



Oregon

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To: Energy Facility Siting Council

From: Kellen Tardaewether, Senior Siting Analyst

Date: March 10, 2023

Subject: Agenda Item B (Action Item):
West End Solar Project, Council Decision on Application for Site Certificate (ASC) for the
March 24, 2023 EFSC Meeting

Attachments: Attachment 1: Proposed Order on ASC
Attachment 2: Hearing Officer's Order Concluding the Contested Case

STAFF RECOMMENDATION

Oregon Department of Energy (Department) recommends the Energy Facility Siting Council (EFSC or Council) approve the Application for Site Certificate (ASC) for the West End Solar Project, based on the recommended findings of fact, conclusions of law, and site certificate condition as presented in the Proposed Order on the ASC. Department recommends Council issue a Final Order and site certificate for the West End Solar Project.

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.

PROCEDURAL HISTORY OVERVIEW

On December 4, 2020, the Department received a Request for Expedited Review for Small Capacity Facilities submitted by Eurus Energy America Corporation (applicant). On December 17, 2020 the Department notified the applicant it approved the Request for Expedited review.

The preliminary application for site certificate (pASC) and payment under ORS 469.421 was filed on November 5, 2021.

Determination of Completeness – September 19, 2022

Date of Filing of Complete Application and Notice to the Public – September 28, 2022

Remote Public Informational Meeting – October 10, 2022

On October 26, 2022, the Department issued the Draft Proposed Order (DPO) on the ASC along with a Public Notice of a 22-day comment period. The DPO included staff's recommendation to grant with conditions a site certificate for the proposed facility, pursuant to OAR 345-015-0210. A public hearing on the DPO was held on November 17, 2022 in Hermiston, Oregon with opportunities for remote and in-person participation. The public hearing was conducted by an EFSC-appointed Hearing Officer from the Office of Administrative Hearings. Prior to the conclusion of the public hearing, the applicant requested that the Hearing Officer extend the record to December 2, 2022 to allow the applicant to provide additional responses to issues raised by EFSC members during the DPO public hearing.

On December 16, 2022, Council reviewed the DPO, issues raised in comments received on the record of the DPO, and applicant response. Following Council's review of the DPO, on January 13, 2023, the Department issued the Proposed Order, which incorporates DPO comments, EFSC comments, applicant responses to comments, and agency consultation in a redline/strikeout format. On the same date, the Department issued notice of the Proposed Order and Contested Case. Pursuant to the notice, the deadline for requesting party status in the contested case was 5:00 pm on February 13, 2023. No petitions for Contested Case were received by the February 13, 2023 deadline. On February 17, 2023, the hearing officer issued the Order Concluding the Contested Case for the facility (see Attachment 2 of this staff report).

SUMMARY OF REVISIONS – DPO TO PROPOSED ORDER

Proposed Order Section II.D., *Council Review Process*; Table A-1: *Summary of DPO Comments and Department Recommendations (as represented in Proposed Order)*, copied below to assist EFSC in its review of substantive changes in Proposed Order made in response to DPO comments, EFSC comments, and applicant response.

Below Proposed Order Table A-1 (beginning on page 14), Department provides a summary explanation and recommendations for the substantive EFSC comments relating to the Organizational Expertise standard and Land Use Standard – Goal 3 Exception.

Table A-1: Summary of DPO Comments and Department Recommendations (as represented in Proposed Order)

Commenter	Comment Subject	Comment Summary	Proposed Order Applicability (Section/Page Reference)	Recommendations, Responses, and Location in Proposed Order
<i>State and Tribal Government Agencies</i>				
ODFW	Draft Habitat Mitigation Plan (HMP) (DPO Attachment P-5)	Draft HMP is not consistent with mitigation goals for Category 3, 4 and 5; however, habitat quality of site is lower than Category 3 and 4 due to it limited functionality and connectivity	IV.H Fish and Wildlife Habitat (pp. 126-132)	Section IV.H., Fish and Wildlife Habitat, Recommended Fish and Wildlife Habitat Condition 1: Recommends that F&W Condition 1 include an opportunity for the applicant to update the habitat categorization referenced in the HMP to Category 5; commitments for mitigation area size and enhancement actions should be maintained as sufficient to meet the mitigation goals for Category 5 habitat.
CTUIR	Inadvertent Discovery Plan (IDP) (DPO Attachment S-3) and Noxious Weed Control	Draft IDP should be updated to reflect current contacts for CTUIR, Oregon State Police and CIS; and, requests confirmation of applicant’s plan for noxious weed control	IV.K Historic, Cultural and Archeological Resources (pp. 150-152); and, IV.H. Land Use (p. 98)	Section IV.K., Historic, Cultural, and Archaeological Resources: Recommended findings for Historic, Cultural, and Archaeological Resources Condition 1 describe that the draft IDP reviewed by Council includes updated contact information identified by CTUIR; condition language modified to require another update of relevant contacts prior to construction. Proposed Order Attachment P-4 includes the applicant’s draft Noxious Weed

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				Control Plan; plan identifies pre-construction noxious weed survey and treatment, and monitoring, treatment and control methods to be implemented during construction and operation. No changes made in response to CTUIR comment.
ODAV	Review of facility structures for potential impacts to navigable airspace	Recommends a condition requiring that applicant obtain FAA and ODAV review of structures	IV.M.6 Public Services, Air Traffic (pp. 186- 188)	No Proposed Order Revision: Recommended Public Services Condition 3 is consistent with ODAV comments.
<i>Public Comments</i>				
G. Thompson	Opposes proposed facility	Concerns related to project impacts to good quality farmland and wildlife	NA	No Proposed Order Revision: Comment did not contain sufficient detail to allow the Department to substantively respond.
C. Little	Supports proposed facility	General support of solar project to support local economies and help meet state reviewable energy policies/laws	NA	No Proposed Order Revision: Comment did not contain sufficient detail to allow the Department to substantively respond.
<i>EFSC Member Comments</i>				
H. Jenkins	Land Use, Goal 3 exception	Expressed concerns about using arable soils for an energy facility rather than	IV.E.3 Land Use, Goal 3 Exception (pp. 81-100)	Section II.D. describes the Department’s post-DPO evaluation conducted in consultation with Oregon Department of

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		<p>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. Requested a regional assessment to support arguments that the subject tracts are not suitable for agriculture.</p>		<p>Agriculture and conclusion that the analysis recommended by Council is a significant change in the “test” applied to the evaluation of the adequacy of the “reason” compared to prior goal exceptions taken by Council which relied, in part, on the same “minimal impact to agriculture” reason. Therefore, it is recommended that Council consider whether to apply this “test” in a rulemaking or policy to allow applicants/certificate holders an adequate opportunity to understand and complete the evaluation.</p>
K. Howe	Land Use, Goal 3 exception	<p>Information in the record is confusing and refers to adjacent agricultural activity on soils of same quality as site – requests that information submitted at the hearing be applied to ASC Exhibit K analysis to ensure the record is accurate and clear.</p>		<p>Section IV.E1.b. Land Use, Applicable Substantive Criteria and Goal Exception: Updated section based on additional facts and evidence provided by applicant (see below)</p>
C. Condon	Organizational Expertise and	<p>Applicant should clarify how the applicant, an LLC, can rely on the parent company in</p>	IV.B Organizational Expertise (pp. 37-40); and IV.G	Section IV.B Organizational Expertise, Recommended Organizational Expertise Condition 3:

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	concerns over the “Act”	light of the limitations established in the definition of the “Act” as referenced in ASC Exhibit A Attachment A-3	Retirement and Financial Assurance (pp. 121-123)	Organizational Expertise Condition 3(c) and (d) authorizes the Department to review site certificate compliance status to re-evaluate the adequacy of the decommissioning estimate associated with Retirement and Financial Assurance Condition 4(a). This will provide the State protection if the applicant went bankrupt or the Council opted to terminate the site certificate and the applicant was unable to fulfil its facility decommissioning obligation.
<i>Applicant Comments (includes comments from underlying landowners on behalf of applicant)</i>				
R. Curulla, EE West End Solar, LLC	Organizational Expertise Condition 5	Requests to revise recommended Organizational Expertise Condition 5 to remove requirement to provide the Department the selected contractor’s compliance history	IV.B Organizational Expertise (pp. 40-42)	No Proposed Order Revision: Department recommends that the condition be maintained. The Department disagrees that this request is unreasonably burdensome as the information is readily available from construction contractors and is recommended due to the lack of demonstrated experience of the applicant in Oregon. The Department intends to rely on the results of the selected contractor’s compliance history to inform the level of construction compliance oversight/inspections by the Department.

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	Land Use Condition 2(d) (parking lot design)	Requests to revise recommended Land Use Condition 2(d) to allow Umatilla County to approve alternative parking lot design requirements, if needed.	IV.E Land Use (pp. 59-65)	Section IV.E.1.b. Land Use, IV.E.1 Applicable Substantive Criteria, Recommended Land Use Condition 2(d): Department consulted with Umatilla County and recommends that UCDC 152.562(l) (1-7) be removed from the list of applicable substantive criteria in Table 2 and that the condition imposing parking lot standards be removed in proposed order based on inapplicability of the requirement for non-public use facility. ¹
	Land Use Condition 12 (setback for avoidance of impacts to irrigated agriculture)	Requests to revise recommended Land Use Condition 12 to correct tax lot reference applied to setback.	IV.E Land Use (pp. 100)	Section IV.E.1.b. Land Use, Recommended Land Use Condition 12: Department agrees that the condition contained an erroneous taxlot reference and recommends the condition be amended to reference taxlot 4N2900000300 rather than 4N29000001700 (see DPO Figure 4)
	T&E Species Condition 1	Requests revisions to recommended T&E Species Condition 1 for sub(a) to allow desktop analysis for areas	IV.I Threatened and Endangered Species (pp. 140)	Section IV.I., Threatened and Endangered Species, Recommended Threatened and Endangered Species Condition 1:

¹ WESAPPDoc1-1 Proposed Order Agency Consultation SAG Umatilla County 2022-12-09. Umatilla County confirmed that UCDC 152.562(l) (1-7) consists of parking lot design standards intended to apply to publicly accessible businesses and therefore would not apply to the proposed facility. This criteria has been removed from list of “applicable substantive criteria” in Table 2 of the proposed order and from the land use evaluation in Section IV.E.1 (resulting in removal of recommended Land Use Condition 2(d)).

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		extending outside the site boundary where applicant land access has not been obtained; and (c) to remove explanation of WGS colonies and burrows.		Department agrees that the condition should be amended per applicant comment – the revisions are consistent with the methods employed for the ASC evaluation and were discussed/concurred with by ODFW.
	T&E Species Condition 2	Requests revisions to recommended T&E Species Condition 2 to remove the requirement for delineation and avoidance of Category 2 WGS habitat.	IV.E Land Use (pp. 140-141)	Section IV.I., Threatened and Endangered Species, Recommended Threatened and Endangered Species Condition 2: Department agrees that the condition should be amended per applicant comment - delineation for avoidance and avoidance requirements do not apply to Category 2 WGS habitat impacts, only Category 1 WGS habitat.
S. & W. Scott (landowner)	Land Use, Goal 3 exception and farm impacts	Testimony describing that they farmed land in 2013 and 2015; best crop occurred in 2013 resulting in 14 bushels an acre which did not pay for the inputs; in 2015, they produced 11 bushels an acre at \$5.50 a bushel. Area is within critical groundwater restricted area and obtaining water for	IV.E Land Use (pp. 81-100)	Section IV.E1.b. Land Use, IV.E.3 Goal Exception: Recommends that the testimony and facts presented be incorporated into findings of fact for Goal 3 exception analysis.

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		irrigation is virtually impossible. Confirmed that adjacent lands with same soil type are irrigated.		
A. Prior (landowner)		Testimony describing that he has owned the property since 1990 and has never attempted to farm the parcel because it is outside of irrigation water district boundaries. He affirmed that his adjacent properties where high value crops are produced are indeed irrigated and that he does not have enough water rights to irrigate the subject properties and that the value of the land is not viable to move water right on to farm.		Section IV.E1.b. Land Use, IV.E.3 Goal Exception: Recommends that the testimony and facts presented be incorporated into findings of fact for Goal 3 exception analysis.
L. McClain on behalf of EE West End Solar, LLC (applicant)		Provided a copy of the East Improvement District Recorded Landowner Notice, which provides documentation of all of the parcels located in the		Section IV.E1.b. Land Use, IV.E.3 Goal Exception: Recommends that the testimony and facts presented be incorporated into findings of fact for Goal 3 exception

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		<p>East Improvement Irrigation District. Pages 92-94 of the PDF are the pertinent sections to Art Prior’s land holdings. Page 94 lists the tax lots he owns that are in the East Improvement District – including the two tax lots (Tract 3 and Tract 6) located east of the West End Solar site boundary that have recently been developed for irrigated agricultural use. The tax lot Mr. Prior owns within the site boundary (4N29C00000500) is not listed in this document.</p>		<p>analysis.</p>
<p>L. McClain on behalf of EE West End Solar, LLC (applicant)</p>		<p>Provided a map from the Oregon Water Resources Department of the Groundwater Restricted Areas in North Umatilla County, Stage Gulch area, where the facility and adjacent properties are located.</p>		<p>Section IV.E1.b. Land Use, IV.E.3 Goal Exception: Recommends that the testimony and facts presented be incorporated into findings of fact for Goal 3 exception analysis.</p>
<p>Acronyms: CTUIR = Confederated Tribes of Umatilla Indian Reservation</p>				

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FAA = Federal Aviation Administration LCIS = Oregon Legislative Commission on Indian Services ODAV = Oregon Department of Aviation ODFW = Oregon Department of Fish and Wildlife				

COUNCIL SCOPE OF REVIEW

Under ORS 469.370 (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. The Council shall make its decision by the affirmative vote of at least four members approving or rejecting any ASC.

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 comment on material changes to the Proposed Order, including material changes to conditions of approval resulting from the Council's review. On March 14, 2023, the Department issued public notice of the March 24, 2023 EFSC Meeting Agenda which included Public Notice of the potential for a Hearing to Adopt Final Order under ORS 469.370(7). Therefore, if, during Council's review of the Proposed Order on the ASC, Council makes material changes to site certificate conditions in the Proposed Order, it must hold a material change hearing providing the applicant an opportunity to comment.

During the March 24, 2023 EFSC meeting, Council will review the Proposed Order and have the opportunity to approve or modify the Proposed Order as the Final Order and grant issuance of a site certificate, or may reject the Proposed Order and deny issuance of a site certificate. The Council's order is considered a Final Order for purposes of appeal under ORS 469.403. Under OAR 345-015-0085(8), if the Council approves the request in the Final Order, the Council shall issue a site certificate. The site certificate becomes effective upon execution by the Council and by the applicant.

The Council's three options are included below.

- 1) Approve as presented by staff.** The Council can approve the Proposed Order as the Final Order and grant issuance of a site certificate. The site certificate may become effective based on date of Council approval.
- 2) Amend, and approve.** The Council may amend the staff's Proposed Order, including either the findings of fact or conditions of approval. If the amendments are not considered material, the Council can approve and issue the Final Order without a material change hearing. If the amendments are considered material, including material changes to conditions, the Council must provide the applicant an opportunity to comment on the changes, during a material change hearing, which if necessary, is planned for the March 24, 2023 EFSC Meeting.
- 3) Reject, and deny.** The Council can decide that the proposed facility does not meet one or more Council standards or other applicable rules and statutes, and reject the Proposed Order and deny issuing a site certificate. However, because the Proposed Order finds that the facility meets all Council standards and applicable rules and statutes (with conditions of approval), if Council disagrees with staff's findings of fact or

conclusions of law in the Proposed Order, Council would have to specify which standard or rule is not met and why based upon fact or law, and direct staff to prepare findings accordingly. As per ORS 469.370(7), Council would be required to provide a material change hearing on the revised conclusions, which if necessary, is planned for the March 24, 2023 EFSC Meeting, or applicant and EFSC can hold a hearing at a later Council, and ultimately issue its Final Order.

SUMMARY OF REVISIONS – PROPOSED ORDER TO FINAL ORDER

The Final Order, if approved or modified and approved by Council at the March 24, 2023 EFSC Meeting, will include updates to the procedural history and administrative revisions such as converting “Department recommends” to “Council finds and “Proposed Order” to “Final Order.” The Final Order will include any changes to findings of fact or material changes to conditions made by EFSC during it’s review of the Proposed Order, and any changes made in response to applicant’s comments on material changes from material change hearing, if held.

ATTACHMENTS:

- Attachment 1: Proposed Order on ASC
- Attachment 2: Hearing Officer’s Order Concluding the Contested Case