



# Oregon

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**To:** Energy Facility Siting Council

**From:** Kathleen Sloan, Senior Siting Analyst

**Date:** July 5, 2023

**Subject:** Agenda Item G (Information & Action Items): Nolin Hills Wind Power Project – Council Review of Proposed Order; Proposed Contested Case Order, Exceptions and Responses; and Material Change Hearing for the July 17-19, 2023 EFSC Meeting

**Attachments:** Attachment 1: [Staff Report on Draft Proposed Order on ASC \(via hyperlink\)](#)  
Attachment 2: Proposed Order on ASC  
Attachment 3: Proposed Contested Case Order, Exceptions and Responses

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## AGENDA ITEM OVERVIEW

This agenda item will include the following:

- 1.a) Proposed Order Review – Council will initiate review of the Proposed Order on the Application for Site Certificate (ASC), excluding issues evaluated in the contested case proceeding.<sup>1</sup> Council will conduct an informal vote (straw poll) to preliminarily determine whether to affirm, reject or modify staff’s recommended findings of facts, conclusions of law and conditions of approval from the Proposed Order.
- 2) Overview of the Council appointed Hearing Officer’s (an Administrative Law Judge (ALJ) with the Oregon Office of Administrative Hearings) Proposed Contested Case Order (PCCO) – Council’s Counsel from the Oregon Department of Justice will provide a brief overview of the contested case process and proceeding, and will present a summary of the findings, legal analysis and conclusions of the ALJ’s PCCO.
- 3) Exceptions Hearing – Council will conduct a hearing on exceptions filed on the PCCO. Umatilla County will be provided an opportunity to briefly summarize arguments raised in their written exceptions to the PCCO. Nolin Hills Wind, LLC (applicant) and the Department will be provided an opportunity to briefly summarize their written responses to Umatilla County’s exceptions. Council will receive oral testimony from all parties based on an established grouping of issues/topics, as presented in the July 19, 2023 EFSC agenda and below in this staff report. All parties will be subject to time limits established by the Council. Council will conduct a straw poll on each issue group to

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<sup>1</sup> The contested case proceeding evaluated issues under the Land Use standard. Therefore, Council review of the applicant’s ability to comply with the Land Use standard will occur after the exceptions hearing.

either affirm, reject, or modify the PCCO’s findings of facts, legal analysis, or conclusions of law.

- 1.b) Proposed Order Review – Council will continue its review of the Proposed Order, specifically review of the Land Use standard.
- 4) Material Change Hearing (if applicable) – If, based on the straw polls referenced above, Council proposes material changes to the Proposed Order or PCCO, each party in the contested case proceeding will be allowed time to comment on the material changes. Material changes are changes to recommended actions, including changes to a recommended finding that an applicant has/has not complied with a particular standard and recommended conditions of approval.
- 5) Hearing to Adopt Final Order - Council will consider the oral testimony from the Material Change Hearing (if applicable) and issue a Final Order on the ASC, either approving or rejecting the ASC based upon the standards adopted under ORS 469.501 and any additional statutes, rules or local ordinances determined to be applicable to the facility by the project order, as amended. ORS 469.370(7) and ORS 469.370(9).

**PROPOSED FACILITY OVERVIEW**

The Nolin Hills Wind Power Project is a proposed wind and solar energy generation facility with a nominal generating capacity of approximately 600 megawatts (preliminarily 340 MW from wind and 260 MW from solar), located within a site boundary of approximately 48,196 acres of private land, primarily within lands zoned as exclusive farm use (EFU). Proposed related or supporting facilities include two 230 kilovolt (kV) transmission lines, two substations, an operations and maintenance building, a battery energy storage system (BESS), electrical collection system (underground and overhead collector lines), access roads, and up to three meteorological towers. The facility is proposed to be located in Umatilla County, south of I-84, approximately 4 miles south of Echo and 10 miles west of Pendleton. Nolin Hills Wind, LLC, a subsidiary of Capital Power Corporation, is the applicant.

**PROCEDURAL HISTORY**

The ASC procedural history is presented below.

**Nolin Hills Wind Power Project ASC Procedural History Summary**

<b>Milestone</b>	<b>Responsible Party</b>	<b>Date</b>
Preliminary ASC filed	Applicant	2/28/20
Complete ASC filed	Applicant	1/31/22
Draft Proposed Order/Public Notice issuance	ODOE	4/19/22
Draft Proposed Order Public Hearing	ODOE	4/19/22 – 5/26/22, 6/24/22 for applicant
Council’s Draft Proposed Order Review	Council	06/24/22
Proposed Order/Public Notice/Notice to Eligible Participants of Opportunity to Request a Contested Case issuance	ODOE	08/04/22
Contested Case Proceeding on the Proposed Order	Hearing Officer	8/22/22 – 6/27/23

## PROPOSED ORDER REVIEW

Council reviewed the Draft Proposed Order on the ASC (DPO), including issues raised in comments received on the record of the DPO public hearing, at the June 24, 2022 EFSC meeting. The DPO and staff report prepared to support Council's review of the DPO is provided as [Attachment 1](#) to this staff report. Following Council's DPO review, the Department issued its Proposed Order, which is provided in Attachment 2 of this staff report. All changes made between the DPO to the Proposed Order are presented in red-line format, and includes changes based on Council comments under the Organizational Expertise and Land Use standards, as summarized below. There were no substantive changes made between the DPO to Proposed Order for the following standards:

- General Standard of Review
- Structural Standard
- Soil Protection
- Protected Areas
- Retirement and Financial Assurance
- Fish and Wildlife Habitat
- Threatened and Endangered Species
- Scenic Resources
- Historic, Cultural and Archeological Resources
- Recreation
- Public Services
- Waste Minimization
- Public Health and Safety Standards for Wind Energy Facilities
- Cumulative Effects Standard for Wind Energy Facilities
- Siting Standards for Transmission Lines
- Noise Control Regulation
- Removal Fill Law
- Water Rights

### IV.B. ORGANIZATIONAL EXPERTISE: OAR 345-022-0010 (Pages 42-49)

On the record of the DPO hearing, a Council member raised an issue regarding the Organizational Expertise standard, questioning Council's reliance on the applicant's parent company, Capital Power Corporation, for financial assurance to develop, construct, operate and retire the facility – when it was the applicant that submitted the ASC and there was no guarantee or otherwise provided in the ASC from the parent company acknowledging the representations in the ASC and the applicant's heavy reliance on the parent company's financial stability to meet the standard.

In responses to these comments, the applicant provided testimony and a written "firm statement" from its parent company. In the Proposed Order, the Department presented additional recommended findings of fact from the applicant's testimony and parent company letter, as follows:

- Capital Power Corporation has been a corporation since 1896 and is a publicly traded company on the Toronto Stock Exchange, with shareholders and over 870 employee in Canada and the US.
- Capital Power Corporation has a Standard & Poor (or S&P) "investment rating" which is only given to companies considered financially solid – the investment rating is BBB-.
- Capital Power Corporation owns 15 operational, wind and solar energy projects in North America (eight in the United States, and seven in Canada), ranging from 15 MW – 201.6 MW, totaling 1,441.6 MWs).

- Capital Power Corporation, as the parent company to the LLC, is the entity that would fund the construction, operation and retirement of the proposed facility.
- Capital Power Corporation’s Senior Vice President and Chief Legal, Development and Commercial Officer Christopher Kopecky that Capital Power “stands behind” the project and has “committed to providing the financial assurance outlined in Exhibit M of the Application and the human capital and expertise outlined in Exhibit D..”.
- The statement also affirmed that “Capital Power has the financial wherewithal and expertise to develop, construct, own and operate the Project.”

Based upon these additional recommended findings of fact, the Department recommended Council impose the following new condition (Proposed Order, pages 43-44):

**Recommended Organizational Expertise Condition 1 (PRE):** Prior to construction, the certificate holder shall submit to the Department a guarantee signed by its parent company guaranteeing payment and performance of the certificate holder’s obligations under the site certificate using the form:

- a. Provided in Final Order on ASC Attachment F; or
- b. Substantially similar to Final Order on ASC Attachment F, if approved by the Department in consultation with the Department’s legal counsel at the Oregon Department of Justice.

IV.E. LAND USE: OAR 345-022-0030 (Pages 65-164)

On the record of the DPO hearing, issues were raised under the Land Use standard by the applicant, Umatilla County and Council. Issues raised by Umatilla County were further evaluated in the contested case proceeding, and are not presented in this section of the staff report as they will be further reviewed by Council through the exceptions hearing.

The applicant presented arguments to the Department’s approach in evaluating the “reasons” provided for the Goal 3 exception request. In the DPO, the Department evaluated each reason and supporting facts individually, to weigh the merits of each part. The applicant argued that the “reasons” and supporting facts were to be evaluated holistically, not separately. The Department did not agree and did not make changes in the Proposed Order.

On the record of the DPO hearing, Council members expressed concern that the applicant’s “reasons” provided for the Goal 3 exception request were not site specific and could be applied to any site. As a result, the Department recommended Council find that the site specific parameters contributing to the “locational dependency” reason included that the site offered the ability to design, construct and operate both a utility-scale wind AND solar facility. To ensure that this “locationally dependent” factor associated with the site is realized, the Department recommended Council impose the following condition:

**Recommended Land Use Condition 16 (PRE):** Prior to construction of solar photovoltaic energy generation components, the certificate holder shall document that turbine strings with a minimum of 50 MW generation capacity be constructed in close proximity to the proposed solar site and that the wind and solar facility components will share the northern project substation and any existing roads during construction and operation.

Documentation of the combination of wind and solar energy generation components, at final design, shall be submitted to the Department or Council for review and approval, per (a) or (b) as applicable:

- a) If construction of wind energy generation components will commence within the same 12-month period as solar energy generation components, certificate holder shall submit to the Department final facility design documents and executed contracts (e.g., construction contract, Power Purchase Agreement) or other evidence that shows a minimum of 50 MW within turbine strings in close proximity to the solar site will be constructed and that the wind and solar facility components will share the northern project substation and any existing roads during construction and operation; or
- b) If commencement of wind energy generation components will occur more than 12-months after solar energy generation components, certificate holder shall submit to Council, for review at a regularly scheduled Council meeting, facility design documents and executed contracts (e.g., construction contract, Power Purchase Agreement) or other evidence that demonstrates to Council's satisfaction that turbine string with a minimum of 50 MW generation capacity will be constructed in close proximity to the solar site and that the wind and solar facility components will share the northern project substation and any existing roads during construction and operation prior to the construction completion deadline.

### **PROPOSED CONTESTED CASE ORDER, EXCEPTIONS AND RESPONSES**

The parties to the contested case proceeding include: Umatilla County, applicant and the Department. The issues granted in the contested case proceeding include:

**Issue 1:** Whether the County's land use regulation UCDC 152.616(HHH)(6)(a)(3) ("Criterion (3)," requiring a two-mile setback between wind turbines and rural residences on EFU-zoned land) constitutes "applicable substantive criteria" within the meaning of OAR 345-022-0030(3) that apply to the Project.

**Issue 1.1:** If so, whether the Project complies with UCDC 152.616(HHH)(6)(a)(3)

**Issue 2:** Whether the Project is required to obtain a conditional use permit from the County.

On May 12, 2023, the HO issued the PCCO, with the following rulings:

**Issue 1:** Criterion (3) is not an applicable substantive criterion under ORS 469.504 and OAR 345-022-0030(3) because it is not required by the statewide planning goals.

**Issue 1.1:** ..it is immaterial to Council's review under the Land Use standard whether the Project complies with Criterion(3).

**Issue 2:** All parties agree that the Project requires a conditional use permit..and the Department included, as recommended Land Use Condition 1, that the requirement that, prior to construction, applicant obtained conditions use permits and zoning permits from the County.

Umatilla County filed 9 exceptions to the PCCO (as presented in the table below); applicant and the Department responded. The PCCO, exceptions and responses are provided in Attachment 3 of this staff report. To support Council’s review of issues raised in exceptions, oral testimony on exceptions and responses will be received in the following order, which groups common subjects or themes:

- Procedural/other: Exception B.iv (Umatilla County Exceptions, pg 16) – whether HO’s Issues Order statement that deciding whether Criterion (3) is an applicable substantive criteria is not within Council’s authority is binding and whether that statement had to be appealed, under an appeal process that has already passed.
- Interpretation of “applicable substantive criteria” and whether the 2-mile setback meets the definition: Exceptions B.ii and B.iii (Umatilla County Exceptions, pg. 13 and 15)
- Whether the UEC Cottonwood transmission line is a related or supporting facility that crosses more than 3 zones, thereby authorizing Council review under ORS 469.504(5): Exceptions A.i, A.ii; B.v, B.i, B.vii and B.vi (Umatilla County Exceptions, pgs. 10, 20, 11 and 21)

**Exception Summary Table and Hearing Order**

No. <sup>1</sup>	Exception
<b>Procedural – intent/appeal process on ALJ Issues Order</b>	
B.iv. (pg. 16)	Relatedly, the ALJ in their Order on Petitions for Party Status and Issues for Contested Case Order (“Issues Order”) has already decided that whether Criterion (3) is an applicable substantive criterion is not within the Council’s authority. There is a specific seven (7)-day period of time for filing objections to the Issues Order and none were filed. OAR 345-015-0016(6). That means, as a matter of law, the PCCO misconstrues applicable law by deciding that Criterion (3) is not an applicable substantive criterion.
<b>Applicable substantive criteria – interpretation/SAG and Council authority</b>	
B.ii. (pg.13)	UCDC 152.616(HHH)(6)(a)(3) (“Criterion (3)”) is an “applicable substantive criterion” under ORS 469.504 and OAR 345-022-0030(3) and the PCCO erroneously asserts that it is not an “applicable substantive criterion” because it is not required by the statewide planning goals. PCCO, p. 14.
B.iii. (pg. 15)	ODOE and EFSC do not have jurisdiction to review or reverse the special advisory group’s identification of Criterion (3) as an applicable substantive criterion.
<b>Council authority to choose level of land use review (applicable sub criteria, statewide planning goals, or combination) when related or supporting facility crosses more than 3 zones.</b>	
A.i. (pg. 10)	The Proposed Facility would not pass through more than three zones, including Umatilla County’s Agri-Business zone. The PCCO, p. 6, Finding of Fact #12 to the contrary is wrong and is not supported by substantial evidence. The record does not support the PCCO findings (PCCO, p. 30-31) that conclude that the UEC Cottonwood transmission line is a related or supporting facility (a “facility”) to the proposed wind and solar energy facilities.
A.ii. (pg. 10)	The UEC Cottonwood Transmission Line Alternative is not a “related or supporting facility” to the proposed wind energy facility or solar energy facility and the County did cite evidence in the record establishing this fact. PCCO Finding of Fact #16.
B.v. (pg. 20)	The UEC Cottonwood transmission line is not a “related or supporting facility” that passes through more than three zones, as a matter of law.
B.i (pg. 11)	Related to the exception to the erroneous finding of fact described in section (II)(A)(ii) immediately above, the PCCO misconstrues applicable law by shifting the burden of proof to the County. The applicant carries the burden of proof. The PCCO misconstrues applicable law by deciding that the County did not show that the UEC Cottonwood line is not a related or supporting facility. The burden of proving that fact belongs to the applicant. There is at the least a genuine issue of material fact regarding whether the Cottonwood line is a related or supporting facility. That means as a matter of law that summary determination on that issue misconstrued applicable law. OAR 137-003-0580(6)(a).

**Exception Summary Table and Hearing Order**

<b>No.<sup>1</sup></b>	<b>Exception</b>
B.vii (pg. 21)	The PCCO misconstrues applicable law in determining that MSD is appropriate in favor of ODOE and the applicant. MSD is only appropriate if there are no genuine issues of fact and the applicant has carried its burden to demonstrate compliance with all applicable standards. Neither is the case here.
B.vi (p. 21)	The PCCO determination that even if Criterion (3) is an applicable substantive criterion, that the Council is authorized to ignore it and approve the proposal anyway under ORS 469.504(1)(b)(B) notwithstanding that the Proposed Facility does not comply with Criterion (3), misconstrues applicable law.
<p>Notes:</p> <ol style="list-style-type: none"> <li>1. The alpha-numeric reference and page numbers are from Umatilla County's exceptions filed to the PCCO, as provided in Attachment 3 of this staff report.</li> </ol>	



**ATTACHMENTS:**

Attachment 1: [Staff Report on Draft Proposed Order on ASC \(via hyperlink\)](#)

Attachment 2: Proposed Order on ASC

Attachment 3: Proposed Contested Case Order, Exceptions and Responses