ASC and conditioned in this Proposed Order complies with the Council's Soil Protection standard.

7. The proposed facility as set forth in the ASC and conditioned in this Proposed Order is not likely to exceed the capacity of public or private utilities, roads, or local emergency services.

8. The ASC, as conditioned in the Department's Proposed Order, demonstrates the proposed facility will comply with LCZO §24.01, Statewide Planning Goal 9, and LCCP Goal 9 Policy 1.

9. The Department's Proposed Order erroneously permits excessive water use from wells within the project site and should be corrected to limit Applicant's use to no more than 5,000 gallons per day from all wells within the project site.

OPINION

Statutes, administrative rules, and local zoning ordinances generally applicable to this contested case generally.

ORS 197.005 provides legislative findings applicable to statewide and local land use and provides:

(1) Uncoordinated use of lands within this state threatens the orderly development, the environment of this state and the health, safety, order, convenience, prosperity and welfare of the people of this state.

(2) To promote coordinated administration of land uses consistent with comprehensive plans adopted throughout the state, it is necessary to establish a process for the review of state agency, city, county and special district land conservation and development plans for compliance with goals.

(3) Except as otherwise provided in subsection (4) of this section, cities and counties should remain as the agencies to consider, promote and manage the local aspects of land conservation and development for the best interests of the people within their jurisdictions.

(4) The promotion of coordinated statewide land conservation and development requires the creation of a statewide planning agency to prescribe planning goals and objectives to be applied by state agencies, cities, counties and special districts throughout the state.

(5) City and county governments are responsible for the development of local comprehensive plans. The purpose of ORS 195.065, 195.070 and 195.075 is to enhance coordination among cities, counties and special districts to assure effectiveness and efficiency in the delivery of urban services required under those local comprehensive plans.

ORS 197.010 declares the legislative policy of the state regarding adoption and implementation of comprehensive land use plans and provides, in part:

The Legislative Assembly declares that:

(1) In order to ensure the highest possible level of livability in Oregon, it is necessary to provide for properly prepared and coordinated comprehensive plans for cities and counties, regional areas and the state as a whole. These comprehensive plans:

(a) Must be adopted by the appropriate governing body at the local and state levels;

(b) Are expressions of public policy in the form of policy statements, generalized maps and standards and guidelines;

(c) Shall be the basis for more specific rules and land use regulations which implement the policies expressed through the comprehensive plans;

(d) Shall be prepared to assure that all public actions are consistent and coordinated with the policies expressed through the comprehensive plans; and

(e) Shall be regularly reviewed and, if necessary, amended to keep them consistent with the changing needs and desires of the public they are designed to serve.

(2)(a) The overarching principles guiding the land use program in the State of Oregon are to:

(A) Provide a healthy environment;

(B) Sustain a prosperous economy;

(C) Ensure a desirable quality of life; and

(D) Equitably allocate the benefits and burdens of land use planning.

(b) Additionally, the land use program should, but is not required to, help communities achieve sustainable development patterns and manage the effects of climate change.

ORS 197.015 provides definitions for ORS chapters 195, 196, 197 and ORS 197A.300 to 197A.325 and reads, in pertinent part:

As used in ORS chapters 195, 196 and 197 and ORS 197A.300 to 197A.325, unless the context requires otherwise:

* * * * *

(2) “Board” means the Land Use Board of Appeals.

* * * * *

(4) “Commission” means the Land Conservation and Development Commission.

(5) “Comprehensive plan” means a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs. “Comprehensive” means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. “General nature” means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is “coordinated” when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible. “Land” includes water, both surface and subsurface, and the air.

* * * * *

(8) “Goals” means the mandatory statewide land use planning standards adopted by the commission pursuant to ORS chapters 195, 196 and 197.

* * * * *

(10) “Land use decision”:

(a) Includes:

(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

(i) The goals;

(ii) A comprehensive plan provision;

(iii) A land use regulation; or

(iv) A new land use regulation;

(B) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals; or

(C) A decision of a county planning commission made under ORS 433.763;

* * * * *

(11) “Land use regulation” means any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan.

* * * * *

(13) “Local government” means any city, county or metropolitan service district formed under ORS chapter 268 or an association of local governments performing land use planning functions under ORS 195.025.

ORS 197.225 requires to preparation and adoption of certain goals and guidelines and provides:

The Department of Land Conservation and Development shall prepare and the Land Conservation and Development Commission shall adopt goals and guidelines for use by state agencies, local governments and special districts in preparing, adopting, amending and implementing existing and future comprehensive plans.

ORS 197.646 requires local governments to amend its comprehensive plan and land use regulations to comply with land use statutes and statewide planning goals and provides:

(1) A local government shall amend its acknowledged comprehensive plan or acknowledged regional framework plan and land use regulations implementing either plan by a self-initiated post-acknowledgment process under ORS 197.610 to 197.625 to comply with a new requirement in land use statutes, statewide land use planning goals or rules implementing the statutes or the goals.

(2)(a) The Department of Land Conservation and Development shall notify local governments when a new requirement in land use statutes, statewide land use planning goals or rules implementing the statutes or the goals requires changes to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan.

(b) The Land Conservation and Development Commission shall establish, by rule, the time period within which an acknowledged comprehensive plan, an acknowledged regional framework plan and land use regulations implementing either plan must be in compliance with:

(A) A new requirement in a land use statute, if the legislation does not specify a time period for compliance; and

(B) A new requirement in a land use planning goal or rule adopted by the commission.

(3) When a local government does not adopt amendments to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan, as required by subsection (1) of this section, the new requirements apply directly to the local government's land use decisions. The failure to adopt amendments to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan required by subsection (1) of this section is a basis for initiation of enforcement action pursuant to ORS 197.319 to 197.335.

ORS 215.203 permits adoption of zoning ordinances establishing exclusive farm use zones by local governments and provides, in part:

(1) Zoning ordinances may be adopted to zone designated areas of land within the county as exclusive farm use zones. Land within such zones shall be used exclusively for farm use *except as otherwise provided in ORS * * * 215.283 * * **. Farm use zones shall be established only when such zoning is consistent with the comprehensive plan.

(2)(a) As used in this section, "farm use" means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. "Farm use" includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. "Farm use" also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. "Farm use" also includes the propagation,

cultivation, maintenance and harvesting of aquatic, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. "Farm use" includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. "Farm use" does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees or land described in ORS 321.267 (3) or 321.824 (3).

* * * * *

(c) As used in this subsection, "accepted farm practice" means a mode of operation that is common to farms of a similar nature, necessary for the operation of such farms to obtain a profit in money, and customarily utilized in conjunction with farm use.

ORS 215.243 identifies the state's agricultural land use policy and provides:

The Legislative Assembly finds and declares that:

(1) Open land used for agricultural use is an efficient means of conserving natural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state, whether living in rural, urban or metropolitan areas of the state.

(2) The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation.

(3) Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.

(4) Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones.

ORS 215.283 identifies uses permitted in exclusive farm use zones in non-marginal lands and provides, in part:

(1) The following uses may be established in any area zoned for exclusive farm use:

* * * * *

(c) Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in:

(A) ORS 215.275; or

(B) If the utility facility is an associated transmission line, as defined in ORS 215.274 and 469.300.

ORS 469.300 provides definitions applicable to applications for energy facilities and provides, in part:

As used in ORS 469.300 to 469.563, 469.590 to 469.619, 469.930 and 469.992, unless the context requires otherwise:

(1) “Applicant” means any person who makes application for a site certificate in the manner provided in ORS 469.300 to 469.563, 469.590 to 469.619, 469.930 and 469.992.

(2) “Application” means a request for approval of a particular site or sites for the construction and operation of an energy facility or the construction and operation of an additional energy facility upon a site for which a certificate has already been issued, filed in accordance with the procedures established pursuant to ORS 469.300 to 469.563, 469.590 to 469.619, 469.930 and 469.992.

(3) “Associated transmission lines” means new transmission lines constructed to connect an energy facility to the first point of junction of such transmission line or lines with either a power distribution system or an interconnected primary transmission system or both or to the Northwest Power Grid.

* * * * *

(11)(a) “Energy facility” means any of the following:

* * * * *

(D) A solar photovoltaic power generation facility using more than:

(i) 160 acres located on high-value farmland as defined in ORS 195.300;

(ii) 1,280 acres located on land that is predominantly cultivated or that, if not cultivated, is predominantly composed of soils that are in capability classes I to

IV, as specified by the National Cooperative Soil Survey operated by the Natural Resources Conservation Service of the United States Department of Agriculture;
or

(iii) 1,920 acres located on any other land.

* * * * *

(14) “Facility” means an energy facility together with any related or supporting facilities.

* * * * *

(22) “Project order” means the order, including any amendments, issued by the State Department of Energy under ORS 469.330.

* * * * *

(24) “Related or supporting facilities” means any structure, proposed by the applicant, to be constructed or substantially modified in connection with the construction of an energy facility, including associated transmission lines, reservoirs, storage facilities, intake structures, road and rail access, pipelines, barge basins, office or public buildings, and commercial and industrial structures. “Related or supporting facilities” does not include geothermal or underground gas storage reservoirs, production, injection or monitoring wells or wellhead equipment or pumps.

* * * * *

(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 469.350(1) provides, “Applications for site certificates shall be made to the Energy Facility Siting Council in a form prescribed by the council and accompanied by the fee required by ORS 469.421.”

ORS 469.370 requires the Department to issue a DPO for each ASC and hold a public hearing on the DPO as follows:

(1) Based on its review of the application and the comments and recommendations on the application from state agencies and local governments, the State Department of Energy shall prepare and issue a draft proposed prder on the application.

(2) Following issuance of the draft proposed order, the Energy Facility Siting Council shall hold one or more public hearings on the application for a site certificate in the affected area and elsewhere, as the council considers necessary. Notice of the hearing shall be mailed at least 20 days before the hearing. The notice shall, at a minimum:

(a) Comply with the requirements of ORS 197.763 (2), with respect to the persons notified;

(b) Include a description of the facility and the facility's general location;

(c) Include the name of an agency representative to contact and the telephone number where additional information may be obtained;

(d) State that copies of the application and draft Proposed Order are available for inspection at no cost and will be provided at a reasonable cost; and

(e) State that failure to raise an issue in person or in writing prior to the close of the record of the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue precludes consideration of the issue in a contested case.

* * * * *

(4) After reviewing the application, the draft proposed order and any testimony given at the public hearing and after consulting with other agencies, the department shall issue a proposed order recommending approval or rejection of the application. The department shall issue public notice of the proposed order, that shall include notice of a contested case hearing specifying a deadline for requests to participate as a party or limited party and a date for the prehearing conference.

(5) Following receipt of the proposed order from the department, the council shall conduct a contested case hearing on the application for a site certificate in accordance with the applicable provisions of ORS chapter 183 and any procedures adopted by the council. The applicant shall be a party to the contested case. The council may permit any other person to become a party to the contested case in support of or in opposition to the application only if the person appeared in person or in writing at the public hearing on the site certificate application. *Issues that may be the basis for a contested case shall be limited to those raised on the record of the public hearing under subsection (3) of this section, unless:*

(a) The department failed to follow the requirements of subsection (2) or (3) of this section; or

(b) The action recommended in the proposed order, including any recommended

conditions of the approval, differs materially from that described in the draft proposed order, in which case only new issues related to such differences may be raised.

* * * * *

(7) At the conclusion of the contested case, the council shall issue a final order, either approving or rejecting the application based upon the standards adopted under ORS 469.501 and any additional statutes, rules or local ordinances determined to be applicable to the facility by the project order, as amended. The council shall make its decision by the affirmative vote of at least four members approving or rejecting any application for a site certificate. The council may amend or reject the proposed order, so long as the council provides public notice of its hearing to adopt a final order, and provides an opportunity for the applicant and any party to the contested case to comment on material changes to the proposed order, including material changes to conditions of approval resulting from the council's review. The council's order shall be considered a final order for purposes of appeal.

Emphasis added.

ORS 469.501 directs Council to adopt standards for energy facility siting, construction, operation, and retirement and authorizes Council to grant exceptions to one or more of those standards, stating in part:

(1) The Energy Facility Siting Council shall adopt standards for the siting, construction, operation and retirement of facilities. * * *.

* * * * *

(3)(a) The council may issue a site certificate for a facility that does not meet one or more of the applicable standards adopted under subsection (1) of this section if the council determines that the overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by the applicable standards the facility does not meet.

(b) The council by rule shall specify the criteria by which the council makes the determination described in paragraph (a) of this subsection.

ORS 469.503 identifies the requirements for approval of an energy facility site certificate and provides, in relevant part:

In order to issue a site certificate, the Energy Facility Siting Council shall determine that the preponderance of the evidence on the record supports the following conclusions:

(1) *The facility complies with the applicable standards adopted by the council pursuant to ORS 469.501 or the overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by the applicable standards the facility does not meet.*

* * * * *

(3) Except as provided in ORS 469.504 for land use compliance * * * the facility complies with all other Oregon statutes and administrative rules identified in the project order, as amended, as applicable to the issuance of a site certificate for the proposed facility. If compliance with applicable Oregon statutes and administrative rules * * * would result in conflicting conditions in the site certificate, the council may resolve the conflict consistent with the public interest. A resolution may not result in the waiver of any applicable state statute.

(4) The facility complies with the statewide planning goals adopted by the Land Conservation and Development Commission.

Emphasis added.

ORS 469.504 identifies requirements for energy facility compliance with statewide planning goals and authorizes exceptions thereto and provides, in part:

(1) A proposed facility shall be found in compliance with the statewide planning goals under ORS 469.503 (4) if:

(a) The facility has received local land use approval under the acknowledged comprehensive plan and land use regulations of the affected local government; or

(b) The Energy Facility Siting Council determines that:

(A) The facility complies with applicable substantive criteria from the affected local government's acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals and in effect on the date the application is submitted, and with any Land Conservation and Development Commission administrative rules and goals and any land use statutes that apply directly to the facility under ORS 197.646[.]

* * * * *

(C) For a facility that the council elects to evaluate against the statewide planning goals pursuant to subsection (5) of this section, *that the proposed facility complies with the applicable statewide planning goals or that an exception to any applicable statewide planning goal is justified under subsection (2) of this section.*

(2) The council may find goal compliance for a facility that does not otherwise comply with one or more statewide planning goals by taking an exception to the applicable goal. Notwithstanding the requirements of ORS 197.732, the statewide planning goal pertaining to the exception process or any rules of the Land Conservation and Development Commission pertaining to an exception process goal, *the council may take an exception to a goal if the council finds:*

* * * * *

(c) The following standards are met:

(A) Reasons justify why the state policy embodied in the applicable goal should not apply;

(B) The significant environmental, economic, social and energy consequences anticipated as a result of the proposed facility have been identified and adverse impacts will be mitigated in accordance with rules of the council applicable to the siting of the proposed facility; and

(C) The proposed facility is compatible with other adjacent uses or will be made compatible through measures designed to reduce adverse impacts.

Emphasis added.

OAR 345-001-0010 provides definitions general applicable to the provisions of Chapter 345 and provides, in part:

In this chapter, the following definitions apply unless the context requires otherwise or a term is specifically defined within a division or a rule:

* * * * *

(3) “Applicant” as defined in ORS 469.300 or, if an application has not been submitted, a person who has submitted, or intends to submit, a notice of intent or a request for expedited review.

* * * * *

(14) “Council” means the Energy Facility Siting Council established under ORS 469.450.

* * * * *

(16) “Department” means the Oregon Department of Energy created under ORS 469.030.

* * * * *

(18) “Energy facility” includes:

(a) An energy facility as defined in ORS 469.300[.]

* * * * *

(30) “Land use approval” means a final quasi-judicial decision or determination made by a local government that:

(a) Applies existing comprehensive plan provisions or land use regulations to a proposed facility;

(b) Amends a comprehensive plan map or zoning map to accommodate a proposed facility;

(c) Amends comprehensive plan text or land use regulations to accommodate a proposed facility;

(d) Applies the statewide planning goals to a proposed facility; or

(e) Takes an exception to the statewide planning goals adopted by the Land Conservation and Development Commission for a proposed facility.

(31) “Local government” as defined in ORS 469.300.

* * * * *

(51) “Reviewing agency” means any of the following officers, agencies or tribes:

(a) The Department of Environmental Quality;

(b) The Water Resources Commission and the Water Resources Director through the Water Resources Department;

(c) The Fish and Wildlife Commission through the Oregon Department of Fish and Wildlife;

(d) The State Geologist;

(e) The Department of Forestry;

(f) The Public Utility Commission of Oregon;

(g) The Oregon Department of Agriculture;

- (h) The Department of Land Conservation and Development;
- (i) The Oregon Department of Aviation;
- (j) The Pacific Northwest Electric Power and Conservation Planning Council;
- (k) The Office of State Fire Marshal;
- (l) The Department of State Lands;
- (m) The State Historic Preservation Office;
- (n) Any other agency identified by the Department;
- (o) Any tribe identified by the Legislative Commission on Indian Services as affected by the proposed facility;
- (p) The governing body of any incorporated city or county in Oregon within the study area as defined in OAR 345-001-0010 for impacts to public services;
- (q) Any special advisory group designated by the Council under ORS 469.480;
and
- (r) The federal land management agency with jurisdiction if any part of the proposed site is on federal land.

* * * * *

(56) “Solar photovoltaic power generation facility” includes, but is not limited to, an assembly of equipment that converts sunlight into electricity and then stores or transfers that electricity. This includes photovoltaic modules, mounting and tracking equipment, posts, electrical cabling, inverters, transformers, collection systems, fencing, and other components.

(a) For the purposes of applying the acreage standards of ORS 469.300(11)(a)(D), the land used by a solar photovoltaic power generation facility includes the land occupied by its related or supporting facilities. Related or supporting facilities are not otherwise considered to be components of the solar photovoltaic power generation facility;

(b) A proposed solar photovoltaic power generation project may be determined to be an expansion of any existing or proposed solar photovoltaic power generation facility that is:

(A) Within one mile of the proposed project; and

(B) Determined to be under common ownership with the proposed project. Projects connected to the same parent company or individuals will be considered to be in common ownership, regardless of the operating business structure;

(c) As used in this rule and OAR 345-001-0250, a “proposed solar photovoltaic power generation project” means:

(A) The proposed development of a separate and independent solar photovoltaic power generation facility; or

(B) The proposed expansion or modification of a proposed or existing solar photovoltaic power generation facility.

Pursuant to ORS 469.501, Council has adopted standards for the siting, construction, operation, and retirement of energy facilities. As relevant to this contested case proceeding, those standards are found at OAR 345-021-0000 (General Standard), OAR 345-022-0022 (Soil Standard), OAR 345-022-0030 (Land Use Standard), and OAR 345-022-0110 (Public Services Standard).

OAR 345-022-0000 sets forth Council’s General Standard of Review and provides, in part:

(1) To issue a site certificate for a proposed facility or to amend a site certificate, the Council shall determine that the preponderance of evidence on the record supports the following conclusions:

(a) The facility complies with the requirements of the Oregon Energy Facility Siting statutes, ORS 469.300 to 469.570 and 469.590 to 469.619, and the standards adopted by the Council pursuant to 469.501 or the overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by the applicable standards the facility does not meet as described in section (2);

(b) Except as provided in OAR 345-022-0030 for land use compliance and except for those statutes and rules for which the decision on compliance has been delegated by the federal government to a state agency other than the Council, the facility complies with all other Oregon statutes and administrative rules identified in the project order, as amended, as applicable to the issuance of a site certificate for the proposed facility. If the Council finds that applicable Oregon statutes and rules, other than those involving federally delegated programs, would impose conflicting requirements, the Council shall resolve the conflict consistent with the public interest. In resolving the conflict, the Council cannot waive any applicable state statute.

(2) The Council may issue or amend a site certificate for a facility that does not

meet one or more of the applicable standards adopted under ORS 469.501 if the Council determines that the overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by the applicable standards the facility does not meet. The Council shall make this balancing determination only when the applicant has shown that the proposed facility cannot meet applicable Council standards or has shown, to the satisfaction of the Council, that there is no reasonable way to meet the applicable Council standards through mitigation or avoidance of any adverse effects on a protected resource or interest. The applicant has the burden to show that the overall public benefits outweigh any adverse effects on a resource or interest, and the burden increases proportionately with the degree of adverse effects on a resource or interest. The Council shall weigh overall public benefits and any adverse effects on a resource or interest as follows:

(a) The Council shall evaluate any adverse effects on a resource or interest by considering factors including, but not limited to, the following:

(A) The uniqueness and significance of the resource or interest that would be affected;

(B) The degree to which current or future development may adversely affect the resource or interest, if the proposed facility is not built;

(C) Proposed measures to reduce any adverse effects on a resource or interest by avoidance of impacts;

(D) The magnitude of any anticipated adverse effects on a resource or interest, taking into account any proposed mitigation.

(b) The Council shall evaluate overall public benefits by considering factors including, but not limited to, the following:

(A) The overall environmental effects of the facility, considering both beneficial and adverse environmental effects;

(B) The degree to which the proposed facility promotes Oregon energy policy as described in ORS 469.010 by demonstrating or advancing new efficiency or renewable technology or by expanding electric generating capacity from renewable energy sources;

(C) Recommendations from any special advisory group designated by the Council under ORS 469.480;

(D) Evidence that the benefits are likely to occur only if the proposed facility is built;

(E) For facilities that are subject to a need standard, evidence underlying the Council's decision on compliance with the rules in OAR 345, Division 23, except that the Council shall not find that need for a facility is sufficient, by itself, to outweigh any adverse effects on a resource or interest affected by the proposed facility.

(3) Notwithstanding section (2) of this rule, the Council shall not apply the balancing determination to the following standards:

* * * * *

(b) The land use standard described in OAR 345-022-0030;

* * * * *

(4) In making determinations regarding compliance with statutes, rules and ordinances normally administered by other agencies or compliance with requirements of the Council statutes if other agencies have special expertise, the Department of Energy shall consult with such other agencies during the notice of intent, site certificate application and site certificate amendment processes. Nothing in these rules is intended to interfere with the state's implementation of programs delegated to it by the federal government.

OAR 345-022-0022 identifies Council's Soil Protection Standard and provides:

To issue a site certificate, the Council must find that the design, construction and operation of the facility, taking into account mitigation, are not likely to result in a significant adverse impact to soils including, but not limited to, erosion and chemical factors such as salt deposition from cooling towers, land application of liquid effluent, and chemical spills.

OAR 345-022-0030 sets forth Council's Land Use standard and provides, in relevant part:

(1) To issue a site certificate, the Council must find that the proposed facility complies with the statewide planning goals adopted by the Land Conservation and Development Commission.

(2) The Council shall find that a proposed facility complies with section (1) if:

(a) The applicant elects to obtain local land use approvals under ORS 469.504(1)(a) and the Council finds that the facility has received local land use approval under the acknowledged comprehensive plan and land use regulations of the affected local government; or

(b) The applicant elects to obtain a Council determination under ORS

469.504(1)(b) and the Council determines that:

(A) The proposed facility complies with applicable substantive criteria as described in section (3) and the facility complies with any Land Conservation and Development Commission administrative rules and goals and any land use statutes directly applicable to the facility under ORS 197.646(3);

(B) For a proposed facility that does not comply with one or more of the applicable substantive criteria as described in section (3), the facility otherwise complies with the statewide planning goals or an exception to any applicable statewide planning goal is justified under section (4); or

(C) For a proposed facility that the Council decides, under sections (3) or (6), to evaluate against the statewide planning goals, the proposed facility complies with the applicable statewide planning goals or that an exception to any applicable statewide planning goal is justified under section (4).

(3) As used in this rule, *the “applicable substantive criteria” are criteria from the affected local government’s acknowledged comprehensive plan and land use ordinances that are required by the statewide planning goals and that are in effect on the date the applicant submits the application. If the special advisory group recommends applicable substantive criteria, as described under OAR 345-021-0050,³⁵ the Council shall apply them.* If the special advisory group does not

³⁵ OAR 345-021-0050(6) provides:

(a) If the applicant has elected to demonstrate compliance with the Council’s land use standard under ORS 469.504(1)(a), each local government with land use jurisdiction over the proposed facility must, in the comments or recommendations submitted to the Department under section (4), describe the status of the local land use proceedings and state the date when the local government expects to issue a final land use decision;

(b) If the applicant has elected to obtain a Council determination of compliance with the Council’s land use standard under ORS 469.504(1)(b), each local government with land use jurisdiction over the proposed facility must, in the comments or recommendations submitted to the Department under section (4), include:

(A) A complete list of applicable substantive criteria from the local government’s acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals and that are in effect on the date the application was submitted. For the purpose of this rule, the application is submitted on the date that the Department receives the preliminary application. “Applicable substantive criteria” means the criteria and standards that the local government would apply in making all land use decisions necessary to site the proposed facility in the absence of a Council proceeding;

(B) A complete list of Land Conservation and Development Commission administrative rules, statewide planning goals and land use statutes directly applicable to the facility under ORS 197.646(3);

recommend applicable substantive criteria, the Council shall decide either to make its own determination of the applicable substantive criteria and apply them or to evaluate the proposed facility against the statewide planning goals.

(4) The Council may find goal compliance for a proposed facility that does not otherwise comply with one or more statewide planning goals by taking an exception to the applicable goal. Notwithstanding the requirements of ORS 197.732, the statewide planning goal pertaining to the exception process or any rules of the Land Conservation and Development Commission pertaining to the exception process, the Council may take an exception to a goal if the Council finds:

* * * * *

(c) The following standards are met:

(A) Reasons justify why the state policy embodied in the applicable goal should not apply;

(B) The significant environmental, economic, social and energy consequences anticipated as a result of the proposed facility have been identified and adverse impacts will be mitigated in accordance with rules of the Council applicable to the siting of the proposed facility; and

(C) The proposed facility is compatible with other adjacent uses or will be made compatible through measures designed to reduce adverse impacts.

(5) If the Council finds that applicable substantive local criteria and applicable statutes and state administrative rules would impose conflicting requirements, the Council shall resolve the conflict consistent with the public interest. In resolving the conflict, the Council cannot waive any applicable state statute.

(6) If the special advisory group recommends applicable substantive criteria for an energy facility described in ORS 469.300(11)(a)(C) to (E) or for a related or supporting facility that does not pass through more than one local government jurisdiction or more than three zones in any one jurisdiction, the Council shall apply the criteria recommended by the special advisory group. * * *.

Emphasis added.

(C) Copies of the criteria listed in (A) and any interpretations of ambiguous terms and matters arising from the local government's land use regulations; and

(c) The local government may submit its recommendations, comments and interpretations as described in subsection (b) in the form of a resolution adopted by the local governing body.

OAR 345-022-0110 identifies Council's Public Services Standard and provides:

(1) Except for facilities described in sections (2) and (3), to issue a site certificate, the Council must find that the construction and operation of the facility, taking into account mitigation, are not likely to result in significant adverse impact to the ability of public and private providers within the analysis area described in the project order to provide: sewers and sewage treatment, water, storm water drainage, solid waste management, housing, traffic safety, police and fire protection, health care and schools.

(2) The Council may issue a site certificate for a facility that would produce power from wind, solar or geothermal energy without making the findings described in section (1). However, the Council may apply the requirements of section (1) to impose conditions on a site certificate issued for such a facility.

(3) The Council may issue a site certificate for a special criteria facility under OAR 345-015-0310 without making the findings described in section (1). However, the Council may apply the requirements of section (1) to impose conditions on a site certificate issued for such a facility.

LCZO Article 3: Agricultural Use Zone: A-2

LCZO Section 3.02 Permitted Uses. In an A-2 Zone, the following uses and their accessory uses are permitted outright:

* * * * *

C. Utility facilities necessary for public service, except commercial facilities for the purpose of generating power for public use by sale and transmission towers over 200 feet in height.

D. Nonresidential buildings customarily provided in conjunction with farm use.

* * * * *

LCZO Section 3.04 Conditional Uses. In an A-2 Zone, the following uses and their accessory uses are permitted when authorized in accordance with the requirements of this Article and Article 24 of this Ordinance.

* * * * *

B. Type II. Conditional Uses.

* * * * *

6. Commercial utility facilities for the purpose of generating power for public use by sale.

Article 24: Conditional Uses

Section 24.01 Authorization to Grant or Deny Conditional Uses. Conditional Uses listed in this Ordinance may be permitted, enlarged or otherwise altered when authorized in accordance with the standards and procedures set forth in this Article. In the case of a use existing prior to the effective date of this Ordinance, and classified herein as a Conditional Use, a change in use, enlargement or alteration of such use shall conform with the provisions for a conditional use. An application for a Conditional Use may be approved, modified, approved with conditions or denied.

A. General Criteria. In determining whether or not a Conditional Use shall be approved or denied, it shall be determined that the following criteria are either met or can be met through the compliance with specific conditions.

1. The proposal is in compliance with the *applicable* Comprehensive Plan and Policies set forth thereby.

* * * * *

3. That, for proposals requiring approvals or permits from other local, State and/or federal agencies, evidence of such approval or permit compliance is established or can be assured prior to final approval.

4. That no approval be granted for any use which is or is expected to be found to exceed resource and public service/facility carrying capacities, or for any use which is found to not be in compliance with applicable air, water, land, solid waste, or noise pollution standards.

* * * * *

LCZO Section 24.18 Renewable Energy Facilities. For proposed facilities under Oregon Energy Siting Council (EFSC) jurisdiction, *conditional use permits shall be granted consistent with the EFSC siting standards* as adopted in Oregon Administrative Rules Chapter 345, or amended hereafter. * * * .

* * * * *

Section 24.19 Criteria for Nonfarm Uses, Excluding Farm Related or Accessory Uses, in an A-1 or A-2 Zone. Nonfarm uses, excluding farm related or farm accessory uses, may be approved in an A-1 or A-2 zone upon findings that each such use:

- A. Is compatible with farm uses described in ORS 215.203(2) and is consistent with the intent and purposes set forth in ORS 215.243;
- B. Does not interfere seriously with accepted farming practices as defined in ORS 215.203(2)(c), on adjacent lands devoted to farm use;
- C. Does not materially alter the stability of the overall land use pattern of the area;
- D. Is situated upon generally unsuitable land for the production of farm crops and livestock, considering the flooding, vegetation, location and size of the tract;
- E. Complies with other applicable natural resource provisions; and
- F. Complies with such other conditions as the County considers necessary.

Emphasis added.

Pursuant to ORS 469.470, EFSC is responsible for authorizing the construction, operation, and retirement of energy facilities on approved sites within the state of Oregon. This is not a process built on brevity. Under ORS 469.330(1), the process for obtaining a site certificate begins with the filing of a Notice of Intent (NOI) to file an ASC. In this matter, Applicant filed its NOI in January 2018. The Department then obtains input from state agencies with regulatory oversight responsibilities over one or more aspects of the proposed in the facility NOI/ASC. Thereafter, pursuant to ORS 469.330, the Department issues a project order identifying the applicable statutes, administrative rules, EFSC standards, local ordinances, and other requirements of the ASC. The Department issued the project order in this matter on May 24, 2018. Pursuant to ORS 469.350(1) and (2), an applicant must then file a preliminary ASC which is circulated to certain state agencies and local government entities for additional input before it may file the final ASC. Thereafter, pursuant to ORS 469.370, the Department must make a determination of completeness of the ASC and prepare the DPO. Under OAR 345-010-0190(5), an ASC is complete when the Department finds an applicant has submitted sufficient information to permit EFSC to make findings or impose conditions on all applicable standards. Thereafter, the Department must convene a public hearing on the DPO. In this matter, those events occurred on March 12 and July 20, 2020, respectively. At the DPO, individuals may appear and submit comments on the record. If those comments meet standards specified by Department rules, those parties may seek standing to appear as parties/limited parties to the contested case. Only after each of the above steps is complete does the Department issue a Proposed Order on an ASC. In this matter, the Department's Proposed Order was issued on October 9, 2020, nearly 30 months after filing the NOI.

The limited parties in this matter each appeared, either individually, or through legal counsel, and submitted comments on the record of the DPO. The issues identified herein, as refined by the ALJ through the *Order on Petitions for Party Status and Issues for Contested Case*, are derived from those comments and subsequent petitions. For consistency and clarity, this Proposed Order attempts to address those issues as originally framed, except, as below, where overarching issues require global resolution to avoid unnecessary repetition.

Applicable substantive criteria for purposes of the current ASC.

The parties in this matter dispute which criteria from Lake County's zoning ordinances and comprehensive plan goals should be considered "applicable substantive criteria" for purposes of evaluating the ASC. The limited parties raise this issue in two distinct ways through the issues presented in their petitions for party status. First, through the assertion that goals and policies in the LCCP and identified by the SAG should be evaluated as separate applicable substantive criteria, rather than in conjunction with the implementing provisions of the LCZO also identified by the SAG. Second, by asserting that Applicant was required to demonstrate the proposed facility would comply with certain goals and policies in the LCCP, not identified by the SAG as applicable substantive criteria nor implemented through one or more provisions of the LCZO.

The Department counters the limited parties' assertions by arguing (1) that the LCCP goals and policies identified by the SAG cannot be examined in isolation but, instead, must be evaluated through those corresponding provisions of the LCZO identified by the SAG which implement the identified goals and policies, and (2) that goals and policies not implemented through an adopted zoning ordinance, and required by one or more statewide planning goals, fail to meet the definition of applicable substantive criteria. The Department's position is based on its interpretation of OAR 345-002-0030.

An agency's interpretation of its own validly promulgated administrative rule is entitled to deference unless inconsistent with the text or context of the rule, or with any other source of law. See, *Oil Re-Refining Co. v. Environmental Quality Comm.*, 361 Or 1, 11 (2017) ("Within our framework for interpreting state regulations, this court ordinarily defers to an agency's interpretation of its own regulation if that interpretation is a plausible one and otherwise consistent with the law.") and *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or. 132, 142, (1994) ("Where * * * the agency's plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law, there is no basis on which this court can assert that the rule has been interpreted 'erroneously.' It follows that * * * this court cannot overrule * * * an agency's interpretation of its own rule[.]") Pursuant to *Oil Re-Refining Co.* and *Don't Waste Oregon*, the Department's interpretation of OAR 345-022-0030 is erroneous and therefore not entitled to deference only if it is: 1) implausible; 2) inconsistent with the wording of the rule; 3) inconsistent with the context of the rule; or 4) inconsistent with any other source of law. As discussed below, the ALJ finds the Department's interpretation of OAR 345-022-0030(3) is entitled to deference.

As set forth above, the term "applicable substantive criteria" is defined by OAR 345-022-0030(3). According to that rule, applicable substantive criteria are those criteria (1) from the affected local government's acknowledged comprehensive plan *and* land use ordinances (2) that are required by the statewide planning goals *and* (3) that are in effect on the date the applicant submits the application. Additionally, the relevant standard requires that, if the SAG (in this case, the LCBC) recommends applicable substantive criteria, the Council *shall* apply them. Moreover, if the SAG does not recommend applicable substantive criteria, Council must either make its own determination of the applicable substantive criteria and apply them or evaluate the

proposed facility against the statewide planning goals. This is consistent with the requirements of ORS 469.504 which requires that a proposed facility shall be found in compliance with the statewide planning goals if the proposed facility has either received local land use approval under the acknowledged comprehensive plan *and* land use regulations of the affected local government *or* Council determines the proposed facility complies with applicable substantive criteria from the affected local government's acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals and in effect on the date the application is submitted.

In this matter, Council designated the LCBC as the SAG for the ASC on February 23, 2018. Thereafter, the designated SAG identified those provisions of the LCCP and the LCZO applicable to the ASC on March 29, 2018. As the affected local government, LCBC identified goals and policies of the LCCP along with those provisions of the LCZO implementing those goals and policies which it deemed applicable to the ASC. The LCBC did not identify any goals or policies from the LCCP not implemented through provisions of the LCZO adopted at the time Applicant filed the ASC. As such, under OAR 345-022-0030(3) and ORS 469.504, only those criteria identified by the LCBC/SAG which were (1) contained within the LCCP *and* the LCZO, (2) required by Oregon's statewide planning goals, and (3) in effect at the time Applicant filed the ASC constitute applicable substantive criteria.

Accordingly, any provision of the LCCP that does not meet these criteria, either because it is not implemented through and adopted provision of the LCZO or because it is not also required by one or more statewide planning goals, does not constitute applicable substantive criteria that Council must apply to the ASC.

Issue 1. Whether the ASC impermissibly includes development within the Fort Rock Planning Area that is more than 600 feet from existing roads in violation of Lake County Zoning Ordinance (LCZO) 24.01(A)(1) and Lake County Comprehensive Plan (LCCP) Goal 2, Policies 10 and 11.

Council Standard: General Standard and Land Use Standard; OARs 345-022-0000 and 345-022-0030.

There is no dispute that a large majority of the proposed facility site is within the area designated as the Fort Rock Planning Area and that a significant portion of the proposed facility, if approved, will sit on lands more than 600 ft. from existing roads in that area. The limited parties assert that LCCP Planning Goal 2 policies 10 and 11 serve as a limitation on development not to exceed 600 ft. from any existing road in the Fort Rock Planning Area presumably to preserve agricultural uses. For the reasons below, I disagree.

LCCP Planning Goal 2, Planning Process, identifies the purpose of the policy as "To establish a land use *policy framework and planning process* as the basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions and actions." Emphasis added. Policies 10 and 11 state:

10. That the area designated on the Land Use Plan map as "Fort Rock Planning

Area,” will be subject to those policy provisions specifically applicable to Fort Rock.

11. That additional development in Fort Rock be limited to a depth of 600 feet from the existing road system.

By its terms, LCCP Goal 2 provides for the establishment of a policy framework and planning process to be used in future land use decision and actions. The Department argues that Applicant is not required to comply with, and Council is not required to, consider LCCP Goal 2 policies 10 and 11 when evaluating whether to issue the site certificate for the proposed facility. According to the Department, those policies within Goal 2 do not meet Council’s definition of applicable substantive criteria because the LCBC has not adopted a corresponding provision of the LCZO to implement those policies. Moreover, the Department points out that LCCP Goal 2 policies 10 and 11 do not constitute applicable substantive criteria because they are not required by Statewide Planning Goal 2. As detailed above, the ALJ agrees with the Department’s interpretation of applicable substantive criteria and thus this order determines, based on the record, that LCCP Goal 2 policies 10 and 11 do not constitute applicable substantive criteria.

According to the Director of the LCPC and spokesman for the SAG Darwin Johnson, all LCCP policies and goals identified by the SAG and included in Exhibit K to the ASC are applicable under LCZO §24.01(A)(1). Exhibit A15 at 5-6. The SAG did not identify LCCP Goal 2 policies 10 and 11 because, according to Mr. Johnson, they are “not applicable within the meaning of LCZO §24.01(A)(1).” *Id.* at 6. Moreover, Mr. Johnson confirmed at hearing that each of the members of the LCBC agreed with his stated interpretation of applicability of LCCP goals and policies. Testimony of Johnson. The limited parties offered no evidence to rebut Mr. Johnson’s testimony or to support an alternate interpretation of the disputed planning goal and policies. As such, the Department argues, and the ALJ agrees, that Mr. Johnson’s stated position interpreting the disputed provisions of the LCCP and the LCZO are entitled to deference, particularly in the absence of evidence to the contrary, even if such interpretation has not been reduced to writing. *See Siporen v. City of Medford*, 349 Or. 247, 259 (2010) (when a local government plausibly interprets its own land use regulations by considering and then choosing between or harmonizing conflicting provisions, that interpretation must be affirmed, as * * * provided in ORS 197.829(1)(a), unless the interpretation is inconsistent with *all* of the “express language” that is relevant to the interpretation, or inconsistent with the purposes or policies underpinning the regulations.) Thus, according to the record in this matter, the LCZO §24.01(A)(1) is not intended to implement LCCP Goal 2 policies 10 and 11 and the limited parties argument is without merit.

The limited parties’ proffered blanket application of LCCP Goal 2 policies 10 and 11 would prohibit any development on lands more than 600 ft. from existing roads, including those barns, sheds, and other outbuildings on the limited parties’ properties used for agricultural operations, not just those subject to conditional use provisions. That is clearly not intended by any provision of the LCCP or LCZO §24.01(A)(1) and clearly conflicts with LCZO §3.02(D). Rather, the ALJ views LCCP Goal 2, policies 10 and 11, as unimplemented aspiration goals that the LCBC may choose to implement at some later date through adoption of additional land use ordinances for the specified planning area. Because no such provisions were in effect at the time

Applicant filed the ASC, the ALJ may not elevate these aspirational goal policies to the equivalent of a promulgated land use ordinance.

The limited parties failed to show, by a preponderance of the evidence, that LCCP Goal 2 policies 10 and 11 constitute applicable substantive criteria. As such, they failed to demonstrate that either Applicant or the Department erred in failing to consider those goal policies when evaluating compliance of the proposed facility with LCZO §24.01(A)(1). Thus, the ALJ finds no basis for disturbing the findings in the Department's Proposed Order

Issue 2. Whether the ASC failed to demonstrate compliance with the conditional use permit requirements for non-farm use in the A-2 zone as required by LCZO §24.19 because the potential impacts including fugitive dust, invasive weeds, competition for water resources, wildlife displacement, and increased thermal energy (heat blooms) would result in a failure to demonstrate that the proposed facility is compatible with farm uses, consistent with the intent and purposes of ORS 215.243, does not seriously interfere with accepted farming practices on adjacent lands, and does not materially alter the stability of the overall land use pattern of the area.

Council Standard: Land Use Standard; OAR 345-022-0030.

The limited parties' arguments in this matter, similar to those applicable to multiple issues in this adjudication, assume that each of the potential adverse impacts (dust, weeds, limited water, wildlife displacement, and increased heat above the proposed facility) will all come to fruition in the most harmful possible ways. The limited parties' arguments related to each of these elements assume that: (1) Applicant will neglect each of the required obligations, including any conditions adopted by Council, in the site certificate; (2) ODOE will fail to appropriately enforce those neglected obligations under the site certificate; (3) other state agencies with oversight and enforcement authority (*i.e.*, DEQ, ODFW, OWRD, etc.) will similarly neglect their responsibilities and allow Applicant and its contractor to run amok through the proposed facility site; (4) that each of the potential impacts will manifest to the maximum extent possible on neighboring lands; and (5) that the vast scope of the proposed facility will materially alter the agricultural nature of the area. As such, the limited parties argue the proposed facility will be incompatible with existing farm uses, inconsistent with the intent and purposes of ORS 215.243, will seriously interfere with accepted farming practices on adjacent fields, and will materially alter the stability of the overall land use pattern of the area in violation of LCZO §24.19. For the reasons stated herein, I disagree.

ORS 215.243 identifies the state's agricultural land use policy and identifies preservation of a maximum amount of the limited supply of agricultural land as necessary to the conservation of the state's economic resources. Nonetheless, ORS 215.283 identifies non-agricultural uses permitted in exclusive farm use zones, which include electrical generating utility facilities necessary for public service. *See* ORS 215.283(2)(g).

As set forth in this order, LCZO §24.19 provides criteria for non-farm uses in an A-1 or A-2 zone, and reads, in pertinent part:

Nonfarm uses, excluding farm related or farm accessory uses, may be approved in an A-1 or A-2 Zone upon findings that each such use:

- A. Is compatible with farm uses described in ORS 215.203(2) and is consistent with the intent and purposes set forth in ORS 215.243;
- B. Does not interfere seriously with accepted farming practices as defined in ORS 215.203(2)(c), on adjacent lands devoted to farm uses;
- C. Does not materially alter the stability of the overall land use pattern of the area; Is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and folding, vegetation, location and size of the tract;
- D. Complies with other applicable natural resource provisions; and
- E. Complies with such other conditions as the County considers necessary.

Moreover, OAR Chapter 660 Division 033 implements the Land Conservation and Development Department's efforts to maintain agricultural lands identified by Statewide Planning Goal 3 for farm use. OAR 660-033-0130 identifies minimum standards applicable to the schedule of permitted and conditional uses and provides, in part:

The following requirements apply to uses specified, and as listed in the table adopted by OAR 660-033-0120. For each section of this rule, the corresponding section number is shown in the table. Where no numerical reference is indicated on the table, this rule does not specify any minimum review or approval criteria. Counties may include procedures and conditions in addition to those listed in the table, as authorized by law.

* * * * *

(38) A proposal to site a photovoltaic solar power generation facility shall be subject to the following definitions and provisions:

(a) "Arable land" means land in a tract that is predominantly cultivated or, if not currently cultivated, predominantly comprised of arable soils.

(b) "Arable soils" means soils that are suitable for cultivation as determined by the governing body or its designate based on substantial evidence in the record of a local land use application, but "arable soils" does not include high-value farmland soils described at ORS 195.300(10) unless otherwise stated.

* * * * *

(d) "Nonarable land" means land in a tract that is predominantly not cultivated

and predominantly comprised of nonarable soils.

(e) “Nonarable soils” means soils that are not suitable for cultivation. Soils with an NRCS agricultural capability class V–VIII and no history of irrigation shall be considered nonarable in all cases. The governing body or its designate may determine other soils, including soils with a past history of irrigation, to be nonarable based on substantial evidence in the record of a local land use application.

The Department and Applicant argue the proposed facility, with the conditions proposed by the Department, will comply with LCZO §24.19. In support of this position, the Department and Applicant each point to evidence in the record demonstrating the extensive requirements to be placed on Applicant and its contractor through the DAMP, ESCP, RNWCP, CTMP and nearly 60 detailed conditions contained within the Department’s Proposed Order as well as the modifications to those conditions proposed through this adjudication and set forth herein. Specifically, the Department has proposed two conditions related to Council’s Soil Protection Standard, each with multiple subparts; 7 conditions pertaining to Council’s Land Use Standard, again with several subparts each; 11 conditions related to Council’s Fish and Wildlife Habitat Standard; and 2 conditions under Council’s Water Rights Standard. Many such conditions incorporate requirements set forth in the draft mitigation plans to address the limited parties concerns.

The potential adverse impacts to the limited parties’ interests from an improperly managed and unmitigated construction project of the size proposed by Applicant cannot be gainsaid. Nonetheless, Applicant does not request and the Department does not propose Council grant a site certificate for unmanaged construction activities with sufficient mitigation. Instead, the record supports that both Applicant and the Department considered the limited parties’ concerns throughout this process and have continued to refine draft mitigation proposals designed to minimize or even eliminate the potential impacts from dust and sediment erosion, invasive and noxious weeds, and construction traffic on nearby agricultural lands. In addition, the evidence revealed Applicant has a complex set of BMPs woven into the draft mitigation plans that are designed to work in concert, allowing Applicant to adjust its approach to each concern and minimize potential adverse impacts in real-time. Moreover, the overwhelming weight of the evidence demonstrates that Applicant has constructed multiple solar projects in the area and, in each instance, has proven itself a contentious community partner ready, willing, and able to meet its obligations under the applicable site certificates.

Nothing in the limited parties’ evidence sufficiently challenges the adequacy of the proposed mitigation measures, if implemented, or Applicant’s past practices of compliance. Instead, the limited parties speculate Applicant will engage in questionable construction practices and either implement limited mitigation measures or fail to implement any such measures entirely. In addition, the limited parties’ argument regarding the potential heat island effect and its impact on nearby farmland was shown at hearing to be without merit. As such, the limited parties failed to show that the proposed facility, as conditioned in the Department’s Proposed Order and further conditioned herein, will seriously interfere with accepted farming practices in the area.

With regard to the limited parties' concerns that the proposed facility will fundamentally alter the nature of land use in the area by removing nearly 4,000 acres of A-2 zoned land, that argument disregards significant findings of the Department and NRCS regarding the non-arable nature of the land and lack of water available for irrigation within the proposed facility site. Instead, the limited parties argue that the land *might* be made productive if one or more of them were permitted to purchase the property and transfer one or more existing irrigation water rights to the proposed facility site. That argument fails because it assumes the current landowner is required to divest himself of the property in favor of the limited parties' speculative ability to irrigate and cultivate the land. The limited parties present no statutory or regulatory support for this assumption. As identified above, ORS 215.283 permits certain non-farm uses on A-2 zoned lands including energy generating facilities. Mr. Morehouse is free to choose how best to manage his lands, including leasing unproductive agricultural lands to Applicant for other permissible uses. Moreover, the limited parties failed to demonstrate that transferring one or more existing water rights would be permissible by OWRD and would not constitute enlargement of existing water rights. Rather, they simply speculate that such transfer would be allowed. A preponderance of the evidence shows the proposed facility, as conditioned, will be compatible with existing farm uses.

Finally, the limited parties' argument related to alteration of the overall land use pattern of the area focuses heavily on the number of acres in the proposed facility site and its designation as one of the largest such facilities in the United States. Couched in those terms, the project appears to dwarf surrounding agricultural uses. Nonetheless, those arguments ignore the evidence showing that Lake County currently has 657,055 acres allocated to farm uses, with approximately 67 percent in pastureland, and 20 percent in cropland. According to the evidence, the amount of acres within the proposed facility site amount to about 0.32 percent of the privately owned land in the county, or 0.6 percent of the acres currently allocated to farm uses. Moreover, the arguments raised appear to ignore the fact that the proposed facility site will be restored to agricultural use upon decommissioning and retirement of the facility. A preponderance of the evidence demonstrates that the proposed facility site is nearly insignificant in the grander scope of land allocated to agricultural uses in Lake County and thus is not likely to alter the overall land use pattern of the area.

The limited parties' concerns are understandable, as are their assumptions about the potential impact from an unmitigated and unmanaged construction project of the size contemplated by the proposed facility. Nonetheless, the ASC and the Department's Proposed Order sufficiently mitigate the expressed concerns and the limited parties' assumptions regarding Applicant's willingness and ability to appropriately implement those mitigations measures are not supported by the preponderant weight of the evidence.

Issue 3. Whether the ASC failed to demonstrate the proposed development will not unduly diminish agriculture from impacts of fugitive dust, invasive weeds, and wildlife displacement caused by removal of native vegetation, as well as heat blooms caused by the proposed facility, or unduly increase related public service costs in violation of LCZO §24.01(A)(1) and LCCP, Goal 2, Policy 17.

Council Standard: Soil Protection, Land Use, and Public Services Standards; OARs 345-022-0022, 345-022-0030, and 345-022-0110.

As set forth above, LCCP Goal 2 Policy 17 provides that development will be encouraged, providing it does not unduly diminish agriculture nor unduly increase related public service costs or taxes. And, LCZO §24.01(A)(1) permits conditional uses on A-2 zoned land that are in compliance with applicable LCCP goals and policies.

Here, the limited parties assert that Applicant failed to demonstrate, through the ASC, that the proposed facility will not unduly diminish agriculture from impacts of fugitive dust, invasive weeds, and wildlife displacement caused by removal of habitat, as well as heat blooms caused by the proposed facility, or unduly increase related public service costs. As set forth in detail above, and contrary to the limited parties' assertions, the Department's Proposed Order found the ASC, as conditioned, demonstrates the proposed facility, as conditioned, is not likely to unduly diminish agriculture, unduly increase public services costs, or increase taxes. I agree with the Department on this issue.

As addressed in the discussions above, the record in this matter is replete with evidence of the mitigation efforts to be implemented during construction and operation of the proposed facility related to Applicant's intent to control dust from its construction endeavors, methods to be used to preserve wildlife habitat and revegetate disturbed portions of the site to restore habitat and control invasive and noxious weed species. Again, as discussed above, the limited parties' only counter to this evidence in the record is speculation that certain measures, in isolation, are insufficient, and that Applicant will fail to meet its obligations with regard to those mitigation measures. For reasons already addressed in this order, I do not agree.

With regard to the limited parties' assertions that Applicant's destruction of nearly 4,000 acres of wildlife habitat will drive destructive species into neighboring alfalfa fields, haystacks, and barns, the evidence is almost entirely speculative and fails to take into consideration the limited scope of Applicant's proposed construction schedule.

In the ASC, Applicant states it will engage in construction activities on approximately 60 acres at any one time, limiting disturbance to wildlife habitat and other soil stabilizing vegetation. Applicant also expressed its intent to implement its mitigation plans, including the DAMP, ESCP, and RNWCP, during all construction and post-construction phases of each 60-acre plot. The Department carried those commitments over into its Proposed Order, establishing binding obligations for Applicant. The evidence also supports Applicant's assertions that its construction activities will be undertaken in a manner designed to preserve the greatest amount of habitat, including designating certain sensitive areas for avoidance. Thus, the idea that Applicant's construction activities will strip nearly 4,000 acres of habitat and drive wildlife to nearby agricultural fields is unsupported by the record.

Moreover, the evidence in the record fails to support the limited parties' assertions that the proposed facility site is occupied by large populations of ground squirrels and jackrabbits that will migrate to the nearby alfalfa fields and barns. First, the record establishes that any significant populations of ground squirrels, if present, already reside in the outer edges of

agricultural fields, rather than the undeveloped sagebrush environment of the proposed facility site. The limited parties also failed to show that any displaced jackrabbits currently using the proposed facility site will migrate to any of the limited parties' properties. Rather, the preponderant weight of the evidence reflects that jackrabbits are more likely to migrate away from the limited parties' properties due to a lack of suitable habitat and prevalence of predators on or around the limited parties' land(s).

The limited parties also express concerns that the proposed facility will drive elk, who use the property for migration and winter forage, onto existing alfalfa fields. According to the evidence in this matter, elk are opportunistic feeders that pose a significant concern on agricultural lands. To combat the intrusion by these animals, ODFW has a suite of management techniques available to landowners, including the limited parties, designed to protect agricultural fields and encourage relocation of elk herds. The Department's Proposed Order incorporates additional conditions related to wildlife monitoring and habitat mitigation. Nothing in the limited parties' evidence shows those measures will not be adequate.

According to the evidence in the record, dust, weeds, and destructive mammals are known and existing challenges for farmers in Lake County. In fact, the evidence establishes that farming activities alone are responsible for creating a significant amount of fugitive dust that drifts to neighboring farms during tilling and planting periods. Nothing in the record indicates local farmers, including the limited parties, take steps to reduce the temporary impacts of those activities on neighboring farms. In contrast, Applicant will be bound by the terms of the site certificate, with conditions imposed by Council, which will require ongoing mitigation measures and provide mechanisms by which neighboring landowners may seek redress. As such, a preponderance of the evidence establishes the proposed facility, as conditioned, will likely create less adverse impact on surrounding agricultural lands than would farming practices on the same land.

Finally, with regard to the limited parties' argument that the proposed facility will likely increase related public service costs, the record contains ample evidence to the contrary. The evidence in this matter, including the draft construction traffic management and fire protection and emergency response plan, demonstrates Applicant will pay significant property taxes, will be responsible for road repairs and maintenance commensurate with increased construction traffic, and will contribute significantly to local schools and fire protection and EMT services. Moreover, the record demonstrates that the proposed facility will result in an infusion of funds into the local economy by providing well-paying jobs for the local labor force. By contrast, the limited parties provide only speculation with regard to Applicant's likely burden on local public services. According to the record, the proposed facility is likely to result in a net economic benefit to the community.

The ASC, as conditioned by the Department's Proposed Order, demonstrates the proposed facility will not unduly diminish agriculture or unduly increase related public service costs or taxes.

Issue 4. Whether the ASC failed to demonstrate grounds justifying an exception to LCCP Goal 3, identifying a preference for the preservation of agricultural land, as required by the LCCP and

ORS 469.504(2).

Council Standard: Land Use Standard; OAR 345-022-0030.

Next, the limited parties assert the Department erred in finding Applicant presented sufficient reasons in the ASC to justify Council to take an exception to Statewide Planning Goal 3. For the reasons below, I disagree.

OAR 660-033-0010 identifies the purpose of division 033 as the preservation and maintenance “of lands as defined by [Statewide Planning] Goal 3 for farm use, and to implement ORS 215.203 through 215.327 and 215.438 through 215.459 and 215.700 through 215.799.” OAR 660-033-0020(1)(a)(A) defines “agricultural land” for the purposes of Goal 3 as, “Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon.”

As discussed above, OAR 660-033-0130(38) provides minimum standards applicable to the schedule of permitted and conditional uses approvals for solar facilities on agricultural land and provides for exceptions as follows:

(j) For nonarable lands, a photovoltaic solar power generation facility shall not use, occupy, or cover more than 320 acres. The governing body or its designate must find that the following criteria are satisfied in order to approve a photovoltaic solar power generation facility on nonarable land:

(A) Except for electrical cable collection systems connecting the photovoltaic solar generation facility to a transmission line, the project is not located on those high-value farmland soils listed in OAR 660-033-0020(8)(a);

(B) The project is not located on those high-value farmland soils listed in OAR 660-033-0020(8)(b)-(e) or arable soils unless it can be demonstrated that:

(i) Siting the project on nonarable soils present on the subject tract would significantly reduce the project’s ability to operate successfully; or

(ii) The proposed site is better suited to allow continuation of an existing commercial farm or ranching operation on the subject tract as compared to other possible sites also located on the subject tract, including sites that are comprised of nonarable soils;

(C) No more than 12 acres of the project will be sited on high-value farmland soils described at ORS 195.300(10);

(D) No more than 20 acres of the project will be sited on arable soils;

(E) The requirements of OAR 660-033-0130(38)(h)(D) are satisfied;

(F) If a photovoltaic solar power generation facility is proposed to be developed on lands that contain a Goal 5 resource protected under the county's comprehensive plan, and the plan does not address conflicts between energy facility development and the resource, the applicant and the county, together with any state or federal agency responsible for protecting the resource or habitat supporting the resource, will cooperatively develop a specific resource management plan to mitigate potential development conflicts. If there is no program present to protect the listed Goal 5 resource(s) present in the local comprehensive plan or implementing ordinances and the applicant and the appropriate resource management agency(ies) cannot successfully agree on a cooperative resource management plan, the county is responsible for determining appropriate mitigation measures; and

(G) If a proposed photovoltaic solar power generation facility is located on lands where, after site specific consultation with an Oregon Department of Fish and Wildlife biologist, it is determined that the potential exists for adverse effects to state or federal special status species (threatened, endangered, candidate, or sensitive) or habitat or to big game winter range or migration corridors, golden eagle or prairie falcon nest sites or pigeon springs, the applicant shall conduct a site-specific assessment of the subject property in consultation with all appropriate state, federal, and tribal wildlife management agencies. A professional biologist shall conduct the site-specific assessment by using methodologies accepted by the appropriate wildlife management agency and shall determine whether adverse effects to special status species or wildlife habitats are anticipated. Based on the results of the biologist's report, the site shall be designed to avoid adverse effects to state or federal special status species or to wildlife habitats as described above. If the applicant's site-specific assessment shows that adverse effects cannot be avoided, the applicant and the appropriate wildlife management agency will cooperatively develop an agreement for project-specific mitigation to offset the potential adverse effects of the facility. Where the applicant and the resource management agency cannot agree on what mitigation will be carried out, the county is responsible for determining appropriate mitigation, if any, required for the facility.

(k) An exception to the acreage and soil thresholds in subsections (g), (h), (i), and (j) of this section may be taken pursuant to ORS 197.732 and OAR chapter 660, division 4.

Because the proposed facility would occupy more than 320 acres of non-arable lands, it does not comply OAR 660-033-0130 unless the ASC provides justification for an exception to this Goal 3 requirement. As set forth above, OAR 345-022-0030(4) permits Council to take an exception to a statewide planning goal if it finds reasons justify why the state policy embodied in the applicable goal should not apply; the significant environmental, economic, social and energy consequences anticipated as a result of the proposed facility have been identified and adverse impacts will be mitigated in accordance with rules of the Council applicable to the siting of the proposed facility; and the proposed facility is compatible with other adjacent uses or will be

made compatible through measures designed to reduce adverse impacts. OAR 345-022-0030(4)(c)(A) – (C).

ORS 197.732 provides criteria and rules for granting exceptions to applicable planning goals and provides, in part:

(1) As used in this section:

(a) “Compatible” is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses.

(b) “Exception” means a comprehensive plan provision, including an amendment to an acknowledged comprehensive plan, that:

(A) Is applicable to specific properties or situations and does not establish a planning or zoning policy of general applicability;

(B) Does not comply with some or all goal requirements applicable to the subject properties or situations; and

(C) Complies with standards under subsection (2) of this section.

(2) A local government may adopt an exception to a goal if:

* * * * *

(c) The following standards are met:

(A) *Reasons justify why the state policy embodied in the applicable goals should not apply;*

(B) Areas that do not require a new exception cannot reasonably accommodate the use;

(C) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and

(D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.

Emphasis added.

The ASC proffers several of the reasons justifying removal of approximately 4,000 acres

within the proposed facility site to promote other policies of importance within the county and across the state including: (1) the proposed facility will not have significant adverse impacts on accepted farm uses within the surrounding area; (2) Applicant does not seek to permanently remove land from agricultural use; (3) large-scale solar generation promotes rural economic development by creating jobs and adding to the tax base of Lake County; (4) the availability of reliable renewable energy produced by the proposed facility will help attract, recruit, and retain energy-dependent businesses to Oregon; (5) the proposed facility will promote the renewable energy policies of Lake County and support the Lake County Resources Initiative; and (6) the land within the proposed facility site is of low value for agricultural production given the quality of the underlying soils and the lack of available water rights for irrigation, making its removal from agriculture insignificant.

According to a preponderant weight of the evidence, as addressed more fully above, the ASC, as conditioned in the Department's Proposed Order, demonstrates the proposed facility is not likely to have significant adverse environmental consequences because each can be mitigated or eliminated. The evidence also shows Applicant, more likely than not, will fulfill its mitigation obligations. Moreover, the record demonstrates that, according to agreements reached between Applicant and Lake County, Applicant will pay significant taxes during the 15-year operational life of the facility, subject to annual increases of three percent. Further, Applicant will pay an annual community service fee, based on its per megawatt/per acre production, totaling approximately \$12 million over the operational life of the proposed facility. In total, those combined revenues are likely to produce nearly \$30 million in additional revenue for Lake County. Additionally, Applicant has committed to a one-time contribution, based on production capacity, of up to \$4 million.

Additionally, the record shows that the proposed facility, as conditioned, will manage impacts to protected areas, as well as scenic and cultural resources, through existing mitigation plans. Further, the record demonstrates the significant amount of energy to be produced by the proposed facility will generate reliable, renewable energy for sale to the public and promote the state of Oregon's commitment to rural economic development. Likewise, as addressed in this order, the evidence supports a conclusion that the proposed facility is or will be compatible with other adjacent uses through implementation of the DAMP, ESCP, RNWCP, and CTMP.

Accordingly, the ALJ finds the ASC provides a preponderance of evidence to justify an exception to Goal 3, as required by LCCP and ORS 469.504(2), because Applicant has proposed reasons sufficient for Council to take such an exception. Under ORS 469.504(2) and OAR 345-022-0030(4), Council may find goal compliance for a facility that does not otherwise comply with one or more statewide planning goals by taking an exception to the applicable goal if it finds reasons justify why the state policy embodied in the applicable goal should not apply. For the reasons stated above, I find the Department's Proposed Order determined information contained in the ASC provided a sufficient basis for Council to take an exception to Goal 3. Because Applicant has stated reasons justifying an exception to Goal 3, OAR 660-033-0130(38)(h) is inapplicable.

Issue 5. Whether the proposed project as identified in the ASC diminishes the value of the limited parties' private property and business interests in violation of LCZO 24.01(A)(1) and LCCP

Goal 2, Policy 18.

Council Standard: Land Use Standard; OAR 345-022-0030.

LCCP Goal 2, Planning Process, Policy 18 provides that private property investments will be protected from incompatible development which might likely diminish property value or unduly increase taxes.

The limited parties argue, based in large part on an appraisal conducted by Gregory Moore (*see* Exhibits R12 and R24)³⁶, that the proposed facility will negatively impact property values and business interests for surrounding properties. The limited parties' arguments are based on conclusions about diminution in value which in turn are based on assumptions that construction and operation of the proposed facility will bring about the limited parties' worst fears with regard to fugitive dust impacts, proliferation of invasive and noxious weed species, and large-scale incursions from displaced wildlife resulting in reduced crop production and quality, negative impacts on personal and livestock health, loss of organic certifications, and destruction of in-field and harvested alfalfa.

The findings in the Department's Proposed Order, as confirmed in this Proposed Order, conclude that the concerns expressed by the limited parties, while significant, are based largely on speculation. Such speculation about the possible adverse impacts is not a sufficient basis for either the Department or the ALJ to recommend denial of the site certificate. Moreover, a preponderance of the evidence establishes Applicant's ability and commitment to operating within the parameters of site certificates issued by Council, making it unlikely that the limited parties' concerns will come to fruition, particularly as speculated. As such, the assumption built into Mr. Moore's appraisal and the limited parties' arguments regarding impacts on personal property and business interests are insufficient to meet the legal standard of proof applicable to this adjudication in light of the findings and conditions in the Department's Proposed Order.

Because the limited parties have failed to put forth evidence that the proposed facility, as conditioned, is likely to result in diminished value for their real property and business interests, even if properly managed, the ALJ finds the conclusions in Mr. Moore's appraisal, as the limited parties' other purported conclusions regarding diminution in value, to be unsubstantiated.

As discussed more fully above, the ALJ finds the ASC as conditioned in the Department's Proposed Order presents sufficient evidence for Council to determine that the construction and operation of the proposed facility will not produce or encourage fugitive dust, invasive weeds, or wildlife displacement likely to diminish agriculture on surrounding lands. Logic dictates the same is true with regard to impacts on real property.

Issue 6. Whether the ASC failed to demonstrate that the design, construction, and operation of the proposed facility is not likely to result in significant adverse impacts to soil, taking into account Applicant's proposed mitigation, in violation of OAR 345-022-0022.

³⁶ Because this Proposed Order finds the arguments based on diminution in value to be speculative, the exhibits and related testimony are not addressed in any detail.

Council Standard: Soil Protection; OAR 345-022-0022.

Next, the limited parties assert that, “[n]either the [ESCP] nor the DAMP provide any assurance that substantial, crippling wind erosion will not be generated by * * * activities on the [proposed facility] site, and neither create any remedy * * * if that kind of erosion occurs * * *.” Petitioners’ Hearing Memorandum at 69. Again, this argument is grounded in the assumptions that Applicant will not fulfill its obligations under the site certificate and, in this instance, the NPDES 1200-C permit issued and enforced by DEQ and that neither the Department, Council, nor DEQ will hold Applicant accountable.

As discussed in greater detail above and supported throughout the findings of the ALJ, there is no dispute that sediment erosion and dust are significant concerns in the area of the proposed facility. The ASC contains multiple proposed mitigation plans and BMPs intended to address these issues. Moreover, the NPDES, which will remain in effect until construction concludes and DEQ determines the site has been restored to acceptable vegetation levels to prevent soil erosion, mandates ongoing control measures. In addition, the Department also recognized the significance of the limited parties’ concerns in this area and recommended conditions to the site certificate to minimize soil erosion from Applicant’s construction and operation of the proposed facility (Soil Protection Conditions 1 and 2). The Department’s proposed conditions require, *inter alia*, that Applicant obtain approval of its finalized ESCP from DEQ and the Department *before* beginning any construction on the proposed site. Finally, in response to the limited parties’ renewed concerns at hearing, the Department proposed amending Soil Protection Condition 1 to further ensure that those concerns are addressed. That amendment includes requiring Applicant to demonstrate all revegetation protocols identified in the ESCP are consistent with the requirements and success criteria of the RNWCP and DAMP, and that those protocols address dust abatement, erosion and sediment control, noxious and invasive weeds as determined by the Department, DEQ, and ODFW.

Currently, Applicant will be required to control soil erosion onsite through application of water to internal roads, which may also include soil binders, and revegetation efforts which include reseeding disturbed areas. During revegetation, seeded soils must be protected by erosion controls until vegetation is established. Those measures include mulching, erosion control blankets, hydro-mulch, and, if necessary, application of gravel to roadways that prevent erosion from disturbed portions of the site. Moreover, Applicant’s construction plan reveals that it intends to retain as much native vegetation as possible onsite and avoid blading, or clear-cutting, the site prior to or during construction. Additionally, Applicant and DEQ agree the best approach to erosion prevention is implementation of the adaptive management techniques proposed in the ASC that will use the DAMP, ESCP, and RNWCP along with industry BMPs to allow for real-time adjustments to control measure to minimize impacts to the greatest extent possible. The ALJ agrees with the Department that such requirements ensure that site stabilization measures are developed based on site specific information.

The evidence in the record does not support the limited parties’ assertions regarding dust and/or wind erosion. As such, the limited parties failed to demonstrate that the ASC, as conditioned in the Department’s Proposed Order, does not comply with Council’s Soil Protection Standard in OAR 345-022-0022.

Issue 7. Whether the application proposes development that exceeds the existing capacity of public and private utilities or facilities, including county roads to provide water needed for the construction of the facility, without Applicant providing funds for the increased services, in violation of LCZO §24.01(A); LCCP Goal 11, Policy 1; and LCCP Goal 13, Policy 14.

Council Standard: Public Services Standard; OAR 345-022-0110.

Throughout these proceedings, the limited parties have continued to express concerns about how construction and operation of the proposed facility will impact public and private utilities and services, including public roads and emergency services.

LCCP Goal 11 Public Services & Facilities, Policy 1 states:

[D]evelopment will be approved only where existing capacity or planned capability of public or private utilities and facilities can accommodate such, unless the development provides funding for the increased services which will be needed.

LCCP Goal 13 Energy, Policy 14 states:

In addition to Policy 13, in all cases the County's support for renewable energy development shall also be conditioned upon a lack of adverse impacts to public facilities and services. In this regard, the County's concerns shall include, but not be limited to: roads, drainage, schools, law enforcement, fire protection, water supply, sewage disposal, solid waste disposal, and general administrative services.

As set forth and discussed in detail above, LCZO §24.01(A)(1) requires approved conditional uses must comply with all applicable goals and policies from the comprehensive plan. In this instance, it is unnecessary to determine whether each of the goals and policies above are applicable because the record supports a finding that the proposed facility will not adversely impact public facilities and services.

First, the record reflects that the proposed facility would not exceed the carrying capacity of local emergency services. To the contrary, the draft Fire Protection and Emergency Response Plan, required by the Department's Proposed Order, includes significant construction and operation requirements, designed to minimize fire risk and address incidents with onsite personnel, including maintenance of sufficient water on site to combat fires. The costs of those measures will be borne by Applicant, rather than the county, and therefore place no additional financial burden on the public. Moreover, the evidence shows Applicant is continuing to work with the RFPA through contributions of funding and equipment.

Next, the record reflects the proposed facility is not likely to exceed the carrying capacity of local roads. While the limited parties have expressed legitimate concerns about increased construction traffic, particularly from large trucks and equipment, and its impact on their farming and livestock operations, the record reflects both Applicant and the Department have addressed

these concerns. According to the evidence, Applicant is in the process of negotiating agreements with Lake County pertaining to maintenance and repair of local roads during the two year construction period. Moreover, the Department's Proposed Order includes a draft CTMP designed to reduce traffic impacts on local roads of concern, through use of primary and secondary delivery routes. The CTMP will be required by the site certificate as a condition precedent that must be complete before construction begins. The draft road use agreement offered in the record demonstrates that Applicant continues to negotiate in good faith with the county to comply with the requirements of the Department's Proposed Order.

Finally, the evidence in this record establishes that Applicant will contribute significant sums over the 15-year operational life of the facility from increased taxes, direct road repair funding, community service fees, and contributions to local schools. Construction concerns on the proposed facility site, including perceived impact on public services, are not expected to extend beyond two years. The ALJ finds any temporary impact on public services are likely to be minor and will be offset by significant monetary contributions to the local community, resulting in a net benefit.

Nonetheless, based on evidence and testimony submitted by the limited parties and Applicant's Exhibit U to the ASC, the Department proposed amending its Public Services Condition 4 which further clarifies Applicant's obligation to finalize agreements with local emergency response service prior to construction. That proposal is addressed in detail below.

The record demonstrates the proposed facility will not exceed the existing capacity of public and private utilities or facilities, including county roads. Moreover, Applicant will provide funding, both directly and through local taxes, which will more than offset any impact to such public utilities, facilities, and/or roads.

Issue 8. Whether the application failed to demonstrate that the proposed development is compatible with existing uses and will not diminish living conditions in violation of LCZO §24.01(A)(1) and LCCP Goal 9, Policy 1.

Council Standard: Land Use Standard; OAR 345-022-0030.

Here, the limited parties declare that each of their concerns expressed throughout this proceeding prove that the proposed facility is incompatible with surrounding agricultural uses and will therefore diminish their living conditions. Thus, the limited parties argue that the ASC does not comply with LCZO §24.01(A)(1) (requiring conditional uses to comply with all applicable goals and policies from the comprehensive plan) because it fails to comply with LCCP Goal 9, Policy 1.

LCCP Goal 9, related to economic development, states its purpose is "[t]o diversify and improve the economy of the County and State." Goal 9, Policy 1 states:

That those employment opportunities will be accommodated that are compatible with existing and anticipated uses and will improve employment, providing desirable living conditions in the area are not diminished.

This Proposed Order has addressed the flaws in the limited parties' arguments regarding purported incompatibility in near-exhaustive detail above.³⁷ Accordingly, it is unnecessary to engage in a detailed analysis of this issue. Rather, it is sufficient to state that the record in this matter establishes the ASC, as conditioned by the Department's Proposed Order, demonstrates the proposed facility will not significantly impact surrounding properties through soil erosion and/or fugitive dust, proliferation of invasive and noxious weeds, displacement of wildlife, or adverse impacts on public services and/or utilities. As such, the limited parties failed to show the proposed facility will be incompatible with surrounding agricultural uses and/or will diminish their current living conditions.

Issue 9. Whether the Department's Proposed Order erred by imposing a condition limiting the Applicant to 5,000 gallons of water per well per day rather than limiting the Applicant's water use to a total of 5,000 gallons per day.

Council Standard: General Standard and Public Services Standard; OARs 345-022-0000 and 345-022-0110.

The limited parties assert, and the Department and Applicant agree, that Issue 9 accurately identifies an unintentional error in recommended Water Rights Condition 2a that must be corrected. That condition, as drafted initially, permitted Applicant to draw up to 5,000 gallons per day from each well on the proposed facility site.

ORS 537.545 provides for exempt uses of groundwater and provides, in part:

(1) No registration, certificate of registration, application for a permit, permit, certificate of completion or ground water right certificate under ORS 537.505 to 537.795 and 537.992 is required for the use of ground water for:

* * * * *

(f) Any single industrial or commercial purpose in an amount not exceeding 5,000 gallons a day;

* * * * *

(2) A ground water use for a purpose that is exempt under subsection (1) of this section, to the extent that the use is beneficial, constitutes a right to appropriate ground water equal to that established by a ground water right certificate issued under ORS 537.700.

³⁷ The only element not previously addressed are Mr. Simmons' assertions regarding unmitigated visual blight (*see* Ex. R3) and assertions raised in the Declaration of Dean Apostol, Scenic and Visual Rangeland Specialist (*see* Ex. R13). Each of these exhibits presents arguments under the guise of impact on property use, enjoyment, and value. Nonetheless, such arguments raise issues under Council's Scenic Resources Standard, rather than the Land Use Standard identified by the ALJ and accepted by the parties prior to hearing.

The parties agree that, under the relevant statute, Applicant's projected use of groundwater on the proposed facility site is limited to 5,000 gallons per day, regardless of the number of wells on the site, unless Applicant obtains a permit to appropriate groundwater from OWRD. Applicant does not claim to have obtained or applied for such a permit. Consequently, the Department amended its proposed Water Rights Condition 2 to limit Applicant to a total of 5,000 gallons of water from all groundwater sources within the proposed facility site. The ALJ finds the Department's proposed amended condition to be appropriately tailored to the requirements of ORS 537.545(1)(f).

The remainder of the Department's proposed conditions are addressed below.

Adequacy of the Department's proposed site certificate conditions.

OAR 345-015-0085 identifies the requirements of a hearing officer's/ALJ's proposed contested case order and permits the parties to propose site certificate conditions each deems appropriate. As relevant here, that rule provides:

(1) The hearing officer shall allow any party, including any limited party, to propose site certificate conditions that the party believes are necessary or appropriate to implement the policy of ORS 469.310 or to meet the requirements of any other applicable statute, administrative rule or local government ordinance. Parties shall submit proposed site certificate conditions to the hearing officer in writing according to a schedule set by the hearing officer.

(2) In a contested case proceeding on an application for a site certificate or on a proposed site certificate amendment, any party or limited party may present evidence relating to the appropriateness, scope or wording of any other party's proposed site certificate conditions and may present written proposed findings of fact, briefs and other argument concerning proposed conditions.

(3) After the hearing in a contested case proceeding on an application for a site certificate * * *, the hearing officer shall issue a proposed contested case order stating the hearing officer's findings of fact, conclusions of law, *and recommended site certificate conditions on the issues in the contested case.* * * * .

Emphasis added.

In its Proposed Order on the ASC, the Department included 57 recommended site certificate conditions. Through this process, Applicant challenged none of those recommended conditions and filed a concurrence with the Department's proposed correction to Water Rights Condition 2, as addressed above. The limited parties challenged 9 of the recommended conditions and, in response, proposed 19 conditions of their own.

As addressed throughout this Proposed Order, the Department also recommended additional revisions to the challenged conditions through written closing arguments. According

to the Department's briefs, those amendments are based on evidence and argument presented at hearing, and are intended to further clarify Applicant's obligations under the site certificate.

Specifically, the Department proposed further amendment to its recommended provisions of Soil Protection Condition 1, Fish and Wildlife Habitat Condition 1, and Public Services Conditions 1 and 4. In addition, the Department proposed revisions to the draft Revegetation and Noxious Weed Control Plan, which appears in its recommended Fish and Wildlife Habitat Condition 11 and the draft Wildlife Monitoring Plan.

The limited parties' proposed site conditions are based upon the assumption that each of the expressed concerns were established at hearing and that this Proposed Order finds in their favor on each issue raised. As set forth above, that is not the case. Moreover, none of the limited parties' proposed conditions are necessary, particularly in light of the additional revisions to site certificate conditions recommended by the Department.

The Department's recommended site certificate conditions contained in its Proposed Order adequately address concerns raised by the limited parties. Likewise, the Department's proposed amendments to those conditions seek to clarify Applicant's obligations under the site certificate and further mollify the limited parties' fears of a mismanaged solar project covering nearly 4,000 acres. As such, the ALJ finds the additional amendments recommended by the Department to be appropriate for Council's consideration in the final site certificate, save one.

In closing briefs, the Department proposed to further amend Section 4.0 of Applicant's draft Wildlife Monitoring Plan, relating to landowner notification for elk damage programs available through ODFW, to include monitoring for other wildlife displacement. *See Attachment P-2 at 5.* That amendment would require Applicant to hire a qualified wildlife specialist to conduct assessments of wildlife populations in the area of the proposed facility along with additional assessment if neighboring landowners complain of wildlife displacement due to facility construction. This requirement is presumably based on concerns raised by the limited parties regarding displacement of ground squirrels, jackrabbits, and other rodents. Nonetheless, this order found the limited parties failed to present evidence sufficient to substantiate any issue related to these concerns. As such, the additional amendment is unsupported by the evidence and therefore unnecessary.

ORDER

I propose the Oregon Department of Energy, Energy Facility Siting Council issue a Final Order, granting the requested site certificate, consistent with the Department's Proposed Order dated October 9, 2020, including recommended site certificate conditions and incorporating the following amendments to recommended conditions:

Recommended Amended Soil Protection Condition 1:

- a. Prior to obtaining the DEQ-issued NPDES 1200-C permit, the certificate holder shall:
 - i. Evaluate the results of the preconstruction Geotechnical Investigation to develop

appropriate, site-specific erosion and dust control measures, to be reflected in the Erosion and Sediment Control Plan (ESCP).

- ii. Demonstrate to the Department that all revegetation protocols identified in the ESCP are consistent with the requirements and success criteria of the RNWCP and DAMP, and that protocols address dust abatement, erosion and sediment control, noxious and invasive weeds and are inclusive of a successional seed mix and sequence. Any changes in the protocols, based on adaptive management during construction, must be determined by the Department, in consultation with ODFW, ODEQ or third-party consultant, to be appropriate to meet the revegetation, dust and erosion control requirements in the ESCP, DAMP and RNWCP.
- b. Prior to construction of the facility, the certificate holder shall provide a copy to the Department of its DEQ-issued NPDES 1200-C permit, including final ESCP and associated drawings (as provided in Attachment I-1 of the Final Order on the ASC).
- c. Prior to construction of the facility, the certificate holder shall submit to the Department a construction schedule that considers site-specific soil factors and demonstrates that site preparation and disturbance activities are scheduled to occur in a manner that allows for predisturbance site preparation (e.g., seeding) within the appropriate season and with sufficient time to allow for increased success during construction and upon site restoration.
- d. Prior to construction of the facility, the certificate holder shall develop a phased site preparation and disturbance plan that limits overall site disturbance to 60 acres or less within any disturbance timeframe. Subsequent disturbance may not commence until the previous phase of disturbed area has been adequately stabilized with vegetation, erosion, or other stabilization materials, as determined by the onsite monitor per sub(e) of this condition, in consultation with the Department. The phased plan shall consider peak farming activity schedules (e.g. harvest, deliveries, etc.) of adjacent landowners, based on documented landowner consultation. The phased site preparation and disturbance plan must be prepared by an engineer, soil scientist or individual with similar technical qualifications and reviewed and approved by the Department in consultation with the Oregon Department of Agriculture (soil/vegetation specialist) or other third-party specialist.
- e. During construction of the facility, the certificate holder shall obtain a monitor with relevant experience during all construction activities to monitor the requirements of the 1200-C, RNWCP and DAMP. The monitor shall maintain daily field logs, to be made available upon request by the Department, documenting compliance with the phased site preparation and disturbance plan, the success of predisturbance seeding, 1200-C, RNWCP and DAMP requirements. Daily field logs shall clearly identify any necessary corrective actions. All corrective actions must be reported to and timely implemented by the certificate holder.

- f. During construction of the facility, the certificate holder shall conduct all work in compliance with a final ESCP that is satisfactory to the Oregon Department of Environmental Quality as required under the National Pollutant Discharge Elimination System Construction Stormwater Discharge General Permit 1200.
- g. The certificate holder must provide copies of completed Erosion and Sediment Control Inspection Forms (forms) for Department review during construction inspections and, if requested by the Department based on continuous erosion and dust issues and corrective actions at the site, must provide form copies to the Department within seven (7) days of inspections, in electronic format, to allow the Department, in consultation with the Oregon Department of Environmental Quality and Lake County Public Works Department, the ability to recommend additional site controls.

Recommended Amended Fish and Wildlife Habitat Condition 1:

The certificate holder shall:

- a. Prior to construction of the facility, the certificate holder shall finalize and submit the Revegetation and Noxious Weed Control Plan, based upon the draft plan provided in Attachment P-3 of the Final Order on the ASC, for review and approval by the Department, in consultation with ODFW and the Lake County Weed Control Supervisor, including consideration of whether cheatgrass and Russian thistle should be addressed in the RNCWP. The scope of finalizing the plan shall, at a minimum, include the following:
 - 1. Final assessment of temporary habitat impacts (in acres), based on habitat quality of habitat subtype, and final facility design, presented in tabular format.
 - 2. Survey and sampling protocol for evaluating the success criteria against paired monitoring and reference sites determined to represent a statistically significant number of sites based on pre-disturbance habitat quality and diversity of habitat temporarily impacted.
 - 3. Approval of appropriate revegetation seed mix from ODFW.
 - 4. Confirmation of revegetation and noxious weed monitoring frequency, to occur annually for the first five (5) years following construction, unless otherwise agreed to by the Department in consultation with ODFW, Lake County or the Cooperative Weed Management Area
 - 5. Assurance that the success criteria for vegetation cover is based upon desirable, native vegetation.

- b. During construction and operation of the facility, the certificate holder shall implement the requirements of the plan, monitor and report results of revegetation activities to the Department, as required by the plan.

Recommended Amended Provision of draft RNWCP (contained in the Department's Recommended Fish and Wildlife Habitat Condition 11):

Proposed Order Attachment P-3 p. 11 should be amended as follows: "Once the Department determines that revegetation and noxious weed control is successful, Applicant will report this in the relevant annual report."

Recommended Amended Public Services Condition 1:

Prior to construction of the facility, the certificate holder shall:

- a. Place a roadside sign along North Oil Dri Road and at the facility entrance, including the contact information (cell number) for an onsite representative for dust complaints.
- b. Finalize the Dust Abatement and Management Control Plan (DAMP) included as Attachment U-4 to the Final Order on the ASC, in consultation with the Lake County Planning and Road Departments, the Oregon Department of Environmental Quality and the Department. Consultation, at a minimum, shall include:
 - i. Submission of the draft DAMP, with a cover letter/description of the construction schedule, activities and final facility design, to the above referenced state and local government representatives, with a request for review and comment within 45 days. The draft DAMP shall include reasonable available control measures including application of binders/dust suppressants (e.g., Earth Bind, ligano sulfonate) on highly trafficked roads. The DAMP shall also include a description of conditions that would warrant application of additional water or suppressants and shall provide evidence that the certificate holder/contractor has reasonable access to additional suppressants/water controls for facility construction.
 - ii. Within 60 days of submission or as otherwise feasible, meet with the Department to evaluate comments and finalize the DAMP. Receive written confirmation from the Department that the DAMP may be finalized.
 - iii. Provide copies of the final DAMP and construction schedule to all property owners of record within 500 feet of the boundary of the property for which the site boundary is located.

Recommended Amended Public Services Condition 4:

- a. Prior to construction of the facility, the certificate holder shall submit a Final Construction Fire Protection and Emergency Response Plan to the Department, consistent with the components included in the draft plan provided in Attachment U-3 of the Final Order on the ASC, for review and approval. Plan finalization shall include documentation of coordination with local fire protection and emergency services; qualifications and contact information for the onsite emergency medical technician; and executed agreement, or similar conveyance, for onsite emergency transport service. The plan shall also include an updated Emergency and Fire contact list.
- b. Prior to operation of the facility, the certificate holder shall submit an Operational Fire Protection and Emergency Response Plan to the Department, consistent with the components included in the draft plan provided in Attachment U-3 of the Final Order on the ASC. The plan shall also include an updated Emergency and Fire contact list.

/s/ Joe L. Allen

Senior Administrative Law Judge
Office of Administrative Hearings

Exceptions to the Administrative Law Judge's Proposed Order

EXCEPTIONS. Pursuant to OAR 345-015-0085(5) parties and limited parties may file exceptions to this proposed contested case order. Any party or limited party filing an exception must: a) in the exception(s) specifically identify the finding of fact, conclusion of law or recommended site certificate conditions to which the party excepts and state the basis for the exception; and b) email the exception(s) to Jesse Ratcliffe, legal counsel to EFSC in this contested case at Jesse.D.Ratcliffe@state.or.us and to the other parties/limited parties and the Office of Administrative Hearings no later than 5:00 p.m. Pacific Time on January 26, 2022.

RESPONSES. Pursuant to OAR 345-015-0085(6) parties and limited parties may file responses to exceptions. All responses must be emailed to Mr. Ratcliffe, the other parties/limited parties and the Office of Administrative Hearings no later than 5:00 p.m. Pacific Time on February 9, 2022.

EFSC HEARING ON PROPOSED CONTESTED CASE ORDER AND EXCEPTIONS. The Energy Facility Siting Council will conduct a hearing to review the Proposed Contested Case Order and the parties' and limited parties' exceptions and responses. Parties and limited parties will be provided notice of that hearing once scheduled.

CERTIFICATE OF MAILING

On December 29, 2021, I mailed the foregoing PROPOSED ORDER in OAH Case No. 2020-ABC-03504.

By: Electronic Mail

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