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To: Energy Facility Siting Council

From: Christopher M. Clark, Senior Siting Analyst

Date: May 29, 2024

Subject: Wheatridge Renewable Energy Facility East, Request for Amendment 1 – Staff Analysis and Recommendations on Request for Contested Case.

STAFF RECOMMENDATION

Brief summary of recommendation

BACKGROUND

On April 25, 2024, the Oregon Department of Energy (Department) issued its Proposed Order on Request for Amendment 1 of the Site Certificate for Wheatridge Renewable Energy Facility East (RFA1). The Proposed Order recommends the Energy Facility Siting Council (EFSC or Council) approve RFA1, with amended recommended findings of fact and conditions of approval based on the Department's consideration of timely comments on the Draft Proposed Order, comments provided by the Council at its April 19, 2024, and additional evidence received on the record.

A Public Notice of the Proposed Order was issued on the same day, establishing that all requests for contested case must be received no later than May 27, 2024, at 5:00 p.m. PT to be considered. The Department timely received a contested case request prior to the deadline.

Before considering whether an issue justifies a contested case proceeding, the Council must determine that the person requesting a contested case commented in person or in writing on the record of the public hearing and properly raised each issue included in the request as provided under OAR 345-027-0371(7).

After identifying properly raised issues, the Council must determine whether any properly raised issue justifies a contested case proceeding. Under OAR 345-027-0371(9), to determine that an issue justifies a contested case proceeding, the Council must find that the issue raises a significant issue of fact or law that is reasonably likely to affect the Council's determination on whether the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24. If the Council does not have jurisdiction over the issue raised in the request, the Council must deny the request.

If the Council finds that the request identifies one or more properly raised issues that justify a contested case proceeding, the Council must conduct a contested case proceeding, unless the Council finds that one or more properly raised issues could be settled in a manner satisfactory to the Council by an amendment to the Proposed Order, in which case the Council may deny the request as to those issues and direct the Department to amend the Proposed Order and issue a notice of the amended Proposed Order. If the Council finds that a request does not identify a properly raised issue that justifies a contested case proceeding, the Council must deny the request.

CONTESTED CASE REQUEST OVERVIEW

Wendy King (petitioner) submitted a petition for contested case on May 27, 2024, prior to the 5:00 pm deadline. Ms. King provided oral testimony at the public hearing on the Draft Proposed Order on RFA1 on March 21, 2024, and provided written comments on April 4, 2024.¹

The Contested Case Request identifies five issues:

Issue 1 – Compliance with Scenic Resources Standard

Issue 2 – Compliance with Historic, Cultural, and Archaeological Resources Standard

Issue 3 – Adequacy Of Wildfire Prevention and Risk Mitigation Plan

Issue 4 – Compliance with Cumulative Effects Standard for Wind Energy Facilities (Turbines)

Issue 5 – Compliance with Cumulative Effects Standard for Wind Energy Facilities (Lighting)

As provided in OAR 345-027-0371, the Council must answer each of the following questions before it grants or denies a contested case proceeding on any of the issues:

1. Did the petitioner properly raise each issue on the record of the public hearing?
2. Does the issue justify a contested case proceeding?
3. Can an amendment to the Proposed Order, including modification to conditions, settle the issue in a manner satisfactory to the Council?

The Department provides its analysis of the issues and recommendations regarding these questions in the sections that follow.

ISSUE 1: COMPLIANCE WITH SCENIC RESOURCES STANDARD

The petitioner asserts that visual representations of turbines proposed to be located on Gleason Butte provided in RFA1, Exhibit R are “misleading, vague and downplay the true adverse visual impact wind turbines impose on this elevated landscape.” The petitioner requests that the Council impose a condition that removes at least three most prominent towers located on the top of Gleason Butte. The petitioner identifies OAR 345-022-0080(2) as the basis for the request.

Was the issue raised on the record of the public hearing?

Yes, the petitioner raised objections to siting turbines on or near the top of Gleason Butte in both oral testimony and written comments. Specific concerns regarding the accuracy of visual

¹ See Council Staff Report:
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simulations and the facility's compliance with the Scenic Resources standard were raised in the written comments.²

Does the issue justify a contested case proceeding?

In the Proposed Order, the Department recommends the Council find that Gleason Butte is not identified as significant or important in a current land use management plan adopted by a tribal, state, regional, or federal government or agency; therefore, it is not protected under the Council's Scenic Resources Standard.³ As such, the certificate holder was not required to provide visual simulations or formally evaluate the significance of impacts to views of the Butte to demonstrate compliance with the Scenic Resources Standard. Because the certificate holder was not required to provide visual simulations to demonstrate compliance with the Standard, the Department recommends the accuracy of the visual simulations is not an issue that is reasonably likely to affect the Council's determination whether the facility, with the change proposed by the amendment, meets the requirements of OAR 345-022-0080. Accordingly, the Department recommends that this issue does not justify a contested case proceeding.

Options for Settlement of Issue

The Department recommends that this issue does not justify a contested case proceeding, and does not recommend any conditions be imposed to settle the issue. The Department further notes that the petitioner requests that the Council impose a condition restricting turbine development on Gleason Butte under OAR 345-022-0080(2). The petitioner identifies OAR 345-022-0080(2) as the basis for the request. In citing comments regarding the importance of views of the Butte to community members despite the Butte's unprotected status, the petitioner appears to interpret OAR 345-022-0080(2) to allow Council to impose conditions to reduce visual impacts, even when a resource is not considered a "significant or important" scenic resource. That section of the Scenic Resources Standard is not applicable to this proceeding as it only applies to special criteria facilities. Even if it were applicable, the section authorizes the Council to impose conditions to minimize the potential significant adverse visual impacts of a special criteria facility "on significant or important scenic resources" (emphasis added) when the facility does not otherwise comply with the Scenic Resources Standard.

Recommendation

Because the issue is not reasonably likely to affect the Council's determination whether the facility, with the change proposed by the amendment, meets the requirements of OAR 345-022-0080, the Department recommends the Council deny the request for contested case proceeding on this issue.

ISSUE 2: COMPLIANCE WITH HISTORIC, CULTURAL, AND ARCHAEOLOGICAL RESOURCES STANDARD

The petitioner asserts that the construction and operation of wind turbines on the top of Gleason Butte would result in significant adverse impacts to the historical setting and viewshed of the Bartholomew-Myers Farm, a registered Century Farm. The petitioner identifies OAR 345-022-0090(1)(a) as the basis for their request.

² WREFEAMD1Doc24-01 Final March EFSC Meeting Minutes 2024-03-22, p. 6-7; WREFEAMD1Doc24-19 DPO Public Comment KingW 2024-04-04, p. 1-2.

³ WREFEAMD1Doc27 Proposed Order Compiled 2024-04-25, p. 30.

Was the issue raised on the record of the public hearing?

Yes. The petitioner identified the Bartholomew-Myers Farm as a historic property and raised concerns about visual impacts on the farm in both oral testimony and written comments.⁴

Does the issue justify a contested case proceeding?

As explained in the Proposed Order, the Bartholomew-Myers Farm is not registered on the National Register of Historic Places but was identified as likely eligible for listing in other proceedings before the Council. The farm is located approximately 2 miles north of the proposed amended site boundary. The certificate holder's zone of visual influence (ZVI)-analysis and visual simulations indicate 0-20 turbines will be visible in the vicinity of the homestead site, with greater turbine visibility on other portions of the farm property.⁵ In its responses to public comments, the certificate holder provided an analysis of visual impacts of the facility in the general vicinity of the Bartholomew-Myers Farm maintaining that impacts would not be significant.⁶ In the Proposed Order, the Department does not recommended the Council make findings with regard to the significance of visual impacts on the farm, but rather, recommends the certificate holder be required to submit a complete Section 106 Documentation Form recording the historic attributes of the property and potential impacts to the Department and the State Historic Preservation Office prior to beginning construction of wind turbines in the viewshed, consistent with proposed mitigation for other historic properties.

Although the Council may impose conditions of approval to mitigate the significant adverse visual impacts of wind turbines on the visual setting of protected historic properties,⁷ the Council may not impose the Historic, Cultural, and Archaeological Resources Standard to approve or deny a site certificate. Because the Department has already recommended conditions of approval that are commensurate with the expected impact, the Department recommends that this issue is not reasonably likely to affect the Council's determination whether the facility, with the change proposed by the amendment, meets the requirements of OAR 345-022-0090.

Options for Settlement of Issue

The Department recommends that this issue does not justify a contested case proceeding, and does not recommend any conditions be imposed to settle the issue. The petitioner requests that the Council impose a condition that removes at least the three most prominent towers located on the top of Gleason Butte from the proposal. The Department notes that while imposition of such a condition would likely resolve this, and other issues, for the petitioner but it is not clear if the certificate holder would be able to construct and operate the facility as intended with such restrictions.

Recommendation

⁴ WREFEAMD1Doc24-01 Final March EFSC Meeting Minutes 2024-03-22, p. 7; WREFEAMD1Doc24-19 DPO Public Comment KingW 2024-04-04, p. 2.

⁵ WREFEAMD1Doc27 Proposed Order Compiled 2024-04-25, p. 212-213.

⁶ WREFEAMD1Doc25-06 DPO Cert Holder Response Letter Ex A Visual Impacts Memo 2024-04-08

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Because the issue of visual impacts to the Bartholomew-Meyers Farm issue is not reasonably likely to affect the Council’s determination of whether the facility, with the change proposed by the amendment, meets the requirements of OAR 345-022-0090, the Department recommends the Council deny a contested case proceeding on this issue.

ISSUE 3: ADEQUACY OF WILDFIRE PREVENTION AND RISK MITIGATION PLAN

The petitioner asserts that the proposed Wildfire Mitigation Plan does not comply with the requirements of the Wildfire Prevention and Risk Mitigation Standard under OAR 345-022-0115(1)(b)(D) because the plan “relies on outdated, inaccurate mapping” and does not provide “adequate procedures to minimize damages to resources.” In particular, the petitioner raises concerns about potential impacts to crop owners located “downwind” of the site if a wildfire occurs at the facility.

Was the issue raised on the record of the public hearing?

Yes. The petitioner raised concerns about potential wildfire hazard to homes and agricultural resources in the analysis area in both oral testimony and written comments. Specific concerns about mapping relied on to prepare the Wildfire Prevention and Risk Mitigation Plan and the adequacy of provisions to protect and compensate adjacent landowners were raised in written comments.⁸

Does the issue justify a contested case proceeding?

With regards to the accuracy of wildfire data used to support the certificate holder’s analysis, the Department recommends that the petitioner’s assertion that the data is “outdated” and “inaccurate” is unsupported by the record. As explained in the Proposed Order, the certificate holder relied on data from the Oregon Community Wildfire Protection Plan (CWPP) Planning Tool to characterize wildfire risk at the site. The tool was developed by the Oregon Department of Forestry, Oregon State University, US Forest Service, and others to inform local wildfire planning efforts, and relies in part on 2018 Pacific Northwest Quantitative Wildfire Risk Assessment prepared for the US Forest Service by Pyrologix. The Department recommends the Council find that the Oregon CWPP Planning Tool is a reputable source that uses reasonably current data to characterize wildfire risk. The certificate holder also used supplemental information from Morrow County’s and Umatilla County’s Natural Hazard Mitigation Plans.⁹ The petitioner did not provide evidence to support claims that these sources were outdated or provide alternative sources using newer data, and the Department is unaware of any newer data that would be reasonably available to the certificate holder. As such the Department recommends that a contested case on this issue would not be reasonably likely to affect the Council’s determination of whether the facility, with the change proposed by the amendment, meets the requirements of OAR 345-022-0115(1)(a). In addition, recommended Condition PRE-WP-01 would require the certificate holder to incorporate updated information into its Wildfire Mitigation Plan if available prior to construction.¹⁰

⁸ WREFEAMD1Doc24-01 Final March EFSC Meeting Minutes 2024-03-22, p. 7; WREFEAMD1Doc24-19 DPO Public Comment KingW 2024-04-04, p. 2-3.

⁹ WREFEAMD1Doc27 Proposed Order Compiled 2024-04-25, p. 241.

¹⁰ WREFEAMD1Doc27 Proposed Order Compiled 2024-04-25, p. 254.

With regards to the adequacy of procedures to minimize damages to resources, including surrounding croplands and residences, the Proposed Order recommends the Council impose a new Condition PRE-WP-01 and further revise Condition PRE-PS-05 to require the certificate holder, prior to construction, to finalize the Wildfire Mitigation Plan and Emergency Management Plan in consultation with local rural fire protection districts and other emergency service providers, and require the plans to include additional information about protocols and strategies for fire suppression and containment.¹¹ It is not clear what changes the petitioner believes should be included to minimize wildfire risk that would not be addressed by the revised conditions. The petitioner appears to argue that, in addition to minimizing wildfire risk, the Council should impose a condition that protects adjacent crop owners from financial losses resulting from a wildfire caused by the facility. As noted in the Proposed Order, the Department recommends that the financial liability of the certificate holder for damages from wildfire caused by the facility is a matter outside of the Council's jurisdiction.¹²

Because the inadequacies in the proposed Wildfire Mitigation Plan and Emergency Management Plan identified by the petitioner are either addressed by recommended conditions, or are outside of the scope of Council's jurisdiction, the Department recommends the issue is not reasonably likely to affect the Council's determination of whether the facility, with the change proposed by the amendment, meets the requirements of OAR 345-022-0115(1)(b).

Options for Settlement of Issue

The Department recommends that this issue does not justify a contested case proceeding, and does not recommend any conditions be imposed to settle the issue. The petitioner requests that the council impose a condition that protects and compensates crop owners in the event that a wildfire occurs at the facility; however, as noted above the Department recommends that such a condition is outside of the Council's jurisdiction.

Recommendation

Because the petitioner did not identify issues that are both within the Council's jurisdiction and reasonably likely to affect the Council's determination of whether the facility, with the change proposed by the amendment, meets the requirements of OAR 345-022-0115, the Department recommends the Council deny the contested case proceeding on this issue.

ISSUE 4: CUMULATIVE EFFECTS STANDARD FOR WIND ENERGY FACILITIES

The petitioner asserts that the certificate holder has not designed the facility to "reduce cumulative adverse environmental effects and minimize adverse visual features" and as a result, the facility does not comply with the Cumulative Effects Standard for Wind Energy Facilities under OAR 345-024-0015(5) & (6). The petitioner requests that the Council impose a condition that removes at least three of the most prominent towers located on the top of Gleason Butte.

Was the issue raised on the record of the public hearing?

¹¹ WREFEAMD1Doc27 Proposed Order Compiled 2024-04-25, p. 253-255.

¹² WREFEAMD1Doc27 Proposed Order Compiled 2024-04-25, p. 29.

Yes. The petitioner raised concerns regarding the visual impacts of turbines located on Gleason Butte in both oral testimony and written comments. The petitioner raised issues specifically regarding the facility's compliance with the Cumulative Effects Standard for Wind Energy Facilities in written comments.¹³

Does the issue justify a contested case proceeding?

As explained in the Proposed Order, it is not clear that the petitioner's proposed mitigation would significantly reduce visual impacts of the facility as visual simulations show that multiple turbines would still break the skyline along the ridgeline, and the Department recommends that greater exclusions would likely not be practicable.¹⁴ In addition, there is no evidence on the record indicating what the Gleason Butte turbine's contribution to cumulative visual impacts would be given the volume of wind facility development in Morrow and Umatilla Counties. As such, it is not clear that this issue would be reasonably likely to affect the Council's determination of whether the facility, with the change proposed by the amendment, meets the requirements of OAR 345-024-0015.

Options for Settlement of Issue

The Department recommends that this issue does not justify a contested case proceeding and does not recommend any conditions be imposed to settle the issue. The petitioner requests that the Council impose a condition that removes at least the three most prominent towers located on the top of Gleason Butte from the proposal. The imposition of such a condition would likely resolve the issue and other issues raised by the petitioner, but as noted, there is no evidence on the record indicating what the Gleason Butte turbine's contribution to cumulative visual impacts would be given the volume of wind facility development in Morrow and Umatilla Counties.

Recommendation

Because it is not clear that this issue would be reasonably likely to affect the Council's determination of whether the facility, with the change proposed by the amendment, meets the requirements of OAR 345-024-0015, the Department recommends the Council deny the contested case proceeding on this issue.

ISSUE 5: MINIMUM LIGHTING REQUIREMENTS

The petitioner asserts that the certificate holder does not adequately address the visual impacts of night-time aviation safety lighting, and as a result, the facility does not comply with the requirements of the Cumulative Effects Standard for Wind Energy Facilities under OAR 345-024-0015(6).

Was the issue raised on the record of the public hearing?

Yes. The petitioner raised concerns regarding the visual impacts of aviation safety lighting in both oral testimony and written comments. The petitioner raised issues specifically regarding

¹³ WREFEAMD1Doc24-01 Final March EFSC Meeting Minutes 2024-03-22, p. 6-7; WREFEAMD1Doc24-19 DPO Public Comment KingW 2024-04-04, p. 3-4.

¹⁴ WREFEAMD1Doc27 Proposed Order Compiled 2024-04-25, p. 30, 273.
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the facility's compliance with the Cumulative Effects Standard for Wind Energy Facilities due to these concerns in written comments.¹⁵

Does the issue justify a contested case proceeding?

As explained in the Proposed Order, it is not clear that the petitioners proposed mitigation would significantly reduce visual impacts of the facility as visual simulations show that multiple turbines would still break the skyline along the ridgeline, and the Department recommends that greater exclusions would likely not be practicable.¹⁶ In addition, there is no evidence on the record indicating what the Gleason Butte turbine's contribution to cumulative visual impacts would be given the volume of wind facility development in Morrow and Umatilla Counties. As such, it is not clear that this issue would be reasonably likely to affect the Council's determination of whether the facility, with the change proposed by the amendment, meets the requirements of OAR 345-024-0015.

Options for Settlement of Issue

The Department recommends that this issue does not justify a contested case proceeding, and does not recommend any conditions be imposed to settle the issue. The petitioner requests that the Council impose a condition that removes at least the three most prominent towers located on the top of Gleason Butte from the proposal. The imposition of such a condition would likely resolve the issue and other issues raised by the petitioner, but as noted, there is no evidence on the record indicating what the Gleason Butte turbine's contribution to cumulative visual impacts would be given the volume of wind facility development in Morrow and Umatilla Counties.

Recommendation

Because it is not clear that this issue would be reasonably likely to affect the Council's determination of whether the facility, with the change proposed by the amendment, meets the requirements of OAR 345-024-0015 the Department recommends the Council deny the contested case proceeding on this issue.

RECOMMENDED COUNCIL ACTION

The Department recommends the Council find that the petitioner's request does not raise a significant issue of fact or law that is reasonably likely to affect the Council's determination whether the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24. Accordingly, the Department recommends the Council deny the request for a contested case proceeding.

¹⁵ WREFEAMD1Doc24-01 Final March EFSC Meeting Minutes 2024-03-22, p. 6-7; WREFEAMD1Doc24-19 DPO Public Comment KingW 2024-04-04, p. 4-5.

¹⁶ WREFEAMD1Doc27 Proposed Order Compiled 2024-04-25, p. 30, 273.
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