

*SUBMITTED VIA E-MAIL*

Feb. 21, 2019

Oregon Energy Facility Siting Council  
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**Re: Summit Ridge Wind Farm – Request for Amendment 4**

Dear Chair Beyeler and Members of the Council:

Friends of the Columbia Gorge, Oregon Wild, the Oregon Natural Desert Association, Central Oregon LandWatch, the Audubon Society of Portland, and the East Cascades Audubon Society (collectively, “Commenters”) have reviewed the Request for Amendment 4 (“RFA4” or “Request for Amendment”) of the Summit Ridge Wind Farm site certificate, submitted by Summit Ridge Wind, LLC (“Pattern Energy” or “Pattern”),<sup>1</sup> and offer the following comments. In addition, we adopt and incorporate all comments made in the attached comment letter of K.

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<sup>1</sup> The site certificate holder is Summit Ridge Wind, LLC. According to the Request for Amendment, Summit Ridge Wind, LLC is a wholly owned subsidiary of Pattern Renewables 2 LP, which is a subsidiary of Pattern Energy Group 2 LP. RFA4 at § 1.0.

Shawn Smallwood, Ph.D. For the reasons that follow, we urge the Council to deny the Request for Amendment 4.

Commenters are nonprofit public interest organizations, with more than 54,000 collective members and supporters, with a strong interest in responsible energy generation and the proper implementation of state law governing the approval, construction, and modification of large energy facilities in Oregon generally, and the Summit Ridge project specifically. Commenter Friends of the Columbia Gorge (“Friends”) is a nonprofit organization with approximately 7,000 members dedicated to protecting and enhancing the resources of the Columbia River Gorge. Commenter Oregon Wild represents approximately 20,000 members and supporters who share Oregon Wild’s mission to protect and restore Oregon’s wildlands, wildlife, and waters as an enduring legacy. Commenter Oregon Natural Desert Association (“ONDA”) is a nonprofit, public interest organization whose mission is to protect, defend, and restore Oregon’s high desert for current and future generations. ONDA represents more than 10,000 members and supporters. Commenter Central Oregon LandWatch is a conservation organization with more than 200 members that has advocated for the preservation of natural resources in Central Oregon for more than 30 years. Commenter Audubon Society of Portland is a nonprofit, public interest organization with more than 17,000 members that works to promote the enjoyment, understanding, and protection of the natural world—particularly native birds and wildlife and their habitat. Commenter East Cascades Audubon Society (“ECAS”) is a nonprofit organization with approximately 400 members. ECAS is involved in conservation projects throughout Central Oregon and promotes enjoyment of birds, birdwatching, and habitat improvement.

Commenters note that the “sufficient specificity” standard for raising issues at this stage pursuant to ORS 469.370(3) and OAR 345-027-0067(5)(b) is a *notice* standard, not a strict *preservation* standard. As applied here, interested persons such as Commenters are not required to *preserve* issues during the public hearing—as one would do in a judicial action in the event of appeal. Instead, interested parties are merely required to put the applicant, ODOE, and EFSC *on notice* of potential issues for any contested case. The Oregon Court of Appeals has interpreted statutory language nearly identical to that in ORS 469.370(3) and OAR 345-027-0067(5)(b) to merely require “no more than fair notice” to decision makers and to not involve “strict preservation principles.” *Boldt v. Clackamas County*, 107 Or App 619, 623–24, 813 P2d 1078 (1991) (interpreting ORS 197.763(1) (1991)); *see also Lett v. Yamhill County*, 32 Or LUBA 98, 106–07 (1996) (interpreting ORS 197.763(1) (1996)).

Thus, there are a number of ways that issues may be raised at this stage. An interested person may raise an issue by “referr[ing] to the subject matter of the criteria that the ordinance establishes.” *Boldt*, 107 Or App at 624. Or a person may raise an issue by citing a statutory or regulatory provision or by discussing its operative terms. *Lett*, 32 Or LUBA at 107. But persons are not required to do all of the above for every issue raised; to impose such a requirement would conflict with the applicable notice standard.

To the extent that the record of this public hearing does not already include all of EFSC’s and ODOE’s files on the original site certificate for this project as well as Amendments 1

through 3,<sup>2</sup> Commenters hereby designate and incorporate all such materials as part of the record of this hearing.

As will be explained below, many of the problems with Pattern's Request for Amendment 4 involve Pattern's failures to submit materials demonstrating compliance with the applicable approval standards and criteria. In the event Pattern submits new materials (e.g., surveys, data, reports, analyses, argument, evidence, and/or other information) in the future, Commenters reserve the right to challenge the adequacy and compliance of such material.

**1. Because the Request for Amendment was submitted pursuant to invalid rules, it cannot be processed and must be denied.**

Because the Request for Amendment was submitted pursuant to invalid rules, it cannot be processed and must be denied. Commenters Friends, Oregon Wild, ONDA, and six other nonprofit public interest organizations are currently challenging these rules in the Oregon Supreme Court, *Friends of the Columbia Gorge v. EFSC*, SC No. S065478. Commenters hereby adopt all legal arguments, facts, and evidence asserted and/or submitted in that case, including the following:

- Pursuant to ORS 183.400(4)(c), the challenged rules are invalid because they were not adopted in compliance with the rulemaking procedures required by ORS 183.335.
  - EFSC and ODOE violated ORS 183.335(2)(d) by failing to provide the public with copies of the proposed rules that clearly showed all proposed changes.
  - EFSC and ODOE violated ORS 183.335(3)(d) by failing to provide the public with a statement identifying how EFSC and ODOE will subsequently determine whether the rules are in fact accomplishing the stated rulemaking objectives.
  - EFSC and ODOE violated ORS 183.335(3)(e)(C) by failing to respond to Petitioners' comments recommending other options for achieving the substantive goals of the rulemaking.

Because the rules invoked by Pattern's Request for Amendment are invalid, the Request for Amendment is likewise invalid and must be denied. *See Homestyle Direct, LLC v. Dep't of Human Serv.*, 245 Or. App. 598, 263 P.3d 1118 (2011) (state agencies may not enforce invalid rules); *Kessler v. Or. Corr. Div.*, 26 Or App 271, 552 P2d 589 (1976) (agency decision reversed and remanded because it applied invalid rules). In addition, because the Request for Amendment is invalid, the August 18, 2018 deadline for Pattern Energy to commence construction has expired. If Pattern desires to move forward on this project after the many years of delay, it will need to file a new application for a new site certificate. Pattern's Request for Amendment can neither be processed nor approved under invalid rules.

Nor can Pattern's Request for Amendment be processed under the rules that were previously in effect, prior to the invalid rules. Pattern expressly and specifically filed its Request for Amendment under the invalid rules, not the prior rules. *See* Final Request for Amendment at

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<sup>2</sup> The ODOE Staff Report indicates that "[t]he record [of the public hearing] is based on materials submitted in relation to the application for site certificate, and requests for amendments 1 through 3." Staff Report for Feb. 22, 2019 Council Meeting at 3 n.1.

§ 1.1. The Request for Amendment cannot be retroactively processed under the prior rules, which were not even in effect at the time the Request for Amendment was submitted.

Moreover, even if the prior rules could somehow be applied here, Pattern's Request for Amendment violates the prior rules because the request was submitted only three days prior to the construction start deadline, rather than the six months required under the prior rules. *See* OAR 345-027-0030(1) (2017) ("The certificate holder shall submit a request that includes an explanation of the need for an extension and that conforms to the requirements of 345-027-0060 no later than six months before the date of the applicable deadline, or, if the certificate holder demonstrates good cause for the delay in submitting the request, no later than the applicable deadline."). Nor did Pattern even attempt to explain or demonstrate good cause for its delay in submitting its request, as required by the prior rules. *See id.* For these reasons, the Request for Amendment must be denied, even under the prior rules.

**2. Pattern has failed to adequately explain or demonstrate any need for the requested third round of two-year extensions.**

It has been more than nine years since the preliminary application for this project was filed, and more than seven years since the project was approved. If Summit Ridge were a viable, worthwhile project, construction would have been underway years ago. Yet Pattern admits that it has not been able to find a buyer for the power, obtain financing, or enter into any construction contracts for the project, despite the previous two extensions. *See* RFA4 at § 1.2.

Pattern is now asking the Council for a third round of extensions. Specifically, Pattern requests to extend both the construction start deadline and the construction completion deadline for a third time, each by two years. Because Pattern has failed to adequately explain or demonstrate any need for the requested extensions, they should be denied.

Assuming that the Request for Amendment can be processed under the current rules, these rules require Pattern to provide "an explanation of the need for an extension." OAR 345-027-0085(1). Pattern fails to adequately address this requirement; instead, it has merely provided the following single sentence:

Certificate Holder requests Council approval of an extension of site certificate construction deadlines in order to allow the Project to complete development, including obtaining a power purchase agreement, financing, and construction under the requested timeline.

Preliminary Request for Amendment at § 1.3; *see also* Final Request for Amendment at § 1.2 (same).

This single sentence fails to provide sufficient evidence to demonstrate a need for each of the applicable deadlines to be extended by the requested two years. Pattern has failed to provide any details about how far along it may be in "complet[ing] development," nor any explanation of why Pattern has been unable to "obtain[] a power purchase agreement, financing, and

construction under the requested deadline” to date, nor why it might believe that it will be able to complete these tasks in the future if the requested extensions were granted.

In contrast, when the prior certificate holder in 2014 sought what would become the first of two two-year extensions of the construction deadlines, it provided two pages of details documenting all the work it had done in attempt to procure one or more buyers for the power, including naming six specific potential buyers it had negotiated with, attaching a copy of a letter of intent from one of those potential buyers, and discussing the engineering and procurement work it had authorized for the proposed interconnection substation. Request for Amendment 1 at § 1.2 & Ex. A.

For the requested fourth amendment, no such details or information were provided. It is completely unclear whether Pattern has done *any* work in marketing the project, negotiating with potential buyers, or procuring any letters of intent. The status and projected timelines for financing and construction likewise remain a mystery. Nor does Pattern’s Request for Amendment 4 discuss the status of the power market in California (where Pattern is based), which was a focal point for the extensions requested as part of Request for Amendment 1.

In addition, Pattern fails to acknowledge that the prior certificate holder stated on February 11, 2016 that “[w]e fully intend to begin construction on Summit Ridge prior to August 19, 2016, as required by Amendment #1.” Request for Amendment 2 at § 1.3. Pattern fails to explain why that statement of intent was not honored, nor why the subsequent second extension of the construction start date (to August 19, 2018) was similarly not met.

Pattern also fails to explain or demonstrate why a third round of extensions is needed, given that two prior rounds of extensions were already sought and granted. “When considering whether to grant a request for amendment for a deadline extension . . . , the Council shall consider how many extensions it has previously granted.” OAR 345-027-0085(5)(c). Here, two rounds of extensions were already granted. Yet, despite those two extensions, by all outward appearances Pattern appears to be even less ready to proceed with the project than the prior site certificate holder was three years ago. Unlike the prior site certificate holder, Pattern has provided no letters of intent from potential purchasers, nor any details of the expected timeline for the project. The Council should not encourage further delays by granting the requested third round of extensions.

Nor does Pattern demonstrate there is a need to extend *both* the construction start deadline and the construction completion deadline. If the construction start deadline were extended to August 19, 2020, and even if Pattern waited until the day before that deadline to start construction, it would still have an entire year to complete construction (until August 19, 2021), even without any extension of the latter date. Pattern neither explains nor demonstrates why it would need a minimum of three years to complete construction, for a project that should have been constructed years ago.

Under the applicable rules, the Council has authority to approve an extension for *up to* two years. OAR 345-027-0085(5)(d). In other words, the Council could approve an extension, but for a period of *less than* two years. Pattern’s Request for Amendment 4 fails to demonstrate

why it needs full two-year extensions of both the construction start deadline and the construction completion deadline, and why extensions of less than two years would not be sufficient.

In summary, Pattern has utterly failed to explain or demonstrate a need for the requested extensions. Accordingly, Request for Amendment 4 should be denied

**3. Pattern has failed to demonstrate compliance with the applicable rules and standards for the protection of wildlife, plants, and habitat.**

Pattern has failed to demonstrate compliance with the applicable rules and standards for the protection of wildlife, plants, and habitat. For example, Pattern has failed to provide current information about site conditions sufficient to evaluate the project's actual impacts on birds, other wildlife, plants, and habitat. These failures by Pattern are particularly troubling, given the notorious history of this project and its impacts on wildlife and other resources.

In May 2009, a total of 23 active raptor nests and 29 inactive nests were identified within two miles of the project site boundary. Final Application for Site Certificate (Aug. 25, 2010) at § P.6.3 & fig. P-1. In addition, during avian use surveys in 2009, multiple bald and golden eagles were detected in the vicinity of the project. *Id.* at § P.5. On September 20, 2010, in a letter addressed to EFSC and ODOE (attached as an exhibit to this letter), the U.S. Fish and Wildlife Service ("USFWS") concluded that this Project, "including all turbines, transmission and roads, and associated facilities has the potential to result in injury and mortality of individual eagles and potential loss of nest sites over the life of the Project." In the same letter, the USFWS also recommended that no wind turbines for this Project should be sited any closer than six miles from a golden eagle nest (except for in "non-use locations"), that turbine operations should be shut down during peak migration periods, and that turbine lighting should be minimized to protect eagles. The USFWS also wrote that "[i]n the absence of clear solutions to address golden eagle mortalities at wind energy projects, to enhance populations through conservation measures, or to off-set losses in other ways, our best efforts should be directed at avoidance of mortalities by siting wind turbines well away from the areas where resident and migrating eagles are known to concentrate their activities."

Despite these serious concerns stated by the USFWS in 2010, Pattern has failed in 2018–2019 to update the surveys and analyses conducted several years ago by the prior site certificate holder for wildlife and plants. For this project, the most recent habitat mapping and categorizations were conducted in 2009 (but neither the project site nor the proposed mitigation parcels have ever been field surveyed for habitat), the most recent avian use surveys within the proposed wind turbine area were conducted in 2009,<sup>3</sup> the most recent raptor nest surveys were conducted in 2016, and the most recent surveys for threatened and endangered plants were conducted in 2016. RFA4 at § 5.1.8; Summit Ridge Wind Farm, Final Order on Request for Contested Case, Amendment #2, and Transfer Request (Nov. 4, 2016) at § III.B.9. Pattern fails

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<sup>3</sup> Both the Request for Amendment 4 and the Draft Proposed Order state that the most recent use surveys were in 2010. To clarify, only the proposed transmission line was surveyed in 2010. The most recent avian use survey within the proposed wind turbine area was in 2009. *See* Summit Ridge Wind Farm Final Order (Aug. 19, 2011) at §§ IV.G.1.a.ii, IV.G.1.a.iii IV.G.1.b.i.

to explain why none of these surveys and other information have been updated for its Request for Amendment 4.

Furthermore, Pattern states in Table 2 of its Request for Amendment 4 that each specific species was either “documented during surveys” or “not documented during surveys,” but no details are provided about the applicable date(s) of these surveys, nor the type of survey (*e.g.*, was each species documented during a use survey or a nest survey, or both?). Similarly, in Table 3 of its Request for Amendment, Pattern fails to provide any information about actual, current occurrences of plants listed as threatened or endangered, instead merely rating the “likelihood of occurrence” for each species. This severe lack of details only further exacerbates the paucity of underlying information and data, making it impossible for the Council and the reviewing public to fully understand the project’s actual, current impacts.

In addition, in a November 28, 2018 letter, the Oregon Department of Fish and Wildlife (“ODFW”) raised concerns about the significant length of time that has passed since this project was first proposed, and the need to reevaluate and update the analyses of the project’s impacts on wildlife and habitat, as well as the need to reexamine the potentially available mitigation measures. (“The original site application for this project was received over ten years ago, and recommendations have evolved based on new science as well as ODFW’s experience with operational projects. . . . With the proposed start of construction still unknown, ODFW is concerned that current proposed mitigation parcels may no longer meet the original intent for mitigation as outlined in the original mitigation plan.”) Pattern has failed to update the data, analyses, and proposals in its Request for Amendment to respond to ODFW’s concerns.

Pattern admits that it is “currently performing eagle use surveys [that will] inform updates to eagle occurrence in the analysis area.” RFA4 at § 5.1.8. But Pattern fails to provide any details for these “current” eagle surveys, fails to explain why it waited until now to update the eagle surveys, and fails to explain why its “current” surveys are limited to eagles and why it has not instead updated all surveys, maps, and analyses for all species and habitat.

Because Pattern has not disclosed the project’s true, current impacts; has not evaluated appropriate mitigation of these impacts; and has not demonstrated current compliance with all applicable approval standards and criteria for the protection of wildlife, plants, and habitat, the requested third round of extensions must be denied. The relevant Council rules and provisions of the Wasco County ordinance will be discussed below.

**a. Council Rules**

*OAR 345-021-0010(1): “The applicant shall include in its application for a site certificate information that addresses each provision of this rule identified in the project order.”*

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*(p) Exhibit P. Information about the fish and wildlife habitat and the fish and wildlife species, other than the species addressed in subsection (q) that could be*

*affected by the proposed facility, providing evidence to support a finding by the Council as required by OAR 345-022-0060. The applicant shall include:*

The language of OAR 345-021-0010(1)(p) expressly requires in pertinent part “[i]nformation about the fish and wildlife habitat and the fish and wildlife species, other than the species addressed in subsection (q)[,] that could be affected by the proposed facility” (emphasis added). In other words, this section requires Pattern to provide information about all fish and wildlife species and habitat that may be affected by the project, except for the species listed by the State of Oregon as threatened or endangered, which are covered separately under OAR 345-021-0010(1)(q). Pattern is violating this requirement by failing to provide current, accurate information about all fish and wildlife species and habitat that could be affected by the proposed facility.

For example, Pattern completely omits from its Request for Amendment 4 *any* information about several special status fish and wildlife species that were actually observed within or near the project site boundary in 2005, 2009, and/or 2010, including the following species:

- Yellow-breasted chat (*Icteria virens auricollis*)
- White-tailed jackrabbit (*Lepus townsendii*)
- Western small-footed bat (*Myotis ciliolabrum*)
- Yuma myotis (*Myotis yumanensis*) or California myotis (*Myotis californicus*)<sup>4</sup>



**Yellow-breasted chat (*Icteria virens auricollis*)**



**White-tailed jackrabbit  
(*Lepus townsendii*)**

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<sup>4</sup> “Either the Yuma myotis, or California myotis, or both, were detected. The calls of these two species are very difficult to distinguish.” Summit Ridge Wind Farm, Final Order (Aug. 19, 2011) at 95 n.204.



**Western small-footed bat (*Myotis ciliolabrum*)**



**Yuma myotis (*Myotis yumanensis*)**

Pattern appears to be under the mistaken assumption that it is only required to provide information about fish and wildlife species in the project vicinity if a particular species is listed by the State of Oregon as endangered, threatened, or sensitive in the Columbia Plateau region. See RFA4 at 31 (“Table 2 . . . includes only the ODFW Sensitive Species as required to meet the standard.”), 34 (“Table 3 . . . omit[s] the federal status and update[s] the current state status of species.”). Pattern’s assumptions are incorrect. OAR 345-021-0010(1)(p) requires the applicant to provide information about *all* fish and wildlife species that may be affected by the project, regardless of the species’ listing status. Nevertheless, most or all of the omitted species discussed above are in fact listed as federal species of concern and/or as state sensitive species. Pattern is violating OAR 345-021-0010(1)(p) by failing to disclose that these species were previously observed within or near the project site, and by failing to evaluate the project’s impacts on these and other species and their habitat.

In fact, Pattern’s omissions of these previously observed and disclosed species raises questions about what *other* wildlife species may be present in the project vicinity, but may have been similarly omitted from the Request for Amendment. Two examples of such species, which were previously documented within the project area and acknowledged “to be at the highest risk of collision at the proposed site,” are the American kestrel (*Falco sparverius*) and the red-tailed hawk (*Buteo jamaicensis*). Summit Ridge Wind Farm Final Order (Aug. 19, 2011) at 99.

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**American kestrel (*Falco sparverius*)**



**Red-tailed hawk (*Buteo jamaicensis*)**

Again, Pattern is required to provide current, accurate information about *all* fish and wildlife species that may be affected by the project, whether or not a particular species is listed by federal or state authorities. This required information is neither optional nor waivable. Pattern is in violation by failing to disclose the required information, and these failures in turn taint other required components of the application. For example, without current, complete information about the presence, distributions, and relative abundance of all fish and wildlife species actually present in the project vicinity, it is difficult or impossible to fully assess the categorization and suitability of habitat at the project site. The presence or absence of specific species is often an

important indicator of the characteristics of wildlife habitat.<sup>5</sup> By failing to provide the required information, Pattern is violating the Council's rules and making it impossible to determine that the Request for Amendment complies with the applicable substantive standards.

*(A) A description of biological and botanical surveys performed that support the information in this exhibit, including a discussion of the timing and scope of each survey.*

Pattern has failed to conduct any new biological or botanical surveys to support its request for a third round of construction extensions. Instead, it broadly cites species observations made in previous surveys, some of which have not been updated for nearly a decade. Pattern also fails to provide details when each specific species was observed, which type of survey was involved for each species (*e.g.*, use survey or nest survey), which portion of the project a species was observed in (*e.g.*, within the transmission line area or the turbine corridors area), or any other information about the scope of each survey. As a result of these omissions, it is impossible to evaluate the project's current impacts on fish, wildlife, and plant species and habitat. Pattern is in violation of OAR 345-021-0010(1)(p)(A).

*(B) Identification of all fish and wildlife habitat in the analysis area, classified by the general fish and wildlife habitat categories as set forth in OAR 635-415-0025 . . . and a description of the characteristics and condition of that habitat in the analysis area, including a table of the areas of permanent disturbance and temporary disturbance (in acres) in each habitat category and subtype.*

Pattern has not conducted field surveys assessing habitat for this project, and the most recent "desktop" categorizations and mapping occurred in 2009. Pattern seeks to extend the construction deadlines by another two years, which could mean the project might not be operational until 2023. Without current, accurate surveys, categorizations, and mapping, it is impossible for the Council and the reviewing public to evaluate the project's impacts on fish and wildlife habitat. Pattern is in violation of OAR 345-021-0010(1)(p)(B).

*(C) A map showing the locations of the habitat identified in (B).*

Again, Pattern has failed to conduct any field surveys of habitat for this project, and there have been no habitat categorizations or mapping since 2009. The habitat maps are deficient, not current, and must be updated. Without current, accurate habitat mapping, it is impossible for the Council and the reviewing public to evaluate the project's current impacts on fish and wildlife habitat. Pattern is in violation of OAR 345-021-0010(1)(p)(C).

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<sup>5</sup> One example is the Oregon vesper sparrow (*Pooecetes gramineus affinis*). Pattern's amended Draft Habitat Mitigation Plan implies that this species will be affected by the project, and ties this impact to its proposals for habitat mitigation, but there is no disclosure elsewhere in the Request for Amendment as to the presence, abundance, and distribution of this species within the project site. *See* Draft Habitat Mitigation Plan (Jan. 2019) at 3.

*(D) Based on consultation with the Oregon Department of Fish and Wildlife (ODFW) and appropriate field study and literature review, identification of all State Sensitive Species that might be present in the analysis area and a discussion of any site-specific issues of concern to ODFW.*

Pattern fails to provide any evidence that it consulted with ODFW in 2018 or 2019 regarding the project's current impacts to fish and wildlife and habitat. Nor does Pattern provide in its Request for Amendment 4 a discussion of any site-specific issues of concern to ODFW, as required by the rule.

The record does contain a November 28, 2018 comment letter from ODFW to ODOE, but ODFW's letter merely contains a general discussion of applicable statutes, rules, and policies, plus a statement that the required analyses of habitat impacts and potential mitigation measures might be deferred to a later, unspecified date, presumably after the Request for Amendment might be approved (without any legal analysis of whether such deferrals would be lawful). The existence of this letter does not satisfy the requirements of OAR 345-021-0010(1)(p)(D), which expressly requires Pattern Energy to consult with ODFW about the sensitive species that may be present in the analysis area and to discuss, in its application, any site-specific issues of concern to ODFW. (There is no evidence in the record that Pattern even asked ODFW to provide any site-specific issues of concern.) The required consultation and discussion cannot be deferred to a future date, after EFSC's decision on the application.

Nor has Pattern conducted any habitat field studies, as required by the rule. Pattern notes in the Request for Amendment 4 that much of the project site was burned by wildfires in 2018, and implies that it has conducted updated "desktop analysis" of the habitat areas and burned areas. However, "desktop analysis" is not an adequate substitute for "field study"; the latter is required by the rule.

As for literature review, Pattern indicates that it reviewed the October 2018 version of the ORBIC database and the current Oregon state lists of wildlife and plants, but there is no indication of any other literature review. For the original application for this project, the prior site certificate holder reviewed plant and wildlife studies from seven other wind projects. Summit Ridge Wind Farm Final Order (Aug. 19, 2011) at 93. Since then, numerous other wind projects have been proposed in the area, yet Pattern fails to mention this fact, nor explain whether it has reviewed the surveys from these other wind projects, nor any other recent surveys in the vicinity.

By failing to consult with ODFW, by failing to update the field studies and literature review, and by failing to provide a discussion of ODFW's site-specific issues of concern, Pattern is in violation of OAR 345-021-0010(1)(p)(D).

*(E) A baseline survey of the use of habitat in the analysis area by species identified in (D) performed according to a protocol approved by the Department and ODFW.*

Pattern ignores this requirement. The avian use surveys for this project have apparently not been updated since 2010. Pattern has failed to conduct any current baseline use surveys.

In addition to the 2010 avian use surveys, other surveys were previously conducted (*e.g.*, the bat inventory in 2009 and the raptor nest surveys in 2015 and 2016), but these surveys are also not current. In addition, Pattern has not demonstrated that these other surveys constitute the “baseline survey[s] of the use of habitat” required by the rule. For example, an inventory that merely lists the bat species detected in the project area tells the Council and the reviewing public nothing about the relative prevalence of each bat species at this site, the location(s) where each species was detected, nor the seasons when each species was detected. Moreover, even if the prior surveys *were* sufficient to supply the required baseline data, they were conducted years ago, so they no longer provide current, accurate baselines. Pattern has failed to meet the requirements of OAR 345-021-0010(1)(p)(E).

*(F) A description of the nature, extent and duration of potential adverse impacts on the habitat identified in (B) and species identified in (D) that could result from construction, operation and retirement of the proposed facility.*

Pattern largely ignores this requirement, and the information that it does provide is inadequate to demonstrate compliance. For example, Pattern fails to disclose which season(s) each migratory bird and bat species has been documented at the site, and the relative abundance of each species at the site, thus making it impossible to evaluate the extent and duration of potential adverse impacts to each species. Moreover, Pattern’s failure to provide adequate, current baseline use surveys and habitat data renders defective its descriptions of the project’s potential impacts. Pattern has failed to meet the requirements of OAR 345-021-0010(1)(p)(F).

*(G) A description of any measures proposed by the applicant to avoid, reduce, or mitigate the potential adverse impacts described in (F) in accordance with the general fish and wildlife habitat mitigation goals and standards described in OAR 635-415-0025 . . . , and a discussion of how the proposed measures would achieve those goals and requirements.*

Pattern fails to comply with this requirement. Instead of describing proposed measures to avoid, reduce, or mitigation potential adverse impacts, and instead of discussing how the proposed measures would achieve the applicable goals and requirements, as expressly required by the rules, Pattern merely notes that the prior habitat delineations, which were prepared nearly a decade ago (in 2009), were previously deemed by the Council to meet the applicable requirements. RFA4 at 30. Because Pattern has failed to update its data and analyses to reflect current conditions and best available science and technologies, there are no assurances that the proposed project continues to comply with the applicable rules and standards.

Furthermore, Commenters object to the Draft Habitat Mitigation Plan (January 2019) as insufficient to demonstrate that the project will avoid, reduce, or mitigate potential adverse impacts to wildlife species and habitat in compliance with the applicable Council rules and the applicable fish and wildlife habitat mitigation goals and standards. Among other problems, the

Draft Habitat Mitigation Plan is not based on actual, current habitat surveys (neither the project area nor the proposed mitigation parcels have been field surveyed for habitat), it fails to include binding provisions requiring Pattern to acquire the legal rights to ensure permanent protection for the proposed Habitat Mitigation Area, it fails to incorporate state standards for protecting habitat in any binding, meaningful way, it fails to prohibit cattle grazing, and it defers consultation with and review by ODFW of the proposed mitigation measures until a future, unspecified date.

In fact, there is no evidence as to whether the current version of the Draft Habitat Mitigation Plan has been reviewed or approved by ODFW.<sup>6</sup> For example, the Draft Habitat Mitigation Plan is dated January 2019—more than a month *after* ODFW’s most recent comments on the project (in November 2018). In those comments, ODFW stated that “ODFW is concerned that current proposed mitigation parcels may no longer meet the original intent for mitigation as outlined in the original mitigation plan.” The January 2019 Draft Habitat Mitigation Plan states that “[t]he referenced parcels for mitigation have been discussed with ODFW.” Draft Habitat Mitigation Plan at 3. However, Pattern does not state *when* these discussions occurred. Most likely this is a reference to the discussions of the original mitigation proposal from the original application (circa 2009–2011). In fact, the four proposed mitigation parcels have not changed since that original application, and Pattern admits as much by referring to these parcels as “the previously proposed mitigation sites” and conceding that the parcels may be “determined not to have sufficient quality and quantity of habitat to meet ODFW’s mitigation goals for the permanent and temporal habitat impacts from facility construction.” *Id.* There is no indication as to ODFW’s current conclusions as to whether the proposed mitigation parcels (and the Draft Habitat Mitigation Plan) are satisfactory to ODFW; to the contrary, ODFW’s November 2018 comments imply otherwise.

*(H) A description of the applicant’s proposed monitoring plans to evaluate the success of the measures described in (G).*

In its amended Draft Habitat Mitigation Plan (2019), Pattern has failed to include specific and binding monitoring requirements, reporting requirements, and success criteria, instead supplying vague and general statements that the “monitoring protocol[s]” and “details of monitoring time frames and success criteria will be designed after the final site is selected.” Draft Habitat Mitigation Plan (2019) at 5. Commenters object to the Draft Habitat Mitigation Plan as insufficient to demonstrate compliance with the Council’s rules and the applicable fish and wildlife habitat mitigation goals and standards. Moreover, Pattern cannot defer a demonstration of compliance with these rules to a future, unspecified date, after its Request for Amendment 4 is approved. A demonstration of compliance with the applicable law is required *now*. Both the reviewing public and the Council have a right to obtain and review this information prior to a final Council decision.

*(q) Exhibit Q. Information about threatened and endangered plant and animal species that may be affected by the proposed facility, providing evidence to*

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<sup>6</sup> It should be noted that the ultimate responsibility for determining compliance with the applicable rules and standards for the protection of wildlife and wildlife habitat lies with the Council. However, review of these issues by ODFW can be relevant, and in some cases instructive, for the Council’s ultimate decisions.

*support a finding by the Council as required by OAR 345-022-0070. The applicant shall include:*

*(A) Based on appropriate literature and field study, identification of all threatened or endangered species listed under ORS 496.172(2) and ORS 564.105(2) that may be affected by the proposed facility.*

As with the counterpart standard for sensitive species required by OAR 345-021-0010(1)(p)(D), Pattern fails to provide sufficient evidence to demonstrate that it has updated the prior literature reviews and field studies for this proposed project to identify all threatened or endangered species that may be affected by the project. Instead, Pattern merely lists the four plant species and one bird species that were previously determined to possibly occur within the project area. RFA4 at Table 3. There is no evidence that Pattern has conducted any current field surveys of the project site, nor any evidence that Pattern has reviewed any other surveys in the vicinity, or by other nearby wind projects. By failing to update the literature reviews and field studies, Pattern is in violation of OAR 345-021-0010(1)(q)(A).

*(B) For each species identified under (A), a description of the nature, extent, locations and timing of its occurrence in the analysis area and how the facility might adversely affect it.*

When Pattern's predecessor sought the second round of construction extensions for this project, it conducted new bird nest surveys, as well as new surveys for endangered and threatened plants, in order to ensure that no such species were located within the project area. Pattern's predecessor conducted these surveys in both 2015 and 2016. Final Order on Request for Contested Case, Amendment #2, and Transfer Request (Nov. 4, 2016) at § III.B.9.

In contrast, now that Pattern owns the project, it has apparently failed to update any of these surveys, nor complete any other new surveys for wildlife or plants (except for the undisclosed surveys for bald eagles that Pattern alleges it is currently conducting). Because Pattern has failed to update these surveys—yet is seeking extensions that could further delay construction and operation of the proposed facility by several more years—Pattern has failed to demonstrate compliance with OAR 345-021-0010(1)(q)(B). Nor does Pattern describe “the nature, extent, locations, and timing” of the occurrence of each species in the analysis area, nor “how the facility might adversely affect” the species if it is present, as required by the rule.

*(C) For each species identified under (A), a description of measures proposed by the applicant, if any, to avoid or reduce adverse impact.*

*(D) For each plant species identified under (A), a description of how the proposed facility, including any mitigation measures, complies with the protection and conservation program, if any, that the Oregon Department of Agriculture has adopted under ORS 564.105(3).*

*(E) For each plant species identified under paragraph (A), if the Oregon Department of Agriculture has not adopted a protection and conservation*

*program under ORS 564.105(3), a description of significant potential impacts of the proposed facility on the continued existence of the species and on the critical habitat of such species and evidence that the proposed facility, including any mitigation measures, is not likely to cause a significant reduction in the likelihood of survival or recovery of the species.*

*(F) For each animal species identified under (A), a description of significant potential impacts of the proposed facility on the continued existence of such species and on the critical habitat of such species and evidence that the proposed facility, including any mitigation measures, is not likely to cause a significant reduction in the likelihood of survival or recovery of the species.*

Because Pattern has not updated its wildlife and plant surveys to demonstrate compliance with OAR 345-021-0010(1)(q)(B), it has also failed to demonstrate compliance with OAR 345-021-0010(1)(q)(C), (D), (E), and (F).

*OAR 345-022-0060*

*Fish and Wildlife Habitat*

*To issue a site certificate, the Council must find that the design, construction and operation of the facility, taking into account mitigation, are consistent with:*

*(1) The general fish and wildlife habitat mitigation goals and standards of OAR 635-415-0025(1) through (6) in effect as of February 24, 2017 . . . .*

As discussed above, Pattern has failed to complete current habitat surveys, mapping, and categorizations; literature reviews; and field surveys for wildlife and plants. In addition, Pattern has substantially weakened its proposed mitigation measures and has failed to take into account the latest science and technologies for avoidance and mitigation of impacts. Pattern has also failed to demonstrate consultation with and approval by ODFW, under current standards and conditions, of the project's impacts and proposed mitigation measures. As a result of these failures, it is impossible for the Council to conclude that the design, construction, and operation of the facility, taking into account mitigation, are consistent with the applicable fish and wildlife habitat mitigation goals and standards. The requested third round of construction extensions should be denied.

*OAR 345-022-0070*

*Threatened and Endangered Species*

*To issue a site certificate, the Council, after consultation with appropriate state agencies, must find that:*

*///*

*(1) For plant species that the Oregon Department of Agriculture has listed as threatened or endangered under ORS 564.105(2), the design, construction and operation of the proposed facility, taking into account mitigation:*

*(a) Are consistent with the protection and conservation program, if any, that the Oregon Department of Agriculture has adopted under ORS 564.105(3); or*

*(b) If the Oregon Department of Agriculture has not adopted a protection and conservation program, are not likely to cause a significant reduction in the likelihood of survival or recovery of the species; and*

*(2) For wildlife species that the Oregon Fish and Wildlife Commission has listed as threatened or endangered under ORS 496.172(2), the design, construction and operation of the proposed facility, taking into account mitigation, are not likely to cause a significant reduction in the likelihood of survival or recovery of the species.*

As discussed above, Pattern has failed to complete current habitat surveys, mapping, and categorizations; literature reviews; and field surveys for wildlife and plants. In addition, Pattern has substantially weakened its proposed mitigation measures and has failed to take into account the latest science and technologies for avoidance and mitigation of impacts. Pattern has also failed to demonstrate consultation with and approval by ODFW, under current standards and conditions, of the project's impacts and proposed mitigation measures. As a result of these failures, it is impossible for the Council to conclude that the design, construction, and operation of the facility, taking into account mitigation, are consistent with OAR 345-022-0070. The requested third round of construction extensions should be denied.

#### **b. Wasco County Rules**

Pursuant to ORS 469.310, 469.503(4), and 469.504, as well as OAR 345-022-0030, Wasco County's land use rules apply to the Council's review of this project. This includes Wasco County's standards for commercial energy facilities, found at Wasco County Land Use and Development Ordinance ("LUDO") Chapter 19, as well as the conditional use review standards, found at Wasco County LUDO Chapter 5.

As will be explained below, Pattern has failed to demonstrate compliance with the natural resource/wildlife protection provisions of these rules, found at LUDO section 19.030, as well as the conditional use review standards at LUDO 5.020 and 5.030.

#### *Section 19.030*

#### *Commercial Power Generating Facilities Review Processes & Approval Standards*

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C. *General Standards* - The following standards apply to energy facilities as outlined in Section A above, in addition to meeting the Conditional Use Standards listed in Chapter 5:

5. *Natural Resource/Wildlife Protection* - Taking into account mitigation, siting, design, construction and operation the energy facility will not cause significant adverse impact to important or significant natural resources identified in the Wasco County Comprehensive Plan, Wasco County Land Use and Development Ordinance or by any jurisdictional wildlife agency resource management plan adopted and in effect on the date the application is submitted. As appropriate, the permit holder agrees to implement monitoring and mitigation actions that Wasco County determines appropriate after consultation with the Oregon Department of Fish and Wildlife, or other jurisdictional wildlife or natural resource agency. Measures to reduce significant impacts may include, but are not limited to the following:

This section requires protection of all “important or significant natural resources identified in the Wasco County Comprehensive Plan, Wasco County Land Use and Development Ordinance[,] or by any jurisdictional wildlife agency resource management plan adopted and in effect on the date the application is submitted.” The reference to “any jurisdictional wildlife agency resource management plan” includes all federal wildlife plans, such as the following plans:

- [Final Eagle Incidental Take and Eagle Nest Take Regulations](#) (USFWS, 2016)
- [Record of Decision for the Final Programmatic Environmental Impact Statement for the Eagle Rule Revision](#) (USFWS, 2016)
- [Programmatic Environmental Impact Statement for the Eagle Rule Revision](#) (USFWS, 2016)
- [Bald and Golden Eagles: Population demographics and estimation of sustainable take in the United States, 2016 update](#) (USFWS, 2016)
- [Final Rule, Revised List of Migratory Birds](#) (USFWS, 2013)<sup>7</sup>
- [Memorandum of Understanding Between the U.S. Department of Energy and U.S. Fish & Wildlife Service Regarding Implementation of Executive Order 13186, “Responsibilities of Federal Agencies to Protect Migratory Birds”](#) (USFWS & USDOE, 2013)
- [Birds of Conservation Concern 2008](#) (USFWS, 2008)
- [National Bald Eagle Management Guidelines](#) (USFWS, 2007)

Thus, pursuant to Wasco County LUDO § 19.030.C.5, Pattern is required to demonstrate that the project will not cause significant adverse impact to bald eagles, golden eagles, federally designated migratory birds, and federal birds of conservation concern. Pattern has failed to identify all such bird species in its application, and to the contrary, has removed federal birds of

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<sup>7</sup> The U.S. Fish and Wildlife Service is currently proposing to revise its list of migratory birds. However, Pattern’s Request for Amendment 4 is subject to the 2013 version of the list, which was “in effect on the date [Pattern’s] application [was] submitted.” Wasco County LUDO § 19.030.C.5.

conservation concern that were previously identified in prior applications by Pattern's predecessor. Pattern is also failing to demonstrate that it will follow the recommendations of the U.S. Fish and Wildlife Service for the protection of bald eagles and golden eagles.

Because Pattern has failed to identify, survey for, and demonstrate the protection of bald eagles, golden eagles, federally designated migratory birds, and federal birds of conservation concern, Pattern is in violation of Wasco County LUDO § 19.030.C.5, and its Request for Amendment 4 must be denied.

*a. Providing information pertaining to the energy facility's potential impacts and measures to avoid impacts on:*

- (1) Wildlife (all potential species of reasonable concern);*
- (2) Wildlife Habitat;*
- (3) Endangered Plants; and*
- (4) Wetlands & Other Water Resources.*

This provision in pertinent part requires Pattern to demonstrate the protection of wildlife ("all potential species of reasonable concern"<sup>8</sup>), wildlife habitat, and endangered plants. Yet, in the same ways as explained above with respect to the Council's rules, Pattern has failed to provide sufficient information to demonstrate that these natural resources will be protected. For example, Pattern is failing to identify the presence and distribution of all potentially affected wildlife and plant species. Pattern is also failing to demonstrate that it will follow the recommendations of the U.S. Fish and Wildlife Service for the protection of bald eagles and golden eagles. Pattern is in violation of Wasco County LUDO § 19.030.C.5.a.

*b. Conducting biologically appropriate baseline surveys in the areas affected by the proposed energy facility to determine natural resources present and patterns of habitat use.*

As discussed above with respect to the Council's rules, Pattern has failed to conduct any updated baseline surveys for wildlife and plant species and habitat. Because current baseline surveys have not been made available, it is impossible "to determine natural resources present." Nor has Pattern shown the "patterns of habitat use," as required by this rule. The requirement to supply these baseline surveys is mandatory, and cannot be waived or deferred. *See* Wasco County LUDO § 19.030.A.2 (allowing for "tentative approval" and deferral of "the wildlife plan and all its required baseline studies" until "final approval," but stating that "[f]or facilities sited through EFSC, this section does not apply."). Pattern is in violation of Wasco County LUDO § 19.030.C.5.b.

*c. Selecting locations to reduce the likelihood of significant adverse impacts on natural resources based on expert analysis of baseline data.*

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<sup>8</sup> "All potential species of reasonable concern" includes bald eagles, golden eagles, federally designated migratory birds, and federal birds of conservation concern. *See also* Wasco County LUDO § 19.030.C.5.

Because there are no current baseline surveys or data, it is impossible for expert analysis to occur, and likewise impossible to “[s]elect locations to reduce the likelihood of significant adverse impacts on natural resources.” Because Pattern has failed to provide this required information, the Council and the reviewing public do not know where wildlife and plant species and habitat are currently located in the project vicinity, and thus which locations should be focused on for reducing or avoiding impacts. Pattern is in violation of Wasco County LUDO § 19.030.C.5.c.

- h. Avoiding construction activities near raptor nesting locations during sensitive breeding periods and using appropriate no construction buffers around known nest sites.*

Because Pattern has failed to update the prior raptor nest surveys, Pattern has failed to demonstrate compliance with this requirement. Pattern must update and disclose the raptor nest surveys, so that the Council and the reviewing public will be able to review that information and evaluate compliance. Pattern is in violation of Wasco County LUDO § 19.030.C.5.h.

*Section 5.020*

*Authorization to Grant or Deny Conditional Uses, and Standards and Criteria Used*

*Conditional uses listed in this Ordinance shall be permitted, enlarged or otherwise altered or denied upon authorization by Administrative Action in accordance with the procedures set forth in Chapter 2 of this Ordinance. In judging whether or not a conditional use proposal shall be approved or denied, the Administrative Authority shall weigh the proposal's appropriateness and desirability or the public convenience or necessity to be served against any adverse conditions that would result from authorizing the particular development at the location proposed, and to approve such use, shall find that the following criteria are either met, can be met by observance of conditions, or are not applicable.*

- A. The proposal is consistent with the goals and objectives of the Comprehensive Plan and implementing Ordinances of the County.*

*\* \* \**

- F. The proposed use will not significantly reduce or impair sensitive wildlife habitat, riparian vegetation along streambanks and will not subject areas to excessive soil erosion.*

Because Pattern has failed to complete current wildlife and habitat surveys, categorizations, and mapping, it is impossible to evaluate current compliance with section 5.020 of the Wasco County LUDO. Pattern has failed to demonstrate that the proposal is consistent with the Wasco County land use rules, that the proposal will not significantly reduce or impair sensitive wildlife habitat or riparian vegetation along streambanks, and that the proposal will not subject areas to excessive soil erosion. The need to update the baseline data and maps is

especially important given the recent wildfires in the project area. Because Pattern is in violation of Wasco County LUDO section 5.020, the Request for Amendment 4 should be denied.

*Section 5.030  
Conditions*

*Such reasonable conditions as are necessary to ensure the compatibility of a conditional use to surrounding permitted uses as are necessary to fulfill the general and specific purposes of this Ordinance may be imposed in approving an application, pursuant to Section 2.110(D). Such conditions may include, but are not limited to, the following:*

- A. Limiting the manner in which the use is conducted including restricting the time an activity may take place and restraints to minimize such environmental effects as noise, vibration, air pollution, glare, and odor.*
- B. Establishing a special yard or other open space or lot area or dimension.*
- C. Limiting the height, size, or location of a building or other structure.*
- D. Designating the size, number, location, and nature of vehicle access points.*
- E. Increasing the amount of street dedication, roadway width or improvements within the street right of way.*
- F. Limiting or otherwise designating the number, size, location, height and lighting of signs.*
- G. Limiting the location and intensity of outdoor lighting and requiring its shielding.*
- H. Requiring diking, screening, landscaping or another facility to protect adjacent or nearby property and designating standards for its installation and maintenance.*
- I. Designating the size, height, location and materials for a fence.*
- J. Protecting and preserving existing trees, vegetation, water resources, wildlife habitat or other significant natural, historic, or cultural resources.*
- K. Other conditions to permit the development of the County in conformity with the intent and purpose of the conditional classification of uses.*

As discussed above, Pattern has failed to update its plant, wildlife, and habitat surveys, and has also failed to disclose and evaluate the best available current science and technologies for avoiding and reducing impacts. Pattern has failed to do so despite the likely changes in conditions at the site caused by the 2018 wildfires. Without this required information, it will be impossible for the Council to craft and adopt appropriate conditions of approval to “minimize . . . environmental effects,” “protect[] and preserv[e] existing trees, vegetation, water resources,

[and] wildlife habitat,” and otherwise ensure compliance with section 5.030 of the Wasco County LUDO. Accordingly, the Request for Amendment 4 should be denied.

**4. The Council must be provided with, and must consider, all written comments received on the record of the hearing before taking any action.**

The Council’s rules state in pertinent part that “the Council . . . shall consider *all* comments received on the record of the hearing” (emphasis added). OAR 345-027-0067(7); *see also* OAR 345-027-0071(1) (referencing the Council’s duty to “consider[] *all* comments received on the record of the public hearing under [OAR] 345-027-0067”) (emphasis added). The Council will not be able to fulfill its mandatory duty to “consider all comments” until it receives copies of *all* written comments received on the record of the hearing.

It appears that the Council has not yet been furnished with copies of all written comments received on the record of the hearing. On February 20, 2019, the Department posted to the EFSC website a [statement](#) that 892 comments had been received, along with a draft index of 323 of those comments and a statement that some of the comments are “identical” or “contain similar content.” Finally, copies of approximately 28 of the 892 comments received as of February 20, 2019 were posted along with the Department’s statement and index.

Thus, it appears that, as of February 20, 2019, only about 3.1% of the 892 comments received at that point had been shared with the Council. In particular, the Department has apparently not provided the Council with copies of purportedly “identical” comments. Nor has the Department posted or provided the Council with any of the names, addresses, or any other identifying information for the persons or entities who submitted these purportedly identical comments.

In order to “consider all comments,” as required by OAR 345-027-0067(7) and 345-027-0071(1), the Council must be provided with copies of “all” written comments, even if the text of multiple comments from different persons or entities are purportedly identical. Until it is provided with copies of all comments, the Council will have no knowledge of who made the comments, where the commenters reside, whether each comment is submitted on behalf of multiple people (*e.g.*, a husband and wife), or whether each comment is submitted on behalf of any entities. The identities, locations, and any affiliations of the commenters is vital information that must be provided to the Council for its consideration. For example, a Council member may personally know one or more of the commenters, or know of a commenter, and thus may have knowledge of that person’s credibility (or lack of credibility).

The Staff Report fails to state any reason—let alone any compelling reason—why these comments have apparently been withheld from the Council to date. All comments must be provided to the Council, both because it is required by the Council’s own rules, and also because each commenter has rights under the federal and state constitutions to due process and to petition the government for a redress of their grievances.

The Department must provide the Council with copies of all written comments received. In addition, the agencies should explain the anticipated process and timeline by which the

Department will do so, and by which Council will conclude its consideration of all comments pursuant to OAR 345-027-0067(7) and 345-027-0071(1). Not until the Council has “considered all comments” will the procedures and timeline for the Department to issue a Proposed Order begin. OAR 345-027-0071(1).

Finally, the agenda for the February 22, 2019 Council meeting shows an “Action Item” for Council action on this Request for Amendment immediately following the public hearing, and the Staff Report states that “[t]he Department recommends Council direct staff to issue the Proposed Order.” It is unclear why this is listed as an action item. In contrast, prior matters in similar postures, such as the Wheatridge Wind Energy Facility (heard by the Council on October 26, 2018) and the Golden Hills Wind Project (heard by the Council on August 24, 2018), were listed on the meeting agendas as information items, rather than action items. The Department and the Council have failed to explain why they apparently intend to process the Summit Ridge matter differently.

Moreover, a vote by the Council directing the Department to issue the Proposed Order is unnecessary and potentially inconsistent with OAR 345-027-0071(1), which governs the process for the issuance of the Proposed Order and which requires the Department to issue it within a specific timeline.

Finally, if the Council *were* to take action directing the Department to issue the Proposed Order before the Council considers “all comments” submitted by the public, such an action would be in violation of OAR 345-027-0067(7) and 345-027-0071(1). The Council should not act prematurely, and should not prejudge, nor imply any prejudgment of, this matter. Even assuming for the sake of argument that it would be appropriate for the Council to direct the Department to issue the Proposed Order, it would need to wait to do so until after the Council completes its consideration of “all comments.” OAR 345-027-0067(7), 345-027-0071(1).

## 5. Conclusion

For these and other reasons, the Council should deny Request for Amendment 4, including the requested third round of extensions of the construction deadlines. If Pattern Energy desires to move forward with this controversial project, it must file a new application, complete with current data and information on the project’s impacts. Please don’t reward Pattern for its delays in proceeding with this project and its failures to disclose and address the project’s current impacts. Please deny the Request for Amendment 4.

Sincerely,



Nathan Baker  
Senior Staff Attorney  
Friends of the Columbia Gorge



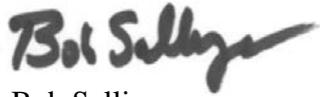
Doug Heiken  
Conservation and Restoration Coordinator  
Oregon Wild



Dan Morse  
Conservation Director  
Oregon Natural Desert Association



Rory Isbell  
Staff Attorney  
Central Oregon LandWatch



Bob Sallinger  
Director of Conservation  
Audubon Society of Portland



Tom Lawler  
President  
East Cascades Audubon Society

# **EXHIBIT A**

U.S. Fish & Wildlife Service  
Letter to Oregon Dept. of Energy  
(Sept. 20, 2010)



# United States Department of the Interior



## FISH AND WILDLIFE SERVICE

Bend Field Office

20310 Empire Ave, Ste A-100

Bend, Oregon 97701

Phone: (541) 383-7146 FAX: (541) 383-76381

Reply To: 6320.0010(10)

File Name: 2010 EFSC ASC Summit Ridge Cmrs 09202010

TS Number: 10-1494

TAILS: 13420-2009-FA-0217

September 20, 2010

Sue Oliver  
Energy Facility Siting Officer  
Oregon Department of Energy  
245 Main Street, Suite C  
Hermiston, OR. 97838

Subject: Request for Comments on the Application for Site Certificate for the proposed Summit Ridge Wind project, Wasco County, Oregon

Dear Ms. Oliver:

The Fish and Wildlife Service (Service) has reviewed the August 24, 2010, Application for a Site Certificate (ASC) for the proposed Summit Ridge Wind Project (Project) to be located in Wasco County, Oregon. The proposed Project will include up to 87 wind turbines (2.0 to 3.0 MW each) with a total nominal generating capacity of approximately 200 MW of electricity. The Project will include about 19 miles of new access roads, turbine foundations, underground and overhead electrical collection systems, meteorological towers, and an operations and maintenance building. The Project will also include a communications system, a substation, and interconnection facilities to tie into the transmission line, located to the west of the project. The transmission feeder line will be an overhead 230 kV (kilovolt) line and will be approximately eight miles long.

Much of the project site is agricultural land used for dry land winter wheat production. The proposed facility would be built on land one to four miles west of the Deschutes River Canyon extending from approximately river mile 7 on the north end of the project boundary to river mile 31 on the south end. The Service supports the use of disturbed habitats for the placement of wind energy generation. However, we remain concerned regarding short and long-term Project impacts to migratory birds including bald and golden eagles, and bats.

The Service supports renewable energy and the economic benefits that wind energy generation brings to local communities. We also recognize wind power development has the potential to impact wildlife and habitat resources. The Service provided comments on the Notice of Intent to Apply for an Energy Facility Site Certificate (NOI) for the Project in a letter dated July 13, 2009, and Preliminary ASC in a letter dated November 18, 2009. We appreciate the opportunity to

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provide additional comments, and we look forward to working with you and LotusWorks on this important project.

Our previous comment letters focused on: (1) the potential for project specific mortality to birds and bats, including cumulative impacts of wind energy projects within the Columbia River corridor; and (2) measures to avoid or minimize Project impacts and adequate mitigation to offset unavoidable project impacts to biological resources. The Service subsequently received information in an email on June 24, 2010, from LotusWorks documenting the presence of golden eagles, large stick nests, and bald eagles in the project vicinity. Our comments below will focus on project impacts to bald and golden eagles and other migratory birds. We refer you to our previous two letters referenced above regarding other issues of concern.

### **Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act**

The Migratory Bird Treaty Act (MBTA) prohibits the taking, killing, possession, and transportation, (among other actions) of migratory birds, their eggs, and nests except when specifically permitted by regulations. While the MBTA has no provision for allowing unauthorized take, the Service realizes that some birds may be killed during specific wind project operations even if all known reasonable, effective measures to protect birds are implemented. The Service's Office of Law Enforcement (OLE) carries out its mission to protect migratory birds through investigations and enforcement as well as by fostering relationships with individuals, companies, and industries that have taken effective steps to avoid take of migratory birds. It is not possible to absolve individuals, companies, or agencies from liability even if they implement bird mortality avoidance or other similar protective measures. However, the OLE focuses its resources on investigating and prosecuting individuals and companies that take migratory birds without identifying and implementing all reasonable, prudent and effective measures to avoid that take.

Additionally, the Bald and Golden Eagle Protection Act (BGEPA) prohibits the taking of golden and bald eagles except when specifically authorized by the Department of the Interior (16 U.S.C. 668-668d). The Service has new regulations (Federal Register 74:46836-46879; 11 September 2009) (USFWS 2009) that may eventually allow a wind project to receive a permit to take golden or bald eagles under the BGEPA (50 CFR 22.26), for programmatic actions that are consistent with the goal of stable or increasing eagle breeding populations. Therefore, we encourage LotusWorks to work closely with the Service to identify available protective measures and develop an Avian and Bat Protection Plan (ABPP) and implement those measures prior to and during Project construction and operation.

The Service's goal for golden and bald eagles is stable or increasing breeding populations. Data from long-term studies of golden eagle migration, population models, and surveys sponsored by the Service indicate cause to be concerned about population trends for golden eagle (Millsap and Allen 2006, Good et al. 2007, Farmer et al. 2008, Smith et al. 2008, USFWS 2009). The Service was sufficiently concerned regarding the status of golden eagles that we determined, until further data shows golden eagle populations can withstand additional take, we will only consider BGEPA permit issuance of new golden eagle take for safety emergencies and for projects that

result in net benefits to golden eagles. Bald eagle permit issuance criteria would limit permits to only 5% of the Maximum Sustainable Yield.

### **Project Impacts and Service Recommendation**

Golden eagles and other bird species are known to collide with wind turbines and transmission lines. Studies for the Project document the presence of golden eagles (12 detections) and three inactive large stick nests that were likely golden eagle nests, with a fourth nest that may have been built by golden eagles. These nests were located within 1,000 to 10,000 feet from Project wind turbines (Northwest Wildlife Consultants, Inc. 2010). Additionally, adult bald eagles were observed (4 detections) on or in proximity to the Project. The Service is concerned regarding the potential for injury or mortality from a turbine strike, transmission line collision, or other Project-related disturbance to bald and golden eagles. The Project studies and reports provide only a limited eagle impact analysis.

With the expected growth of the wind industry in the western United States, the Service anticipates that the number of golden eagles killed annually will multiply. The Service is concerned that the population trend of golden eagle will drop even more rapidly as a result of collisions with wind turbines, resulting in greater conflicts between renewable energy industry and agencies. Ultimately, fewer golden eagles will exist unless we find solutions to either greatly reduce golden eagle mortalities at wind projects, reduce other sources of mortality to offset losses of golden eagles from wind farms, or enhance golden eagle populations with habitat or other reforms.

In the absence of clear solutions to address golden eagle mortalities at wind energy projects, to enhance populations through conservation measures, or to off-set losses in other ways, our best efforts should be directed at avoidance of mortalities by siting wind turbines well away from areas where resident and migrating eagles are known to concentrate their activities. The Service believes the Project, including all turbines, transmission and roads, and associated facilities has the potential to result in injury and mortality of individual golden eagles and potential loss of nest sites over the life of the Project.

The Service recommends that LotusWorks prepare an Avian and Bat Protection Plan consistent with the Service "white paper" titled *Consideration for Avian and Bat Protection Plans* (FWS 2010) that addresses bald and golden eagles, other migratory bird species of concern, and bats. We recommend that the Oregon Department of Energy defer the approval of the Project site certificate until an Avian and Bat Protection Plan is completed, and available for review. We further recommend the following measures be incorporated into any site certificate approval:

To reduce the likelihood of golden eagle take and to minimize Project impacts, we recommend the following measures be included in the development of the Project:

1. Minimize the potential for resident golden eagle collisions by locating individual Project wind turbines a sufficient distance from golden eagle nest sites. Based on the best information available to us, a radius of a minimum of six miles from a golden eagle nest to the nearest turbine will likely avoid take of adult golden eagles associated with that nest. Any wind turbines proposed closer than six miles to golden eagle nests should not

be constructed until specific golden eagle studies have been implemented that define areas where no golden eagle use occurs (see studies in #2, below). These golden eagle-specific data should then be integrated into a protective turbine location “micrositing” design where turbines within six miles of a golden eagle nest are only sited in areas determined to be golden eagle non-use locations;

2. Conduct site specific studies to help define areas of use and non-use by golden eagles including:
  - Complete nest surveys within six miles of the Project location;
  - Conduct observation-post studies to observe the behavior of the adults (if present) without disturbing nesting behavior. These studies collect information on territory occupancy, productivity, fledging success, foraging and winter habitat and other information per the Interim Golden Eagle Inventory and Monitoring Protocols (Pagel et al. 2010); and
  - Satellite telemetry of nesting golden eagles within six miles of Project location.
3. Develop a Project construction plan that fully integrates avoidance of golden eagle disturbance during construction activities by implementing concurrent protective timing windows and distance buffers during sensitive nesting and fledging activities.
  - Distance and timing: Construction and maintenance activities between January 1 and July 15 should not be conducted within 1 mile of an active golden eagle nest (or ½ mile if not line-of-sight), unless site specific surveys indicate otherwise.

The Service has regulations in place that allow us to issue 'Programmatic Permits' to project applicants whose developments have the potential to incidentally 'take' golden eagles over extended periods of time. The Service is not currently issuing those permits, but is developing conditions that will likely be components of them. Permit conditions will likely include, appropriate Advanced Conservation Practices - measures that represent the best available techniques to reduce take to a level where additional take is unavoidable: and permit conditions will also likely include mitigation measures to offset whatever birds are taken so that the effect of the Project on eagles will be consistent with the Service's goal of stable or increasing breeding populations. It is possible that a programmatic permit issued by the Service when it becomes available, would include as permit conditions many of the recommendations for monitoring, adaptive management and conservation actions described below:

1. Develop and implement a golden eagle monitoring plan (including monitoring of Project-related golden eagle mortality, golden eagle territory occupancy, nest success, and productivity) over the life of the Project to ensure all golden eagles injured or killed by wind turbines or other impacts to golden eagles are immediately identified and reported.
2. Develop and implement an adaptive management plan to address new information that is obtained during operation of the Project, including all turbines, transmission, and roads, and connected wind projects that effectively address any identified problems.

- Utilize turbine feathering and cut-in speeds of 5 m/sec to 6 m/sec at times of low wind speed to reduce bird (and bat) fatalities;
- Lock rotors during daytime and at night during peak migration periods and peak presence of migrating birds and bats;
- Specific commitment to integrate turbine operation curtailment (seasonally or permanently) into Project management to minimize impacts to bald and golden eagles;
- Specific commitment to remove turbines if they are found to cause repeated mortalities of golden or bald eagles;
- Experimental procedures (e.g. blade painting for higher visibility);
- Minimize lighting associated with the Project including:
  - a) FAA visibility lighting of wind turbines should employ only strobed, strobe-like, or blinking incandescent lights, preferably with all lights illuminating simultaneously; and
  - b) Keep lighting at both operation and maintenance facilities and substations located within ½ mile of the turbines to a minimum level by using motion or infrared light sensors and switches to keep lights off when not required; shield operation lights downward, and do not use high intensity, steady burning, bright lights; and
- Commitment to implement future technology when available.

Additionally, specific conservation actions should be collaboratively developed with the Service to meet the conservation goal of stable or increasing breeding populations of golden and bald eagles. The Service cannot permit take of golden eagles; however were we able to, we would look for the types of measures identified below to potentially offset such take in a manner that is consistent with the goal of stable or increasing breeding populations of golden eagles. The local-area eagle population of concern in this case is the area encompassed by a circle 140 miles from the Project boundary, by definition (USFWS 2009). This is the area within which we would expect evaluations of the effects of this Project on eagles would take place. The following should guide any collaborative development of proposed conservation measures:

- Ensure no net loss or an increase in golden eagles in the local-area population via:
  - Land acquisitions or easement purchases;
  - Nest site protection;
  - Habitat enhancement via:
    - Restoration projects (e.g. juniper removal in shrub-steppe systems that will enhance prey base);
    - Grassland restoration efforts with native grasslands;
    - Cheatgrass control programs;
    - Nest platforms;
    - Nest enhancements;
  - Reduce electrocution mortality via partnering with utilities to implement Avian Power Line Interaction Committee standard (APLIC 2006) retrofits of problem distribution lines;
  - Reduce losses to lead poisoning via:
    - Education program on lead poisoning;

- Raptor rehabilitation centers;
- Contribute to regional or population-wide monitoring and research on golden eagles and wind turbines to better inform management across the West.

***Conclusion***

The Service appreciates the opportunity to comment on the ASC for the Summit Ridge Wind Project. We support well-designed wind projects that are carefully sited on habitats that will result in less impacts to Service trust resources. We recommend that the Oregon Department of Energy defer the approval of the Project site certificate until an Avian and Bat Protection Plan is completed, and available for review. We further recommend the measures outlined in this letter be incorporated into any site certificate approval. The Service is available to continue to work with LotusWorks in the review, development, mitigation, and monitoring of the Project.

If you have any questions regarding the Service's comments or desire to meet with us to discuss these issues further, please contact Jerry Cordova or me at (541) 383-7146.

Sincerely,



Nancy Gilbert  
Field Supervisor

cc:

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## References

- Avian Power Line Interaction Committee (APLIC). 2006. Suggested practices for avian protection on power lines: the state of the art in 2006. Edison Electric Institute, APLIC, and the California Energy Commission, Washington, D.C. and Sacramento, CA.
- Farmer, C.J., L.J. Goodrich, E. Ruelas Inzunza, and J.P. Smith. 2008. Conservation status of North America's birds of prey. Pp. 303 – 420 *In* K.L. Bildstein, J.P. Smith, E. Ruelas Inzunza and R.R. Veit (eds.). State of North America's birds of prey. Series in Ornith. # 3, Nuttall Ornith. Club and the Am. Ornith. Union.
- Good, R.E., R.M. Nielson, H. Sawyer, and L.L. McDonald. 2007. A population estimate for golden eagles in the western United States. *J. Wildl. Manage.* 71:395-402.
- Millsap, B.A., and G.T. Allen. 2006. Effects of falconry harvest on wild raptor populations in the United States: theoretical considerations and management recommendations. *Wildl. Soc. Bull.* 34:1392-1400.
- Northwest Wildlife Consultants, Inc. (NWC) 2010. Ecological Baseline Studies and Impact Assessment for the Summit Ridge Wind Power Project, Summit Ridge Wind Power Project. March 22, 2010. Pendleton, OR. and Goldendale, WA. 85 pages.
- Northwest Wildlife Consultants, Inc. (NWC) 2010. Summit Ridge Wind Project Habitat Mitigation Plan, Summit Ridge Wind Power Project. March 30, 2010. Pendleton, OR. and Goldendale, WA. 4 pages.
- Northwest Wildlife Consultants, Inc. (NWC) 2010. Summit Ridge Wind Project Wildlife Monitoring and Mitigation Plan, Summit Ridge Wind Power Project. March 30, 2010. Pendleton, OR. and Goldendale, WA. 9 pages.
- Pagel, J.E., D.M. Whittington, and G.T. Allen. 2010. Interim Golden Eagle technical guidance: inventory and monitoring protocols; and other recommendations in support of eagle management and permit issuance. Division of Migratory Bird Management. US. Fish and Wildlife Service.
- Smith, J.P., C.J. Farmer, S.W. Hoffman, G.S. Kaltenecker, K.Z. Woodruff, and P.F. Sherrington. 2008. Trends in autumn counts of migratory raptors in western North America. *In* K.L. Bildstein, J.P. Smith, E. Ruelas Inzunza and R.R. Veit (eds.). pp 217-254. State of North America's birds of prey. series in Ornith. # 3, Nuttall Ornith. Club and the Am. Ornith. Union.
- U.S. Fish and Wildlife Service (FWS) 2009. Federal Register - 44. 74 FR 46836, Rules and regulations, Department of the Interior (DOI) United States Fish and Wildlife Service (FWS), 50 CFR Parts 13 and 22, [FWS-R9-MB-2008-0057; 91200-1231-9BPP-L2] RIN

1018-AV81, eagle permits; take necessary to protect interests in particular localities, part II, action: final rule. September 11, 2009.

U.S. Fish and Wildlife Service. 2010. Considerations for Avian and Bat Protection Plans. U.S. Fish and Wildlife Service White Paper. 11 pages.