

Agenda Item G Attachment 2:

Council Review and Decision on Proposed Retirement Plan and Application for Termination of the Fifth Amended Site Certificate of the Summit Ridge Wind Farm
- Comments on Application for Site Certificate Termination

Attachment Index

Commenter	Date
Friends of the Columbia River Gorge	04/01/2024
Wasco County Board of Commissioners	04/03/2024

ESTERSON Sarah * ODOE

From: sarah.esteron@energy.oregon.gov
Subject: Application to Terminate the Summit Ridge Wind Farm Site Certificate
Attachments: Comments on the Application to Terminate the Summit Ridge Wind Farm Site Certificate.pdf

From: Nathan Baker <Nathan@gorgefriends.org>
Sent: Monday, April 1, 2024 4:56 PM
To: ESTERSON Sarah * ODOE <sarah.esteron@energy.oregon.gov>
Cc: Karl Anuta <kg@integra.net>; Hank Shell <hank@gorgefriends.org>; Curtiss, Sarah Stauffer <sarah.curtiss@stoel.com>; Reilley Keating <reilley.keating@stoel.com>; Samantha K. Sondag <samantha.sondag@stoel.com>
Subject: Application to Terminate the Summit Ridge Wind Farm Site Certificate

To Whom It May Concern:

Please find attached the comments of Friends of the Columbia Gorge, Oregon Wild, and Central Oregon LandWatch on the Application to Terminate the Summit Ridge Wind Farm Site Certificate.

Thank you.



Nathan Baker
Senior Staff Attorney
Friends of the Columbia Gorge

123 NE 3rd Ave., Suite 108
Portland, OR 97232-2975
nathan@gorgefriends.org
(503) 241-3762 x101

KARL G. ANUTA

LAW OFFICE OF KARL G. ANUTA, P.C.
735 SW FIRST AVENUE, 2ND FLOOR
PORTLAND, OREGON 97204
(503) 827-0320
FACSIMILE (503) 386-2168

TRIAL ATTORNEY
LICENSED IN
OREGON & WASHINGTON

E-MAIL
KGA@LOKGA.NET

April 1, 2024

Sarah Esterson, Senior Policy Advisor
Oregon Department of Energy
550 Capital Street NW
Salem, OR 97301

Via email only to sarah.esterson@energy.oregon.gov

Re: Application to Terminate the Summit Ridge Wind Farm Site Certificate

Dear Ms. Esterson:

These comments are submitted on behalf of Friends, Oregon Wild, and Central Oregon LandWatch (collectively, “Commenters”). This matter involves the proposed Summit Ridge Wind Farm, hereafter referred to as the “Project.”

As will be further detailed below, construction of the Project was neither lawfully *commenced* prior to the construction commencement deadline nor *completed* prior to the construction completion deadline. Moreover, an application that in part had proposed to extend the construction completion deadline for the Project was recently withdrawn. Based on that withdrawal, the Site Certificate for the Project has expired and it should be deemed terminated or null and void under applicable law.

Commenter Friends of the Columbia Gorge (“Friends”) is a nonprofit organization with more than 5,000 members dedicated to protecting and enhancing the resources of the Columbia River Gorge. Friends’ mission is to vigorously protect the scenic, natural, cultural, and recreational resources of the Columbia River Gorge. Friends fulfills this mission by ensuring strict implementation of the Columbia River Gorge National Scenic Area Act and other laws protecting the region of the Columbia River Gorge; promoting responsible stewardship of Gorge land, air, and waters; encouraging public ownership of sensitive areas; educating the public about the unique natural values of the Columbia River Gorge and the importance of preserving those values; and working with groups and individuals to accomplish mutual preservation goals.

Commenter Oregon Wild is a nonprofit Oregon corporation with more than 20,000 members and supporters. Oregon Wild’s mission is to protect and restore Oregon’s wildlands, wildlife and waters as an enduring legacy for all Oregonians. Founded in 1974, Oregon Wild has been instrumental in securing permanent legislative protection for some of Oregon’s most precious landscapes, including approximately two million acres of federally designated wilderness areas and almost 1,800 miles of federally designated wild and scenic rivers. Oregon Wild works to maintain and enforce environmental laws, while building broad community support for its campaigns.

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

BACKGROUND

Commenters are Petitioners in two pending court cases, *Friends v. EFSC*, Case No. 20CV13611 (Mult. Cnty. Cir. Ct. Mar. 24, 2020), and *Friends v. ODOE*, Case No. 20CV35596 (Mult. Cnty. Cir. Ct. Oct. 9, 2020). Commenters hereby incorporate all claims and arguments raised by Petitioners in these two cases. Copies of the current Petitions for Judicial Review in those cases are attached hereto as Exhibits A and B. Commenters further note that these arguments are incorporated solely to preserve the arguments. Commenters will elaborate on these arguments in sections 2 and 3 of this comment letter.

On February 8, 2024, Commenters enter into a settlement agreement with Summit Ridge, LLC; Summit Ridge Wind Holdings, LLC; and Aypa Power LLC, in which these parties agreed to certain terms and conditions that, if met, will result in the dismissal of the two pending Circuit Court cases. The Settlement Agreement expressly allows Commenters to comment on the Application to Terminate the Summit Ridge Wind Farm Site Certificate. The Settlement Agreement further expressly allows Commenters to include arguments to EFSC in our comments as to whether (1) construction of the Project was lawfully *commenced* prior to the construction completion deadline and whether (2) the Site Certificate has expired with respect to the construction *commencement* deadline, so long as Commenters request that EFSC not adopt any findings or conclusions determining these two disputed issues, and so long as Commenters make it clear in our comments that we are *not* requesting that EFSC make any determinations on these two disputed issues.

Accordingly, in sections 2, 3, and 4 of this comment letter (and in the incorporated Petitions for Judicial Review), Commenters will present arguments regarding *commencement* of construction of the Project and expiration of the Site Certificate with respect to the construction *commencement* deadline. These arguments are presented solely for purposes of preservation of appeal rights, should findings on those issues be made. However, Commenters expressly request that EFSC **not** adopt any findings and conclusions on the issues presented in Sections 2, 3, and 4 of this comment letter and in the incorporated Petitions for Judicial Review.

In contrast, Commenters request action by ODOE (and findings and conclusions by EFSC) on the issues presented in section 1 of this comment letter. This Section relates to County positions on this matter.

Finally, Commenters also request findings and conclusions on the issues presented in section 5 of this comment letter. Section 5 involves the expiration of the Site Certificate based on

the Site Certificate Holder's failure to *complete* construction by the construction *completion* deadline, combined with the Site Certificate Holder's voluntary withdrawal of its preliminary Request for Amendment #6 (pRFA#6) to the Site Certificate, which would have extended the construction *completion* deadline. The Settlement Agreement does not prohibit Commenters from commenting on the issues presented in section 4 of this letter, nor from requesting that EFSC adopt findings and conclusions on these issues. Accordingly, Commenters ask EFSC to find and conclude that because the Site Certificate Holder voluntarily withdrew RFA#6 and failed to complete construction by the construction completion deadline, the Site Certificate expired by operation of law and is terminated on that basis.

SUBSTANTIVE COMMENTS

1. Prior to any Council Order in this matter, ODOE should procure a final, dated copy of the undated letter from Wasco County included in the Termination Application.

The Application for Termination of the Summit Ridge Site Certificate, at Exhibit 3, page 11, includes an undated letter from Kelly Howsley-Glover, Wasco County, to Kathleen Sloan, ODOE. This letter is undated and appears to be incomplete given that the words "INSERT DATE" appear at the top of the page.

The apparently incomplete status of this letter raises multiple concerns. First, it is unclear whether this letter was complete and was intended for submission to the Council as part of this Application. Second, it is unclear whether the positions stated by the County in this letter are the County's final positions.

To clear this up, Commenters recommend that ODOE should procure a final, dated copy of the undated County letter, and submit that letter to the Council, prior to any Council Order in this matter.

2. The Site Certificate expired under its own terms and the applicable law when the Site Certificate Holder failed to lawfully commence construction of the Project prior to the Site Certificate's construction start deadline.

If and when a site certificate holder fails to lawfully begin construction of a facility by the construction start deadline specified in the site certificate, the certificate automatically expires on that date. OAR 345-027-0313. The Council is then required to issue an order terminating the Site Certificate. *See* OAR 345-027-0110(9) ("When the Council finds that the site certificate has expired . . . the Council *shall issue an order* terminating the site certificate.") (emphasis added). "Construction" is a statutorily defined term, meaning "work performed on a site, excluding surveying, exploration or other activities to define or characterize the site, the cost of which exceeds \$250,000." ORS 469.300(6); *see also* OAR 345-001-0010(12) (same). Here, the Site Certificate Holder failed to lawfully begin construction of the Project by the August 19, 2020 construction start deadline specified in the Site Certificate. The Site Certificate expired on that date for the reasons asserted in the attached Petition for Judicial Review in *Friends v. ODOE*, including the reasons summarized below.

First, ODOE’s purported waiver of numerous pre-construction conditions and requirements of the Site Certificate was an attempted amendment of the Site Certificate. *See* OAR 345-027-0350 (stating that an amendment to a site certificate is required in order to “[d]esign, construct, or operate a facility in a manner different from the description in the site certificate, if the proposed change . . . [c]ould require a new condition *or a change to a condition* in the site certificate.”) (emphasis added). Yet ODOE lacked authority to make these attempted amendments without the approval of the Council. *See* ORS 469.405(1); *Friends of Columbia Gorge v. EFSC*, 365 Or. 371, 394, 446 P.3d 53 (Or. 2019) (citing ORS 469.405(1)) (“The statutes governing the [request for amendment] process *require the council itself to approve an amendment*, thus precluding the council from delegating that final decision-making authority to Staff.”) (emphasis added). Thus, ODOE’s attempted waivers of these conditions were null and void, and the conditions have remained in effect and applicable to the entire Project at all times.

Second, all pre-construction conditions of the Site Certificate were expressly required to be complied with prior to commencement of construction of the Project. *See, e.g.*, Fourth Amended Site Certificate (Aug. 2019), at Conditions 2.14, 3.0, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 5.8, 5.10, 5.11, 5.12, 5.13, 5.14, 6.1.a, 7.12, 8.2, 8.4, 10.1, 10.4.a, 10.4.b, 10.4.c, 10.4.d, 10.4.e, 10.4.f, 10.7.a, 10.7.b, 10.7.c, 10.13, 10.14, 11.1, 11.2, 11.3, 12.2.a, 12.2.b, 12.2.c, 12.2.d, 13.3.a, 14.1, and 14.7. Here, the Site Certificate Holder never complied with numerous pre-construction conditions. Thus, the Site Certificate Holder was not authorized to lawfully commence construction of the Project, and as a result the Site Certificate expired on the August 19, 2020 construction start deadline and has been void ever since.

However, as explained above and in the joint letter dated February 21, 2024, Commenters ask the Council to *not* adopt any findings and conclusions on the disputed issues presented in section 2 of this letter.

3. The Council never approved “phased construction” of the Project, and ODOE lacked authority to retroactively approve “phased construction” without oversight and approval by the Council.

In the erroneous agency orders challenged in *Friends v. ODOE*, ODOE unlawfully determined that multiple mandatory pre-construction conditions of the Summit Ridge Site Certificate either were not applicable or were satisfied prior to the construction start deadline of August 19, 2020, including but not limited to Conditions 2.14, 3.0, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 5.8, 5.10, 5.11, 5.12, 5.13, 5.14, 6.1.a, 7.12, 8.2, 8.4, 10.1, 10.4.a, 10.4.b, 10.4.c, 10.4.d, 10.4.e, 10.4.f, 10.7.a, 10.7.b, 10.7.c, 10.13, 10.14, 11.1, 11.2, 11.3, 12.2.a, 12.2.b, 12.2.c, 12.2.d, 13.3.a, 14.1, and 14.7. ODOE’s determinations for these Conditions were based on the faulty premise that numerous mandatory pre-construction conditions did not apply to a so-called “Phase 1” for construction of the Project, which was purportedly limited to improvements to approximately 0.8 miles of an existing road within the Project site (a road that has served and continues to serve as a residential driveway). Yet the Site Certificate did not authorize, or even contemplate, any such “phased construction” of the Project.

Rather, applicable law requires applicants for site certificates and amendments thereto to detail the proposed construction schedule for each proposed energy facility within their applications for site certificates and any requests for amendment. OAR 345-021-0010(1)(b)(F) (applications for site certificates must include “[a] construction schedule including the date by which the applicant proposes to begin construction and the date by which the applicant proposes to complete construction.”); *see also* OAR 345-027-0360(1)(b) (requiring preliminary certificate amendment requests to include a detailed description of any proposed changes to the Site certificate).

Here, the Site Certificate Holder never presented any proposal for “phased” construction of the Project; nor did the Council approve any such proposal. Instead, the Site Certificate’s terms and conditions, including its pre-construction conditions, applied to the *entire* Facility as defined by statute, not specific “phases.” *See* ORS 469.300(14) (defining “facility” to include all “related or supporting facilities”); OAR 345-027-0350. ODOE’s retroactive approval of a “phased construction” concept was inconsistent with the terms and conditions of the Site Certificate and would have required approval by the Council. *See Friends v. ODOE*, Amended Petition for Judicial Review (Ex. B) at ¶¶ 41–46, 50.

As noted above, construction of an approved facility in a manner that could require a new or changed certificate condition *requires* an amendment to the certificate, which must be approved by the Council (not by ODOE). *See* OAR 345-027-0350; ORS 469.405(1). Here, by purporting to approve a “phased construction” schedule for the Project, ODOE unilaterally (and unlawfully) purported to waive numerous pre-construction conditions previously imposed by the Council. But only the Council would have had the power and authority to do that.

In fact, the Multnomah County Circuit Court has previously indicated agreement with Friends on this point in an unrelated case, noting that ODOE’s attempted unilateral action “functionally adds that only permits required for the specific part of the facility must be obtained before construction may begin. *This language is not included in the Site Certificate and therefore arguably serves as an amendment to the Site Certificate.*” *Columbia Riverkeeper v. ODOE*, No. 20CV38607, Opinion Regarding Respondents’ Motion to Dismiss, at 8 n. 5 (Multnomah Cnty. Cir. Ct. Oct. 20, 2021) (emphasis added) (attached as Exhibit C).

In summary, the Council never approved “phased construction” of the Project, and ODOE lacked authority to retroactively approve “phased construction” without oversight and approval by the Council.

However, as explained above and in the joint letter dated February 21, 2024, Commenters ask the Council to *not* adopt any findings and conclusions on the disputed issues presented in section 3 of this letter.

4. Because the Site Certificate Holder never applied to the Council for a site certificate amendment to extend the August 19, 2020 construction commencement deadline prior to that deadline, the certificate expired on that deadline and is null and void.

Despite promising to the Council that it would do so, Summit Ridge failed to apply to the Council for a site certificate amendment to extend the August 19, 2020 construction commencement deadline prior to that deadline. As a result, the certificate expired on that deadline and is null and void.

Only the Council, not ODOE, has the authority to adopt conditions in a site certificate to ensure compliance with any applicable statute or regulation. *See* ORS 469.501, .503. Certain conditions are mandatory, meaning the Council must impose them in every site certificate. *See* OAR 345-025-006. A construction commencement deadline is one such mandatory condition; it is expressly required by the Siting Act. ORS 469.370(12) (“The council shall specify in the site certificate a date by which construction of the facility must begin.”); *see also* OAR 345-025-006(4) (“A certificate holder *must* begin and complete construction of the facility by the dates specified in the site certificate.”) (emphasis added).

A certificate holder may extend the construction start deadline for a site certificate *only* by obtaining a site certificate amendment from the Council, and *only* the Council has the authority to amend a site certificate. *See* OAR 345-027-0350(3); ORS 469.405(1) (“A site certificate may be amended with the approval of the Energy Facility Siting Council.”); *see also Friends v. EFSC*, 365 Or. at 394.

The original deadline to commence construction of the Project was August 19, 2014, as approved by the Council in the original Site Certificate. The Site Certificate later sought and obtained approval from the Council to amend the Site Certificate to extend that deadline three times, resulting in the ultimate deadline of August 19, 2020.

The Site Certificate Holder failed to seek an additional amendment prior to the August 19, 2020 construction start deadline. As a result of that inaction, the Site Certificate expired by operation of law and its own terms. Fourth Amended Site Certificate (Aug. 2019) at §§ 4.1, 4.4 (Dec. 18, 2020) (requiring Summit Ridge to begin construction by August 19, 2020 and to construct the Project “[s]ubstantially as described in the site certificate”); OAR 345-027-0313 (“If the certificate holder does not begin construction of the facility by the construction beginning date specified in the site certificate or amended site certificate, *the site certificate expires on the construction beginning date specified*, unless expiration of the site certificate is suspended pending final action by the Council on a request for amendment to a site certificate under OAR 345-027-0385(2).”) (emphasis added). The Site Certificate Holder’s failures to secure further extension of the August 19, 2020 deadline results by law in the termination of the Site Certificate. *See* OAR 345-027-0110(9). In summary, the Site Certificate has been expired and void since August 19, 2020.

However, as explained above and in the joint letter dated February 21, 2024, Commenters ask the Council to *not* adopt any findings and conclusions on the disputed issues presented in section 4 of this letter.

5. The Site Certificate expired under its own terms and the applicable law when the Site Certificate Holder failed to *complete* construction of the Project prior to the Site Certificate’s construction *completion* deadline.

The construction completion deadline for this Project was (and is) August 19, 2023. *See* Fifth Amended Site Certificate (Dec. 2020) at § 4.2. There is no dispute that the Site Certificate Holder did not complete construction of the Project by that deadline, and still has not completed construction of the Project as of the date of this letter.

On August 17, 2023, the Site Certificate Holder filed the preliminary Request for Amendment #6 (pRFA#6) of the Site Certificate, in which the Site Certificate Holder requested a three-year extension of the construction completion deadline. However, on February 13, 2024, as part of its Application to Terminate the Summit Ridge Site Certificate, the Site Certificate Holder expressly withdrew pRFA#6. As a result, the operative construction completion deadline for this Project remains August 19, 2023. *See* OAR 345-027-0385(2). That filing was sufficient to delay the construction completion deadline until that filing was acted upon.

By voluntarily withdrawing pRFA#6, the Site Certificate Holder agreed to abide by a construction *completion* deadline of August 19, 2023, and effectively waived its request to extend that deadline. And because construction of the Project was not *completed* by that deadline, the Site Certificate is expired and null and void by operation of law. The Council should determine that the Site Certificate is expired and thereby terminated, and enter an order to that effect. *See* OAR 345-027-0110(9) (directing issuance of “an order terminating the site certificate” for expired certificates).

In summary, the Council should conclude that the Site Certificate has expired given the Site Certificate Holder’s failure to complete construction by the construction completion deadline, and should enter an order terminating the Site Certificate on that basis.

6. Conclusion

For the reasons stated herein, ODOE should procure a final, dated letter from Wasco County to replace the undated copy in the record, and EFSC should issue an order concluding that the Site Certificate has expired and is terminated given the Site Certificate Holder’s failure to complete construction by the August 19, 2023 construction completion deadline and the Certificate Holder’s voluntary withdrawal of its request to extend that deadline.

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

/s/ Karl G. Anuta
Karl G. Anuta, OSB #861423
Email: kg@integra.net
Attorney for Commenters

FRIENDS OF THE COLUMBIA GORGE

/s/ Nathan J. Baker

Nathan J. Baker, OSB #001980

Email: nathan@gorgefriends.org

Senior Staff Attorney for Commenter Friends

cc: Sarah Stauffer Curtiss, Attorney for Summit Ridge Wind, LLC, Summit Ridge Wind Holdings, LLC, & Aypa Power LLC

Exhibit A

Petition for Judicial Review

Friends of the Columbia Gorge v. EFSC,
No. 20CV13611 (Mult. Cnty. Cir. Ct. Mar. 24, 2020)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

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

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

PARTIES

1.

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

2.

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

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

7 3.

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

15 4.

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

22 **THE PROJECT AT ISSUE**

23 5.

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

1 6.

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

3 7.

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

5 8.

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

12 9.

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

17 10.

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

27 ////

1 11.

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

4 12.

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

8 13.

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

11 14.

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

14 15.

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

17 16.

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

22 17.

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

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

5 18.

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

14 19.

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

18 20.

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

21 21.

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

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

3 **THE AGENCY ORDERS AT ISSUE**

4 22.

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

10 23.

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

13 24.

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

21 25.

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

1 26.

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

6 27.

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

11 28.

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

14 29.

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

17 30.

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

21 31.

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

27 ////

1 32.

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

10 33.

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

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

14 34.

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

21 35.

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

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

7 **ADVERSE EFFECTS ON PETITIONERS**

8 36.

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

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

24 **COUNT ONE**

25 37.

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

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

4 **COUNT TWO**

5 38.

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

9 **COUNT THREE**

10 39.

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

13 **COUNT FOUR**

14 40.

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

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

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

14 41.

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

17 **REQUESTED RELIEF**

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

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

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

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

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

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

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

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

14 DATED: March 24, 2020

15 REEVES, KAHN, HENNESSY & ELKINS

16 /s/ Gary K. Kahn

17 Gary K. Kahn, OSB #814810

18 Email: gkahn@rke-law.com

19 Attorney for Petitioners and Trial Attorney

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

21 /s/ Karl G. Anuta

22 Karl G. Anuta, OSB #861423

23 Email: kga@integra.net

24 Attorney for Petitioners

25 FRIENDS OF THE COLUMBIA GORGE

26 /s/ Nathan J. Baker

27 Nathan J. Baker, OSB #001980

 Email: nathan@gorgefriends.org

 Senior Staff Attorney for Petitioner Friends

Exhibit B

Second Amended Petition for Judicial Review

Friends of the Columbia Gorge v. ODOE,
No. 20CV35596 (Mult. Cnty. Cir. Ct. May 3, 2022)

1 **PARTIES**

2 2.

3 Petitioner FRIENDS OF THE COLUMBIA GORGE (“Friends”) is a nonprofit Oregon
4 corporation with more than 5,000 members. Friends’ mission is to vigorously protect the scenic,
5 natural, cultural, and recreational resources of the Columbia River Gorge. Friends fulfills this
6 mission by ensuring strict implementation of the Columbia River Gorge National Scenic Area
7 Act and other laws protecting the region of the Columbia River Gorge; promoting responsible
8 stewardship of Gorge land, air, and waters; encouraging public ownership of sensitive areas;
9 educating the public about the unique natural values of the Columbia River Gorge and the
10 importance of preserving those values; and working with groups and individuals to accomplish
11 mutual preservation goals.

12 3.

13 Petitioner OREGON WILD is a nonprofit Oregon corporation with more than 20,000
14 members and supporters. Oregon Wild’s mission is to protect and restore Oregon’s wildlands,
15 wildlife and waters as an enduring legacy for all Oregonians. Founded in 1974, Oregon Wild has
16 been instrumental in securing permanent legislative protection for some of Oregon’s most
17 precious landscapes, including approximately two million acres of federally designated
18 wilderness areas and almost 1,800 miles of federally designated wild and scenic rivers. Oregon
19 Wild works to maintain and enforce environmental laws, while building broad community
20 support for its campaigns.

21 4.

22 Petitioner CENTRAL OREGON LANDWATCH (“LandWatch”) is a nonprofit Oregon
23 corporation with more than 200 members that has advocated for the preservation of natural
24 resources in Central Oregon since 1986. LandWatch plays a vital role in achieving a responsible,
25 balanced approach to planning for and conserving Central Oregon’s land and water resources,
26 while recognizing the needs of future generations. LandWatch works to protect and conserve the
27

1 region's ecosystems and wildlife habitats; to foster thriving, sustainable communities; and to
2 spread the costs and benefits of growth equitably across the community as a whole.

3 5.

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

9 6.

10 Respondent SUMMIT RIDGE WIND, LLC ("SRW") is a limited liability company
11 registered in the State of Oregon. SRW is the site certificate holder for the EFSC-issued Site
12 Certificate for the Summit Ridge Wind Farm ("Site Certificate").

13 7.

14 Respondent AYPower LLC ("Aypa") is a limited liability company registered in
15 the State of Delaware. Aypa has been the sole member of SRW since approximately August 3,
16 2020.

17 8.

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

21 **JURISDICTION AND VENUE**

22 9.

23 Pursuant to ORS 183.484(1), jurisdiction is proper before this Court because the
24 challenged Orders are "orders other than contested cases," and venue is proper before this Court
25 because Petitioners Friends of the Columbia Gorge and Oregon Wild have their principal
26 business offices in Multnomah County.
27

THE PROJECT AT ISSUE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

10.

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

11.

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

12.

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

13.

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

14.

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

15.

On September 20, 2010, in a letter addressed to EFSC and ODOE, the United States Fish and Wildlife Service (“USFWS”) concluded that the Facility has the potential to cause injury and mortality of individual eagles and to cause loss of nest sites over the life of the Facility. In the same letter, the USFWS also concluded that the Facility’s wind turbines should be sited as far as possible away from the areas where resident and migrating eagles are known to concentrate their activities. Accordingly, the USFWS recommended that no wind turbines for this Facility should be sited any closer than six miles from a golden eagle nest, except for in “non-use locations.”

1 The USFWS also recommended that turbine operations should be shut down during peak
2 migration periods and that turbine lighting should be minimized to protect eagles.

3 16.

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

6 17.

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

10 18.

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

14 19.

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

17 20.

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

20 21.

21 The full Facility site has never been field surveyed for wildlife and plant habitat mapping
22 and categorization. Instead, only "desktop" habitat mapping and categorization have occurred.
23 The most recent "desktop" habitat mapping and categorizations for the Facility were conducted
24 in 2009.

25 22.

26 In a November 28, 2018 letter, the Oregon Department of Fish and Wildlife ("ODFW")
27 raised concerns about the significant length of time that had passed since the Facility was first

1 proposed, and expressed a need to reevaluate and update the analyses of the Facility’s impacts on
2 wildlife and habitat and to reexamine the potentially available mitigation measures. In that letter,
3 ODFW noted that it had been more than ten years since the Facility was first applied for and that
4 since then, appropriate practices and approaches had evolved based on new science as well as
5 ODFW’s experience with existing wind projects once they had become operational. ODFW also
6 expressed concerns that the proposed habitat mitigation parcels may no longer meet the original
7 intent for mitigation as outlined in the original mitigation plan for the Facility.

8 23.

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

17 24.

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

21 25.

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

24 26.

25 On August 16, 2018, three days before the then-applicable construction start deadline,
26 SRW submitted an application (“Request for Amendment 4” or “RFA4” or “Request for
27 Amendment”) to amend the Site Certificate by extending the construction deadlines for a third

1 time. In the Request for Amendment, SRW proposed to extend the construction start deadline by
2 two years, to August 19, 2020, and to extend the construction completion deadline by two years,
3 to August 19, 2023. EFSC ultimately approved the RFA4 and amended the Site Certificate, thus
4 extending the deadline to begin construction of the Facility to August 19, 2020.

5 27.

6 Pattern sold all of its interests in SRW and the Facility to Aypa on or about August 3,
7 2020. According to Aypa, since that date, Aypa has had sole ownership of both SRW and the
8 Facility.

9 28.

10 Despite those representations by Aypa, according to SRW Holdings' business entity
11 records filed with the Oregon Secretary of State, SRW Holdings also purports to hold an
12 "interest" in the Facility.

13 29.

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

16 30.

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

19 31.

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

25 32.

26 Prior to the August 19, 2020 deadline to commence construction of the Facility, SRW
27 failed to comply with numerous conditions of approval of the Site Certificate that, by their own

1 terms and pursuant to the applicable law, were required to be satisfied prior to commencing
2 construction of the Facility.

3 33.

4 In addition to being required to satisfy pre-construction conditions, under ORS
5 469.300(6) and OAR 345-001-0010(12) a site certificate holder has not lawfully started
6 construction of an approved energy facility until it performs physical on-site work to build the
7 facility, “excluding surveying, exploration or other activities to define or characterize the site,”
8 valued at more than \$250,000. In order to demonstrate that construction has lawfully commenced
9 in excess of the required \$250,000 threshold, under OAR 345-001-0000(50) a site certificate
10 holder must also demonstrate that such on-site work “would not be built but for construction or
11 operation of the energy facility,” and such work cannot “include any structure existing prior to
12 construction of the energy facility, unless such structure must be substantially modified *solely* to
13 serve the energy facility.”

14 34.

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

23 35.

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

26 ///

27 ///

1 36.

2 SRW also failed, prior to the August 19, 2020 construction start deadline, to submit to
3 EFSC a request to amend the Site Certificate to extend the construction start deadline for a fourth
4 time. If SRW had submitted such a request, EFSC would have been required to again review the
5 Facility for current compliance with the applicable law, and the public, including Petitioners,
6 would have been allowed to participated in that review process, for example by submitting
7 written comments, by attending any public hearings held, and by formally requesting that EFSC
8 conduct a contested case proceeding in order to resolve the Facility’s current compliance with
9 the applicable law.

10 37.

11 On August 20, 2020, Petitioners sent ODOE a complaint letter regarding the Facility.
12 Among other things, Petitioners alleged in this complaint letter that construction of the Facility
13 had not been lawfully commenced by the August 19, 2020 deadline and requested that ODOE
14 confirm that the Site Certificate had expired and was terminated. In the complaint letter,
15 Petitioners also alleged violations of numerous conditions of the Site Certificate and requested “a
16 site inspection, investigation, and enforcement action in order to remedy the violations described
17 herein; . . . an immediate cessation of all site work and ground-disturbing activity at the Project
18 site, an assessment of civil penalties, and any other remedies deemed appropriate by the
19 Department and/or Council.”

20 38.

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

24 39.

25 Upon information and belief, SRW has withdrawn or cancelled its previously filed
26 application with the Bonneville Power Administration (“BPA”) to connect the Facility to the
27 regional power grid at a BPA substation. In its Congressional budget for fiscal year 2021, BPA

1 listed the Facility as “cancelled” as of 2019, and listed “[n]o planned capital projects” for the
2 Facility in either 2020 or 2021. In its Congressional budget for fiscal year 2022, BPA listed “[n]o
3 planned capital projects” for the Facility in 2022.

4 **THE AGENCY ORDERS AT ISSUE**

5 40.

6 This appeal challenges two agency Orders issued by ODOE, on August 21, 2020, and
7 September 10, 2020.

8 **THE FIRST ORDER**

9 41.

10 On August 21, 2020, ODOE issued and served upon various company representatives for
11 SRW Holdings, Pattern, Aypa, and Gardner Infrastructure Advisors, LLC an Order, entitled
12 “Preconstruction Compliance Evaluation for Summit Ridge Wind Farm Site Certificate” (the
13 “First Order”).

14 42.

15 Among other things, the First Order acknowledges the receipt of, evaluates, and reaches
16 conclusions regarding “several compliance submittals from July 6 through August 18, 2020 for
17 general and preconstruction site certificate conditions imposed in the [Site Certificate] identified
18 as applicable to Phase 1 construction.”

19 43.

20 The First Order describes a purported “Phase 1 construction” as “includ[ing]
21 improvements to approximately 0.8 miles of existing road, requiring approximately 14 workers
22 and two weeks in total duration.” The First Order states that ODOE “received notice of Phase 1
23 construction commencement on August 6, 2020.”

24 44.

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

1 45.

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

8 46.

9 The First Order followed an earlier preliminary preconstruction compliance evaluation by
10 ODOE, dated August 10, 2020, which, according to ODOE, “confirms that, at this time,
11 sufficient information has been provided to satisfy the intent of the applicable conditions” but
12 also concludes that “there are several conditions pending complete compliance verification.” The
13 August 10, 2020 preliminary preconstruction compliance evaluation also describes the purported
14 “Phase 1 construction” as “includ[ing] improvements to approximately 0.8 miles of existing
15 road, requiring approximately 14 workers and two weeks in total duration.” Upon information
16 and belief, the August 10, 2020 preliminary preconstruction compliance evaluation was the first
17 time ODOE described in writing the purported “Phase 1 construction” of the Facility.

18 47.

19 The First Order, issued August 21, 2020, “review[s] . . . all general and preconstruction
20 site certificate conditions and confirms that sufficient information has been provided to satisfy all
21 condition requirements applicable to Phase 1.” The First Order includes an Attachment 1, in
22 which ODOE evaluated numerous conditions of the Site Certificate and determined whether each
23 condition had or had not been met. In Attachment 1, ODOE also purported to waive compliance
24 with numerous pre-construction conditions as “not applicable to Phase 1 construction activities.”
25 The First Order does not explain which authorities, criteria, or standards were used to deem
26 pre-construction conditions as “applicable” or “not applicable” to the purported “Phase 1
27 construction” of the Facility.

1 48.

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

7 49.

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

10 **THE SECOND ORDER**

11 50.

12 On September 10, 2020, ODOE issued and served upon Petitioners, through their
13 attorney, a copy of an Order entitled “ODOE Response to Complainants’ August 20, 2020 Letter
14 re: Violations of Summit Ridge Wind Farm Site Certificate Conditions and Applicable Laws”
15 (the “Second Order”).

16 51.

17 Among other things, the Second Order concludes that “[i]t is not necessary [for SRW] to
18 meet all preconstruction requirements of [various conditions of the Site Certificate] for the
19 entirety of the facility footprint,” that SRW was only “required to satisfy preconstruction
20 conditions applicable to Phase 1, which included improvements to a private road,” that “[o]n
21 August 3, 2020, certificate holder provided a contract scope of work demonstrating that the cost
22 of road work exceeded \$259,000 . . . , which [ODOE] considers substantial, consistent with the
23 definition of construction,” and that ODOE “does not have any evidence or reason to believe that
24 the road modifications designed to support the loads of wind-turbine related construction
25 vehicles would be needed for any other purpose than solely to serve the energy facility.” The
26 Second Order concludes by “maintain[ing]” ODOE’s prior conclusions in the First Order that
27

1 “preconstruction conditions applicable to Phase 1 activities had been satisfied and the site
2 certificate was activated.”

3 52.

4 The Second Order also expressly rejects Petitioners’ requests for a site inspection,
5 investigation, and enforcement action to remedy the potential violations raised in Petitioners’
6 August 20, 2020 complaint letter. In rejecting these requests, the Second Order announces
7 ODOE’s “conclu[sion] that an inspection was not warranted” under OAR 345-026-0050(2)(a)
8 (erroneously cited as OAR 345-026-0050(a) in the Second Order).

9 53.

10 After rejecting Petitioners’ requests, the Second Order then states that “Compliance
11 Officer Duane Kilsdonk nonetheless conducted a construction site visit of the area in question on
12 September 1, 2020 which serves the same purpose as the requested inspection.” The Second
13 Order subsequently states that “[a]s previously indicated, the Department’s Compliance Officer,
14 Duane Kilsdonk, conducted a construction site visit on September 1, 2020 with certificate holder
15 representative Steve Ostrowski, and validated work areas and compliance with applicable
16 conditions.” The Second Order neither provides nor discusses any other information or evidence
17 as to how compliance with each specific condition raised in Petitioners’ complaint letter was
18 evaluated and “validated.” The Second Order concludes by stating “[g]iven that there are no
19 issues of non-compliance, civil penalties or other remedy are unnecessary.”

20 **THE NATURE OF THE PETITIONERS’ INTERESTS**

21 54.

22 Petitioners have significant interests in whether Respondent ODOE is lawfully and
23 correctly implementing state statutes and rules governing energy siting and administrative
24 procedures; whether construction of the Facility has lawfully commenced; whether the Site
25 Certificate has expired; whether the Facility is actually under construction; whether it will be
26 fully built and operated; whether and when SRW should be required to update the wildlife and
27 plant surveys, data, and other evidence for this Facility; and whether and under what conditions

1 SRW should be allowed to harm protected resources, including wildlife, plants, and their habitat,
2 by constructing and operating the Facility.

3 55.

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

15 **ADVERSE EFFECTS ON PETITIONERS**

16 56.

17 Petitioners are adversely affected or aggrieved by ODOE's Orders in multiple ways.
18 ODOE unlawfully purported to waive numerous preconstruction conditions for the Facility,
19 incorrectly concluded that construction of the Facility was lawfully commenced, and concluded
20 that the Site Certificate for the Facility was "activated," rather than expired and terminated.
21 ODOE's determinations violate the applicable law and the language of the Site Certificate. As a
22 result of these determinations, ODOE has effectively given SRW at least three additional years
23 to construct the Facility than would otherwise have been allowed. Moreover, ODOE has
24 unlawfully allowed SRW to bypass the required procedures for extending a construction start
25 deadline for a project. Had those required procedures been followed here, EFSC would have
26 been required to evaluate the Facility's current compliance with applicable law, and the public at
27 large, including Petitioners, would have been allowed to participate in EFSC's decision-making

1 processes and affect the result. ODOE's Orders, including the erroneous legal interpretations
2 contained therein, adversely affect or aggrieve Petitioners' interests in ensuring the protection of
3 resources, including the scenic, recreational, and wildlife resources threatened by this Facility.

4 **THE GROUNDS UPON WHICH PETITIONERS CONTEND THE**
5 **AGENCY ORDERS SHOULD BE REVERSED OR REMANDED**

6 **CLAIM FOR RELIEF**

7 **(Violations of Oregon Administrative Procedures Act)**

8 57.

9 In issuing both the First and Second Orders, ODOE acted in violation of the Oregon
10 Administrative Procedures Act and the Oregon Energy Facility Siting Act by erroneously
11 interpreting one or more provisions of law; acting outside the range of discretion delegated to the
12 agency by law; acting inconsistent with one or more agency rules, officially stated agency
13 positions, and/or prior agency practices without explaining the inconsistencies; acting in
14 violation of a statutory provision; and/or issuing agency orders not supported by substantial
15 evidence in one or more of the following ways:

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

18 (b) By erroneously determining that one or more of the mandatory pre-construction
19 conditions of the Site Certificate were not applicable or were satisfied prior to the construction
20 start deadline of August 19, 2020, including but not limited to Conditions 2.14, 3.0, 5.1, 5.2, 5.3,
21 5.4, 5.5, 5.6, 5.7, 5.8, 5.10, 5.11, 5.12, 5.13, 5.14, 6.1.a, 7.12, 8.2, 8.4, 10.1, 10.4.a, 10.4.b,
22 10.4.c, 10.4.d, 10.4.e, 10.4.f, 10.7.a, 10.7.b, 10.7.c, 10.13, 10.14, 11.1, 11.2, 11.3, 12.2.a, 12.2.b,
23 12.2.c, 12.2.d, 13.3.a, 14.1, and 14.7;

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

26 (d) By authorizing construction of the Facility to begin in a manner inconsistent with
27 the mandatory requirements of OAR 345-025-0006(8) prior to the construction start deadline of
August 19, 2020;

1 (e) By unlawfully authorizing an amendment to the bond or letter of credit
2 requirement established by EFSC;

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

6 (g) By unlawfully extending the deadline to commence construction of the Facility
7 outside of and in violation of the required decision-making procedures for amending a site
8 certificate;

9 (h) By violating the construction start deadline specified in the Site Certificate, ORS
10 469.370(12), and the Oregon Legislature’s expressly stated legislative intent to prohibit “lengthy
11 site banking” of sites for EFSC-approved energy facilities;

12 (i) By erroneously determining that more than \$250,000 worth of physical on-site
13 work to build the Facility was performed prior to the construction start deadline of August 19,
14 2020;

15 (j) By erroneously determining that the road work performed at the site in August
16 2020 was consistent with the Site Certificate, with the application for the Site Certificate, with
17 the requests for amendments to the Site Certificate, and with EFSC’s Final Orders regarding the
18 facility;

19 (k) By erroneously determining that an existing road at the site was substantially
20 modified in August 2020;

21 (l) By erroneously determining that all components of the road work performed at
22 the site in August 2020 were solely to serve the wind turbines approved by EFSC;

23 (m) By erroneously determining that all components of the road work performed at
24 the site in August 2020 would not have been built but for construction or operation of the energy
25 facility;

26 (n) By erroneously determining that SRW Holdings and/or its manager, Steven
27 Ostrowski, had authority to act on behalf of SRW and the Facility in furtherance of satisfying

1 pre-construction conditions required by the Site Certificate and/or commencing construction of
2 the Facility;

3 (o) By authorizing or allowing Aypa and/or SRW, after ownership, possession,
4 and/or control of the Facility and/or of SRW was transferred to Aypa, to construct the Facility
5 without first securing EFSC's approval of the transfer of ownership, possession and/or control of
6 the Facility and/or the transfer of the ownership, possession, and/or control of SRW (either in the
7 form of an amended site certificate issued by EFSC or in the form of a temporary amended site
8 certificate issued by the Council Chair), in violation of OAR 345-027-0400(3).

9 (p) By authorizing or allowing SRW Holdings, after SRW Holdings obtained an
10 interest in the Facility and/or in SRW, to construct the Facility without first securing EFSC's
11 approval of the transfer of ownership, possession and/or control of the Facility and/or the transfer
12 of the ownership, possession, and/or control of SRW (either in the form of an amended site
13 certificate issued by EFSC or in the form of a temporary amended site certificate issued by the
14 Council Chair), in violation of OAR 345-027-0400(3).

15 (q) By erroneously determining that the Site Certificate has not expired and need not
16 be terminated;

17 (r) By erroneously determining that the Site Certificate was "activated";

18 (s) By allowing the Facility to be constructed in the absence of a validly issued and
19 effective site certificate, in violation of ORS 469.320(1);

20 (t) By allowing further on-site work and/or construction activities for the Facility to
21 continue in 2021 and beyond, and by allowing the subsequent operation of the Facility; and

22 (u) By acting in ways as yet unknown to Petitioners that violated the applicable
23 statutes, applicable rules, the Site Certificate, prior EFSC Orders, and prior ODOE Orders.

24 58.

25 In issuing the Second Order, ODOE acted in violation of the Oregon Administrative
26 Procedures Act and the Oregon Energy Facility Siting Act by erroneously interpreting one or
27 more provisions of law; acting outside the range of discretion delegated to the agency by law;

1 acting inconsistent with one or more agency rules, officially stated agency positions, and/or prior
2 agency practices without explaining the inconsistencies; acting in violation of a statutory
3 provision; and/or issuing agency orders not supported by substantial evidence in one or more of
4 the following ways:

5 (a) By erroneously concluding that one or more of the conditions of the Site
6 Certificate have not been violated, including but not limited to Conditions 2.10, 6.1, 6.31, 8.2,
7 8.4, 9.1, 10.1, 10.6, 11.4, 11.6, and 15.0;

8 (b) By denying Petitioners' requests for a site inspection, an investigation,
9 enforcement action, an immediate cessation of all site work and ground-disturbing activity at the
10 site, an assessment of civil penalties, and/or any other appropriate remedies; and

11 (c) By erroneously determining that SRW Holdings and/or its manager, Steven
12 Ostrowski, had authority to act on behalf of SRW and the Facility in furtherance of establishing
13 compliance with the conditions of the Site Certificate, commencing construction of the Facility,
14 and continuing construction of the Facility.

15 59.

16 Pursuant to ORS 469.563, Petitioners request that this Court issue such restraining orders
17 and/or such temporary and permanent injunctive relief as is necessary to secure compliance with
18 applicable provisions of the Oregon Energy Facility Siting Act and its implementing regulations
19 and/or with the terms and conditions of a site certificate.

20 60.

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

23 ///

24 ///

25 ///

26 ///

27 ///

1 **REQUESTED RELIEF**

2 WHEREFORE, Petitioners request that this Court, exercising its authority under ORS
3 183.480, 183.484, 183.486, 183.497, and 469.563,

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

9 2. Set aside and reverse or remand each or both of the challenged Orders;

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

11 4. Restrain and enjoin the construction and operation of the Facility unless and until
12 EFSC properly issues a new, valid site certificate;

13 5. Declare that one or more of the conditions of the Site Certificate have been
14 violated and that appropriate remedies are warranted;

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

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

17 DATED: May 3, 2022

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

19 /s/ Karl G. Anuta

20 Karl G. Anuta, OSB #861423

21 Email: kga@integra.net

22 Attorney for Petitioners and Trial Attorney

23 FRIENDS OF THE COLUMBIA GORGE

24 /s/ Nathan J. Baker

25 Nathan J. Baker, OSB #001980

26 Email: nathan@gorgefriends.org

27 Senior Staff Attorney for Petitioner Friends

Exhibit C

Opinion Regarding Respondents' Motion to Dismiss

Columbia Riverkeeper v. ODOE,
No. 20CV38607 (Mult. Cnty. Cir. Ct. Oct. 20, 2021)

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

COLUMBIA RIVERKEEPER, and)
FRIENDS OF THE COLUMBIA GORGE,)
)
Petitioners,)
)
v.)
)
OREGON DEPARTMENT OF ENERGY,)
and PERENNIAL WIND CHASER, LLC,)
)
Respondents.)
)

Case No: 20CV38607

OPINION REGARDING
RESPONDENTS' MOTION TO
DISMISS

FILED
21 OCT 22 PM 12:08
4TH JUDICIAL DIST.

The parties appeared via videoconference on June 4, 2021, on Respondents' Motions to Dismiss. Erin Saylor, Karl Anuta and Maura Fahey appeared for Petitioners. Richard Allan appeared for Perennial Wind Chaser ("PWC") and Sadie Forzley and Abigail Fallon appeared for the Oregon Department of Energy ("ODOE"). The Court invited the parties to submit supplemental briefing on Petitioners' argument that this Court has jurisdiction to review non-final orders under ORS 469.563 if the agency is proceeding without probable cause. See ORS 183.480(3). ODOE submitted its supplemental brief on June 18, 2021. Petitioners filed their brief on June 25, 2021. Respondents' motions to dismiss are based on two main contentions. First, Respondents assert that letters authored by ODOE on September 2, 2020 and September 18, 2020 were not final orders and thus not subject to judicial review. Second, Respondents assert that Petitioners lack standing to bring this action. After considering the submissions and arguments of the parties, the Court grants the motions to dismiss as to the September 2, 2020 letter from the ODOE to Petitioner Columbia Riverkeeper but otherwise denies Respondents' motions to dismiss.

Subject matter jurisdiction arguments

Procedural history

The PWC facility's original site certificate was effective September 23, 2015. Forzley Decl., Ex.A. The original site certificate required that construction on the facility begin within three years of the effective date of the site certificate, September 23, 2018. *Id.* When Respondents realized that beginning construction by September 23, 2018 would not be possible, Respondents applied to the Oregon Energy Facility Siting Council ("EFSC") for a two-year extension on the construction deadline. *Id.* In the summer of 2019, Petitioners provided written comments to EFSC during the public hearing phase of its decision to extend the construction deadline. Goldberg Decl. ¶ 9. In November 2019, Petitioners requested EFSC hold a contested case hearing on its proposed order to extend the deadline, EFSC denied this request. *Id.* at ¶ 10. On November 22, 2019, EFSC issued an amended site certificate which extended the construction deadline to September 23, 2020.

Petitioners seek judicial review of what they assert are three final Orders purportedly issued by ODOE on September 2, 2020, September 18, 2020 and September 21, 2020. Respondents move to dismiss review of the September 2nd and September 18th letters asserting that the Court lacks subject matter jurisdiction because these two letters are not final orders as defined in ORS 183.310(6)(b). Preliminary or tentative agency declarations or statements are not final if they either precede final agency action or do not preclude further agency consideration of the subject matter of the declaration or statement. As the Court explained in *Grobovsky, M.D. v. Board of Medical Examiners*, 213 Or App 136, 143 (2007), "a final order expresses final agency action and is in writing. A final order is neither tentative nor preliminary but is a complete statement of the agency's decision on the matter before it."

September 2, 2020 letter

Petitioner wrote ODOE on August 20, 2020, alleging that PWC failed to meet some of the site certificate's preconstruction conditions arguing primarily that:

- 1) Building a \$250,000.00 access road does not count as beginning construction with respect to the construction deadline provisions of the site certificate, and
- 2) PWC failed to obtain every permit and approval necessary to build every aspect of the facility before starting construction on any part of the site. Petitioner argued that since Perennial did not have an air emissions permit from the Oregon Department of Environmental Quality (DEQ), it did not have construction rights on all parts of the site and thus could not begin construction per OAR 345-025-0006(5).

On September 2, 2020, ODOE sent a response letter to Petitioner Columbia Riverkeeper and courtesy copied PWC. Forzley Decl., Ex. C. The letter outlined ODOE's interpretation of applicable administrative rules and ORS 469.300. The response included a statement that "if a certificate holder demonstrates to the Department that the cost of the work performed to construct part of a facility exceeds \$250,000, the construction commencement condition would be satisfied." ODOE explained that, "it is not necessary to meet all pre-construction requirements before beginning work on any part of a facility, such as the road and bridge Perennial will construct. Rather it is only necessary to meet the pre-construction requirements applicable to the part of the facility to be constructed." (emphasis in original).

Furthermore, ODOE explained that PWC is not required to acquire an Air Contaminant Discharge permit before commencement of construction, "DEQ's Air Contaminant Discharge Permit is not a 'construction right' as defined in OAE 345-025-0006(5) because it is not a 'legal

right to engage in construction activities,’ rather it is a permit used to regulate sources of air contaminant emissions.”

September 18, 2020 letter

On September 18, 2020, ODOE sent a letter to Perennial Power Holdings, Inc., regarding ODOE’s “Preconstruction Compliance Evaluation for Perennial Wind Chaser Station Site Certificate.” The letter confirmed that ODOE had received Perennial’s summary of how it had purportedly met the preconstruction site certificate conditions applicable to Phase 1 of the project and contained the following statement, “Based upon the Department’s review of this summary and the attachments referenced in that summary, the Department confirms that Perennial has provided sufficient information to satisfy all preconstruction condition requirements applicable to Phase 1.” Forzley Decl., Ex. D.

September 21, 2020 letter

This letter was also addressed to Perennial Power Holdings, Inc. Respondents concede that this letter constitutes a final order. ODOE writes that because “construction commenced prior to the September 23, 2020 construction commencement deadline, the Department confirms that the site certificate has been activated.” Forzley Decl., Ex. E. Importantly, this letter also includes the following statement justifying the determination that the site certificate had been activated: “[I]nformation and materials submitted by the certificate holder for general and preconstruction conditions applicable to Phase I have been reviewed by the Department and determined sufficient to satisfy the requirements, as stated in our September 18, 2020 letter.” *Id.*

Discussion

In seeking judicial review of the September 2 and 18 letters, Petitioners rely on *Teel Irrigation Dist. v. Water Resources Dept.*, 323 Or 663 (1996), a case in which the Court

considered whether a particular letter in a series of written communication should be considered a final order. The Court noted that the question of whether a letter dated December 18, 1991, was a final order begs the question, “final as to what?” *Id.* at 676. The Court also considered the context in which the letter was written. *Id.* Ultimately, the Court held that one paragraph of the December 18 letter was final because it precluded further agency consideration of water use under the terms of an existing permit, while other paragraphs related to the Petitioner’s rights under proposed future certificates. *Id.* at 677.

Petitioner correctly points out that *Teel* stands for the proposition that an agency order may be final as to some issues and not others. With respect to section 2 of the September 2, 2020 letter, Petitioner argues that ODOE’s determination that DEQ’s Air Contaminant Discharge Permit is not a construction right was a final order because the decision cleared the way for Perennial to commence construction. Petitioner is incorrect. ODOE’s statement that a DEQ Air Contaminant Discharge Permit is not a construction right as defined in OAR 345-025-0006(5) was not a final order because it did not preclude further agency consideration of the subject matter. ORS 183.310(6)(b)(B). When considering the context of the letter, which was not addressed to Perennial and which was not a final determination that all preconstruction conditions requirements were satisfied, this letter from ODOE to Petitioner is nothing more than an attempt to provide a detailed response to a letter of concern from an advocacy organization.

The content of the subsequent September 18, 2020 letter supports the conclusion that the September 2nd letter was not a final order. ODOE, while communicating directly to Perennial, states that the Department “**confirms** that Perennial has provided sufficient information to satisfy all preconstruction condition requirements.” (emphasis added). A confirmation that all preconstruction conditions submitted pursuant to OAR 345-026-0048 were satisfied is an

expression that the agency necessarily, while considering the ultimate question of preconditions, also considered whether the absence of a DEQ Air Quality Discharge Permit was a failure to obtain a necessary construction right. Thus, the September 2nd letter was not a final order.¹²

Conversely, the September 18 letter was a final order subject to judicial review on the important issue of whether preconstruction conditions were met clearing the way for construction commencement. This finding is bolstered by the context provided by the subsequent letter to Perennial on September 21, 2020, in which ODOE reiterates that prior agency review of materials in support of preconstruction conditions took place days earlier which the agency “determined [were] sufficient to satisfy the requirements, as stated in our September 18, 2020 letter.” Forzley Decl., Ex. E. Of course, the purpose of the September 21 letter was to confirm that the site certificate had been activated, which could only legally occur if preconditions requirements were satisfied (September 18 letter) and if construction commenced before the deadline of September 23, 2020.

The Court notes that whether only one final order is reviewable (September 21 letter) or two final orders are reviewable (September 18 and September 21 letters), the Circuit Court may review the ODOE’s ultimate determination that the site certificate was properly and legally

¹ The portion of the September 2, 2020 letter dealing with the issue of whether building a \$250,000.00 access road counts as beginning construction with respect to the construction deadline provisions of the site certificate was also not a final order. ODOE dealt with this issue with finality when it issued the September 21, 2020 letter stating that “Phase I construction * * * includes constructing an approximately 200-foot by 30-foot access road and an access bridge across the Westland Irrigation District canal.”

² By holding that the September 2, 2020 letter is not a final order subject to judicial review, it does not follow that the letter cannot be considered when reviewing the subsequent final orders. ODOE’s detailed position outlined in the initial correspondence can certainly be examined in determining the legality of the later statements that preconstruction condition requirements were satisfied and that commencement of construction occurs upon the expenditure of \$250,000.00 to build an access road and bridge.

activated by the September 23, 2020 deadline. This review will necessarily include review of the issues raised by Petitioners. That is because the issues of precondition requirements and construction commencement are necessarily part of the ultimate decision that the site certificate was properly activated.³

Standing arguments

Respondents also move to dismiss for lack of standing claiming Petitioners are not adversely affected or aggrieved by ODOE's final orders. ORS 183.480(1) provides, "any person adversely affected or aggrieved by an order [...] is entitled to judicial review of a final order." The statute does not define "adversely affected" or "aggrieved." The Court ultimately provided clarification on the meaning of "aggrieved" in *People for the Ethical Treatment of Animals v. Instit. Animal Care & Use Committee*, 312 Or 95 (1991), stating that a person is aggrieved if, "(1) the person has suffered an injury to a substantial interest resulting directly from the challenged governmental action, (2) the person seeks to further an interest that the legislature expressly wished to have considered, or (3) the person has such a personal stake in the outcome of the controversy as to assure concrete adverseness to the proceeding." *Id.* at 101-102 (internal citations omitted). Petitioners allege standing based on "preclusion of Petitioners' ability to participate in the proper public processes required by law before EFSC for a site certificate amendment," which jeopardizes Petitioners' separate interests in the resources and recreation in the Colombia Gorge.⁴ Petitioners' Opposition to Motions to Dismiss, 12-13. Petitioners argue

³ Petitioners further argue that the Court may also review the September 18, 2020 letter based on an allegation that the ODOE acted without probable cause. ORS 183.480(3). Respondents raise several arguments in supplemental briefing for why a probable cause review is improper in the context of this case. The Court declines to address the issues raised as it is unnecessary to do so given the Court's ruling that the September 18 letter is subject to review as a final order.

⁴ Petitioners also allege standing based on the direct harms to the natural resources protected by Petitioners, loss of funds to The Climate Trust, or alternatively that Petitioners seek to further an

that ODOE's orders functionally amend the Site Certificate⁵ and had the Site Certificate been properly amended by the EFSC, Petitioners would have been afforded their procedural right to participate. This Court is not aware of any Oregon court that has addressed whether "aggrieved" under ORS 183.480 includes harm to procedural rights such as the right to public participation. However, the United States Supreme Court has decided similar issues surrounding the same language of "adversely affected or aggrieved" under the federal Administrative Procedure Act (APA). 5 U.S.C. § 702. In doing so, the Supreme Court noted that there is "much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572

interest the Legislature expressly wished to have considered. Additionally, on September 27, 2021, Petitioners filed Notice of Supplemental Authority arguing that the recent enactment of HB 2021, effectively prohibits the EFSC from issuing a site certificate for proposed fossil fuel power plants such as the one subject to this litigation. These arguments only provide a basis for standing to the extent they give context to the procedural standing argument made by Petitioners. That is to say, the procedural right to public participation is important precisely because participation from the public is a fundamentally important mechanism for enforcing rights and furthering interests.

⁵ ODOE's letter claim that the air emissions permit from Department of Environmental Quality is not required under OAR 345-025-006(5) to meet a "construction right;" however, the Amended Site Certificate states: "This remains true — even if the Council amends the site certificate to extend the construction commencement date to September 23, 2020, Perennial would not be able to commence facility construction without a valid DEQ permit." Forzley Decl., Ex A. "Condition B.6: The certificate holder shall obtain all necessary federal, state and local permits or approvals required for construction, operation and retirement of the facility or ensure that its contractors obtain the necessary federal, state and local permits or approvals. Condition B.7: Before beginning construction, the certificate holder shall provide confirmation in writing to the department that the third parties have obtained all necessary permits or approvals and shall provide to the department proof of agreements between the certificate holder and the third parties regarding access to the resources or services secured by the permits or approvals." Forzley Decl., Ex. B. The final order by ODOE functionally adds that only the permits required for the specific part of the facility must be obtained before construction on that part may begin. This language is not included in the Site Certificate and therefore arguably serves as an amendment to the Site Certificate.

n.7 (1992). The Supreme Court has recognized procedural injuries are a harm and will only deny standing on a procedural injury when harmless error results, *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009), or on Article III requirements of redressability, *Lujan*, 504 U.S at 572. More specifically, the Supreme Court has found that an injury to the right to provide commentary prior to an agency action is a procedural injury sufficient to provide standing, provided that failure to allow for public comment jeopardizes a separate concrete interest. *Summers v. Earth Island Instit.*, 129 S.Ct. 1142, 1151 (2009). The relevant standard for reviewing standing rests on whether the failure to provide the procedural right jeopardizes a separate concrete interest of the Petitioners. *Id.* In addition to the Supreme Court of the United States, the D.C. Circuit Court has addressed the issue and held that a procedural injury is sufficient to establish standing so long as it protects a separate concrete interest.⁶ The Court finds the interpretation of the Supreme Court of the United States that “any person adversely affected or aggrieved” to include a person who has had an injury to their procedural right persuasive. The Court finds that this interpretation to be consistent with the decision in *PETA.*, as that case involved an organization that claimed to be aggrieved by the agency’s final decision after having the opportunity to participate in the public hearing process. *PETA*, 312 Or at 99. The Supreme Court noted, the act at issue “specifically provides for representation of the public interest through the very committee whose decision PETA disputes.” *Id.* (citing Court of Appeals decision in *People for the Ethical Treatment of Animals v. Instit. Animal Care & Use Committee* 102 Or.App. 276, 794 P.2d 1224 (1990)). The Court finds that an injury to a procedural right that jeopardizes a separate concrete interest is an injury to a substantial interest consistent with the first prong of the *PETA* analysis.

⁶ *Electric Power Supply Ass’n v. FERC*, 391 F.3d 1255, 1261-1262 (2004); *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 51 (D.C.Cir.1999); *Florida Audubon Soc’y v. Bentsen*, 94 F.3d 658, 664 (D.C.Cir.1996).

In this case, Petitioners standing rests on the allegation that ODOE amended the final decision of ESFC without allowing Petitioners their opportunity to be heard and protect their interests.

Petitioners claim that the functional amendment to the Site Certificate by ODOE eliminated their opportunity to be heard before EFSC. Petitioners were seeking to protect their separate concrete interests in the resources and recreation in the Colombia Gorge, as well as protection of the climate. In this case, the procedural right existed to protect the interests of the Petitioners and the loss of their opportunity to be heard creates a credible threat to Petitioners' separate interests. Thus, Petitioners have standing to challenge ODOE's final orders as it denied Petitioners their right to be heard before ESFC for amendments to the Site Certificate.

For all of these reasons, Respondents' Motions to Dismiss as to the September 2, 2020 letter is granted. Otherwise, the motions are denied. Petitioners shall prepare a proper form of Order consistent with, and referencing, this Opinion.

DATED this 21st day of October, 2021.



Michael A. Greenlick
Circuit Court Judge



BOARD OF COUNTY COMMISSIONERS

511 Washington St, Ste. 101 • The Dalles, OR 97058
p: [541] 506-2520 • f: [541] 506-2551 • www.co.wasco.or.us

Pioneering pathways to prosperity.

April 3, 2024

Oregon Department of Energy
ATTN: Sarah Esterston
550 Capitol Street NE
Salem, OR 97301
(Sent by email to Sarah.esterston@energy.oregon.gov)

April 3, 2024

Subject: Summit Ridge Wind Farm Site Certificate Termination and Developed Road

Dear Ms. Esterston;

We received Oregon Department of Energy's notice of termination for the Summit Ridge Wind Farm Site Certificate and the request for comments related to the roads constructed for the project.

The Planning and Public Works Directors have reviewed your request. The Public Works Director has determined from a brief analysis that the road was built to a fair standard, with good rock and width and feels it would have a greater impact and disturbance to remove or decommission the road at this time.

The Planning Director concurs that the road is consistent with road standard requirements and does not have concerns about its existence separate from development. The project is within Exclusive Farm Use zones, which allow for private access roads within properties and would've been constructed with consideration to any sensitive resources. Neither long term permits nor maintenance are required for private access roads within a property within this portion of Wasco County.

We appreciate the Oregon Department of Energy's continued coordination and look forward to reviewing the notice of intent for the Summit Ridge Renewable Energy Facility.

Respectfully,
Wasco County Board of Commissioners



Steven D. Kramer, Board Chair



Scott C. Hege, Vice-Chair



Philip L. Brady, County Commissioner