

ODOE Recommended Changes to Proposed Order / to be included in Final Order

(p. 195 in the Proposed Order)

The HMP is in draft format because the project has not yet been approved, the Applicant has not eliminated the possibility for alternative mitigation options (i.e., using another potential HMA or payment to a mitigation bank) should additional suitable options be identified and the final HMP must be based on final impacts from facility construction. The finalization of the draft HMP includes determining final estimated permanent habitat disturbance based on final facility design or phase, by habitat type and category; finalization of the management plan to be implemented at the HMA; and execution of the legal instrument required to secure the HMA. The legal mechanism must provide assurance of durability for the life of the proposed facility to ensure the mitigation property will remain habitat if the landowner ceases to own or manage the land prior to facility decommissioning. The legal instrument shall also contain an assurance that the land covered under the agreement will not be used to satisfy any other mitigation obligations other than those pertaining to this facility.

The Department recommends Council impose the following conditions requiring that, prior to construction, the applicant secure the HMA(s) based on execution of a legal instrument approved by the Department; and finalize the HMP, subject to review and approval by the Department, in consultation with ODFW.

~~Recommended~~ Fish and Wildlife Condition 7 (PRE): Prior to construction of the facility, facility component or phase, as applicable, the certificate holder shall submit the draft legal agreement for review and approval by the Department, in consultation with ODFW. The legal agreement shall ensure that payment provided for long-term management and enhancement of the mitigation area is adequate to cover the permanent habitat loss from the facility.

[PRE-FW-03; Final Order on ASC]

¹ ODOE-YRBAPPDoc29, pASC Reviewing Agency Comment ODFW 2025-07-18 and ODOE - YRBAPPDoc19-12 ASC Review Agency Comment ODFW 2025-09-29, p. 3 of 6.

² Id.

Recommended Fish and Wildlife Condition 8 (PRE): ~~Prior to construction of the facility, facility component, or phase, as applicable, the certificate holder shall finalize the Habitat Mitigation Plan, as provided in Attachment P-3 of this Order, based on the impacts associated with the final facility design and the legal agreement, as approved by the Department.~~ Prior to construction of the facility, facility component, or phase, as applicable, the certificate holder shall finalize the Habitat Mitigation Plan, provided in Attachment P-3 of this Order, demonstrating that the chosen HMAs are consistent with the in-proximity definition in OAR 635-415-0005(13), as approved by the Department in consultation with ODFW and based on:

- the impacts associated with the final facility design,
- the legal agreement required under Fish and Wildlife Condition 7, and mapping of the HMAs, watershed boundary and big game home range based on ODFW's available technical data.

While ODFW did not explicitly address the OAR 635-415-0005(13) definition of "In-proximity Habitat Mitigation" in its comments on the proposed facility, the fact that ODFW recommended Tygh Ridge Ranch HMA indicates it concluded that the potential HMA meets the ODFW habitat mitigation rules, including the definition of "in-proximity" habitat mitigation. Council does not rely on any of the documents submitted by ODOE or Alvin Alexanderson in their respective briefs addressing Mr. Alexanderson's exceptions to the Hearing Officer's PCCO that were not already in the record on the Department's Proposed Order.

As described above, the draft HMP is in draft format. The applicant is not bound to utilize the Tygh Ridge Ranch as an HMA and may instead choose another location or locations to conduct habitat mitigation (or make payment to a mitigation bank). The question of whether (if an HMA is selected as part of the final HMP) the HMA is "in proximity" must ultimately be determined when the applicant finalizes the HMP and submits it to ODOE and ODFW for review, based on ODFW's interpretation of OAR 635-415-0005(13). To ensure compliance with the in-proximity requirement, pursuant to ORS 469.402, Council adopts the following condition, requiring that, prior to construction, the applicant document that the HMAs (including Tygh Ridge Ranch, if chosen) meet the definition of "in-proximity" in OAR 635-415-0005(13).

Per OAR 635-415-0025(2)(b)(B) the mitigation goal for Category 2 habitat is "no net loss of either habitat quantity or quality and to provide a net benefit of either habitat quantity or quality." The applicant has demonstrated there will be no net

loss of Category 2 habitat quantity. While the proposed facility will permanently impact approximately 4,670 acres and temporally impact approximately 168 acres of BGWR Category 2 habitat, under the applicant's Habitat Mitigation Plan (and subject to Fish and Wildlife Conditions 7, 8 and 9) the applicant will protect 6,675 acres of in-kind BGWR Category 2 habitat via a conservation easement or similar legal instrument.

Further, the proposed facility will not result in a net loss of BGWR Category 2 habitat; the proposed HMP will provide a net benefit for habitat quality through enhancement and uplift actions described in the HMP (including through planting shrubs and Oregon White Oak, controlling weeds, and removing fences and conducting long term monitoring).

Recommended Changes to the Draft HMP (Final Order Attachment P-3)

1.1 Pre-construction HMP Finalization

Prior to construction, this Draft HMP will be finalized based on the following:

1. Conduct a field habitat characterization of the Tygh Ridge Ranch HMA;
2. Designate specific locations for habitat enhancement actions;

3. Demonstrating that the chosen HMAs are consistent with the in-proximity definition in OAR 635-415-0005(13), as approved by the Department in consultation with ODFW and based on:

- the impacts associated with the final facility design,
- the legal agreement required under Fish and Wildlife Condition 7, and
mapping of the HMAs, watershed boundary and big game home range based on ODFW's available technical data.

~~3.~~ 4. Develop monitoring protocol in coordination with ODFW and ODOE;
and

~~4.~~ 5. Develop success criteria for habitat enhancement actions.

4.0 Mitigation

The mitigation obligation for the Facility is 6,675 acres based on the ratios and calculations in Table 3. Through coordination with ODFW, the Applicant preliminarily identified two potential mitigation areas for addressing the mitigation obligation where habitat protection and enhancement is feasible and consistent with this HMP. The HMAs are on the Columbia Plateau and “in proximity” to the Facility. If it is determined at final design of any phase of Facility development that additional mitigation is needed, mitigation would be developed in a like manner as the mitigation approach identified in this HMP, subject to ODFW review and approval by ODOE. The Applicant has not eliminated the possibility for alternative mitigation options (i.e., using another potential HMA or payment to a mitigation bank) should additional suitable options be identified. Whatever HMAs are chosen, the certificate holder shall demonstrate to the Department’s satisfaction, in consultation with ODFW, that the chosen Habitat Mitigation Areas are “in proximity to” the areas impacted by the proposed facility, as that term is defined in OAR 635-415-0005(13), and based on:

- the impacts associated with the final facility design,
- the legal agreement required under Fish and Wildlife Condition 7, and
mapping of the HMAs, watershed boundary and big game home range based on ODFW’s available technical data.

The final mitigation approach will offer enough suitable habitat to achieve the ODFW goal of no net loss of habitat quantity or quality. A net benefit in habitat quantity will be achieved through a 2:1 ratio for key habitats and a net benefit in quality will be achieved through appropriate enhancement actions.
