



ENERGY FACILITY SITING COUNCIL

Barry Beyeler, Chair ■ Hanley Jenkins II, Vice-Chair ■ Betty Roppe ■ Marcy Grail ■ Ann Gravatt ■ Kent Howe

Energy Facility Siting Council December 14, 2018 Meeting Minutes

December minutes were approved at the February 22, 2019 EFSC meeting.

Columbia Gorge Discovery Center & Museum 5000 Discovery Drive The Dalles, OR

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The meeting materials and audio recording presented to Council are available online at:
<https://www.oregon.gov/energy/facilities-safety/facilities/Pages/Council-Meetings.aspx>

<http://soundcloud.com/odoe/audio-recording-of-the-EFSC-Meeting-held-December-14-2018-in-The-Dalles-Oregon>

FRIDAY, DECEMBER 14TH, 2018

Call to Order: The meeting was called to order at 8:30 a.m. on December 14th, 2018 by Chair Barry Beyeler.

Roll Call: Council Chair Barry Beyeler, Council Vice-Chair Hanley Jenkins, Council Members Betty Roppe, Marcy Grail, Ann Gravatt, and Kent Howe were present.

Oregon Department of Energy representatives present were Assistant Director/Council Secretary Todd Cornett, Senior Siting Analysts Sarah Esterson, Rulemaking Coordinator Christopher Clark, Senior Policy Advisor Maxwell Woods, and Division Assistant Esther Kooistra.

EFSC Counsel Patrick Rowe, Department of Justice (DOJ) was also present.

A. Consent Calendar¹ (Information and Action Items) – Todd Cornett, Assistant Director/Council Secretary.

1) Meeting Minutes

Action: A motion was made by Vice-Chair Jenkins and seconded by Councilor Roppe that the Council approve the October 25-26, 2018 and November 16, 2018 meeting minutes with correction of scrivener's errors.

Vote: Vice-Chair Jenkins, Yes; Chair Beyeler, Yes; Councilor Gravitt, Yes; Councilor Howe, Yes; Councilor Grail, Yes; Councilor Roppe, Yes.

Motion Carried.

2) Council Secretary Report

a. Agenda Modification:

Agenda Item B: Wheatridge Wind Energy Facility Amendment #2 includes the Council first considering and deciding upon any requests for contested case. There were no requests for contested case submitted by the deadline so we will proceed to the second part of the agenda item which is Council's review of the Proposed Order and possible decision on a final order.

Agenda Item C: Carty Generating Station Amendment #1. Similar to the Wheatridge Amendment, no contested case requests were received so we will proceed to the second part of the agenda item which is Council's review of the Proposed Order and possible decision on a final order.

b. Staffing Updates:

Mary Winters, newest Council Member will be replacing Direlle Calica in Position #2. Her term is through September 2021. Since there are more than two years remaining on the term, this will count as Councilor Winter's first term. She has a law degree from University of San Diego School of Law and has been the City Attorney for Bend since 2008. She had a prior engagement so she was not able to attend in person or by phone today. She is expected to be confirmed by the Senate on December 14, 2018.

Secretary Cornett introduced Christopher Clark, Rulemaking Coordinator. Chris started on Monday, December 3rd.

c. Project Updates:

Amendment Rules: The oral arguments were made to the Oregon Supreme Court on December 5th on the amendment rules adopted in 2017. There are three procedural error assertions and two substantive error assertions which are related to the Type B review. The Oregon Supreme Court will issue their opinion in approximately 6 – 24 months.

Solar PV Rulemaking: The third RAC meeting will be scheduled for late January or early February in Boardman, Oregon.

LCDC Solar PV Rulemaking²: Secretary Cornett provided an update of the scope of the LCDC Solar PV Rulemaking, and discussed what implications that might mean for the Council's review of Solar PV facilities. Secretary Cornett discussed the temporary rule language related to goal exceptions and said the Land Conservation and Development Commission is expected to approve final rules at its

¹ Audio for Agenda Item A = 00:04:45 – December 14, 2018

² Audio for LCDC Solar PV Rulemaking, Agenda Item C = 00:09:03 – December 14, 2018

January 24-25, 2019 meeting in Salem. Secretary Cornett said the main driver of the rulemaking in terms of timing is because of the language in the current rule related to goal exceptions.

Chair Beyeler questioned with the goal exception process, would subsequent amendments be affected through the goal exception process or would initial goal exception be sufficient, and not need a goal exception process, for say battery storage.

Secretary Cornett stated he believed an amendment within the boundary of an original application would not be subject to the new goal exception rules because there is no retroactivity requirement at the local level through the LCDC rules.

Vice-Chair Jenkins asked if the intent was to only apply to class 1 and 2 high value soils in the Willamette Valley or statewide?

Maxwell Woods, Senior Policy Advisor, responded it is statewide. The concept is trying to focus on the Willamette Valley, as that is where the farming communities seem to have the most interest. Marion and Yamhill Counties have already taken steps in placing moratoria on solar projects. Mr. Woods mentioned the desire to protect soils categorized as prime and unique.

Vice-Chair Jenkins and Mr. Woods discussed high value farmland versus high value soils and the distinction in rules. Vice-Chair Jenkins stated the point is that it is the soil, not the parcel.

Secretary Cornett said the next LCDC meeting is on January 24, 2019. When ODOE receives the new draft rules, they will be forwarded to the Council.

Vice-Chair Jenkins said at some point we will need to have a discussion about the differences between the LCDC exception process and the EFSC exception process as it relates to what they are proposing. He said it is very confusing as to how the two processes operate independently, but we also have to consider what LCDC is defining as high value farmland. There is a separation between our two processes.

Secretary Cornett stated the threshold will be the same. What triggers a goal exception will be identical. However, whereas land use regulations typically come through LCDC rules and statutes or through the local jurisdiction, the Council has a specific goal exception statute which is identical in rule. The main difference is that an alternatives analysis is not required like it is in the LCDC rules.

Secretary Cornett mentioned one of the proposals by DLCD staff was to prohibit new solar development within one mile of another approved facility. There was not a lot of support for that idea at the last RAC meeting so it may not be reflected in the draft rules.

Secretary Cornett provided an update on two amendment determination requests:

Montague Wind Facility: The proposed change is to add 25.8 acres to the approved (Phase 1) site boundary to allow for the construction of more direct collector line paths than previously approved, and to modify an access road alignment to better accommodate farming practices. The applicant asserted an amendment was not required and after evaluating their request, staff agreed.

Summit Ridge Wind Project: The request is that the beginning and ending construction deadline time extension request amendment be processed through the Type B review rather than the default Type A review. In August 2018 staff received a similar request and determined Type A

review was justified because the certificate holder did not provide sufficient evidence to justify Type B review. After receiving a second request with additional information, staff determined Type B review for this amendment was justified.

Secretary Cornett provided a copy of ODOE's Biennial Energy Report's Executive Summary Version. This report is required as a result of legislation in 2017 with the purpose of informing local, state, regional and federal energy policy development and energy planning and investments. The report is also located on our website.

Secretary Cornett discussed a proposal in the Governor's Budget, to eliminate the Oregon Department of Energy and create a new Oregon Climate Authority. For both the Nuclear Safety Division and the Siting Division, the Governor has indicated a willingness to have a discussion about the best long term location of each division. This budget will still need legislative authorization so there is the potential for changes to what is proposed.

Patrick Rowe, Department of Justice, is evaluating whether Council has the authority to develop new rules that identify objective criteria for defining what constitutes a solar PV facility subject to EFSC jurisdiction.

d. Future EFSC Meeting Dates:

January – No January meeting.

February – 21-22, 2019 expected to be in Pendleton, Oregon. The agenda is anticipated to include the review of the proposed order and final order for the Summit Ridge Wind Farm. [*note: the February EFSC meeting will be held in The Dalles, not Pendleton*]

e. Senator Olsen Workgroup:

In light of the Governor's Budget, which would eliminate the Oregon Department of Energy and create a new Oregon Climate Authority, Senator Olsen has discontinued his EFSC workgroup.

B. Wheatridge Wind Energy Facility, Request for Amendment 2 of the Site Certificate³: (Action Item) – Sarah Esterson, Senior Siting Analyst.

The Request for Amendment 2 seeks approval by the Council of a second amended site certificate by the Certificate Holder, Wheatridge Wind Energy LLC, with NextEra Energy Resources LLC as the Certificate Holder Parent Company, to authorize the construction and operation of two lithium-ion battery storage systems with a capacity of 20 and 30 megawatts, respectively. If approved, the storage systems would be located adjacent to a previously approved but not yet constructed facility substation and operation and maintenance building sites in Morrow and Umatilla counties. The approved, but not yet constructed facility would include a 500 MW wind energy generation facility with up to 292 wind turbines. In response to Draft Proposed Order comments, changes and responses were made to III.B. Organizational Expertise; III.E. Land Use; III.I. Threatened and Endangered Species; III.M. Public Services, III.Q.1. Noise Control Regulation with Staff recommending Council adopt proposed order, with modifications, as final order and grant an amended site certificate.

The Council did not receive any contested case requests and reviewed the proposed order on Request for Amendment 2 and after deliberation, adopted the proposed order, with the following modifications authorized by Council:

Ms. Esterson confirmed Vice-Chair Jenkins' question regarding the intent of Condition 15 to be specific to Umatilla County.

³ Audio for Agenda Item B = 00:48:10 – December 14, 2018

Vice-Chair Jenkins commented on Page 84, line 18-41, and noted the cited regulatory language for the Noise Control Regulation appeared to be a duplicate, which Ms. Esterson confirmed was erroneous and would be corrected in the final order.

Vice-Chair Jenkins questioned the elimination of a footnote on page 46 and on page 72, the same footnote. Ms. Esterson responded page 46, footnote 36 described the amendment of a condition that didn't occur.

Secretary Cornett clarified the proposed order was issued by staff, and Council is determining if members agree with everything in the proposed order.

Vice-Chair Jenkins asked Patrick Rowe, Department of Justice, if Council wanted to provide the staff the opportunity to evaluate the two items on page 84, whether one needs to be eliminated, how that is included in a motion.

Mr. Rowe stated the order could be adopted with modifications.

Action: A motion was made by Vice-Chair Jenkins and seconded by Councilor Grail that the Council adopt the Proposed Order on Request for Amendment 2, with modifications discussed during the Council meeting, as the final order and approve Amendment 2 of the site certificate for the Wheatridge Wind Energy Facility with modifications.

Vote: Councilor Gravatt, Yes; Councilor Howe, Yes; Councilor Grail, Yes; Councilor Roppe, Yes; Vice-Chair Jenkins, Yes; Chair Beyeler, Yes.
Motion Carried.

More information is located on the [Council Meetings website](#) for additional details pertaining to Ms. Esterson's [presentation](#).

C. Public Comment⁴

This time is reserved for the public to address the Council regarding any item within the Council's jurisdiction that is not otherwise closed for comment.

Carla McLane, Planning Director for Morrow County, commented on the effects of Council decisions on local government, specifically when a goal exception is part of the approval. Ms. McLane shared her concern is that counties do not have the capacity or process to incorporate the goal exception into the county's comprehensive plan that is part of a Council decision, even though it is required by statute. Ms. McLane requested assistance, maybe creating a workgroup, and encouraged EFSC, ODOE staff, DLCD staff, and County Planning Directors to hold a conversation for a simplified process in order to comply with this requirement.

Councilor Grail stated her appreciation for Ms. McLane's input and for raising the issue.

Vice-Chair Jenkins commented there is an added issue associated with this. In order for her to adopt the EFSC exceptions process, it would not be in compliance with the LCDC's exceptions process. Challenge would be whether her adoption would meet the State's requirements. The issue needs to be resolved and he believes it is an excellent recommendation that should be referred to staff.

⁴ Audio for Agenda Item C = 01:14:12 – December 14, 2018

Councilor Gravatt asked for an example of this situation. Ms. McLane commented that there has not been a conflict yet, but there is the possibility in the future. Councilor Gravatt expressed her appreciation and concern for a future conflict, but noted her hesitation in creating a formal process for something that is yet to be a conflict.

Councilor Howe commented it is a conflict in the statutes. He asked Secretary Cornett if there needed to be something formal from EFSC for staff to look at this and come back with a recommendation.

Secretary Cornett agreed there is a need for general direction or acknowledgement from Council for staff to look into this. Council Members nodded in agreement.

[Break]

D. Carty Generating Station: Request for Amendment 1 of the Site Certificate (Action Item)⁵ – Sarah Esterson, Senior Siting Analyst.

Ms. Esterson led the Council through their review of the Proposed Order on Request for Amendment 1 of the Carty Generating Station Site Certificate. The presentation began with an overview of the certificate holder, facility, facility location, and a review of the procedural history of the amendment request.

Request for Amendment 1 seeks Council approval of the construction and operation of a 50-megawatt photovoltaic solar unit, a 34.5 kV transmission line; five 34.5 kV transmission line routing options and three interconnection options; use of temporary construction laydown and parking areas; removal of reference to previously approved but not yet constructed Unit 2 gas plant, Unit 2 associated components, and Unit 2 related or supporting facilities; site boundary changes; amendment to a Water Pollution Control Facilities permit; and, amendment and removal of previously imposed Conditions. Request for Amendment 1 was received in August 2016; therefore, the amendment request is being processed under the amendment rules in effect prior to October 24, 2017. Under the old rules, the procedural steps include an opportunity for public comment on the amendment request; requirement that Department issues Proposed Order within 6 months of receipt; dual comment period and opportunity to request a contested case on Proposed Order – 30-day timeframe; no public hearing and only one order issued by Department.

The Council did not receive any contested case requests and reviewed the Proposed Order on Request for Amendment 1.

The Department presented an overview of the amendment request, the certificate holder's impact assessment methodology and results, and Department's recommendations as included in the Proposed Order. The Department also reviewed comments received during the Proposed Order comment period, and proposed modifications to the Proposed Order in response to comments received, as presented in the November 30, 2018 staff report to Council.

Chair Beyeler raised questions during review of the Structural Standard, inquiring whether the certificate holder reviewed wind loading. The Department confirmed that the amended site certificate, if approved, would include a requirement that the certificate holder conduct a pre-construction site-specific geotechnical investigation of the proposed solar PV unit site, which would include an evaluation of foundation design and would account for geographic and environmental conditions, such as wind loading.

⁵ Audio for Agenda Item D = 01:39:33 – December 14, 2018

Vice-Chair Jenkins raised questions during review of the Soil Protection standard and requested confirmation of whether sandy loam soil was the predominant soil in the proposed solar PV unit site.

Vice-Chair Jenkins raised questions during review of the Cultural, Archeological and Historical standard, and requested clarification on recommended amended Condition 11.6, specific to the inclusion of a requirement that the certificate holder coordinate with CTUIR during ground-disturbing activities to determine necessity of an onsite cultural monitor. The Department confirmed that the recommended condition amendment was based on a comment received by CTUIR and the certificate holder's representation agreeing to coordinating construction activities and necessity of cultural monitoring with CTUIR, and that it did not establish a requirement for cultural monitoring during all ground-disturbing activities.

Action: A motion was made by Vice-Chair Jenkins and seconded by Councilor Grail that the Council adopt the modified Proposed Order as presented to Council as the Final Order and approve Amendment 1 of the Site Certificate for the Carty Generating Station with the revisions presented in the November 30, 2018 staff report and: on page 26 Line 22 of the Proposed Order, after "Sagehill fine sandy loam soils" add "**the predominant soils on the project site**"; on page 36 Lines 38, change the reference of MCZO 3.010(D)(10)(b) subsection (1) to **subsection (2)**; on page 108 Lines 7 – 12, ad "**In RFA1 Exhibit S, the certificate holder voluntarily agreed to coordinate with CTUIR on monitoring during ground disturbing activities.**"

Vote: Councilor Howe, Yes; Councilor Grail, Yes; Councilor Roppe, Yes; Vice-Chair Jenkins, Yes; Chair Beyeler, Yes; Councilor Gravatt, Yes.
Motion Carried.

More information is located on the [Council Meetings website](#) for additional details pertaining to Ms. Esterson's [presentation](#).

F. [WORKING LUNCH] Annual Election of Officers (Action Item)⁶ – Todd Cornett, Council Secretary.

Per OAR 345-011-0010(1) The Council shall annually elect a chair and a vice-chair. The chair and vice-chair shall serve for one year or until their successors are elected. A member may serve successive full terms as chair or vice-chair.

Action: A motion was made by Vice-Chair Jenkins and seconded by Councilor Roppe that Barry Beyeler remain as Chair for the Energy Facility Siting Council until his term expires in June or until his successor is elected.

Vote: Councilor Grail, Yes; Councilor Roppe, Yes; Vice-Chair Jenkins, Yes; Chair Beyeler, Yes; Councilor Gravatt, Yes; Councilor Howe, Yes.
Motion Carried.

Action: A motion was made by Councilor Roppe and seconded by Councilor Grail that Hanley Jenkins remain as Vice-Chair for the Energy Facility Siting Council for 2019.

Vote: Councilor Roppe, Yes; Vice-Chair Jenkins, Yes; Chair Beyeler, Yes; Councilor Gravatt, Yes; Councilor Howe, Yes; Councilor Grail, Yes.
Motion Carried.

⁶ Audio for Agenda Item F = 03:37:44 – December 14, 2018

G. [ADDED TO AGENDA] Public Comment⁷

This time is reserved for the public to address the Council regarding any item within the Council's jurisdiction that is not otherwise closed for comment.

Irene Gilbert, 2310 Adams Ave, La Grande, OR, representing herself. Ms. Gilbert commented on the new amendment rules: 1) There should be a system to track ongoing concerns related to the new amendment rules; 2) Believes that even though the rule language with regards to commenting on new applications and amendments and how those comments relate to a contested case request are the same, they are being interpreted differently. Specifically, in contested case request on an amendment the public is not allowed to add supporting statutes or rules or additional documents supporting the issues raised; 3) The public does not have adequate time to review the complete request for amendment, Draft Proposed Order, any necessary statutes and rules and submit comments that could be the basis for a contested case; 4) No formal written notice is given on the denial of a request for a contested case in an amendment, which begins the clock to challenge the denial; and 5) The public has a right to challenge staff's decisions about whether an amendment is reviewed under the Type A or Type B process, or whether an amendment is required at all. There is no formal written notice going to the public establishing when the timeframe starts for challenging those decisions.

Council members made the following statements and asked the following questions related to 4) and 5).

Councilor Roppe:

- Asked if there were some type of protocol that tells citizens exactly how to make their appeal or comments so they can respond when they want to. That would be important for anybody who asks.
- Commented that Ms. Gilbert takes this all seriously and has done her research and that it is unfortunate she was told she couldn't bring new information. Citizens should be able to speak to us and share their opinions with us. Someone needs to give her documentation as to what will be done when she appeals a case and we deny her request. Can Mr. Rowe document the steps?
- If an individual files an appeal, and EFSC votes to not accept that appeal, that's date specific. It doesn't hurt us to provide that documentation.

Chair Beyeler:

- Asked if when an Amendment Determination Requests goes out through GovDelivery and if there was an established email list.
- Commented if staff were to report the date, the same time the determination of A or B, a date could be established with Oregon.gov and have an identified mailing list and that would be their date.
- Agreed that providing a date certain that is court worthy is needed.

Vice-Chair Jenkins:

- Stated that for Amendment Determination Requests, most are made by staff and some are made by Council. When Council makes a determination because it was referred by staff or contested by a site certificate holder, there is an action at a regular council meeting. When staff makes a determination on Type A/B, only the certificate holder can contest that in rule.
- During the amendment rulemaking we agreed to put Amendment Determinations on the website so anyone can access them. The way he viewed it at the time it's like a county deciding whether you're going to submit a zone change application or conditional use application. That isn't challenged until there's a final decision. There isn't a final decision until we get to the amendment decision, otherwise then you have the whole issue of giving notice, adequate time

⁷ Audio for Agenda Item G = 03:40:22 – December 14, 2018

frame, and essentially allowing a contested case process for just the Type A / B determination and we didn't choose to go there.

-There is no need for a process change but there is a need to establish dates.

Councilor Gravatt:

-Asked about an interested persons' list to send notices.

-Asked Mr. Rowe to look into the statute related to an appeal.

-Is there even a legal decision able to be made, regarding an appeal on a Type A/B determination?

-Commented she is also grateful Ms. Gilbert's advocacy and the issues raised before us. EFSC is only one venue, the Oregon State Legislature will be considering all sorts of issues related to ODOE and EFSC and that is another venue for her.

Councilor Howe:

-The determination of a Type A or Type B review is not necessarily a decision and questioned if it was appealable. Final decision on the amendment request is what's appealable.

Secretary Cornett provided the following responses/clarifications about the 5)

-During the amendment rulemaking notice to the public on Amendment Determination Requests was discussed. The adopted rules require posting the information on the project page, and updating the council during the next regularly scheduled Council meeting.

-Amendment Determination Request information is also provided on the monthly siting report, but not through a notification to the adjacent property owners or the project mailing list or special mailing list associated with that project.

-There is no language in rule which identifies a list of who can or should receive Type A/B determinations. If there is an identified need, a future rulemaking process could determine who would get the notification, how that would be done, what the timeframe associated with that would be.

-During the rulemaking deliberation, the Council discussed and chose staff to be the ones to do the Type A/B review and so the site certificate holder wouldn't have to wait for a Council meeting. The purpose of Type B review was to allow smaller amendments to go through a shorter more expeditious process. Adding notice and challenge opportunities adds time and cost which eliminates the purpose of doing them in the first place. Not opining on the questions or the ability to challenge, but taking the Council back to deliberation that occurred when establishing the rule.

-We maintain a general mailing list and provide notice of council meetings, projects and rulemakings to those on the list. We would need to research the legal ability to use that list and evaluate the implications of not noticing anyone else.

Mr. Rowe provided the following responses/clarification regarding 4) and 5)

-EFSC is used to hearing anything appealed from EFSC goes to the Supreme Court. In the context of an EFSC decision to accept or reject a site certificate or site certificate amendment, those decisions are reviewed by the Oregon Supreme Court. Ms. Gilbert is not describing the decision to accept or reject a site certificate application, rather, [in her question 4)] she is addressing the Council's decision to not grant a request for a contested case. That is also subject to judicial review. Depending on which statutes were deemed to apply, such a decision would be reviewed

by a circuit court, or it could go to the Court of Appeals. Ms. Gilbert has been advised she needs a date certain by which she was provided notice that her request for a contested case was denied and that would begin the timeframe for her to seek judicial review.

-In order to appeal an Agency action to a court, it needs to be a final agency action. [Re: her question 5)], Ms. Gilbert might ask if a Type A or Type B determination would constitute a final agency action. It could be that the final agency action doesn't take place until this Council issues a final decision on the amendment.

-Sought to confirm that the question being posed is whether ODOE is required to provide public notice of Type A vs Type B amendment determinations other than what it is currently doing, which is posting that determination on the website.

-There is a question as to whether a Type A versus Type B determination made by the agency is even subject to judicial review at that point in time.

-Directed a question to Council: are you also asking me to look into if a Type A / B decision is subject to judicial review? He stated he believes that is a question Mr. Gilbert's counsel should look into.

Conclusion: Mr. Rowe will evaluate whether the agency, the Oregon Department of Energy, is required to provide public notice when it makes a determination on a Type A vs Type B amendment, other than what it's already doing, which is posting that determination to the website.

Meeting Adjourned.