



# ENERGY FACILITY SITING COUNCIL

Marcy Grail~ Kent Howe~ Hanley Jenkins~ Cynthia Condon~ Ann Beier~ Jordan Truitt~ Perry Chocktoot

## Energy Facility Siting Council Meeting Minutes December 16, 2022

Oregon Department of Energy  
550 Capitol St. NE Salem, OR 97301  
Meitner Conference Room

- A. Consent Calendar (Action Item & Information Item)<sup>1</sup>
- B. Stateline Wind Project Transfer Amendment Request (Action Item)<sup>2</sup>
- C. Siting Table Overview (Information Item)<sup>3</sup>
- D. Public Comment (Information Item)<sup>4</sup>
- E. West End Solar Project - Council Review of the DPO (Information Item)<sup>5</sup>
- F. Annual Election of Officers (Action Item)<sup>6</sup>
- G. Protected Areas Rulemaking (Action Item)<sup>7</sup>
- H. Annual Rulemaking Prioritization (Action Item)<sup>8</sup>

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 Friday December 16, 2022 at 8:33 by Chair Grail.

**Roll Call:** Chair Marcy Grail, Vice-Chair Kent Howe, Council Members Hanley Jenkins, Cynthia Condon, Ann Beier were present in person.

Oregon Department of Energy representatives present in person were Assistant Director for Siting/Council Secretary, Todd Cornett; Senior Policy Advisor, Sarah Esterson; Kellen Tardaewether; Senior Siting Analyst; Senior Siting Analyst, Christopher Clark; Rules Coordinator

<sup>1</sup> Audio/Video for Agenda Item A=04:15-2022-12-16-EFSC-Meeting-Audio

<sup>2</sup> Audio/Video for Agenda Item B=45:45-2022-12-16-EFSC-Meeting-Audio

<sup>3</sup> Audio/Video for Agenda Item C=1:13:04-2022-12-16-EFSC-Meeting-Audio

<sup>4</sup> Audio/Video for Agenda Item D=1:55:02-2022-12-16-EFSC-Meeting- Audio

<sup>5</sup> Audio/Video for Agenda Item E=1:58:38-2022-12-16-EFSC-Meeting- Audio

<sup>6</sup> Audio/Video for Agenda Item F=4:45:51-2022-12-16-EFSC-Meeting- Audio

<sup>7</sup> Audio/Video for Agenda Item G=4:53:18-2022-12-16-EFSC-Meeting- Audio

<sup>8</sup> Audio/Video for Agenda Item H=5:32:32-2022-12-16-EFSC-Meeting- Audio

Thomas Jackman; Operations and Policy Analyst, Wally Adams; and Administrative Specialist Nancy Hatch. Oregon Department of Justice Senior Assistant Attorney General Patrick Rowe was also present in person.

**A. Consent Calendar (Action Item & Information Item)<sup>9</sup>** – Approval of the October 28, 2022 minutes; Council Secretary Report; and other routine Council business.

**Agenda Modifications:**

Agenda Item I, Alto Columbia Ethanol - Request to Amend Port of Morrow Agreement on decommissioning, will be removed from the December 2022 schedule and possibly rescheduled for the January 2023 meeting.

Council Member Jenkins motioned to approve the October 28, 2022 and the November 17-18, 2022 meeting minutes.

Vice Chair Howe seconded the motion.

The motion was carried unanimously.

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

**Council Updates**

- **Richard Devlin** - As reported last month, Mr. Devlin was appointed to the Council by Governor Brown. Mr. Devlin was confirmed by the Oregon Senate on December 9, 2022 and his tenure on the Council begins on January 1, 2023.
- **Hanley Jenkins** – Council Member Jenkins is attending his last meeting as a Council Member. Secretary Cornett expressed his appreciation to Mr. Jenkins for his knowledge and experience he has shared during his time on the Council. He has been a tremendously valuable asset who Staff and Council continually learn from. The amount of effort that he put forth including traveling, reviewing volumes of material, and providing staff with corrections and suggestions to improve reports and meeting minutes is immeasurable. Secretary Cornett presented a letter from ODOE director Janine Benner, thanking Mr. Jenkins for his service. Mr. Jenkins was presented as plaque to commemorate his time on the Council. ODOE staff presented a card and gift to thank Mr. Jenkins.

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<sup>9</sup> Audio/Video for Agenda Item A=04:15-2022-12-16-EFSC-Meeting-Audio

*Council Member Beier recognized Mr. Jenkins contribution not only to the Council but to the State of Oregon. Mr. Jenkins also served on the Land Conservation and Development Commission for a full term. His level of public service is admirable.*

*Vice Chair Howe noted his involvement as a colleague of Mr. Jenkins since the 1980's, serving on a variety of committees and agencies. Mr. Jenkins has provided the State with a great service.*

*Chair Grail expressed her gratitude for Mr. Jenkins' contributions to the State. Mr. Jenkins has represented the Council with great integrity. She has been able to learn from Mr. Jenkins; she thanked him for his guidance and friendship.*

*Council Member Condon noted Mr. Jenkins has been an inspiration for doing the work in preparation for meetings and paying attention to details. Mr. Jenkins is an impressive individual council member. She thanked him for his service.*

*Ms. Esterson added that staff has learned so much from Mr. Jenkins in terms of interpretations and application. Mr. Jenkins has been a great leader for staff.*

*Mr. Jenkins thanked everyone and noted it has been a privilege to work with ODOE. Oregon has a lot of challenges ahead and it will take people (like Staff and Council) to address some of those issues. He expressed his pleasure in being able to serve the State of Oregon.*

## **Project Updates**

- **Boardman to Hemingway Transmission Line -**
  - Application - There are currently 3 appeals on the Site Certificate to the Oregon Supreme Court. The final deadline for appeals is December 19, 2022. As the appeals process moves forward, the Supreme Court will keep Council updated as to the timing and status of the proceedings. The Department of Justice has requested the full record of B2H and will convey that information to the Oregon Supreme Court.
  - Amendment #1 - Idaho Power has submitted a request for amendment. On December 7<sup>th</sup>, the Department received a request for amendment #1. The amendment seeks relocation of the transmission line on
  - properties, based on work with property owners. The amendment also seeks a refinement of the location of certain roads associated with the project. The notice for the amendment request went out on December 15, 2022.

*Vice Chair Howe asked if the relocation of the transmission lines requested is different than the alternative location provided in the site certificate?*

*Secretary Cornett confirmed it is different. There is some desire from some landowners to shift the locations on their land which would justify an amendment. Staff will review and determine if there are significant issues. Idaho Power requested the review amendment process A. Secretary Cornett noted that amendment submittals do not trigger a public comment period, only a public notice. The amendment is preliminary and there may be changes based upon the Department's review. Once staff determines the application complete and issues the draft proposed order (DPO), the next notice will go out which will trigger a public comment timeframe and a public hearing in the vicinity of the project.*

- **Cascade Renewable Transmission Line** - The Department recently received a Notice of Intent (NOI) for this project. Staff is currently evaluating the NOI to ensure it contains all the required information. There is a notification requirement and optional public information meetings. The Department will do public information meetings along the route of the project to allow the public to have better understanding of the project and the processes involved. Once staff has determined the NOI contains all the information needed, staff will issue the notice and locations for the public information meetings.
- **Perennial Wind Chaser Project** - The deadline to challenge the Council's decision to accept Perennial Wind Chaser's preliminary plan to decommission the facility as the final plan and terminate the site certificate has passed with no appeals filed.

**Compliance Updates** - Secretary Cornett presented the updates on Compliance Inspections and Incident Reports.

*Chair Grail asked for clarification of the estimated completion column on the compliance chart presented, who determines that date?*

*Secretary Cornett noted the staff does not always have the ability to set a definitive date. Staff issues an estimated date for completion and will follow up on those dates for progress.*

*Council Member Condon asked if certificate holders are aware of the issues they need to address prior to staff notification?*

*Secretary Cornett responded by April 30<sup>th</sup> of every year the site certificate holder must provide an annual report of the prior calendar year. Whatever phase they are currently in, they must evaluate whether they are adhering to all the conditions of the site*

*certificate. The Department is in the process of retooling the process so we can better evaluate the report. We are evaluating condition by condition to be sure those are all being met. We are confirming that certificate holders have a process by which they are clearly evaluating all the applicable conditions that should be met during the prior calendar year.*

*In reference to a bomb threat at the Carty Generating Station, Chair Grail noted her belief that these threats will continue. Council should be aware as they are evaluating applications and the plans included for emergency management and safety issues.*

### **Future Council Meeting Dates**

- **January 19-20, 2023** - We have not confirmed this meeting. However, if there is a needed meeting, it is expected to be a 2-day meeting. Thursday night would be a DPO Public Hearing for the Oregon Trail Solar Facility and a regular Council meeting to be held on Friday. The meeting would be held in Condon Oregon. The meeting will be verified next week. If there are issues with inclement weather, the meeting would be held remotely.

### **B. Stateline Wind Project Transfer Amendment Request (Action Item) <sup>10</sup>**

- 1. Transfer Hearing (Hearing at 9:19 a.m.):** Chair Grail, acted as Hearing Officer. The Council conducted a hearing on the request to transfer ownership of the Stateline Wind Project site certificate from FPL Energy Stateline II, Inc. to Vansycle II Wind, LLC. Stateline Wind Project is an operational 205-megawatt (MW) wind power generation facility. The purpose of the transfer hearing was to provide the public an opportunity to provide oral comments on the transfer request and applicable Council standards (Organizational Expertise and Retirement and Financial Assurance) to Council.

Sarah Esterson, Senior Policy Advisor presented a brief overview of the Amendment Request for the Stateline Wind Project.

David Lawlor, Regional Director for Next Era Energy Resources, commented this transfer is important as the facility is going through repowering construction phase which will go into 2023.

There were no additional verbal or written comments.

**The Public Comment Period was closed at 9:29 a.m.**

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<sup>10</sup> Audio/Video for Agenda Item B=45:45-2022-12-16-EFSC-Meeting-Audio

- 2. Council Review and Decision on Request to Transfer Certificate Holder Ownership (Action Item):** Sarah Esterson, Senior Policy Advisor. Council received a presentation from staff on the transfer request, comments received on the record of the transfer request, and took action to approve or deny the transfer request. If approved, Council will issue an eighth amended site certificate to reflect the new certificate holder.

*Council Member Condon expressed her concern regarding Council rules for organization expertise and the specific language of the applicant who becomes the certificate holder and the parent company who is not recognized. She noted that she has commented on other projects related to this issue. This request is different from others as it is an operating entity with assets and there is an operational history with the same structure.*

*Council Member Condon asked, regarding the Retirement and Financial Assurance Letter of Credit, is the Surety bond issued replacing the bond on file today?*

*Ms. Esterson stated the current bond will be transferred to the new certificate holder.*

Council Member Condon Motioned to approve the transfer as recommended by staff.

Vice Chair Howe seconded the motion with the following explanation:

An amendment request to transfer ownership of the facility requires the Council to find that the new owner satisfies the requirements of two standards: Organizational Expertise and Retirement and Financial Assurance. Evidence provided in the transfer request demonstrates that the new owner meets these standards because it includes a letter from the existing certificate holder affirming that the assets in the Vansycle II unit (43 wind turbines) of the Stateline Wind Project Site Certificate will be assigned to the new owner – Vansycle II Wind, LLC. The letter certifies that the new owner will be in control and possession of the facility and that they will abide by the terms and conditions of the 7<sup>th</sup> Amended Site Certificate.

Council previously found that the parent company, NextEra Energy Resources LLC, has the organizational expertise to operate and retire the facility in compliance with Council standards and site certificate conditions.

Because assets of the Vansycle II unit will be transferred to the new owner, and because the new owner is owned by the same parent company, the new owner has a reasonable likelihood of obtaining a bond or letter of credit in a form and amount deemed satisfactory.

The information and evidence included in the request to transfer ownership demonstrates compliance with the applicable Council standards and that the new owner is lawfully entitled to possession or control of the site or facility described in the site certificate.

The motion carried unanimously.

- C. Siting Table Overview (Information Item)<sup>11</sup>** – Oriana Magnera, Energy, Climate and Transportation Program Manager with VERDE provided an update on the comprehensive stakeholder working group that is discussing the siting process in Oregon. The stated purpose of the group is to identify strategies that reduce conflict and balance state energy goals (like HB 2021) with community interests, natural resources, and the environment.

Ms. Magnera was joined by Diane Brandt Oregon Policy Manager, Renewable NW; Mike McArthur, Executive Director, Community Renewable Energy Association; Mary Kyle McCurdy, Deputy Director of 1000 Friends of Oregon; and Laura Tabor, Oregon Climate Director, The Nature Conservancy.

*Vice Chair Howe asked what is Verde noting regarding the timing of applications being processed and going through the appeals process at the local level?*

*Mr. MacArthur answered the processes that are bound to follow can be expedited at the local level. While he doesn't have a strong understanding of record of the appeals process, it is his understanding that those appeal periods can delay projects significantly. He added it is worth examining the time that is required or allowed for an appeal to go forward. Developers tell Verde that the local process is quicker including appeals.*

*Oriana Magnera added it is also important to consider the relationship impacts of how the state process and local process interact.*

*Council Member Condon noted EFSC projects tend to be larger projects, larger projects take longer. She asked if the EFSC process is lengthened due to the developers taking more time in the application materials for larger projects?*

*Mr. MacArthur stated while EFSC does the same process for every kind of project, counties don't need to do that which can expedite the process.*

*Council Member Beier noted her agreement that the process is important for Council to examine as Council moves forward on very complex issues while recognizing the tension between streamlining any process and still providing an opportunity for public involvement. EFSC struggles with making sure to include public and public comments while keeping projects on track. She thanked Verde for their efforts.*

*Counsel to Council Patrick Rowe asked, as Verde is examining Legislative concepts that may include measures for expediting permitting, is there a particular subgroup reviewing or is the larger Verde group reviewing that?*

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<sup>11</sup> Audio/Video for Agenda Item C=1:13:04-2022-12-16-EFSC-Meeting-Audio

*Oriana Magnera answered there is not a specific group looking into that issue. It is being examined in a couple of the work groups, the local process groups and in the land use group, which is discussing reducing conflict in the siting process and how to help expedite the process when siting in a renewable energy zone or a place that the community has indicated as a lower conflict area. It is also being discussed in the value system groups regarding community benefits agreements. Expediting the permitting process is being discussed across the board and there are several different strategy ideas that are starting to percolate in the different work groups.*

*Diane Brandt stated, referring the Council Member Condon's question regarding the longer timeline for larger projects, there is some element to the longer timeline for larger projects as there is procuring project supplies, finding large workforce and more issues. She acknowledged there is a difference in the issues that both small and large projects face. She added perhaps there is an opportunity in the upcoming EFSC review process and in a recent survey sent to stakeholders to compare the difference the EFSC and county process. Verde's understanding there is a significant difference in the permitting timeline. The other implication noted is the significant cost difference between the EFSC and county process.*

*Chair Grail stated one of the issues EFSC is pressured with is public requests for additional time (to review). EFSC has specific mandated requirements. She asked if local processes have structured requirements?*

*Council Member Jenkins explained in the county process renewable energy applications go through a conditional use process. There are specific Department of Land Conservation Development administrative rules for solar projects and wind projects in exclusive farm use zones. They have specific criteria for reviewing applications. In his experience, there is one chance for approval with a conditional use application process. There are not as many opportunities to review the application for the intricacies of an application as there are through the EFSC process. The elements of the EFSC process are more comprehensive as intended, which is very relevant for large scale operations. The EFSC process is based on standards. Applications are required to meet certain standards where a conditional use application is based on compatibility.*

*Council Member Jenkins further explained in the local level appeals process, mentioned by Vice Chair Howe, an appeal must go through the Land Use Board of Appeals, then the court of appeals and eventually to the Oregon Supreme Court. In the EFSC process, there is a contested case process in which EFSC defines the evaluation and the issues raised, then the appeal goes to the Supreme Court.*

*Council Member Beier added every county is different. Some have explicit standards for renewable development. She noted Crook County's standards language almost parallel EFSC language. She stated there can be an advantage to a local decision body where they are most involved with the community. While EFSC holds hearings in communities'*



*where projects are proposed, sometimes with the local process, there is more community involvement. With each contract being so different, it is hard to design any one system to reflect all the differences. There is a reason for 2 different processes as the state processes reflect the broader state interests, while the local process reflects the conditional use process.*

*Council Member Jenkins agreed, adding while there are rules for renewable applications, not all jurisdictions have adopted them resulting in a lot of variability between the county review of applications.*

*Secretary Cornett stated throughout the Verde process there has been discussions of the state process being more expensive and taking more time versus local process. That is a generic statement. The evaluations should investigate what EFSC's standards and processes require versus those of the local governments and what is needed. As an example, what is required for cultural resources at the county level versus what is required by EFSC's significant cultural resource standards are completely different. It is important for Verde to dig deeper in its evaluations to prevent a false sense of reality.*

*Secretary Cornett reiterated the status of current EFSC solar projects.*

*There are currently:*

- *50 megawatts of Operational EFSC projects*
- *362 megawatts of EFSC projects in construction*
- *812 megawatts of approved EFSC projects not yet beginning construction, 3 of which have requested time extensions due to having no power purchase agreement for facility*
- *2.5 gigawatts of projects under EFSC review*

*He encouraged a review of the Land Conservation and Development Commission Department of Forest and Forest Report which gives a current assessment of EFSC and local government information on solar and wind projects approved across the state to better understand what is needed to move forward.*

*Chair Grail noted her participation in some of the Verde meeting calls and stated it has been fascinating. People are engaged which involves a lot of different perspectives. She expressed her concern regarding the Public Utility Commission participation as the Investor-owned utilities have useful integrated resource plans. She asked if the PUC is participating with Verde?*

*Oriana Magnera answered that PUC gave a presentation on how their resource planning process works. The PUC wants to be less involved as they are deferring to ODOE and have several proceedings at the PUC related to the Boardman to Hemingway project that the commission would like to distance itself from this public process to protect the integrity of the proceedings. Verde is in close conversations with the PUC and are keeping them updated.*

**D. Public Comment (Information Item)<sup>12</sup>** – This time was reserved for the public to address the Council regarding any item within Council jurisdiction that is not otherwise closed for comment. Items closed for comment include the West End Solar Project Draft Proposed Order, the Nolin Hills Wind Power Project Proposed Order, and the Protected Areas, Scenic Resources, and Recreation Resources Standards Rulemaking.

*Max Yoklic, Counsel for New Sun Energy* – Mr. Yoklic commented about the projected need for renewable energy to be produced in effort to meet HB 2021 is approaching 50 gigawatts. The 2.5 gigawatts currently under EFSC review mentioned by Secretary Cornett is far below that amount. He further noted the need to consider projects that are approved versus what projects actually get built due to strict constraints like prior purchase agreements. He thanked Verde for convening and giving an opportunity to discuss the process.

**The Public Comment Period was closed at 9:38 a.m.**

**E. West End Solar Project - Council Review of the DPO (Information Item)<sup>13</sup>**

Kellen Tardaewether, Senior Siting Analyst, provided a presentation of the Draft Proposed Order (DPO) on the ASC for the West End Solar Project, a proposed 50 megawatt (MW) solar photovoltaic and battery storage facility on 324 acres in Umatilla County. The presentation included an overview of standards, conditions of approval, issues raised in comments received on the record of the DPO, and applicant responses for Council review. Council had the opportunity to provide comments to the Department for consideration in the Proposed Order.

*Chair Grail commented, in reference to Organizational Expertise Standard conditions, it is important for Council to have current information for name changes and parent company holdings as required in the Organizational Expertise.*

*Patrick Rowe, Counsel to the Council, noted the need for the updated language presented in the Organizational Expertise and Financial Assurance conditions as over the last several months there have been compliance incidents occurring at some facilities. If enough incidents occur, it may call into question the estimate of how much it will cost to retire a facility or if there a need to revisit the amount of the financial assurance mechanism. The new condition language gives Council the ability to revisit the financial assurance mechanism.*

*Council Member Condon questioned the 5-year period to identify instances for repeat or multiple violations as stated in the new language.*

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<sup>12</sup> Audio/Video for Agenda Item D=1:55:02-2022-12-16-EFSC-Meeting- Audio

<sup>13</sup> Audio/Video for Agenda Item E=1:58:38-2022-12-16-EFSC-Meeting- Audio

*Ms. Tardaewether stated the 5 -year period gives Council and Staff an opportunity to examine the incidents from a longer term perspective for how the facility is operating.*

*Mr. Rowe added that this is not saying Council is only going to revisit every five years. The condition as drafted would require the certificate holder to report incidents that could be a violation and to identify incidents that have occurred over the last five years.*

*Council Member Condon confirmed her understanding that Council is already being provided information of compliance incidents monthly, this would be an additional 5-year report.*

*Ms. Tardaewether noted that the 5-year report will also be useful for new council members and staff who may not be familiar with the history of events at facilities as there is not currently a database that compiles that information.*

*Council Member Jenkins added the important part of the 5-year report in the new language is that there is a reevaluation of money required for the retirement of a facility, partially based on the history of events at a facility.*

*After further discussion, Secretary Cornett clarified the language does not mean every 5 years Council will do an evaluation. The idea is if there is a trigger event, staff and Council can review incidents for the last 5 years (depending on the facility) and examine whether it is a repeated issue or is there a pattern and practice associated with this type of incident and would the issue result in a change in the decommissioning of the facility. The new language gives Council the ability to review information and examine if a change in the decommissioning plan is needed.*

*Council Member Beier noted the term “trigger event” clarifies the meaning of the language. The 5-year timeframe is arbitrary, it is the triggering event that would lead to examining the patterns and practices of a facility.*

*Secretary Cornett added it could be 1 incident, a trigger event, that justifies the need for a change in the bond or letter of credit / financial assurance of a decommissioning plan.*

*Ms. Tardaewether noted the language is fair to the developer also in that the Council must have valid reasons for raising the contingencies of decommissioning a facility. She further stated the certificate holder must demonstrate that it can operate the facility in a manner that protects public health and safety and the environment, and that they are able to operate the facility in compliance with the site certificate conditions. This language allows Council and staff to look back and examine the history of the facility.*

*Mr. Rowe stated this condition [re: the Organizational Expertise standard] applies to what is happening (on the ground) at the facility and its effect on the decommissioning of the site. The other language the Department has suggested under the Financial*

*Assurance Standard condition would allow Council to revisit the decommissioning plan and financial assurance amount without a trigger event at the facility.*

*Ms. Tardaewether explained there are 2 different standards that apply. This is creating an additional path to contemplate the circumstances.*

*After further discussion, Secretary Cornett concluded Council recommends removing the 5-year phrase in the language as Council already has access to that information. If Council makes a recommendation to change the volume of credit for decommissioning a facility, the certificate holder will provide their own information as well.*

*Council Member Condon expressed her concern with Organizational Expertise Standard which requires EFSC to find the applicant has the organizational expertise for the site. Her struggle is finding the evidence that connects the applicant to the parent company (or chain of parent companies) which would show the applicant meets the standard. She suggested an affidavit or memorandum from the parent company saying the parent company will provide the resources for decommissioning.*

*Ms. Tardaewether stated as part of the project LLC structure, the business development project specific LLC is a required component for funding. Requiring an affidavit or memorandum may conflict with the financial business aspect. The Organizational Expertise Standard does state the Council may consider the applicant's experience and their access to technical expertise.*

*Council Member Condon confirmed her understanding of the Organizational Expertise Standard, adding there are no financial statements from the parent company required. There are not affirmative statements from the parent company.*

*Council Member Jenkins added that there is an opportunity to reevaluate the rule at some point in the future which should be explored. EFSC needs to make the linkage and apply responsibility to the parent company.*

*Council Member Beier agreed, adding when the rules were adopted, EFSC didn't deal with corporate structures as they are currently. Until the rules can be updated and clarified, EFSC will need to define in their findings for applications that EFSC is interpreting that the applicant is relying on the parent company to provide some of the structure for the applicant.*

*Council Member Jenkins provided his evaluation of the evidence presented related to the Land Use Standard requirements. The properties are in exclusive farm use zones in Umatilla County. There are 2 identified soils, 235 acres of Atkins Fine Sandy Loam which is a class 4 soil when not irrigated and 87 acres of Quincy Fine Sandy Loam which is a class 7 soil when not irrigated. The analysis area is predominantly composed of arable soils, which is the Atkins Fine Sandy Loam. This is not range land, these are arable soils when not irrigated. The*

320 acres of tax lots around the properties are being farmed and irrigated. Mr. Scott's dry land farming on his property in 2013 and 2015 showed poor production. He feels the applicant has adequately shown that without irrigation water, there is no opportunity to farm high value crops. It has also been adequately shown that irrigation water is not available through the ground water source or through the irrigation districts. The applicants have not shown that the land can't be used for dry land production. The EFSC Goal 3 Exception requirements require a demonstration for the reasons to justify why the statewide policy for protection of agricultural land for agricultural use should not be applied. The statement that 1 landowner could not make a profit over a 2-year period and the other landowner hasn't tried to farm the land could be an argument for any land that is not being irrigated. His concern is that the Goal 3 Exception requires justification to demonstrate with property specific reasons why this land is no longer going to be available for agricultural production in a farm use zone. While Council has been shown that water is not available, it has not been demonstrated that there are other properties in the area that are not being used for agricultural production that are also in a dry land situation. The land is not available for high value crops but is it viable for non-high value crops such as dryland wheat or for grazing? Without knowing whether these properties can be used for other economically viable agricultural activities, he cannot support the Goal 3 Exception for this property at this time. His concern is that for EFSC to set a Goal 3 Exception for this property, Council needs more cause than the property is more valuable for a solar project. If Council is taking the agricultural zoning off of this property and saying it should be used for something else, we need specific reasons for allowing change for this property more than it was farmed unsuccessfully for 2 years.

Ms. Tardaewether questioned the number of years required to demonstrate farming the land is not profitable.

Council Member Jenkins answered it is not about the individual practices of the landowners. It is about what is developing in the area. There is a lot of land being farmed in the Pendleton area that is not irrigated, in Boardman nothing grows unless it is irrigated. Council hasn't been shown the information for this area. There is a lot of land in the area that is being farmed that is not irrigated, which shows viability there for agriculture use unless there is additional information that EFSC has not been provided. Council needs a more comprehensive assessment of the area with specific information regarding this parcel in order to take it out of agricultural production.

Council Member Beier stated Council needs to take the Goal 3 Exception burden of proof very seriously as projects get bigger and more complex. As a former Watershed Council Coordinator for Umatilla County, she is familiar with the area and the production capabilities. The parcel has mixed soils, one of which is class 7 which is by LCDC definition "non arable". Is it impossible to farm crops on this land without water? Are there other non-irrigated parcels in the area being cropped? It is hard to determine what that looks like on the landscape based on the maps provided. The burden of proof for a Goal 3 Exception must be met by the applicant.

*Ms. Tardaewether noted the analysis area for land use is a half mile from the site boundary. Comments from Council in past applications with a request for Goal 3 Exception have included asking the development community to provide clear and concise information for the exception. Staff has the Project Order and can adjust the analysis area but there must be a clear pathway for the applicant to do the evaluation. She reminded Council that part of this applications evaluation is the existing transmission lines over the parcels that minimizes the lands viability to be used for agricultural production.*

*Council Member Jenkins stated the transmission lines are not inhibiting the adjacent lands therefore it is difficult to place much emphasis on the transmission lines as a limiting factor. The limiting factor is there is not irrigation to this property. Council needs a demonstration that the land cannot be used for dry land agricultural production.*

*Vice Chair Howe, agreeing with Council Member Jenkins, added the Goal 3 Exception requires a high threshold to take land out of the Oregon Agricultural Inventory Plan. The definition of farm use includes “planting, growing, harvesting, and managing crops, land, and livestock to make a profit. While Council has indication that for 2 years half of the property was unsuccessful in farming, Council does not know about the other half of the ability to be farmed. The information provided is incomplete. It is not a thorough record for the high standard required to remove this land from agricultural production.*

*Chair Grail concluded there are a lot of reasons for the high threshold of the Goal 3 Exception. Council is asking the applicants if they tried something different for agricultural production. She expressed her concern for lowering the threshold for the exception which council would be held to in future applications. Council Member Jenkins and Vice Chair Howe are not convinced that all avenues for agricultural production on this land have been exhausted.*

*Council Member Jenkins stated rather than Council evaluating farming failures on these parcels, his request was to evaluate the successes on adjoining and nearby properties that are not being irrigated. Council has not been provided that information. There are 3 categories of agricultural land: high value, airable, and non-arable. The LCDC solar rules were designed to incentivize development on non-arable lands so the threshold for a successful application on non-airable land was lowered. His concern is that EFSC is going to see more applications on arable lands. Council needs to have sound reasons for taking arable lands out of agricultural production. Council must be clear about what is needed to meet the Goal 3 Exception. He asked for an evaluation of this particular parcel and reasons why it should no longer be available for agricultural use.*

*Council Member Beier added grazing opportunities and dry land agriculture in the area*

*are other issues for Council to consider.*

*Council Member Condon, in reference to Retirement and Financial Assurance, expressed her concern that the applicant is not mentioned in the comfort letter received from Sumitomo Mitsui Banking Corporation.*

*Ms. Tardaewether stated that the letter of credit will be issued to the certificate holder and the applicant before they can move forward with the project.*

*At the conclusion of Ms. Tardaewether's presentation, Chair Grail noted the amount of work put into the application to ensure that all of the bases are covered. When questions arise regarding EFSC lengthy processes, here is an example of the work required to complete the application process.*

- F. Annual Election of Officers (Action Item)<sup>14</sup>** – Todd Cornett, Council Secretary. Consistent with OAR 345-011-0010(1), Council completed its obligation to annually elect a Chair and a Vice Chair.

During the agenda item, the following discussion occurred:

*Vice Chair Howe stated in his experience there is an opportunity in the annual election of officers for the Vice Chair to move up to Chair and for the Council to select the next Vice Chair to be in line for Chair at the next annual election. Rotating Chair positions gives Council Members the opportunity to experience the role and allows for diversity with different members chairing the EFSC meetings. He commended Chair Grail as she has been exemplary, dependable, articulate, knowledgeable and well spoken. He noted that he would be open to continue as Vice Chair.*

*Secretary Cornett stated the annual election of officers is a requirement. Council can choose to elect new officers or continue with the current officers.*

*Council Member Condon commented that there are benefits for officers to continue for more than one year as they have learned the process. While newer Council Members should be introduced to the position, they may not be ready for it.*

*Council Member Jenkins stated his belief that Council needs to respond to individual circumstances not a policy for the election of officers. Chair Grail and Vice Chair Howe have worked well together as EFSC officers.*

*Council Member Beier agreed, adding the EFSC meetings have been done well.*

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<sup>14</sup> Audio/Video for Agenda Item F=4:45:51-2022-12-16-EFSC-Meeting- Audio

Council Member Condon motioned for Chair Grail to continue as Chair for another year and Vice Chair Howe continue as Vice Chair for another year.

Council Member Beier seconded the motion.

The motion was carried unanimously.

- G. Protected Areas Rulemaking (Action Item)<sup>15</sup>** – Christopher Clark, Senior Siting Analyst. The Council reviewed public comments received prior to 5:00 pm on December 8, 2022 on proposed amendments of the Protected Areas, Scenic Resources and Recreation Standards and associated information requirements and considered the adoption of permanent rules.

*After providing an overview of the rulemaking process and the proposed rules, Mr. Clark summarized the comments received on the proposed rules.*

*Mr. Clark explained that a commenter disagreed with the determination that the impact of the proposed rules on small business will not be significant.*

*Chair Grail stated, referring to the Cost of Compliance for Small Business, it is important for Council to confirm what qualifies as a small business because some out-of-state entities utilize contractors and sub-contractors to the extent that after construction there may only be 2-3 people working at a site and responsibility for compliance is unclear.*

*Council Member Condon asked if, based on the definition of small business, would an LLC with no employees and no assets be considered a small business?*

*Mr. Clark responded that the definition of small business for the purpose of rulemaking is: “A for-profit entity with 50 or fewer employees and independently owned and operated from all other businesses.” He added that the original Notice of Proposed Rulemaking had concluded that an LLC that is subsidiary of another company would not meet that definition even if the entire business had 50 or fewer employees due to multiple businesses being linked together through a common ownership.*

*Council member Jenkins added a company can’t be an independent LLC for one purpose and not linked to the parent company for another purpose.*

*Council Member Condon asked has the Advisory Committee commented on defining who qualifies as a small business.*

*Mr. Clark stated members of the Advisory Committee had submitted comments. One of the comments was a request for Council to issue a formal statement of the legal interpretation of small business.*

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<sup>15</sup> Audio/Video for Agenda Item G=4:53:18-2022-12-16-EFSC-Meeting- Audio



*Council Member Jenkins noted that there is a statutory definition of small business and that the Council should be in a good position to move forward without additional interpretation .*

*Council Member Beier stated her approval of staff creating a guidance document with information regarding Protected Areas Rulemaking and reducing impact on small businesses.*

*Vice Chair Howe inquired if there is a correlation between small businesses and the amount of county applications versus EFSC applications?*

*Mr. Clark answered as indicated by the fiscal impact advisory committee, smaller developers are working on county level projects.*

*Council Member Beier stated when reviewing fiscal impacts in rulemaking, there is a delta between the current rules versus the new rules' requirements. Some of the comments received may not be considering that fact.*

*Regarding the comment requesting to extend the comment period, Council Members unanimously agreed no extension is warranted.*

*Chair Grail stated it's important for the public to understand the purpose of the comment period is their formal opportunity to share views and opinions. The comments are discussed and processed. If the recommendations are not adopted, it does not mean they are dismissed. She noted her approval of the public involvement in the robust conversations with EFSC.*

*Council Member Beier added it is important for the public to know how extensive the public comment period has been for the Protected Areas Rulemaking. She acknowledged Staff's efforts on creating a fiscal impact analysis and helping the public understand the information.*

Vice Chair Howe motioned Council to approve the Proposed Rulemaking as presented in the Proposed Rulemaking Notice dated November 18, 2022.

Council Member Jenkins seconded the motion.

The motion was carried unanimously.

**H. Annual Rulemaking Prioritization (Action Item<sup>16</sup>)** – Tom Jackman, Rules Coordinator. The Council received an update on rulemaking activities conducted in 2022 and considered

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<sup>16</sup> Audio/Video for Agenda Item H=5:32:32-2022-12-16-EFSC-Meeting- Audio

staff's recommendations for potential rulemaking projects to be undertaken in the 2023-2025 time period.

*Council Member Beier asked if the purpose of the changes to the prioritization in rulemaking regarding the Application Process Review is to align the standards with the administrative rules and statutes or are they based on the survey?*

*Secretary Cornett answered it is to better tie the application requirements to the standards. This will make the process clearer. In phase 1, there are no substantive changes. Phases 2 and 3 will contain more substantive evaluations.*

*Council Member Beier added as Council is discussing this, it is important for the public to understand this is procedural process, not a discussion regarding issues.*

*Mr. Jackman noted there may be minor changes to language to make rules more understandable. The prioritization rulemaking will aid in determining what substantive changes need to be made.*

*Secretary Cornett reminded Council the long legislative session begins in January. Many of the members of a Rulemaking Advisory Committee associated with this rulemaking will likely also be involved in the Legislative session. It may be difficult to convene committee meetings during the first half of the year. Time frames may be longer.*

*Council Member Jenkins suggested, based on Secretary Cornett's comment, in Phase 1 Council should begin with Application Process as it is where Council begins (processing applications). The Contested Case Process should be reviewed next as it is involved in the application process. Number 3 should be the Amendment Process. Number 4 would be the Historic, Cultural and Archaeological Resources. This provides a review process that adheres to the Council review process for site certificate applications.*

*Chair Grail and Vice Chair Howe noted their agreement with Council Member Jenkins' comments and suggestion.*

*Council Member Beier also agreed adding Staff has done a great job interacting with Tribal Nations. While the legislature is in session, work can continue with the interested tribes helping staff with the Historical, Cultural and Archaeological Rulemaking.*

*Mr. Rowe added his approval of the prioritization of rulemaking for 2023 suggested by Council Member Jenkins, specifically prioritizing the contested cases rulemaking.*

*Chair Grail asked if a proposed rulemaking project for 2025 is a placeholder for a current legislative concept that is approved, will Council accelerate or modify the prioritization?*

*Secretary Cornett responded that is possible dependent on the legislative session. There can be mandatory changes to rules, some of which can be mandated to be made quickly. Council and Staff would reset the priorities as directed by the legislature. Some mandatory changes can be applied directly through statute. The statute overrides our rules. There also could be a study bill which does not direct changes to the rules but requires significant staff resources. Council should recognize the prioritization set may need to be adjusted at the end of the legislative session.*

**Public Comment** – The Council provided an opportunity for public comment on potential rulemaking projects and their prioritization.

There were no Public Comments.

**The Public Comment Period was closed at 3:00 p.m.**

Vice Chair Howe motioned that the Council approve the 2023-2025 EFSC Rulemaking Project Schedule with the following order of priority:

- Phase 1 application process review (R211))
- Contested Cases (R214)
- 2022 Site Certificate Amendment Rulemaking (R204)
- Historic, Cultural and Archaeological Resources (R194)
- Radioactive Waste Materials (R195), Standby Generators (R223) and Research Reactors (R202) to be done during the year at the discretion of staff as time and resources allow.

Council Member Jenkins seconded the motion.

The motion was carried unanimously.

**The December 16, 2022 EFSC was adjourned at 3:02 p.m.**

**Anticipated Future Energy Facility Siting Council Meetings:**

- January 19-20, 2023
- February 23-24, 2023