



ENERGY FACILITY SITING COUNCIL

Energy Facility Siting Council Meeting Minutes May 26-27, 2022

- A. Consent Calendar (Action Item & Information Item)¹
- B. Nolan Hills DPO Hearing (Hearing)²
- C. Port Westward Renewable Fuels Project, Council Review of Site Certificate Exemption Request (Action Item)³
- D. Public Comments Period⁴
- E. Protected Areas, Scenic Resources, and Recreation Standards Rulemaking (Action Item)⁵
- F. Update on Oregon Public Utility Commission's Certificate of Public Convenience and Necessity Rulemaking (Information Item)⁶
- G. Wildfire Prevention and Response Rulemaking (Action Item)⁷

The meeting materials presented to Council are available online at:

<https://www.oregon.gov/energy/facilities-safety/facilities/Pages/Council-Meetings.aspx>

Call to Order: The meeting was called to order on Thursday May 26, 2022, at 5:30 PM by Vice-Chair Howe.

Roll Call: Chair Marcy Grail, Vice-Chair Kent Howe, Council Members Hanley Jenkins, Cynthia Condon and Jordan Truitt were present.

Oregon Department of Energy representatives present were Assistant Director for Siting/Council Secretary, Todd Cornett; Senior Policy Advisor, Sarah Esterson; Operations and Policy Analyst, Wally Adams; Siting Policy Analyst and EFSC Rules Coordinator, Christopher M. Clark; Senior Siting Analyst, Kate Sloan; and Administrative Specialist, Nancy Hatch. Oregon Department of Justice Senior Assistant Attorney General Patrick Rowe, counsel to EFSC, was also present.

Agenda Modifications were not requested.

- A. **Consent Calendar (Action Item & Information Item)**⁸– Approval of April 22, 2022 meeting minutes; Council Secretary Report; and other routine Council business.

Consideration of the April 22, 2022, Meeting Minutes

¹ Audio/Video for Agenda Item A=02:16-2022-05-26-EFSC-Meeting-Audio

² Audio/Video for Agenda Item B=00:14:53- 2022-05-26-EFSC-Meeting-Audio

³ Audio/Video for Agenda Item C=00:4:40-2022-05-27-EFSC-Meeting-Audio

⁴ Audio/Video for Agenda Item D=01:03:00-2022-05-27-EFSC-Meeting-Audio

⁵ Audio/Video for Agenda Item E=01:23:16-2022-05-27-EFSC-Meeting-Audio

⁶ Audio/Video for Agenda Item F = 02:45:07- 2022-05-27-EFSC-Meeting -Audio

⁷ Audio/Video for Agenda Item G= 03:09:00-2022-05-27-EFSC Meeting-Audio

⁸ Audio/Video for Agenda Item A=02:16-2022-05-26-EFSC-Meeting-Audio

Council Member Jenkins motioned that the Council adopt the April 22,2022, meeting minutes

Vice Chair Howe seconded the motion.

Motion carried unanimously.

Council Secretary Report – Secretary Cornett offered the following comments during his report to the Council.

Council Update

- Governor Brown has appointed Ann Beier to the EFSC to replace Phil Steinbeck. Ann is the retired Crook County Planning Director and she previously worked for the Dept. of Land Conservation and Development. Ms. Beier will be evaluated by the Senate Rules Committee on June 1st. If approved, she will be available for the next Council meeting in June.

Project Updates

- Stateline Wind Project: On April 19, 2022, a request for Amendment 7 of the project was received. Amendment 7 is a request to amend the site certificate condition relating to the turbine dimensions for the Vansycle 2 Wind Turbines. Included in the AMD7 is a request for Type B Review. On May 12, department determined that the amendment request was complete. On May 13, the department determined the Type B review was justified and issued Type B ADR determination, including a courtesy email notice. The Department issued the Draft Proposed Order (DPO) for the amendment on May 13th. With Type B amendment review, there is no DPO Hearing and no opportunity for a contested case. There is a written comment period for the DPO which extends through June 6, 2022. Council's review and possible final decision on the amendment will likely be at the June 2022 EFSC meeting.
- Echo Solar Project: The Notice of Intent (NOI) for Echo Solar Project was received on May 10, 2022. The Department will be creating a project page and will be sending out a notice shortly. The Department will be holding a public information meeting on the NOI, most likely in July.
- Annual Update on Facilities with Long Term Wildlife Reporting: There are 5 wind facilities that have long term annual wildlife reporting: Biglow Canyon Wind Farm, Klondike 3 Wind Project, Leaning Juniper 2A Wind Power Facility, Leaning Juniper 2B Wind Power Facility, and the Stateline Wind Project. Department received 2021 reports in April 2022. The reports will be available for Public Review and Comments on the project pages through July 30,2022. Comments may be emailed to Kate Sloan, Senior Siting Analyst. The ongoing wildlife monitoring includes long term raptor nest surveys (every 5 years), Washington ground squirrel surveys (every 3 years) and incidental wildlife reporting (every 3-5 depending on the facility). All 5 facilities are required to participate in ongoing monitoring and reporting of fatalities under the Wildlife Incident Response and Handling system and to report those findings annually.
 1. Biglow Canyon: The Wildlife Incident Response and Handling system included a report of 6 avian fatalities including 1 Bald Eagle. The facility maintains an incidental take permit with the U.S. Fish and Wildlife Service and is implementing additional fatality monitoring studies and mitigation associated with permit.

2. Klondike 3 Wind Project: Operations personnel recorded 1 common Raven fatality. Stateline Wind Project: 2021 was the last annual monitoring year for the 5-year artificial nest structures installed as habitat enhancement measures. All 5 nest structures were monitored for maintenance needs in February 2021. No maintenance was required. There was no observable use of the 5 artificial nest structures. The next monitoring will occur in 2026. The site certificate holder reported 1 fatality, an American White Pelican.

Future EFSC Meetings

- The June EFSC will be held on June 23rd and 24th 2022. There will be rulemaking hearings (which rulemaking hearings depend on outcome of the May meeting) on Thursday evening and the regular Council meeting on Friday. The hybrid meeting will be held in Salem at the ODOE offices and virtually on Webex.

- B. Nolin Hills Wind Power Project, Public Hearing on Draft Proposed Order on Application for Site Certificate (Hearing)⁹**- The public hearing on the Draft Proposed Order began at 14:53 minutes into the meeting and ended at 2:23:45 minutes. The transcript of the DPO hearing can be found [here](#).

Meeting was recessed at 8:23 p.m.

Call to Order: The meeting was called back to order at 8:30 am by Chair Grail

Roll Call: Chair Marcy Grail, Vice-Chair Kent Howe, Council Members Hanley Jenkins, Cynthia Condon and Jordan Truitt were present.

⁹ Audio/Video for Agenda Item B=00:14:53- 2022-05-26-EFSC-Meeting-Audio

Oregon Department of Energy representatives present were Assistant Director for Siting/Council Secretary, Todd Cornett; Senior Policy Advisor, Sarah Esterson; Operations and Policy Analyst, Wally Adams; Siting Policy Analyst and EFSC Rules Coordinator, Christopher M. Clark; and Administrative Specialist, Nancy Hatch. Oregon Department of Justice Senior Assistant Attorney General Patrick Rowe, counsel to EFSC, was also present.

Agenda Modifications were not requested.

C. Port Westward Renewable Fuels Project, Council Review of Site Certificate Exemption Request¹⁰ – Wally Adams, Operations and Policy Analyst, presented the Proposed Order on a request for an exemption from the requirement to obtain a Site Certificate for NEXT Renewable Fuels Oregon, LLC.

Mr. Adams explained that the Department received 11 public comments on the Proposed Order, and that substantive comments focused on two issues: 1) That the facility does not exclusively use biomass and therefore does not meet the requirements of of ORS 469.320(2)(f)(a), and 2) That the carbon intensity of the facility exceeds 118 lbs CO₂ per MMBtu, and does not meet the requirements of ORS 469.320(2)(f)(E).

With regards to Issue 1, Mr. Adams explained that the Department relied on the definition of “biomass” in ORS 315.141 and found that the facility did exclusively use biomass as the primary feedstock for conversion to liquid fuel. He explained that hydrogen derived from natural gas was used as a secondary ingredient in the production process. He explained that based on the prior Council decisions and a review of the legislative history, only the primary feedstocks should be considered and recommended the Council find the proposed plant would satisfy ORS 469.320(2)(f)(A).

Council Member Jenkins asked if natural gas was also used to fire proposed plant components including boilers, heaters and other processing equipment used in the conversion of biomass, and if that was considered in the statute, legislative history, or prior decisions by the Council.

Mr. Adams confirmed that natural gas is being used for 2 different purposes, as part of the reaction and as the fuel for conversion, and that the second use would be discussed in the discussion of carbon intensity.

Vice-chair Howe expressed his agreement with staff’s reading of the statute and confirmed his agreement with continuing Council’s past practices.

Council Member Condon asked if it was important that ORS 469.320 lists waste vegetable oil as biomass because this project is using tallow and animal fats.

¹⁰ Audio/Video for Agenda Item C=00:4:40-2022-05-27-EFSC-Meeting-Audio

Mr. Adams stated that the list in ORS 469.320 is not exclusive, and that the definition of "biomass" in ORS 315.141 also includes offal and tallow from animal rendering. '

Council Member Condon asked how methanol and ethanol is produced as opposed to hydrogen.

Mr. Adams answered the most common way to make biodiesel is using methanol as the secondary reactant. Most methanol comes from natural gas. Though it is possible to make methanol from biomass, it is most commonly made by steam reforming of natural gas.

Council Member Condon stated that she was troubled by relying on past decisions made in 2007 when natural gas was considered to be the cleaner fuel and issues with its greenhouse gas emissions were possibly sidelined.

Council Member Condon asked if there are other processes to make hydrogen that do not use natural gas.

Mr. Adams replied though there are other ways to make hydrogen that are more environmentally friendly, such as using renewable energy for electrolysis. He commented that this would still not be generated from biomass, and although you could theoretically make hydrogen from renewable natural gas, it may not be commercially viable, and certainly was not commercially viable when the statute was written.

Council Member Truitt asked if the sourcing of materials for the biomass is considered in the proposed exemption.

Mr. Adams referred to prior council decisions noting the Altra facility exemption states that it uses "domestically produced soy and canola oil, imported palm oil or other seed oil," and the Morrow facility states that it uses "seed oil". He noted that while the statute may have been intended to support domestic or Oregon based agriculture it does not require the use domestic, or Oregon produced biomass.

Council Member Truitt expressed concern that high value agricultural farmlands could be converted to use for energy crops, reducing the availability of agriculture for human consumption.

Chair Grail asked if Secretary Cornett or other staff could respond to Council member Condon's concerns about relying on previous decisions.

Secretary Cornett emphasized the importance of looking at the rules, statutes, case law, and legislative history fresh every time it makes a decision. He commented that the Council isn't bound to previous interpretations, as long as new decisions are still based on the language of the statute. This also means the Council cannot base their decisions on current societal ideas regarding types of facilities or uses unless those are consistent with applicable rules, statutes and applicable case law.

Council Member Jenkins agreed with Secretary Cornett and that it is not Council's responsibility to add to the statute. He expressed his support for the staff's position.

Council Member Truitt asked if the same process used to extract methanol and ethanol from natural gas can be used with renewable natural gas.

Mr. Adams responded that it may not be practical, but it is theoretically possible to make methanol or ethanol from renewable natural gas.

Mr. Adams explained that the second criterion under ORS 469.320(2)(f) is that the facility had obtained local land use approval and that the County had found that a rail spur could be located on the portion of the site that is zoned as zoned for agricultural use under rules adopted by the Land Conservation and Development Commission (LCDC). Council Member Jenkins explained that local governments are obligated to apply LCDC's rules even if they haven't been implemented by local land use ordinance.

Council Member Howe expressed his agreement with staff conclusions and recommendations.

Council Member Howe motioned the Council adopt the proposed order as the final order and approve the request by Next Renewable Fuels LLC for an exemption from the requirement to obtain a site certificate from EFSC.

Council Member Jenkins seconded the motion. He further commented it is the Council responsibility to read the language of the statute, not add additional interpretations to language.

Council Member Condon questioned whether the language "exclusively uses" in the statute allows separate definitions for feedstock and reactants?

Mr. Adams referred the entire sentence in the statute. "Exclusively uses biomass as the source of material for conversion to a liquid fuel." It is referring to the primary biomass material (vegetable oils, animal fats) being converted, not the other elements required to achieve conversion. Staff has consulted with the DOJ on the interpretation of the statute and is comfortable making its recommendation to approve exemption.

Council voted to approve the exemption with 5 in favor, 1 not in favor vote.

D. Public Comments¹¹ – This time is reserved for the public to address the Council regarding any item within Council jurisdiction that is not otherwise closed for comment, which includes the Boardman to Hemingway Transmission Line Proposed Order.

¹¹ Audio/Video for Agenda Item D=01:03:00-2022-05-27-EFSC-Meeting-Audio

Angela Crowley-Koch, Executive Director of Oregon Solar Plus Storage Industries Association (OSSIA) - Ms. Crowley-Koch commented on the Protected Areas Rulemaking agenda item. She stated that it was OSSIA's strong preference that formal rulemaking be postponed until the EFSC application review rulemaking was completed.

She noted that ODOE's implementation plan for Executive Order 20-04 states that the application review rulemaking is intended to create efficiencies in the siting process and simplify procedures and that the Proposed Areas Rulemaking does not simplify the procedures, but does increase costs and time and does not recognize the unique nature of renewable product projects. OSSIA believes rulemaking will be better informed when the review of EFSC rules is completed.

Ms. Crowley-Koch stated that OSSIA will continue to participate in the formal rulemaking as it believes the rules can be streamlined for solar facilities. She noted that addressing the current climate crisis and impacts on Oregon requires a significant buildout of renewable energy facilities by 2030. With the lengthy timeline for renewable energy facilities approval and permitting, OSSIA believes 2030 is an ambitious timeline, given the uncertainties in the existing process.

OSSIA further believes those uncertainties are potentially exacerbated by some of the Draft Proposed Rules. While OSSIA agrees regulations and rules need to be kept up to date, the concern is that the proposed changes inject more uncertainty in the siting process. EFSC relies on an evidence-based process, creating uncertainty or open-ended requirements which places a greater burden on the applicant to prove the negative in their submissions. Not only does the additional burden have cost and time involved, but OSSIA also believes it is in contradiction of the objectives of Governor Brown's Climate Executive Order.

Of particular concern to OSSIA is staff's recommendation to eliminate the analysis area when applying standards, which would leave the application of the standards open ended. It would be inconsistent with how EFSC applies other standards, such as land use, would create significant uncertainty about what data is required, and creates an intensive burden for applicants.

Ms. Crowley-Koch suggested the new rules are harder for the applicants and the public to understand. She cited language including "potential additions to the National Wild and Scenic River System" as an example. She stated that this ambiguity would make the ORESA mapping tool harder to use.

With respect to the discussion during April 2022 EFSC meeting, regarding the consideration of Historic Properties of Religious and Cultural Significance to Tribes, OSSIA recommended EFSC adopts staff's recommendation for future rulemaking and have options discussed in the staff report explored at future date, allowing for more robust discussion and allows

EFSC greater time to analyze future avenues for addressing impact to the areas. OSSIA wants to support the Tribes desire to protect the cultural areas. A separate rulemaking hearing would ensure that all the concerns are heard and considered.

Gene Cotton, President of Next Renewable Fuels - Mr. Cotton commented Next Renewable Fuels feels the Port Westward Project brings significant benefits to Oregon and to reducing emissions. The project plans to add 200 full time jobs in the Clatskanie community. By making renewable diesel, the project will result in over 7,000,000 tons of carbon emissions reduction per year, including total life cycle emissions, which will provide a significant benefit to the environment.

In response to earlier discussion regarding the use of natural gas for the production of hydrogen, Next Renewable Fuels minimizes the impact by recycling biogenic material (Naphtha and LPG.) and the gases produced from the process, back to the hydrogen producing facility and produce hydrogen. Using biogenic materials reduces CO₂ production from natural gas by 2/3 or 3/4 of volume. This is one way to produce hydrogen more efficiently.

Dan Serres, Conservation Director of Columbia Riverkeepers - Mr. Serres stated EFSC approval to the Next Renewable Fuels application would come into question if the Land Use Board of Appeals (LUBA) or any other court invalidates Columbia County Land Use's approval for the Next Renewable's proposed rail yard. Columbia Riverkeepers and others are currently appealing the approval. Columbia Riverkeepers believe LUBA has the potential to overturn the approval of the rail yard as LUBA has repeatedly found that the county's attempt to allow industrial uses in the general area of Port Westward violates Oregon's Land Use Planning Laws. The Oregon Department of Land Conservation and Development specifically warned Columbia County that Next Renewable Fuels proposed justification for the Land Use approval for the rail yard might conflict with Oregon Land Use Law. Columbia Riverkeepers urges EFSC to revisit the application if LUBA rules against the rail yard.

With respect to the Protected Areas, Scenic Resources and Recreation Standards rulemaking, Columbia Riverkeepers support option 1 as it is more protective of Historic Properties of Religious and Cultural Significance to the Indian Tribes and that are listed on the National Register of Historic Places. He added EFSC can protect resources now by expanding option 1 to "staff suggests that further rulemaking could occur to address issues that arise and to deepen the consultation. Staff finds that the "expanded protected areas would likely result in the identification of more potentially effective properties." Columbia Riverkeepers believe that would potentially avert harm to sensitive resources. He thanked Council Member Chocktoot for bringing this issue to the attention of EFSC.

Christopher Clark, the Council's Rules Coordinator informed Council that there had been a request that Council accept public comments after staff's presentation in Agenda Item E. After deliberating, Council confirmed that public comments are open during the public comments period only.

There were no further comments. Public Comments Period was closed at 9:51 a.m.

E. Protected Areas, Scenic Resources and Recreation Standards Rulemaking Areas (Action Item)¹² – Christopher M. Clark, ODOE Senior Siting Analyst and EFSC Rules Coordinator presented information regarding Historic Properties of Religious and Cultural Significance to Indian Tribes, and requested Council’s authorization to issue a Notice of Proposed Rulemaking and initiate formal proceedings to adopt proposed amendments to the Protected Areas, Scenic Resources, and Recreation Standards and associated rules.

Mr. Clark explained that the Historic, Cultural, and Archaeological Resources Standard requires the Council to find that the Council find that a proposed facility will not result in significant adverse impacts to: 1) Historic, cultural or archaeological resources that have been listed on, or would likely be listed on the National Register of Historic Places; 2) For a facility on private land, archaeological objects or sites; and 3) for a facility on public land, archaeological sites.

Vice Chair Howe asked if the language for public lands precludes consideration of archaeological objects.

Mr. Clark clarified that archaeological sites are defined as a collection of archaeological objects or contacts together that form a site. If there is an isolated object on public lands, the standard doesn’t necessarily cover that.

Vice Chair Howe asked when State Historic Preservation Officer determines a site eligible, would the site then be placed on the National Register of Historic Places or become eligible for the register.

Mr. Clark answered a site would only become eligible for the register at that point. He further clarified the process for becoming a site on the National Register of Historic Places.

Council Member Howe explained his understanding of process. If the State Historic Preservation Officer determines a site would be eligible for the register, the site moves forward as recommendation to be added to the National Register of Historic Places and becomes their decision.

Mr. Clark confirmed Council Member Howe’s understanding, noting a discrepancy between ORS 358.905, which refers to sites “on or eligible for inclusion on” the National Register, and the Council Standard which refers to sites “on or likely to be listed on” the National Register. He thought this difference may be because only the State Historic Preservation Officer can make the eligibility evaluation for the State, but the Siting Division can still likely make a determination that a site is likely to be eligible.

¹² Audio/Video for Agenda Item E=01:23:16-2022-05-27-EFSC-Meeting-Audio

Council Member Jenkins asked if a site is nominated for listing on the National Register just because it is eligible.

Mr. Clark explained that there may be several reasons why an eligible resource may not be listed. He noted as an example, of relevance for the current conversation, the tribes may not want resources to be listed on the National Register to prevent disclosure of particular locations of those resources in effort to prevent impacts from occurring. He noted that staff's consideration of whether a resource is protected under the Historic, Cultural, and Archaeological Resources Standard is independent of whether the resource is listed on the National Register of Historic Places.

Council Member Condon asked if the "likely to be included on" the National Register language in the Council's Standard anticipated the nomination being submitted?

Mr. Clark expressed though he has not reviewed the legislative history on the rule language, he is unaware of anything clarifying it, and that ODOE staff does not make formal eligibility evaluations.

Council Member Condon expressed her interest in the language differences and if the Council's language was indicated that eligibility to National Register needed to be submitted.

Council Member Jenkins asked how the Council determines that a site is eligible if we don't receive information from State Historic Preservation (SHPO) verifying eligibility of sites.

Ms. Esterson stated staff doesn't receive a concurrence letter on eligibility for most projects. Typically, the Council receives a concurrence on the fact that the resource site would be avoided. Staff doesn't typically receive a concurrence letter on eligibility from SHO unless project goes through the federal Section 106 process, in which case the federal agencies make the determination.

Council Member Jenkins referenced how the rule has worked for previous applications, noting that he is not aware of any cultural archaeological sites having had issues. Site Monitors have been secured in applications as requested by tribes and agreed to by the applicants. Are the current resource standards not working?

Mr. Clark responded while the current standard is working, the federal government has shifted to working directly with tribal governments to identify cultural resources, leading to more sensitivity about impacts on a broader landscape level. He stated that There has been an evolution on how these issues are treated in the past years. There are opportunities for improvement or improving consistency with Federal Review processes.

Council Member Jenkins acknowledged better coordination with Section 106 process is needed but expressed concern regarding the 20 mile out from site under the protected area

standard. The Council is using site monitors to evaluate ongoing activity at site and can react to issues.

Council Member Condon inquired whether the definition of archaeological significance includes a religiously significant site.

Mr. Clark clarified the definition of site of archaeological significance in ORS 358.905 bypasses the definition of significant by stating that an archaeological site is significant if identified as such by an Indian Tribe.

Council Member Condon asked for clarification. Does Definition B “Any archaeological site that has been determined significant in writing by an Indian Tribe” cover the religiously significant sites as deemed by the Tribes.

Mr. Clark confirmed to the best of his knowledge, that statement would be correct.

Vice Chair Howe, referring to the options for Protected Areas Rulemaking, inquired whether Option 2 includes the 20-mile radius from the site for protected areas.

Mr. Clark responded Staff could add a section to the definition of protected areas standard to require an applicant to review available information to identify properties of cultural and religious significance within a 20-mile radius. He explained that the scope of resources protected would depend on how the language is drafted. If the section only included areas listed on the National Register, then a desktop survey would be sufficient. If the language included sites that are likely to be eligible for listing, there would need to be a cultural resource survey of the entire analysis area.

Council Member Jenkins queried, as staff has recommended EFSC amend procedures to better align the review of impacts to the properties for traditional, cultural, and religious importance with the section 106, is that possible with Option 2.

Mr. Clark responded staff would not be ready to include those changes today. Option 2 allows the Council to continue to rely on the standards as written, though it would allow staff to do additional rulemaking in the future. If Council would like to make the procedures closer to the section 106 process, Mr. Clark suggested gathering additional input from Tribal governments and from other stakeholders’ expertise on issue.

Chair Grail commented this a big impactful issue. The Council needs to be sure all the information is gathered for review. She expressed her concern that there is information missing.

Vice Chair Howe asked if Council Member Chocktoot had given feedback to staff as he was unable to attend meeting.

Mr. Clark confirmed he had spoken to Council Member Chocktoot. He expressed he was comfortable with Council discussing and moving forward with the agenda item. His primary concern is that there is an opportunity in the siting process for Tribal governments and other members of the public who have important historical archaeological resources to participate in the process and to have the opportunity to identify the resources that are important to them and their own values in said resources.

Vice Chair Howe and Council Member Jenkins expressed their support for Option 2 with the understanding the Council will later pursue consistency with the federal review process.

Mr. Clark pointed out Staff has been coordinating with the Department's tribal liaison on the development of an outreach and engagement process for improving consistency with federal review process.

Council Member Condon inquired if there is an opportunity in the rulemaking to lower the 20-mile radius if public and stakeholder's comments represent that opinion.

Mr. Clark noted the 20-mile radius around sites applies to all the different categories of protected areas. If Council wants to address these specific resources differently, staff could do so with some clarification. The Siting Analyst has more flexibility in specifying the scope of the detailed impact analysis included in the application.

Chair Grail and Council Member Condon agreed their need/desire for additional information and additional input from Council Member Chocktoot.

Vice Chair Howe motioned the Council authorize staff to issue a notice of proposed rulemaking and initiate formal proceedings to adopt the proposed amendments and associated rules as provided in the Notice of Proposed Rulemaking.

Council Member Jenkins seconded the motion.

The Motion was carried unanimously.

- F. Update on Oregon Public Utility Commission's Certificate of Public Convenience and Necessity Rulemaking (Information Item)**¹³— Garrett Martin, Public Utility Commission Policy Advisor, provided an overview of the PUC's proposed changes to rules regarding Certificates of Public Convenience and Necessity (CPCN's) in OAR chapter 860.

Chair Grail commented there are interesting things that spillover from PUC to EFSC to which Council will be paying attention.

Council Member Condon asked if a CPCN is issued and the project has reached its 10 or 15-year limit for construction completeness, is there a renewal process with PUC.

¹³ Audio/Video for Agenda Item F = 02:45:07- 2022-05-27-EFSC-Meeting -Audio

Mr. Martin noted if those lengths were reached, something in the original plans or utility has changed. If nothing has been built in a 10-year period, the original landowner has the right to repurchase property which would present a complicating factor. It is very unlikely that unbuilt CPCN projects would persist for that long of time.

Council Member Howe asked for clarification on the land use compatibility statement because they can be appealed. Is the PUC going to be taking that on?

Mr. Martin responded that is something the attorneys for PUC are currently working on, to be determined in the next couple of months.

G. Wildfire Prevention and Response Rulemaking- Consideration of Proposed Rules

(Information and Action Item)¹⁴ - Christopher M. Clark, Senior Siting Analyst and EFSC Rules Coordinator requested Council's authorization to issue a Notice of Proposed Rulemaking and initiate formal proceedings to adopt new rules to address wildfire prevention and response at energy facilities.

Mr. Clark explained that Staff recommended that the Council adopt a standard that is applicable to all decision made on or after the effective date of the new rule, without a goal post for applications or requests for amendment that are currently under review.

Council Member Condon expressed her desire for no goal post language to be included.

Council Member Jenkins responded as there is difficulty in trying to apply new rules retroactively and this is a significant issue, he would support a goal post requirement.

Chair Grail agreed with Council Member Jenkins regarding the goal post requirement, recognizing the public's concern with the significant threat to public health, safety, and the environment.

Vice Chair Howe expressed his support for no goal post requirement in alternative 1, noting the life, safety, and health hazards with fires the state is experiencing currently.

Mr. Clark reiterated if Council adopts the standard, it would not apply to past Council decisions unless Council determines a clear showing of significant threat to public health, safety, or environment.

Council Member Condon inquired how requests for amendments to extend construction deadlines would be treated in this process.

Mr. Clark clarified the process for extensions, noting that if Council is required to consider changes in law that have occurred since the original site certificate was

¹⁴ Audio/Video for Agenda Item G= 03:09:00-2022-05-27-EFSC Meeting-Audio

approved. If Council were to adopt a new standard that would constitute a change in law, and the Council would apply the new standard to the review of the amendment.

Council Member Jenkins asked if this Standard makes the applicant prepare a wildfire protection plan and identify their implementation mechanisms.

Mr. Clark clarified when the applicant submits their Notice of Intent, they would submit a characterization of the wildfire risks at the site. The Application would require more detailed information. If there is a high risk of wildfire at the site, the rule is structured so that applicant would be required to submit a formal plan, including all of the proposed prevention and mitigation activities.

Council Member Jenkins expressed his support for Staff recommendation for Issue 4, which would be to establish a ½ mile study area of wildfire risk. Chair Grail noted concurrence in the room for support.

Council Member Jenkins questioned the use of the term “significant increase” in Staff’s recommendation of Issue 5 and the Council’s ability to measure a significant increase. He expressed his support of requiring the Wildfire Protection Plan which identifies what might be a significant increase and the mitigation opportunities that are associated.

Mr. Clark clarified that as drafted, if the site is in a low fire risk area and the applicant noted there would be the introduction of some risk, the Council could apply basic safety protocols and vegetation management practices required by the PUC. By imposing those basic minimum requirements, any risk that is introduced by project would be efficiently mitigated without preparing the detailed wildfire mitigation plan. He noted if the applicant were required to have a wildfire mitigation plan for a low-risk area, there may be little difference between plans as there is less detail to include.

Mr. Clark mentioned in the staff’s recommendation, the Council would make its evaluation of risk at the time the application is submitted, and one weakness of that approach is that wildfire risk changes over time. If Council were to always require a wildfire mitigation plan and requires plan to be updated, EFSC could get updated information on the risk at the site. The PUC requires annual update of plans, Council can do something similar.

Council Member Jenkins expressed his support for Council requiring an update of wildfire risk assessment on sites. He noted at the local level, decisions are made for wildfire protection but there is no follow-up with inspections or maintenance. Council should avoid the same pitfall.

Vice Chair Howe reviewed the 3 alternatives for Issue 5: Standard of Review, noting that alternative 2 is a blend of alternative 1 and 3. Alternative 2 references the vulnerability of site as well as that the energy facility itself would not cause a wildfire.

Chair Grail commented this is an issue that EFSC is taking seriously. It is going to continue to evolve. It is important for developers to understand though they may not fall under the regulatory jurisdiction of the Public Utility Commission, EFSC will still have the expectation of good wildfire protection.

Chair Grail posed the question how the Department's Compliance Officer feels about the Wildfire Mitigation Planning Requirement.

Secretary Cornett responded staff have raised questions regarding the implementation of the requirement. If Council decides to move forward and adopt the rules, staff will implement to the best of their ability. Staff understands it will add additional complexity and a different area for staff to become more knowledgeable in order to implement.

Chair Grail noted it is important to recognize as a department the requirements will be something different and the department should receive the resources needed. As the Council has heard from the public, wildfire effect the entire state.

Council Member Jenkins agreed with Chair Grail, mentioning the reasons for his support for the Wildfire Mitigation Plan. The plan provides more clarity for the public, for the development of the project and for the long-term maintenance and evaluation by the department.

Council Member Condon questioned if the certificate holder is required to have insurance? She expressed concern for the financial risk to the state and the certificate holder if a wildfire were to occur caused by a facility.

Mr. Clark noted if a certificate holder is a regulated public utility, there may be insurance and bonding requirements. He deferred to Secretary Cornett who confirmed EFSC does not have any requirements for posting insurance. Staff could research whether independent power producers are required to maintain insurance.

Council Member Condon questioned the change proposed by Council Member Jenkins in the proposed rulemaking subsection B. She expressed concern for removing the language that allows EFSC and staff the opportunity to review design, construction, and operations and verify the mitigation plan is acceptable.

Mr. Clark acknowledged her concern. The criteria of when the preventive actions and programs minimize the risk is currently based on the Council or the site analyst's judgment.

Council Member Jenkins confirmed his agreement with proposed change to subsection B, noting the "significant risk" language leaves no direction for the specific identification of risks.

Mr. Clark indicated section A of proposed rule has the components of the risk analysis that staff and the Council would be reviewing if there was a change in the baseline risk or consequence. He agreed the characterization of risk and increase in risk is vague.

Council Member Jenkins asked Council Member Condon for clarification on her concerns regarding the removal of language in subsection B, referring to the design of construction and operations being considered as criteria for the mitigation plan.

Council Member Condon iterated if staff does not review the design, construction, and operation in effort to mitigate wildfire risk, how does EFSC make the assessment that it is designed appropriately?

Mr. Clark stated that if the concern was that wildfire mitigation plan is limited to looking at operations, the Council could add new language, "that the proposed facility will be designed and will operate in compliance with the plan". He added though there are specific criteria for what is included in the plan, there is no specific criteria for what results in a plan getting approved.

Council Member Jenkins agreed that adding "design and construct" to the proposed language is necessary to comply with the Wildfire Mitigation Plan.

Council Member Condon asked what the process for staff is to judge the designing construction for mitigation of Wildfires.

Chair Grail referred to the earlier comments on the implementation of the mitigation.

Secretary Cornett added that staff is obligated to implement a rule if approved by Council whether staff has the expertise or needs to rely on others expertise for help.

Council Member Jenkins added the process is also based on the data provided in the plan that determines how to implement the mitigation plan.

Chair Grail noted the Council will keep discussing Wildfire Mitigation Plans. Developers should know the Council will be expecting them to fulfill the criteria for mitigation plans.

Chair Grail clarified her understanding for Issue 8; Exception from Standard, consumer owned utility facilities are only required to submit a plan, not a PUC approved plan.

Mr. Clark agreed adding consumer owned utility facilities are not subject to the specific criteria.

Chair Grail indicated her understanding and agreement, noting the requirements of the PUC are more stringent than the requirements for Consumer-Owned Utilities.

Mr. Clark agreed, but stated there are specific inspection and safety protocols and rules that are applicable to Consumer-Owned Utilities infrastructure.

Council Member Jenkins expressed his support for providing exceptions for facilities subject to a PUC approved Wildfire Protection Plan, noting jurisdictional responsibility.

After discussion with Secretary Cornett and DOJ Patrick Rowe, Council Member Condon recused herself from the discussion of Issue 8 as she is on the board of a Consumer-Owned Utility.

Vice Chair Howe expressed concern for including the goal post if there was a bad fire season.

Secretary Cornett state if the proposed language is eliminated, any applicant that is currently in the process would be required to have a Wildfire Protection Plan. However, if the language is kept as is, if an application were at completeness phase, they would not have to meet the fire safety plan requirement.

Council Member Condon asked if current certificate holders are exempt from having a mitigation plan if the language is kept?

Secretary Cornett confirmed if the goal post language is included, current certificate holders would not have to have a mitigation plan unless construction of site was not completed within the original timeframe and an amendment is applied, at which time the new rules would be a requirement.

Council Member Jenkins added most of the projects have been getting amendments. The Wildfire Protection Plan would be associated with the amendment.

Secretary Cornett clarified that it would depend on the type of amendment. Only the applicable rules and standards associated with each specific amendment would apply, not necessarily all rules and standards. However, if the amendment was a time extension on construction, new rules would apply to the entire certificate and facility.

Council Member Condon asked if language could be changed to require approved facilities to submit a Wildfire Mitigation Plan within X amount of time.

Secretary Cornett noted there is language within the Council's rules related to the application of later adopted laws. While rules do not typically apply retroactively, a member of the public or a Council member would need to make a case there is a need to apply later adopted laws as there is an overriding public health and safety element associated with the law. Council would need evaluate and conclude the later adopted laws are related to public health and safety, then Council could apply laws to pre-existing facilities.

Council Member Condon commented that her concern is when the situation arises is after a crisis event. She expressed a need for addressing the situation ahead of crisis times.

Chair Grail, Vice Chair Howe and Council Members Jenkins and Truitt supported including the goal post language. Council Member Condon supported the language being eliminated.

Vice Chair Howe motioned the Council initiate formal proceeding to adopt a new standard in Rules to address wildfire prevention and response at energy facilities and authorize staff to issue a Notice of Proposed Rulemaking as presented adding the goalpost language, eliminating the significant increase in risk criteria for the Wildfire Standard, and requiring all facilities to be designed, constructed, and operated consistent with the Wildfire Mitigation Plan.

Council Member Jenkins seconded the motion.

The motion was passed unanimously.

The May 26-27, 2022, EFSC meeting was adjourned at 2:04 p.m.