To: Oregon Energy Facility Siting Council

From: Maxwell Woods, Senior Policy Advisor

Date: September 7, 2017

Subject: Agenda Item I
Mist Underground Natural Gas Storage Facility
Staff Analysis of Requests for Contested Case on Temporary Order on Request for Amendment 12 (Expedited Review)

Attachments: Requests for Contested Case

BACKGROUND AND SUMMARY OF REQUESTS FOR CONTESTED CASE

The Mist Underground Natural Gas Storage Facility (Mist Facility) is an energy facility located in unincorporated Columbia County, within a site boundary of 5,472 acres and consists of a series of underground gas storage reservoirs and related and supporting facilities, with a combined working gas capacity of 15.9 billion cubic feet and a maximum gas deliverability of 635 million standard cubic feet per day.

The Energy Facility Siting Council (EFSC or Council) issued the original site certificate for the Mist Facility in June 1981. The Council has approved eleven amendments to the site certificate, and most recently issued a temporary order on the 12th amendment request, temporarily amending the site certificate authorizing short-term water use through a limited water use license issued by the Oregon Department of Water Resources during construction of the North Mist Transmission Pipeline (NMTP); construction of operation of the NMTP was approved by Council in April 2016 in the 11th amended site certificate. The new limited water use license authorizes water withdraw from a source (Beaver Slough) and in a quantity (4.46 million gallons total, including withdraw under LL-1575) previously approved by Council in April 2016 through the 11th amended site certificate.
During its August 18, 2017 meeting, Council considered the Proposed Order on Request for Amendment 12, and comments received on the proposed order, and following their deliberation, issued a temporary order approving the amendment request and temporarily amending the site certificate. As a courtesy, the Department issued public notice of the Council’s issuance of a Temporary Order on Request for Amendment 12 and of the September 5, 2017 (5 p.m.) deadline for requesting a contested case on the Council’s temporary order. The Department received two contested case requests prior to the deadline. The Department’s analysis of the requests for contested case is presented below.

OVERVIEW OF EXPEDITED AMENDMENT PROCESS

Council rules describe the process for expedited review of a request for amendment at Oregon Administrative Rule (OAR) 345-027-0080. Expedited review follows the same general procedure for reviewing a non-expedited request for amendment, but with compressed timelines and the option for Council to issue a temporary order amending the site certificate, pending the final amendment decision.

The final amendment decision is based upon Council’s review of requests for contested case on the temporary order and its determination of whether the issues raised in the request justify a contested case proceeding. The Council’s scope of review for contested case requests during the site certificate amendment process is presented below.

REQUESTS FOR CONTESTED CASE

Two requests for contested case were received by the September 5, 2017 deadline from Messrs. Tracy Farwell and Ed Averill on behalf of NW Climate Methane Task Force; and Mr. Mike Unger on behalf of Engineers for a Sustainable Future.

COUNCIL SCOPE OF REVIEW OF REQUESTS FOR CONTESTED CASE ON AMENDMENTS

OAR 345-027-0080(8) addresses the contested case process for amendments granted approval for review under the expedited process and states,

“Any person may, by written request submit to the Department within 15 days after the date the Council issues the temporary order described in section (5), ask the Council to hold a contested case proceeding on the temporary order...In the request, the person shall provide a description of the issues to be contested, a statement of the facts believed to be at issue and the person’s mailing address and email address.”
OAR 345-027-0080(9) states that, “The Council shall determine whether any issue identified in a request for a contested case proceeding justifies a contested case proceeding.” The Council then has two options:

(1) if the request identifies one or more issues that justify a contested case proceeding, the Council shall conduct a contested case (OAR 345-027-0080(9)(a));

(2) if the request does not identify an issue that justifies a contested case proceeding, the Council shall deny the request and adopt the temporary order as a final order; however, in so doing, the Council may “modify the language of the temporary order, consistent with due process.” (OAR 345-026-0080(9)(b)).

The process for denying a contested case request, but modifying the language of a temporary order “consistent with due process” is not further defined. In the absence of further definition, the Department recommends that the Council rely on the process established in the rules for contested case requests received for non-expedited amendment requests. The Department concludes that these rules are “consistent with due process.”

OAR 345-027-0070(7) and OAR 345-027-0070(8) provide two pathways for modification of an order when a contested case request is denied. OAR 345-027-0070(7) provides:

“To determine that an issue justifies a contested case proceeding under section (8), the Council must find that the request raises a significant issue of fact or law that may affect the Council’s determination that the facility, with the change proposed by the amendment, meets an applicable standard. If the Council finds that the request would not affect the Council’s determination if the alleged facts were found to be true but that those facts could affect a site certificate condition, the Council may deny the request and may adopt appropriate conditions.” (Emphasis added).

OAR 345-027-0070(8) provides, in relevant part:

“If the Council finds that the request identifies one or more issues that an amendment of the proposed order would settle in a manner satisfactory to the Council, the Council may deny the request as to those issues and direct the Department to amend the proposed order....”
Based on the Department’s recommended interpretation, the Council has four options in response to a request for contested case on a temporary order on a request for expedited amendment.

**Option 1:** Under OAR 345-027-0080(9)(a), if the Council decides that an issue justifies a contested case proceeding, the Council shall conduct a contested case proceeding. The contested case proceeding would be limited to the issues that the Council found sufficient to justify the proceeding.

**Option 2:** The Department recommends that Council interpret OAR 345-027-0070(7) for an expedited amendment review as follows: If the Council finds that the contested case request would not affect the Council’s determination that the facility, as amended, meets an applicable standard if the alleged facts were found to be true but that those facts could affect a site certificate condition, the Council may deny the request for a contested case proceeding, amend the temporary order to adopt appropriate conditions or amend existing conditions, and then adopt the amended temporary order as the final order.

**Option 3:** The Department recommends that the Council interpret OAR 345-027-0070(8)(b) for an expedited amendment review as follows: If the Council decides that an issue raised in a request for contested case can be settled by substantively amending the temporary order, the Council can direct the Department to amend the temporary order. The Department would issue an amended temporary order and a public notice. Within 15 days, any person could, in writing, request a contested case proceeding limited to issues associated with the changes included in the amended temporary order. If there were requests for a contested case, then the Council would have to decide at a future meeting whether a contested case proceeding is justified.

**Option 4:** Under OAR 345-027-0080(9)(b), if the Council decides that an issue does not justify a contested case, the Council shall deny the contested case request. The Council would issue a written order specifying the basis for the denial and adopt the amended temporary order as the final order. Under this option, the Council may incorporate the written order denying the requests for contested case into a combined final order denying the requests and approving RFA 12.

Pursuant to OAR 345-027-0080(9)(b), if Council denies the requests for contested case proceeding, the Council shall issue a written order denying the contested case requests. The Department recommends that if Council issue a written order denying the requests for contested case, that the written order be incorporated into an amended temporary order, to be adopted as a combined final order denying the requests for contested case and approving RFA 12.
DEPARTMENT EVALUATION OF CONTESTED CASE REQUESTS

The Department received two requests for a contested case proceeding on the Temporary Order on RFA 12. The first request for a contested case proceeding was received on August 31, 2017 from Messrs. Ed Averill and Tracy Farwell, on behalf of the NW Climate Methane Task Force. The second request for a contested case proceeding was received on September 5, 2017 from Mr. Mike Unger, on behalf of Engineers for a Sustainable Future. Both requests are included as attachments to this report.

Mr. Averill/Mr. Farwell; NW Climate Methane Task Force

The contested case request from Messrs. Averill and Farwell on behalf of the NW Climate Methane Task Force identifies “issues contested” as follows:

“The EFSC standard being used for analyzing the carbon footprint of a Natural Gas nongenerating facility ignores the essential importance of the Natural Gas as a high-impact greenhouse gas. We submit that this deficiency negates any meaning of determination of compliance. Thus, please see “2) Statement of the facility believed to be at issue,” below.”

In its covering email transmitting the contested case request, Messrs. Averill and Farwell state, “We note there is no notice narrowing the scope of issues allowed for a contested case at this time, so rejecting our request on the basis of its not addressing allowed residual issues at the close of the review process would be seriously objectionable.” While this comment was not specifically identified as an issue contested, the Department evaluates the merits of the comment below. For organizational purposes, the Department addresses the primary issue of deficiencies in the Council’s carbon dioxide standard as “Issue 1,” and the comment on scope of a contested case request as “Issue 2.”

Pursuant to OAR 345-027-0080(6) and OAR 345-027-0070(10)(c), the Council’s consideration of RFA 12 is limited to “whether the amendment would affect any finding made by the Council in an earlier order.” Further, and discussed in greater detail below in reference to Issue 2, OAR 345-027-0080(8), contested case proceedings for expedited amendment requests must be “on the temporary order.” Therefore, contested case requests for RFA 12 must pertain to the findings affected by the request – i.e., findings pertaining to the point of diversion change for the limited use water license.

Messrs. Averill and Farwell Issue 1 raises concern related to Council’s carbon dioxide standards at OAR 345-024-0630 and OAR 345-024-0550 and notes perceived flaws with the standard, and how that standard may have been applied to previous amendments of the Mist Facility in general, but do not raise specific issues related to RFA 12 or the Council findings included in the Temporary Order on Amendment 12. Issue 1 does not cite or question a specific Council finding or fact included in the Temporary Order on Amendment 12, or cite a specific law in question

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that is related to the Temporary Order on Amendment 12. Issue 1 does not provide any new evidence or facts related to the Temporary Order on Amendment 12, or provide a substantive evaluation of facts in the record related to RFA 12.

OAR 345-024-0630 and OAR 345-024-0550 are not applicable to RFA 12 or the Council’s Temporary Order on RFA 12, which is clearly described in the temporary order as the new limited water use license under review. Use of the different diversion point authorized by the new limited water use license would only be a temporary use during construction and not a permanent facility feature. The Council’s carbon dioxide standard for nongenerating energy facilities is only applicable to facility operation, not construction, and therefore RFA 12 and the temporary water use license would not trigger applicability of the Council’s carbon dioxide standards. For these reasons, the Department recommends that Council conclude that Messrs. Averill and Farwell Issue 1 does not raise a significant issue of law or fact that affects the Council’s determination that RFA 12 meets an applicable standard.  

Messrs. Averill and Farwell Issue 2 asserts that there is “no notice narrowing the scope of issues allowed for a contested case at this time” and further expresses discontent if the contested case request were to be denied because the issue is determined to be outside the scope of review for this contested case request review process. As noted above, OAR 345-027-0080(8) establishes the scope of a contested case proceeding on an expedited amendment and states, “Any person may, by written request submitted to the Department within 15 days after the date the Council issues the temporary order described in section (5), ask the Council to hold a contested case proceeding on the temporary order. “[Emphasis added]. Therefore, the procedural requirements for requesting the Council to hold a contested case proceeding is established in OAR 345-027-0080(8) and specify that requests for a contested case proceeding by “on the temporary order.” For the Temporary Order on Request for Amendment 12, the Council’s findings are limited to the scope of the amendment request, which as previously described, included one new permit, a new limited water use license to be used during construction of the NMTP that authorizes short-term water use from an existing diversion point withdrawing water from Beaver Slough in quantities not to exceed 4.46 million gallons in conjunction with water withdraw quantities limited under a previously issued water use license. The Department recommends that Council conclude that OAR 345-027-0080(8) defines the document and findings of a temporary order as that to which a request for contested case on an expedited amendment be based.

The Department recognizes the complexity of the siting process, specifically the contested case process. While the Department recommends that Council find that the issues raised by Messrs. Averill and Farwell do not justify a contested case proceeding, it is recommended that Council consider the issues raised as important and valuable input for future rulemaking. The Council

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1 Furthermore, Council found in its Final Order on Request Amendment 11 that the facility, as amended, met the Council’s standard for nongenerating energy facilities. The time to request contested case on RFA 11 and the Council decision on RFA 11 expired in 2016.

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provides various opportunities for the public to comment on perceived flaws in Council’s standards and invites public to present such comments during the public comment period of any Council meeting. Members of the public are also encouraged to contact the Department for more information regarding public comment periods, public participation in the siting process and current and future rulemaking schedules.

Mr. Unger/Engineers for a Sustainable Future

The contested case request from Mr. Unger on behalf of Engineers for a Sustainable Future states, “…Engineers for a Sustainable Future elects to request a contested case for the Mist Expansion Project, joining the NW Climate Methane Task Force. We have reviewed their filing and concur with its content,” and that the “decision criteria do not cite methane leaks and releases for compliance in screening for this natural gas facility.” The request for contested case does not raise a significant issue of law or fact that affects the Council’s determination that RFA 12 meets an applicable standard, nor does the request cite a specific issue with the Temporary Order on Amendment 12. For the same reasons described above in response to Messrs. Averill and Farwell request for contested case, the Department recommends that Council conclude that Mr. Unger’s request for contested case does not raise a significant issue of law or fact that affects the Council’s determination that RFA 12 meets an applicable standard.

DEPARTMENT CONCLUSIONS AND RECOMMENDED COUNCIL ACTION

The Department recommends Council select “Option 4,” and deny both requests for a contested case proceeding for the reasons described above. The Department recommends that Council issue a combined final order, denying the requests for contested case and adopting an amended temporary order as the final order. Amendments to the temporary order would be limited to procedural history and the incorporation of findings related to the Council’s denial of the requests for contested case.

The Department further recommends that Council discuss, in their review of the issues raised, opportunities for public comment related to standards and current and future potential rulemaking schedules, in efforts to provide guidance on public participation opportunities in the Oregon Department of Energy siting and rulemaking processes.
Attachment 1: Request for Contested Case (August 31, 2017)
Mr. Averill and Mr. Farwell on Behalf of NW Climate Methane Task Force
TO: Sarah Esterson, Siting Analyst  
Oregon Department of Energy  
550 Capitol St NE, 1st Floor  
Salem, OR 97301  

RE: NW Climate Methane Task Force Request for Contested Case  

Dear Ms Esterson,

Please find enclosed our filing to request a contested case in the subject matter before the Energy Facility Siting Council. We acknowledge it is late in the Expedited Review process to bring attention to the criteria employed by the Department and Council. Our staff is limited in its ability to identify and track all fossil energy issues in Oregon.

But it is extraordinary to find that a methane storage, processing and transport facility is being evaluated by the Council under its sustainability goals with no compliance criteria for methane releases to the environment under pressure. Under current criteria, this facility could release methane quantities comparable to the Aliso Canyon accident and gain approval regardless. Why? The criteria for non-generating facilities omits mention of methane.

Given the importance of this facility to Oregon’s Greenhouse Gas goals, the ones not being met and no Oregon recovery plan yet identified, we request an email notice of receipt by the Department of the enclosed pdf file, within 24 hours. We note there is no notice narrowing the scope of issues allowed for a contested case at this time, so rejecting our request on the basis of its not addressing allowed residual issues at the close of the review process would be seriously objectionable. We believe all criteria justifying a contested case have been met, and have provided ample access to our rationale along with independently verifiable facts and data. Please advise of any deficiencies we can correct before the 5 September 2017 closing date.

Your effort to assure a fair and equitable review process is most appreciated.

Best Regards.

Tracy Farwell, 503-477-8811  
NW Climate Methane Task Force  

Enclosure
Public Notice on the Availability of Temporary Order on Amendment 12 (Expedited Review) of the Mist Underground Natural Gas Storage Facility Site Certificate

Description:

Northwest Natural Gas Company requested to amend its site certificate for the Mist Underground Natural Gas Storage Facility. The amendment request sought approval for a new limited water use license for water access during pipeline construction from an existing diversion point located in Beaver Slough, north of Clatskanie, in Columbia County. Limited water use licenses are administered by the Oregon Water Resources Department, but are subject to Energy Facility Siting Council (EFSC) jurisdiction, review, and decision authority for EFSC-jurisdictional energy facilities, including the Mist Facility.

The Council considered the Proposed Order and issued a Temporary Order on Amendment 12, temporarily amending site certificate, at its August 18, 2017 teleconference Council meeting. Requests for Contested Case must be submitted by September 5, 2017. The Public Notice on the Temporary Order on Amendment 12 is attached.

Additional Information:

Attached: Public Notice on Temporary Order on Amendment 12, August 18, 2017
Online: Oregon Department of Energy, Energy Siting Division website for the Mist Underground Natural Gas Storage Facility:
http://www.oregon.gov/energy/facilities-safety/facilities/Pages/MST.aspx

Please mail or email requests for contested case on Temporary Order on Amendment 12 by September 5, 2017 (5:00 PM) to ODOE, per the contact information provided below:

Sarah Esterson, Siting Analyst
Oregon Department of Energy
550 Capitol St NE, 1st Floor
Salem, OR 97301
Sarah.esterson@oregon.gov

You received this notice either because you previously signed up for email updates through GovDelivery related to specific siting projects, all Energy Facility Siting Council activities (the "General List") or Rulemaking
activities. You may manage your subscriptions to updates on various ODOE and Energy Facility Siting Council projects by logging in to our GovDelivery page at: http://tinyurl.com/EFSC-email.

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For questions about the content of this message, please contact us at AskEnergy@Oregon.gov.

This service is provided to you by the Oregon Department of Energy.
Attachment 2: Request for Contested Case (Sept 5, 2017)
Mr. Unger on Behalf of Engineers for Sustainable Future
Dear Ms. Esterson,

As president of “Engineers for a Sustainable Future” (ESF), I am requesting a Contested Case for the Mist Expansion Project.

Engineers for a Sustainable Future (ESF) is a community of about 100 engineering professionals who share technical knowledge and skills to advocate for policies and practices that build a sustainable future. Our primary focus is on climate change. We favor a rapid transfer from fossil fuels to renewable energy.

Please acknowledge my request. Thank you.

Regards, Mike Unger
President
Engineers for a Sustainable Future
503.348.8716
Sarah Esterson, Siting Analyst
Oregon Department of Energy
550 Capitol St NE, 1st Floor
Salem, OR 97301

Dear Ms. Esterson,

In networking with the sustainability community in Oregon we share concerns with other organizations. We are aware from the Oregon Global Warming Commission that the Oregon Greenhouse Gas (GHG) Inventory is exceeding the goals set for the State.

This means that more vigilance and due diligence is required. The Oregon Public Utility Commission with its Integrated Resource Plan review process is making progress, in that Portland General Electric has elected to designate renewable energy for new generation rather than fossil natural gas.

Only recently have we learned of the Mist project expansion, which stores and transports natural gas, a powerful GHG. The Energy Facility Siting Council decision criteria do not cite methane leaks and releases for compliance in screening for this natural gas facility. This is a serious omission that undermines the credibility of the Council in committing to its sustainability goal.

For this reason, Engineers for a Sustainable Future elects to request a Contested Case for the Mist Expansion Project, joining the NW Climate Methane Task Force. We have reviewed their filing and concur with its content.

Sincerely,

Michael Unger, President
Engineers for a Sustainable Future
503.348.8716