



Oregon

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To: Energy Facility Siting Council

From: Kellen Tardaewether, Senior Siting Analyst

Date: December 9, 2022

Subject: Agenda Item E (Information Item):
West End Solar Project, EFSC Review of the Draft Proposed Order and
Comments for the December 16, 2022 EFSC Meeting

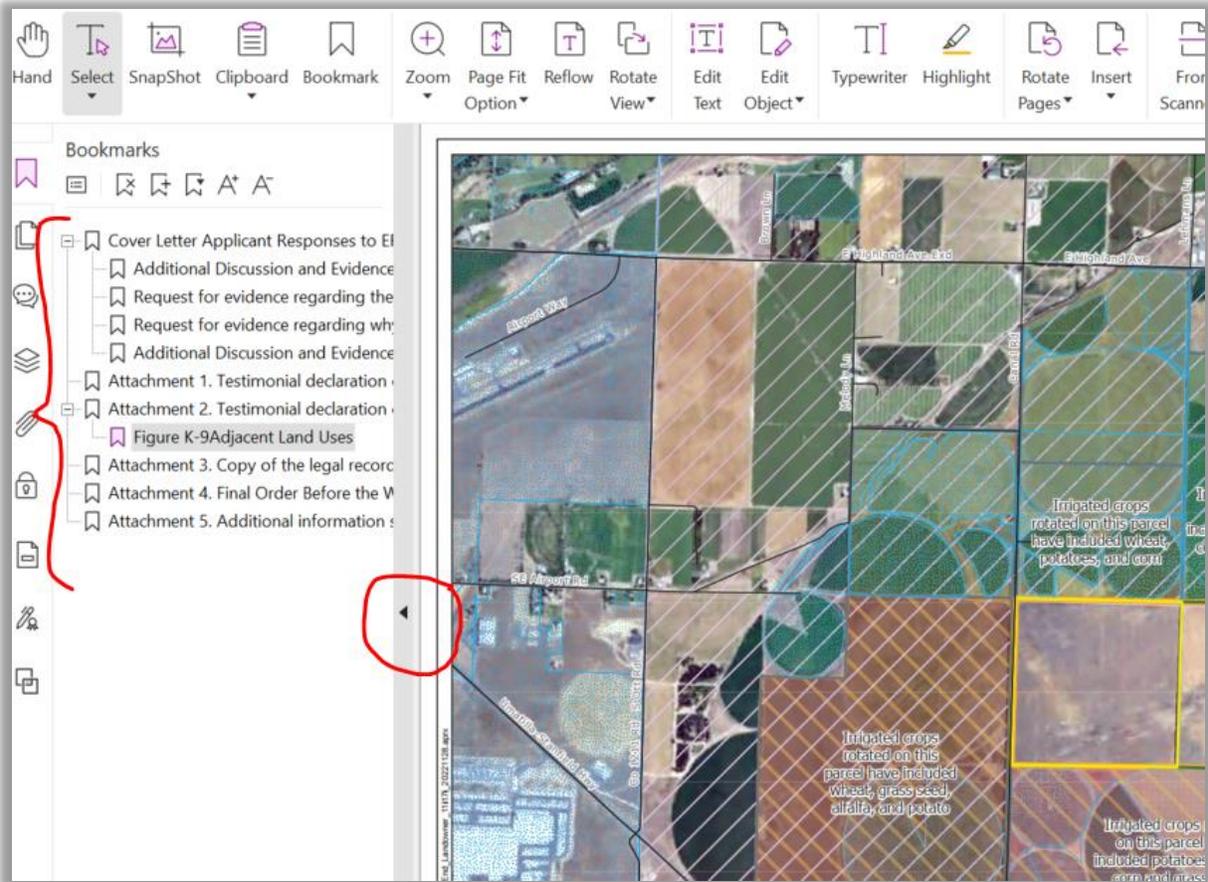
Attachments: Attachment 1: December 2, 2022 Applicant Supplemental Responses to EFSC
DPO Comments

INTRODUCTION

At the November 17, 2022 Energy Facility Siting Council (EFSC or Council) meeting, a public hearing on the Draft Proposed Order (DPO) on the Application for Site Certificate (ASC) for the West End Solar Project was conducted. Council was provided a copy of the Draft Proposed Order on the ASC (DPO) and all comments received on the record of the DPO public hearing, including applicant responses to EFSC comments as of December 1, 2022. At the November 17, 2022 DPO hearing the applicant requested to leave the record open to provide them an opportunity to further respond to EFSC comments and questions. The Hearing Officer granted the applicant's request and on December 2, 2022, the applicant provided its supplemental responses to EFSC DPO comments, which is attached to this staff report as Attachment 1. This staff report evaluates the applicants supplemental responses to EFSC comments.

After the record closed on December 2, 2022, Council will have an opportunity to review the DPO at the December 16, 2022 EFSC Meeting. Following Council's review of the DPO and issues raised in comments received, the Department will issue a Proposed Order intended to address issues raised in comments received that are within Council jurisdiction and based on facts and evidence provided in support of the issue.

The Department added searchable bookmark headers to help navigate the December 2, 2022 applicant responses. In a PDF program access the headers on the left column of the PDF viewer:



STAFF RECOMMENDATION

The Oregon Department of Energy's (Department) DPO on the ASC for the West End Solar Project (proposed facility) recommends that the Council find that EE West End Solar, LLC (applicant), a subsidiary of Eurus Solar Holdings, LLC., provided sufficient evidence in the ASC to demonstrate that the proposed facility, with recommended conditions, satisfies the requirements of applicable Council standards and other state statutes and local ordinance provisions.

PROJECT OVERVIEW

The proposed facility includes approximately 50 megawatts (MW) of solar photovoltaic energy generation components that would occupy up to 324 acres on Exclusive Farm Use zoned land in Umatilla County. Related or supporting facilities include a 70 MW lithium-ion energy storage system, collector substation and switchyard substation within 15-acre fenced area, 15 miles of underground 34.5 kilovolt (kV) collector line system, Supervisory Control and Data Acquisition (SCADA) System, driveway and internal access roads, an Operation and Maintenance (O&M) enclosure, construction staging areas, and approximately 3 miles of perimeter fence.

DEPARTMENT ANALYSIS OF APPLICANT RESPONSES RELATED TO EFSC COMMENTS ON GOAL EXCEPTION "MINIMAL DIRECT IMPACTS TO AGRICULTURE WITHIN SUBJECT TRACTS"

Council members expressed concerns about using arable soils for an energy facility rather than preserving for agricultural use and requested additional reasons/evidence to support the

proposed Goal 3 exception “reason” that the proposed facility would result in a minimum direct impact to agriculture. Council Member Jenkins requested a regional assessment to support arguments that the subject tracts are not suitable for agriculture. On December 2, 2022, the applicant submitted to the Department “Applicant Supplemental Responses” including a cover letter and 5 attachments, including recommendations to be included in the Proposed Order. The facts and evidence provided in this submittal are summarized below.

1. **Attachment 1 of applicant responses:** Testimonial declaration of property owner Steve Scott confirming that his property (Tract 2) has no water rights and explaining why agricultural crops are not viable without a water right for agricultural use/irrigation.

Applicant provides a declaration of property owner Steve Scott and supporting evidence to supplement his in-person oral testimony which describes his unsuccessful attempts and experience trying to farm the subject tract.

Department recommends the inclusion of facts from landowner oral testimony, declaration, and supporting attachments be included in proposed order to support the Goal Exception analysis. Specifically:

- Attempted to cultivate dryland wheat twice on Tract 2 – once in 2013 and once in 2015;
- Dryland wheat production in 2013 with about 14 bushels per acre. In 2015, they averaged 11 bushels per acre. Based on United States Department of Agriculture (USDA) National Agricultural Statistics Service data, Oregon’s average yield for winter wheat in 2013 was 62 bushels per acre and in 2015 was 47 bushels per acre, and in 2021 it was 45 bushels per acre (data and other supporting information included in **Attachment 5 of applicant responses**);
 - The only arable soils located within the site boundary are the 1B Adkins fine sandy loam soils, which have the lowest capability class (Class 4) of the arable soils definition. According to the Natural Resource Conservation Service (NRCS), the Adkins series are suitable for “dryland wheat, irrigation cropland, and range4.” As the two tracts have no irrigation water rights, the only suitable agricultural use for the limited Class 4 arable soils located in the site boundary is dryland wheat or range.
- Costs of farming tract exceed the value in crops and not economically feasible for the land owner;
- Lands have been left fallow and are not used for agriculture;
- Landowner has not been able to secure water rights:
 - The land is located within the Stage Gulch Critical Groundwater Area, acquisition of new groundwater irrigation water rights is not allowed, and landowner has not been able to get water rights to irrigate the parcel. This is evidenced by an Oregon Water Resources Department map of the Stage Gulch Critical Groundwater Area submitted in its November 17 DPO hearing responses and in **Attachment 4 of applicant responses**, a copy of the Final Order Before the Water

Resources Department of Oregon In the Matter of the Determination of a Critical Groundwater Area in the Stage Gulch Area. On page 5 of this document is a map of the Stage Gulch Critical Groundwater Area (CGWA) with the approximate location of the Project site boundary outlined in red and located in subarea A. On page 16 of the Final Order it states “It is FURTHER ORDERED that no new application for a permit to appropriate water from either the upper or the deep basalt groundwater reservoirs within the Stage Gulch Critical Groundwater Area be accepted for filing.”

- **Attachment 3 of applicant responses** is a copy of the legal recording of the Landowner’s Notice of East Improvement District, adopted December 4, 2018. This document lists all of the parcels included in the East Improvement District. Notably, the two tax parcels that make up the facility site boundary (4N29C0000500 and 4N29C0000200) are not listed in this document.

2. **Attachment 2 of applicant responses:** Testimonial declarations of property owner Art Prior explaining why his property (Tract 1) does not have irrigation water rights and why agricultural crops are not viable without irrigation.

Applicant provides a declaration of property owner Art Prior to supplement his in-person oral testimony which describes his farming practices as the owner of Windblown Ranch Inc., who owns a subject tract and adjacent tracts that are actively cultivated and irrigated.

- Since Tract 1 was acquired, it has not been cultivated for agricultural use. To landowner knowledge, Tract 1 parcel has never had water rights or been irrigated.
- Adkins fine sandy loam soils (63% of parcel), similar soils as adjacent lands, do well for certain irrigated crops as the sandy loam drains well, reducing risk of disease or rot and making it easy to dig/harvest root crops. But for dryland cultivation, this soil type is extremely limiting and cultivation of these soils can actually be detrimental due to risk of wind erosion.
- Tract 1 has no irrigation water or water rights:
 - Evidenced by **Attachment 4 of applicant responses** (same as Tract 2 above), Tract 1 is located within the Stage Gulch Critical Groundwater Area; therefore, acquisition of new groundwater irrigation water rights is not allowed.
 - Tract 1 is not located within the Stanfield Irrigation District or the Hermiston Irrigation District and inclusion into either one of these districts is highly unlikely due to the unavailability of water and the need to go through a federal boundary adjustment processes, as evidenced by **Attachment 3 of applicant responses** (similar as above).
- Water rights Mr. Prior secured through creation of a new irrigation district in 2018 called the East Improvement District (EID) he applied to other, more productive parcels owned and farmed by Windblown Ranch Inc. Illustrated and evidenced by **Figure K-9** included in his declaration. Mr. Prior decided to

exclude Tract 1 from the EID because it is site constrained by the existing Bonneville Power Administration and PacifiCorp transmission lines and located farther from the existing EID irrigation infrastructure than some of my other parcels.

DEPARTMENT ANALYSIS OF APPLICANT RESPONSES TO EFSC COMMENTS ON ORGANIZATIONAL EXPERTISE:

Council member Condon expressed concern that the applicant should clarify how the applicant, an LLC, can rely on the parent company in light of the limitations established in the definition of the “Act” as referenced in ASC Exhibit A Attachment A-3. Concerns were raised about how the applicant would ensure that it has access to the financial and organizational resources of its parent company to address potential compliance and liability issues for the project. The December 2, 2022 Applicant Supplemental Responses included a cover letter and 5 Attachments in response, summarized with recommendations to be included in proposed order below.

- Applicant EE West End Solar LLC has been and will continue to be covered by comprehensive business, property and liability insurance.
- EE West End Solar LLC will own the facility, which will have an estimated value of \$80 million dollars, and will generate revenue from a power purchase agreement or from selling power into the wholesale market.
- Under OAR Chapter 345, Division 29, EFSC has authority to address violations of EFSC rules or orders, or any terms or conditions of a site certificate. Following issuance of a notice of violation and any enforcement conference, the Department has the authority to issue civil penalties and, following a contested case proceeding, to revoke or suspend a site certificate.
- Existing site certificate conditions adequately address issues of potential noncompliance.

Under ORS 469.430, the Council has continued authority over the site for which the site certificate is issued and may inspect, or direct Department staff to inspect, or request another state agency or local government to inspect, the site at any time in order to ensure that the facility is being operated consistently with the terms and conditions of the site certificate.

The following site certificate conditions require facility inspections, reporting, and maintenance according to specified standards:

Recommended Organizational Expertise Condition 1: Any matter of non-compliance under the site certificate is the responsibility of the certificate holder. Any notice of violation issued under the site certificate will be issued to the certificate holder. Any civil penalties under the site certificate will be levied on the certificate holder.

Recommended Organizational Expertise Condition 2: The certificate holder must notify the Department within 72 hours of any occurrence of the following:

- a. There is an attempt by anyone to interfere with the facility’s safe operation.

- b. There is a significant nature event such as a fire, earthquake, flood, tsunami or tornado, or human-caused event such as a fire or explosion.
- c. There is any fatal injury at the facility.
[OAR 345-026-0170]

General Standard Condition 10: Annual Reporting including:

- i. Facility Status: An overview of site conditions, the status of facilities under construction and a summary of the operating experience of facilities that are in operation. The certificate holder shall describe any unusual events, such as earthquakes, extraordinary windstorms, major accidents or the like that occurred during the year and that had a significant adverse impact on the facility.
- ii. Reliability and Efficiency of Power Production: The certificate holder shall describe any equipment failures or plant breakdowns that had a significant impact on those factors and shall describe any actions taken to prevent the recurrence of such problems.
- iii. Status of Surety Information: Documentation demonstrating that bonds or letters of credit as described in the site certificate are in full force and effect and will remain in full force and effect for the term of the next reporting period.
- iv. Monitoring Report: A list and description of all significant monitoring and mitigation activities performed during the previous year in accordance with site certificate terms and conditions, a summary of the results of those activities and a discussion of any significant changes to any monitoring or mitigation program, including the reason for any such changes.
- v. Compliance Report: A report describing the certificate holder's compliance with all site certificate conditions that are applicable during the reporting period. For ease of review, the certificate holder shall, in this section of the report, use numbered subparagraphs corresponding to the applicable sections of the site certificate.
- vi. Facility Modification Report: A summary of changes to the facility that the certificate holder has made during the reporting period without an amendment of the site certificate in accordance with OAR 345-027-0350.
[OAR 345-026-0080]

Recommended Soil Protection Condition 4 and 5: Construction - report and clean spills - Control and Countermeasure Plan (SPCC)

Recommended Soil Protection Condition 8: Operation - report and clean spills - Control and Countermeasure Plan (SPCC)

Recommended Fish and Wildlife Condition 4: Construction monitoring and reporting - Wildlife Monitoring and Adaptive Management Plan

Recommended Fish and Wildlife Condition 5: Construction monitoring and reporting - Wildlife Monitoring and Adaptive Management Plan

Recommended Public Services Condition 4 and 5: Report trainings with Umatilla County Fire District #1 (UDFD #1)

Recommended Wildfire Prevention and Risk Mitigation Condition 3: Construction and operation, implement the Operational Emergency Management and Wildfire Mitigation Plan which includes facility component inspection and maintenance criteria, schedules and actions and includes reporting and updates.

As the applicant indicated, the project-specific LLC would have assets under its name to construct, operate and retire the facility as well as organizational and financial support from its parent company. The Department recommends that these existing site certificate conditions would help certify that the applicant/certificate holder would inspect, report and maintain the facility according to site certificate conditions, to ensure that the facility is constructed, operated and retired in a manner that protects public health and safety and the environment. During operation, if the Department becomes aware of repeat or multiple instances of facility issues or violations of site certificate conditions or other state permits, the Department recommends revising Organizational Expertise Condition 3 to require the applicant/certificate holder to report instances of repeat or multiple violations in its incident reports submitted to the Department. This would give the Department and Council the ability to review the ongoing ability of the applicant to properly maintain the facility according to conditions and permits. In a scenario where the Department or Council had concerns about the applicant's ability to comply with site certificate conditions, and its financial relationship with the parent company, the revisions to Recommended Organizational Expertise Condition 3 Recommended Retirement and Financial Assurance Condition 4 allow the Department and Council the ability to adjust the contingency that is included in the retirement bonding estimate. This would provide an opportunity to increase the bond to retire the facility if the applicant is not able to retire the facility and parent company is not available to assist the applicant in the retirement of the facility.

Recommended Edits to Site Certificate Conditions:

Recommended Amended Organizational Expertise Condition 3 (GEN): The certificate holder shall, as soon as reasonably possible:

- a. Report incidents or circumstances that may violate the terms or conditions of the site certificate, terms or conditions of any order of the Council, or the terms or conditions of any order issued under OAR 345-027-0230, to the Department. In the report to the Department, the certificate holder shall provide all pertinent facts including an estimate of how long the conditions or circumstances existed, how long they are expected to continue before they can be corrected, and whether the conditions or circumstances were discovered as a result of a regularly scheduled compliance audit;
- b. Initiate and complete appropriate action to correct the conditions or circumstances and to minimize the possibility of recurrence;
- c. Submit a written report within 30 days of discovery to the Department. The report must contain:
 - i. A discussion of the cause of the reported conditions or circumstances;
 - ii. The date of discovery of the conditions or circumstances by the responsible party;
 - iii. A description of immediate actions taken to correct the reported conditions or circumstances;

- iv. A description of actions taken or planned to minimize the possibility of recurrence; and
- v. For conditions or circumstances that may violate the terms or conditions of a site certificate, an assessment of the impact on the resources considered under the standards of OAR Chapter 345 Divisions 22 and 24 as a result of the reported conditions or circumstances.
- vi. Identify instances of repeat or multiple violations of site certificate conditions and violations of other state or federal permits related to public health and safety, the environment, or other resources protected under Council standards within a five-year period. To account for any impacts to the adequacy of the cost of facility decommissioning associated with these violations, the Department or Council may adjust the contingencies identified in Table 4 of the Final Order on ASC under Retirement and Financial Assurance Condition 4.
[OAR 345-029-0010]

Recommended Amended Retirement and Financial Assurance Condition 4 (PRE):

Before beginning construction of the facility or a facility component, the certificate holder shall submit to the State of Oregon, through the Council, a bond or letter of credit naming the State of Oregon, acting by and through the Council, as beneficiary or payee. The total bond or letter of credit amount for the facility is \$5.7 million dollars (Q3 2022 dollars), to be adjusted to the effective date, and adjusted on an annual basis thereafter, as described in sub-paragraph (b) of this condition:

- a. The certificate holder may adjust the amount of the bond or letter of credit based on the design configuration of the facility, or any phase of the facility, by applying the unit costs presented in Table 4 of the Final Order on the ASC, and the contingencies illustrated in Table 4 of the Final Order on the ASC and may further make adjustments based on unit costs for task and actions presented in ASC Exhibit X Attachment X-1. Any revision to the restoration costs should be adjusted to the effective date as described in (b). Any modification to the unit costs presented in Table 4 of the Final Order on the ASC are subject to review and approval by the Council. The Department and Council reserve the right to adjust the contingencies, as appropriate and necessary to ensure that costs to restore the site and maintain health and safety of the public and environment are adequate.

The Department recommends deleting Recommended Organizational Expertise Condition 1 and the associated Attachment D – Parent Company Guarantee, because the issue raised is sufficiently addressed with existing and amended site certificate conditions rather than a complex financial document.

ATTACHMENTS:

Attachment 1: December 2, 2022 Applicant Supplemental Responses to EFSC DPO Comments

