

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

FRIENDS OF THE COLUMBIA
GORGE, OREGON WILD, and
CENTRAL OREGON LANDWATCH,

Petitioners,

v.

OREGON DEPARTMENT OF
ENERGY; SUMMIT RIDGE WIND,
LLC; AYPower LLC; and
SUMMIT RIDGE WIND HOLDINGS,
LLC,

Respondents.

) Case No. 20CV35596

) **AMENDED PETITION FOR JUDICIAL
REVIEW**

) (Oregon Administrative Procedures Act,
ORS ch. 183)

) [Filing Fee Authority: ORS 21.135(1),
(2)(e)]

) **NOT SUBJECT TO MANDATORY
ARBITRATION**

INTRODUCTION

1.

This Petition is filed pursuant to the Oregon Administrative Procedures Act (“APA”), ORS Chapter 183, and the Oregon Energy Facility Siting Act (“Siting Act”), ORS Chapter 469. Petitioners allege that Respondent Oregon Department of Energy (“ODOE” or “Department”) erred when it determined that Respondents Summit Ridge Wind, LLC (“SRW”), Aypa Power LLC (“Aypa”), and/or Summit Ridge Wind Holdings, LLC (“SRW Holdings”) lawfully began construction of the Summit Ridge Wind Farm (“Facility”), an unbuilt wind energy generation facility that would be located in Wasco County, Oregon. This case arises under and alleges violations of the Siting Act and its implementing regulations as well as prior agency orders issued under these authorities, and is subject to judicial review pursuant to the APA.

///

///

1 **PARTIES**

2 2.

3 Petitioner FRIENDS OF THE COLUMBIA GORGE (“Friends”) is a nonprofit Oregon
4 corporation with approximately 6,500 members. Friends’ mission is to vigorously protect the
5 scenic, natural, cultural, and recreational resources of the Columbia River Gorge. Friends fulfills
6 this mission by ensuring strict implementation of the Columbia River Gorge National Scenic
7 Area Act and other laws protecting the region of the Columbia River Gorge; promoting
8 responsible stewardship of Gorge land, air, and waters; encouraging public ownership of
9 sensitive areas; educating the public about the unique natural values of the Columbia River
10 Gorge and the importance of preserving those values; and working with groups and individuals
11 to accomplish mutual preservation goals.

12 3.

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

21 4.

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

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

3 5.

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

9 6.

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

13 7.

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

17 8.

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

21 **JURISDICTION AND VENUE**

22 9.

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

THE PROJECT AT ISSUE

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

10.

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

11.

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

12.

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

13.

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

14.

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

15.

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

1 be sited any closer than six miles from a golden eagle nest, except for in “non-use locations.”
2 The USFWS also recommended that turbine operations should be shut down during peak
3 migration periods and that turbine lighting should be minimized to protect eagles.

4 16.

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

7 17.

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

11 18.

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

15 19.

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

18 20.

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

21 21.

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

26 ///

27 ///

1 22.

2 In a November 28, 2018 letter, the Oregon Department of Fish and Wildlife (“ODFW”)
3 raised concerns about the significant length of time that had passed since the Facility was first
4 proposed, and expressed a need to reevaluate and update the analyses of the Facility’s impacts on
5 wildlife and habitat and to reexamine the potentially available mitigation measures. In that letter,
6 ODFW noted that it had been more than ten years since the Facility was first applied for and that
7 since then, appropriate practices and approaches had evolved based on new science as well as
8 ODFW’s experience with existing wind projects once they had become operational. ODFW also
9 expressed concerns that the proposed habitat mitigation parcels may no longer meet the original
10 intent for mitigation as outlined in the original mitigation plan for the Facility.

11 23.

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

20 24.

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

24 25.

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

27 ///

1 26.

2 On August 16, 2018, three days before the then-applicable construction start deadline,
3 SRW submitted an application (“Request for Amendment 4” or “RFA4” or “Request for
4 Amendment”) to amend the Site Certificate by extending the construction deadlines for a third
5 time. In the Request for Amendment, SRW proposed to extend the construction start deadline by
6 two years, to August 19, 2020, and to extend the construction completion deadline by two years,
7 to August 19, 2023. EFSC ultimately approved the RFA4 and amended the Site Certificate, thus
8 extending the deadline to begin construction of the Facility to August 19, 2020.

9 27.

10 Pattern sold all of its interests in SRW and the Facility to Aypa on or about August 3,
11 2020. According to Aypa, since that date, Aypa has had sole ownership of both SRW and the
12 Facility.

13 28.

14 However, according to its business entity records filed with the Oregon Secretary of
15 State, SRW Holdings also purports to hold an “interest” in the Facility.

16 29.

17 On August 21, 2020, Aypa notified ODOE by letter of its acquisition of Pattern’s
18 interests in SRW and the Facility.

19 30.

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

22 31.

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

1 32.

2 Prior to the August 19, 2020 deadline to commence construction of the Facility, SRW
3 failed to comply with numerous conditions of approval of the Site Certificate that, by their own
4 terms and pursuant to the applicable law, were required to be satisfied prior to commencing
5 construction of the Facility.

6 33.

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

17 34.

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

26 ///

27 ///

1 35.

2 Upon information and belief, SRW has withdrawn or cancelled its previously filed
3 application with the Bonneville Power Administration (“BPA”) to connect the Facility to the
4 regional power grid at a BPA substation. In its Congressional budget for fiscal year 2021, BPA
5 listed the Facility as “cancelled” as of 2019, and listed “no planned capital projects” for the
6 Facility in either 2020 or 2021.

7 36.

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

10 37.

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

19 38.

20 On August 20, 2020, Petitioners sent ODOE a complaint letter regarding the Facility.
21 Among other things, Petitioners alleged in this complaint letter that construction of the Facility
22 had not been lawfully commenced by the August 19, 2020 deadline and requested that ODOE
23 confirm that the Site Certificate had expired and was terminated.

24 39.

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

1 **THE AGENCY ORDERS AT ISSUE**

2 40.

3 This appeal challenges three agency Orders issued by ODOE, on August 10, 2020;
4 August 21, 2020; and September 10, 2020.

5 41.

6 On August 10, 2020, ODOE issued and served upon various company representatives for
7 SRW Holdings, Pattern, Aypa, and Gardner Infrastructure Advisors, LLC copies of an Order
8 entitled “Preconstruction Compliance Evaluation for Summit Ridge Wind Farm Site Certificate.”
9 In this Order, ODOE acknowledged the receipt of and evaluated “several compliance submittals
10 from July 6 through August 6, 2020 for general and preconstruction site certificate conditions
11 imposed in the [Site Certificate] identified as applicable to Phase 1 construction.” In this Order,
12 ODOE described a purported “Phase 1 construction” as “includ[ing] improvements to
13 approximately 0.8 miles of existing road.” The Order “confirms that, at this time, sufficient
14 information has been provided to satisfy the intent of the applicable conditions” but also
15 concludes that “there are several conditions pending complete compliance verification.” The
16 Order includes an Attachment 1, in which ODOE evaluated numerous conditions of the Site
17 Certificate and determined whether each condition had or had not been met. In Attachment 1,
18 ODOE also purported to waive compliance with numerous pre-construction conditions as “not
19 applicable to Phase 1.”

20 42.

21 The “Phase 1” construction concept (defined in the August 10, 2020 Order as consisting
22 of “approximately 0.8 miles of existing road”) was neither proposed by SRW in the initial
23 application for the Site Certificate, nor proposed in any subsequent requests for amendments to
24 the Site Certificate. Nor was the “Phase 1” construction concept referenced in or approved by the
25 Site Certificate, EFSC’s various amendments thereto, or any of EFSC’s Final Orders regarding
26 the Facility.

27 ///

1 43.

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

5 44.

6 On August 21, 2020, ODOE issued and served upon various company representatives for
7 SRW Holdings, Pattern, Aypa, and Gardner Infrastructure Advisors, LLC an Order, also entitled
8 “Preconstruction Compliance Evaluation for Summit Ridge Wind Farm Site Certificate.” This
9 Order acknowledges the receipt of and evaluates “several compliance submittals from July 6
10 through August 18, 2020 for general and preconstruction site certificate conditions imposed in
11 the amended Summit Ridge Wind Farm site certificate.” The Order “review[s] . . . all general
12 and preconstruction site certificate conditions and confirms that sufficient information has been
13 provided to satisfy all condition requirements applicable to Phase 1.” The Order includes an
14 Attachment 1, in which ODOE evaluated numerous conditions of the Site Certificate and
15 determined whether each condition had or had not been met. In Attachment 1, ODOE also
16 purported to waive compliance with numerous pre-construction conditions as “not applicable to
17 Phase 1.” This Order also states that ODOE “received notice of Phase 1 construction
18 commencement on August 6, 2020.” The Order concludes that “because information and
19 materials submitted by the certificate holder for general and preconstruction conditions
20 applicable to Phase 1 have been reviewed by [ODOE] and determined sufficient to satisfy the
21 requirements, and construction commenced prior to the August 19, 2020 deadline, the
22 Department confirms that the site certificate has been activated.”

23 45.

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

26 ///

27 ///

1 46.

2 On September 10, 2020, ODOE issued and served upon Petitioners, through their
3 attorney, a copy of an Order entitled “ODOE Response to Complainants’ August 20, 2020 Letter
4 re: Violations of Summit Ridge Wind Farm Site Certificate Conditions and Applicable Laws.”
5 Among other things, this Order concludes that “[i]t is not necessary [for SRW] to meet all
6 preconstruction requirements of [various conditions of the Site Certificate] for the entirety of the
7 facility footprint,” that SRW was only “required to satisfy preconstruction conditions applicable
8 to Phase 1, which included improvements to a private road,” that “[o]n August 3, 2020,
9 certificate holder provided a contract scope of work demonstrating that the cost of road work
10 exceeded \$259,000 . . . , which [ODOE] considers substantial, consistent with the definition of
11 construction,” and that ODOE “does not have any evidence or reason to believe that the road
12 modifications designed to support the loads of wind-turbine related construction vehicles would
13 be needed for any other purpose than solely to serve the energy facility.” The Order concludes by
14 “maintain[ing]” ODOE’s prior conclusions in its previous Orders that “preconstruction
15 conditions applicable to Phase 1 activities had been satisfied and the site certificate was
16 activated.”

17 **THE NATURE OF THE PETITIONERS’ INTERESTS**

18 47.

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

1 48.

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

13 **ADVERSE EFFECTS ON PETITIONERS**

14 49.

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

1 contained therein, adversely affect or aggrieve Petitioners' interests in ensuring the protection of
2 resources, including the scenic, recreational, and wildlife resources threatened by this Facility.

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

5 **CLAIM FOR RELIEF**

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

7 50.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 (q) By erroneously concluding that one or more of the conditions of the Site
16 Certificate have not been violated, including but not limited to Conditions 2.10, 6.1, 6.31, 8.2,
17 8.4, 9.1, 10.1, 10.6, 11.4, 11.6, and 15.0;

18 (r) By failing to determine that the Site Certificate has expired and must be
19 terminated;

20 (s) By erroneously determining that the Site Certificate has been "activated";

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

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

25 (v) By acting in ways as yet unknown to Petitioners that violated the applicable
26 statutes, rules, Site Certificate, and EFSC Final Orders.

27 ///

1 51.

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

6 52.

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

9 **REQUESTED RELIEF**

10 WHEREFORE, Petitioners request that this Court, exercising its authority under ORS
11 183.480, 183.484, 183.486, 183.497, and 469.563,

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

17 2. Set aside and reverse or remand each or all of the challenged Orders;

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

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

21 5. Award Petitioners their reasonable attorney fees and costs; and

22 6. Award Petitioners such other relief as the Court deems just and equitable.

23 DATED: February 25, 2020

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

25 /s/ Karl G. Anuta

26 Karl G. Anuta, OSB #861423

27 Email: kga@integra.net

Attorney for Petitioners and Trial Attorney

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

REEVES, KAHN, HENNESSY & ELKINS

/s/ Gary K. Kahn

Gary K. Kahn, OSB #814810

Email: gkahn@rke-law.com

Attorney for Petitioners

FRIENDS OF THE COLUMBIA GORGE

/s/ Nathan J. Baker

Nathan J. Baker, OSB #001980

Email: nathan@gorgefriends.org

Senior Staff Attorney for Petitioner Friends

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the date set forth below, I served a true and accurate copy of the
3 foregoing AMENDED PETITION FOR JUDICIAL REVIEW via USPS mail on the following
4 person listed below at the following mailing address:

5
6 Sadie Forzley
7 Oregon Department of Justice
8 100 SW Market St.
9 Portland, OR 97201
10 *Attorney for Respondent*

11 DATED: February 25, 2021

12 */s/ Gary K. Kahn*
13 _____
14 Gary K. Kahn, OSB #814810
15 Attorney for Petitioners
16
17
18
19
20
21
22
23
24
25
26
27