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# ENERGY FACILITY SITING COUNCIL

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Hanley Jenkins, Chair ■ Marcy Grail, Vice-Chair ■ Kent Howe ■ Mary Winters ■ Jordan Truitt

## **Energy Facility Siting Council November 21-22, 2019 Meeting Minutes**

**Thursday, November 21, 2019 at 5:00 p.m.  
Friday, November 22, 2019 at 9:00 a.m.  
The Dalles – The Discovery Center  
5000 Discovery Drive**

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

### Thursday, November 21, 2019 – The Dalles

**Call to Order:** The meeting was called to order at 5:04 p.m. on November 21, 2019 by Chair Hanley Jenkins.

**Roll Call:** Council Chair Hanley Jenkins, Vice Chair Marcy Grail, and Council Members Kent Howe, and Jordan Truitt were present. Council Member Mary Winters participated by phone.

Oregon Department of Energy representatives present were Assistant Director for Siting/Council Secretary Todd Cornett, Senior Policy Advisor Maxwell Woods, Energy Policy Analyst/Rules Coordinator Christopher Clark, Senior Siting Analyst Katie Clifford, Operations Analyst Sean Mole, Division Assistant Michiko Mata, and Public Affairs Specialist Cliff Voliva. EFSC Legal Counsel Patrick Rowe of the Department of Justice was also present.

#### Opening Remarks

Secretary Cornett explained that there is one agenda modification. The presenter for Agenda Item F., Langenburg Technologies, had a conflict and was not able to attend the meeting. This item has been postponed to a later Council meeting in 2020.

**A. Consent Calendar (Action Item)** – Todd Cornett, Council Secretary. Approval of minutes; Council Secretary Report; and other routine Council business.

October 2019 meeting minutes: Chair Jenkins asked for a few minor changes to the minutes, and they were re-distributed for council to review.

Vice Chair Grail motioned to approve the October 2010 meeting minutes as presented.

Council Member Truitt seconded the motion.

The motion carried unanimously.

#### Project Updates:

-Boardman to Hemingway Transmission Line (B2H)

Secretary Cornett explained that the B2H public comment timeframe concluded, as well as Idaho Power's timeframe to respond to public comments. All public comments and Idaho Power responses are available on the B2H project page and Secretary Cornett explained how to access the information. There are approximately 6400 pages of comments although there is some duplication. For example, if multiple people were signatories to a single comment, that comment was duplicated for each signatory. There are also approximately 400 pages of Idaho Power responses to public comments.

The December Council meeting is scheduled for the 19<sup>th</sup> & 20<sup>th</sup> in Pendleton, OR with the primary agenda item being Council's review of the B2H Draft Proposed Order (DPO). This will include walking through comments and

Idaho Power responses in order to seek input from the Council which will help staff move to the proposed order phase.

Secretary Cornett asked Council Members how they would like the information in order to prepare for the meeting (digital, from the website or printed).

Vice Chair Grail requested to use the website to access the documents.

Chair Jenkins stated that typically the department provides the staff report, and DPO.  
Secretary Cornett replied that is correct.

Chair Jenkins indicated that he is fine with a paper copy of the staff report, but will navigate the website for comments.

Council Member Truitt stated he will use the website.

Council Member Howe stated he will use the website, but maybe a printed summary for the meeting would be helpful.

Council Member Winters stated that there are many files on the website and it is difficult to keep track of what has been read and asked if there was a better way to help identify which comments she's read.

Senior Siting Analyst Kellen Tardaewether (on the phone) stated that there is one combined pdf of the DPO comments, but it doesn't include Idaho Power responses.

-Saddle Butte Wind Park

Secretary Cornett explained to council that the certificate holder of Saddle Butte Wind Park, Caithness Wind, sent a letter dated November 13, 2019 that they would not meet their beginning construction deadline of November 17<sup>th</sup>, 2019, which means their site certificate has expired. In their letter they indicated they have not abandoned plans for the project, they are just evaluating their options for future wind development in the area. Secretary Cornett recommended Council should issue an order to formally terminate the site certificate. The department has prepared an order to terminate should the council make a motion.

Vice Chair Grail motioned to terminate the site certificate.

Council Member Howe seconded the motion.

The motion carried unanimously.

#### Future Council Meetings

The December Council meeting is set for the 19<sup>th</sup> and 20<sup>th</sup> Pendleton. We are still trying to determine if we need both days since there are only 3 agenda items. Would the council like to do a Thursday evening and a shorter Friday or a longer Friday?

Vice Chair Grail preferred a two day meeting.

Council Member Howe agrees with a two day meeting in order to leave earlier on Friday.

Council Member Truitt would like to consolidate into one day, but can be flexible.

Council Member Winters preferred a one day meeting.

Chair Jenkins was fine either way but was concerned with the volume of the material that must be evaluated if it was a one day meeting. Thursday would be a good time to go through some of the material and we can save the action items for Friday.

Secretary Cornett indicated that staff will continue to evaluate the needs and run their conclusions by Chair Jenkins for a final decision.

The January dates, the 23<sup>rd</sup> and 24<sup>th</sup> appear to work for all Council Members. We will provide more information about that meeting in the near future.

Council Member Howe said he wanted to thank the Department for the opportunity to tour the Hanford Site with Ken Niles and the Nuclear Safety and Emergency Preparedness Division. If any Council Members have not participated, you should.

Secretary Cornett encouraged Council Members Winters and Truitt to attend in the future if they are able. Since all of the Nuclear Safety and Emergency Preparedness Division's administrative rules are Council rules, it is a good way to better understand what that division does.

**B. 2020 Meeting Dates <sup>1</sup> (Information Item)** – Michiko Mata, Division Assistant. Council reviewed the 2020 EFSC Meeting Dates

Ms. Mata reviewed the first quarter meeting dates with the Council in order to ensure there would be a quorum available. More information is located on the [Council Meetings website](#) for additional details pertaining to Ms. Matas' [presentation](#).

Secretary Cornett explained that with the absence of two Council members it would be better to finalize placeholder dates starting in April once there are additional council members.

March 19<sup>th</sup>-20<sup>th</sup> is the new proposed meeting date instead of March 26<sup>th</sup>-27<sup>th</sup> when Chair Jenkins, Council Members Truitt and Howe are available but Council Member Winters is not.

We are looking at eliminating February, so another option is March 12<sup>th</sup>-13<sup>th</sup>. Looks like it works for most of the Council but we will confirm later.

Chair Jenkins – Council Member Winters is unsure for July, and I am unavailable for July and August so hopefully we will have two additional council members by then to ensure we have a quorum.

Vice Chair Grail is available July and August.

**C. Financial Assurance Forms and Institutions <sup>2</sup> (Action Item)** – Sisily Fleming, Fiscal Analyst. The Council considered the staff's annual recommended templates for financial instruments as well as the annual recommended financial institutions for use by certificate holders in obtaining financial instruments.

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

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<sup>1</sup> Audio for Agenda Item B = 00:02:18 – November 21, 2019

<sup>2</sup> Audio for Agenda Item C = 00:8:24 – November 21, 2019

Ms. Fleming outlined the Department’s recommendations for the annual financial review for certified facilities. The only change from 2019’s list is the removal of the Bank of Tokyo. Patrick Rowe, Legal Counsel approved the bond and letter of credit templates presented to council for 2020.

Council Member Howe: On the certificate bond and standby letter of credit, is the project name unique enough that it’s the identifier or is there a site certificate number?

Ms. Fleming responded that it is just the name, which is also on the site certificate, but they are all unique.

Vice Chair Grail motioned to approve the recommended templates and financial institutions as presented by staff.

Council Member Truitt seconded the motion.

The motion carried unanimously.

**D. [5:48 pm] Rulemaking Public Hearing – Site Certificate Amendment Process<sup>3</sup> (Hearing)** – Christopher Clark, Rules Coordinator. The Council held a public hearing on the rulemaking that proposed to amend the Oregon Administrative Rules Chapter 345, Division 27 by adopting the August 23, 2019 temporary rules as permanent rules. The amended rules would replace the amendment rules adopted on October 24, 2017; clarify the process the Council will use to review requests for amendments submitted on or after October 24, 2017 for which Council has not yet made a final decision; and amend provisions which exceeded the Council’s statutory authority under the Type B review process.

More information is located on the [Council Meetings website](#) for additional details pertaining to Mr. Clark’s [presentation](#).

Mr. Clark explained the purpose of the rulemaking hearing and provided an overview of the agenda for his presentation. Mr. Clark asked persons in the room who wished to comment to fill out a comment card and return it to staff.

Mr. Clark provided an overview of the procedural history of the rulemaking project and summarized the proposed rules. Mr. Clark explained that the proposed rules would be substantively similar to the temporary rules adopted by Council in August, with some changes to adopt property owner notification requirements, request the number of paper copies required for certain requests, and to make several other clarifications and minor changes.

Mr. Clark provided an overview of comments received on the record, including a request by Council for clarification of the terms “property” and “subject property” in OAR 345-027-0360 made at the October meeting, and a comment letter from the Friends of the Columbia Gorge which contained two procedural requests.

Mr. Clark provided a brief presentation on what staff intended the terms “property” and “subject property” to mean when preparing draft language. He explained that the terms were intended to require the boundaries of the tax lots or parcels on which a facility component is proposed to be sited to determine the basis for the notification area, and that those tax lots or parcels would be considered the subject property.

Mr. Clark explained that staff reviewed the issue and believes that the context of the rule and the case law supports the intended interpretation, but that there was potentially some ambiguity in the text of the rule. Mr.

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<sup>3</sup> Audio for Agenda Item D = 00:12:58 – November 21, 2019

Clark provided examples of Oregon Land Use Board of Appeals (LUBA) cases involving the language of the underlying statute.

Mr. Clark offered a few options to clarify the intent of the rule language for Council's consideration. These included entering a staff memorandum into the record of the rulemaking, addressing this issue in future rulemaking by adopting a definition or revising the language, or adopting the rule and clarifying any specific issues with the rule by order during implementation of the rule.

Council Member Winters asked if the Department entered a memorandum into the record to clarify intent, how the average person or developer would find it.

Mr. Clark explained that all comments included as part of the rulemaking record, including the memorandum, would be published on the Department's website for at least one year after adoption of the rules. Mr. Clark also commented that anyone may also contact the rules coordinator for information about the rules.

Secretary Cornett explained that the Department also has an applicant guide that helps direct the applicant through the process, including information about property owner notification, and that the guide would be updated to reflect the new rules. Mr. Cornett explained that the guide is published on the website and is available to applicants. And that the department reviews this information with them during informational meetings.

Vice-Chair Grail expressed support for whatever option appears most transparent to the process and is most easily accessible for the public to find.

The Council discussed if the rule could be interpreted to require notification based on a tract under contiguous ownership. Chair Jenkins confirmed that his understanding of the intent was to use only the tax lot, and not the entire contiguous ownership.

Mr. Clark explained that there was a recent LUBA case which found that it was reasonable using the tax lots or parcels on which development is proposed and not require notice to be given from the entire ownership.

Chair Jenkins commented that he thought this was very practical as far as notice is concerned, and that it did expand notice from what it has been in the past.

Council Member Winters agreed that this was normal practice but believes that there should be no room for persons to argue that the rule is ambiguous. She added that if the rule language is not more specific, the information provided to the public should be very clear.

Chair Jenkins agreed and commented that the Council should also synchronize language as closely as possible with rules adopted by the Land Conservation and Development Commission.

Secretary Cornett commented that we would supplement the applicant guide and could also update the public guide to make sure that information is readily available to the public.

Mr. Clark explained that on November 15, 2019, the Department received a comment letter from the legal representatives of Friends of the Columbia Gorge and other organizations involved in ongoing litigation of the temporary amendment rules containing two procedural requests authorized under ORS 183.335.

Mr. Clark explained that the first request was for a written statement of the objectives of the rules and how the Council intended to evaluate whether the rules were obtaining those objectives. Mr. Clark summarized the draft response provided to Council by Staff and recommended that Council commit to appointing a Rulemaking

Advisory Committee (RAC) to begin review of the rules within two years of adoption to evaluate whether the rules were accomplishing their objectives.

Mr. Clark then explained that the second request was for Council to postpone the rulemaking process by at least 21 days under ORS 183.335(4). He further explained that the commenters specifically requested that Council extend the public comment period by 21 days and postpone its final decision on the rules until January.

Chair Jenkins asked if Mr. Clark believed the statute required Council to extend both the public comment period and postpone Council's decision.

Mr. Clark responded that the statute specifically speaks to postponement of the Council's decision on adoption, amendment, or repeal of a rule, but that the Attorney General's manual advises that when such a request is made to provide additional opportunity to submit data, views, or arguments on a proposed rules, the agency must also extend the public comment period.

Chair Jenkins asked if the January date was beyond the 21-day extension period.

Mr. Clark responded that it was.

Council Member Truitt asked what the consequences would be if the rules were not adopted in January because Council had discussed not having a February meeting.

Secretary Cornett suggested that Council could have a phone meeting in February if necessary.

Mr. Clark stated that such a meeting would need to be held before February 17, or the temporary rules would expire.

Council Member Winters commented that she agreed with staff's recommendation.

Council Member Howe asked if the requests required a formal motion.

Mr. Clark responded that he believed it would be appropriate for the Council to formally approve the draft response.

Council Member Truitt moved for the Council to approve the response to Mr. Kahn's requests as presented by staff. Specifically, I move the Council commit to initiating a new amendment rulemaking project within two years of adoption of permanent rules, extend the public comment period for the permanent amendment rules until Dec. 18, 2019, and defer any final decision on the permanent amendment rules until January 2020.

Council member Winters and Vice-Chair Grail simultaneously Seconded.

The motion carried unanimously.

Mr. Clark provided a brief overview of the rulemaking schedule and the conduct of the hearing and opened the hearing to public comment at 6:26 pm.

Mr. Clark also provided an overview of how the hearing would be conducted and asked anyone who wished to provide oral comment to fill out and return a comment card.

One person, Ms. Irene Gilbert of La Grande, Oregon, signed up to provide comment. Ms. Gilbert thanked the Council for extending the public comment period and stated that she had also intended to ask for an extension. Ms. Gilbert then raised several concerns related to the proposed rules.

Ms. Gilbert raised several concerns about using a RAC to evaluate the rules and recommended that Council provide more specific information about how the evaluation would occur.

Ms. Gilbert raised concerns that the rules are actually changing the original rules from before October of 2017 since the Court determined that the rules adopted in October 2017 were not validly promulgated.

Ms. Gilbert raised concerns about the proposed rules being applied retroactively for more than two years.

Ms. Gilbert recommended that a person should not be required to specify how they are personally impacted by a rule as part of their request for a contested case because it does not impact the decision about whether or not the request for an issue is valid, and because she feels that the requirement “does nothing other than confuse the issue of what it is the person is asking to have a contested case on.”

Ms. Gilbert stated that she understood that if the Council was going to change the word “shall” to “will,” or anything else in the rules, that that change would be consistently applied. Ms. Gilbert stated that she had found two places in division 015 where “shall” was inappropriately changed to “may.” Ms. Gilbert also commented that the term “shall not” was inappropriately changed to “may not” in OAR 345-027-0230(5).

Ms. Gilbert stated that the proposed rules were not consistent with statute. Specifically, Ms. Gilbert recommended that the proposed language in OAR 345-027-0353 was not consistent with statute because the list of exemptions from an amendment request and procedures contained in the rules were not consistent with ORS 469.320.

Ms. Gilbert raised concerns with the rule limiting the issues a person can request a contested case on to division 22, 23, and 24.

Ms. Gilbert encouraged Council to adopt the language of ORS 469.320(1) in the amendment rules.

Ms. Gilbert concluded her testimony and asked if there were any questions from the Council.

Mr. Clark asked if there was anyone on the phone or in the room who wished to provide testimony. There being no further testimony, Mr. Clark adjourned the hearing at 6:38 p.m.

**Meeting adjourned at 6:39 pm**

## Friday, November 22, 2019 – The Dalles

**Call to Order:** The meeting was called to order at 9:00 a.m. on November 22, 2019 by Chair Hanley Jenkins.

**Roll Call:** Council Chair Hanley Jenkins, and Council Members Kent Howe, and Jordan Truitt were present. Council Member Mary Winters participated by telephone and Vice Chair Marcy Grail participated by telephone starting at 10:33 a.m. Prior to that time the Council did not have a quorum.



Oregon Department of Energy representatives present were Assistant Director for Siting/Council Secretary Todd Cornett, Senior Policy Advisor Maxwell Woods, Energy Policy Analyst/Rules Coordinator Christopher Clark, Senior Siting Analyst Katie Clifford, Operations Analyst Sean Mole, Division Assistant Michiko Mata, and Public Affairs Specialist Cliff Voliva. EFSC Legal Counsel Patrick Rowe of the Department of Justice was also present.

## Opening Remarks

Reminder that agenda item F, the Langenburg Technologies presentation was postponed. No other agenda modifications.

**E. Application Process<sup>4</sup> (Information Item)** – Todd Cornett, Council Secretary and Maxwell Woods, Senior Policy Advisor. Secretary Cornett and Mr. Woods provided training related to the steps associated with the application review process.

More information is located on the [Council Meetings website](#) for additional details pertaining to Mr. Cornett & Mr. Woods' [presentation](#).

Council Member Howe: Non-Generating facility need, what is that?

Secretary Cornett: Until the mid-90's every facility had to meet a "need standard." That has been eliminated for all facilities except for non-generating facilities which are pipelines and transmission lines.

Chair Jenkins: So, application information needs to be presented in the preliminary application, and the application as well. If they don't address all these standards or requirements, is there a review by the department.

Secretary Cornett: Yes, I am going to go over that in the next slide. It is the applicant's burden of proof that they meet all the standards.

Chair Jenkins: A point I'd like to make is that the Draft Proposed Order public hearing it's not just an opportunity for the public to make comments, it's an opportunity for the council to get to know the project, and the issues associated with the projects.

Chair Jenkins: In response to staff pointing out that the applicant has the opportunity to respond to public comments, this goes back to the fact it's the applicant's burden to meet the standards, not the Council's burden. We've had numerous times where we've encouraged the applicant to respond to comments but they have not.

Chair Jenkins: In regards to the Draft Proposed Order, Council Member Howe and I discussed this earlier. I think what's unique about the Draft Proposed Order is it's not in any way a decision. That is why there is this opportunity for a contested case, rather than an appeal because we don't have a decision at this point. So, there may still be issues that were raised by the public that the staff didn't adequately respond to, which allows the opportunity for a contested case to evaluate those issues. This process differs from the planning process, which has made it very difficult for me to wrap my head around, and why this process is the way it is. The best way I can resolve it in my mind is to remember we have not reached a final decision yet, and that it's an evaluation of the application, the standards, and ultimately an attempt to come up with an order.

Chair Jenkins asked if there are multiple decisions made during the contested case, or does Council have to make a specific decision regarding the contest case?

Mr. Woods replied that there is not. The Hearing Officer's Contested Case Order, along with staff's Proposed Order are just recommendations. It is the Council that ultimately decides.

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<sup>4</sup> Audio for Agenda Item E = 00:03:34 – November 22, 2019

Council Member Howe asked about the final order. Who can request a re-hearing?

Mr. Woods responded that the applicants or any parties of the contested case.

Council Member Howe asked if any re-hearing requests have happened?

Mr. Woods responded that there have been a few, but council has never agreed to a re-hearing.

~~**F. Langenburg Technologies Overview (Information Item)** – Rick Barnes, Langenburg Technologies Representative. Council received an information presentation regarding Langenburg Technologies and a potential proposed energy facility in Morrow County~~

**G. Oregon Department of Fish & Wildlife, Fish and Wildlife Habitat Mitigation Policy Overview<sup>5</sup> (Information Item)** – Sarah Reif, Energy Coordinator, Wildlife Division. Ms. Reif provide an overview of ODFW’s Fish and Wildlife Habitat Mitigation Policy and discussed habitat categorization and mitigation assessment.

Sarah thanked the department for the continued coordination and working relationship with the siting division. She appreciates the professionalism and the level of detail from our department. Then went on to review the ODFW’s mitigation policies.

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

Short Break, resume at 10:45 am

**H. Public Comment Period<sup>6</sup>** – This time is reserved for the public to address the Council regarding any item within Council jurisdiction that is not otherwise closed for comment.

Irene Gilbert:

1. Regarding contested cases during amendment reviews, Ms. Gilbert expressed concern that decisions on contested cases are occurring without any basis regarding state statues or rules. Ms. Gilbert discussed the issues of specificity when making comments, presenting additional information during a contested case request, and that denying contested case requests deny the right of the public to appeal to the Oregon Supreme Court.
2. Regarding the areas being surveyed, Ms. Gilbert expressed concern the areas being surveyed are often inadequate to determine the true impact. This includes impacts such as erosion, the spread of noxious weeds and threatened and endangered species.
3. Regarding bonds for site restoration, Ms. Gilbert expressed concern that not all developers were required to maintain bonds for site restoration, which is a statutory requirement. This puts the public at risk from the time of the development starts to the end of the development.

**No phone public comments**

**I. Port Westward Generating Project, Review of the Proposed Order on Request for Amendment 11 of the Site Certificate<sup>7</sup> (Action Item)** – Christopher Clark, Rules Coordinator. Council reviewed the Proposed Order on Amendment 11 (RFA11). RFA11 seeks Council approval to add a 4 to 6 MW battery storage system to the existing 650 MW natural gas-fired electric generating facility.

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<sup>5</sup> Audio for Agenda Item G = 01:16:50 – November 22, 2019

<sup>6</sup> Audio for Agenda Item H = 01:38:10 – November 22, 2019

<sup>7</sup> Audio for Agenda Item I = 01:47:54 – November 22, 2019

Mr. Clark provided a brief summary of the proposed order regarding the request for RFA11. More information is located on the [Council Meetings website](#) for additional details pertaining to Mr. Clark's [presentation](#).

Council Member Howe motioned that the council adopt the proposed order as the final order and issue the 11<sup>th</sup> amendment to the site certificate for the Port Westward Generating Project.

Council Member Truitt seconded the motion.

The motion carried unanimously.

**J. Wheatridge Wind Energy Facility, Council Decision on Requests for Contested Case; and Review of the Proposed Order on Request for Amendment 4 of the Site Certificate<sup>8</sup> (Working Lunch, Action Item) – Maxwell Woods, Senior Policy Advisor.**

Council reviewed the Proposed Order on Amendment 4 (RFA4). RFA4 seeks Council approval to add 1,527 acres to the approved site boundary within Morrow County for construction and operation of up to 150 MW of photovoltaic solar energy facility components, up to 41 distributed energy storage (battery) system sites and expansion of the Wheatridge West collector substation. RFA4 also seeks Council approval for site certificate condition amendments. The certificate holder's RFA4 and the Department's Draft Proposed Order on RFA4 are available for review at: [Department's Wheatridge Wind Energy Facility webpage](#).

Mr. Woods informed Council he would be presenting the agenda item, but Sarah Esterson, Senior Siting Analyst was the project lead and although she was not present, she was on the phone to add any input or answer any questions. Mr. Woods noted that the staff report had a typo, it referenced amendment 5, but it should have said amendment 4. More information is located on the [Council Meetings website](#) for additional details pertaining to Mr. Woods' [presentation](#).

Chair Jenkins referenced 2 prior amendments, but believed there were 3, so one is not being referenced or not identified.

Mr. Woods stated that the first amendment was actually transferring the site certificate from the developer who permitted it to the NextEra, which is the current owner.

Mr. Woods stated the turbine construction will be starting early next year.

The Council first considered the request for contested case received on RFA4. There were three issues raised by Ms. Irene Gilbert:

1. Disagreement on interpretation of ORS 469.370(3) and OAR 345-027-0367(5) – related to information submitted in contested case request

A request for a contested case itself is not when any additional information can be submitted. On the record of the DPO is when a person needs to provide a statement of facts to what the issues are with the DPO, and why it does not comply with the department standards. The time to request a contested case is not the time to submit additional information. It's the time to point where in the record the person had submitted, and why the issue was not satisfied in the proposed order. When a material change happens in the order, a person can request a contested case against the material change. Mr. Woods referenced to page 4 of the staff report quoting the rule/standards. The Department recommended that the Council find the issue did not justify a contested case.

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<sup>8</sup> Audio for Agenda Item J = 01:56:43 – November 22, 2019

Council Member Winters commented that our staff provided a good explanation, along with the staff report. Ms. Winters said that when information is presented to a reviewing body it needs to be clearly stated, and she found the rule quite clear, as well as the exception was clear.

2. Failure to comply with state weed laws (ORS 569.390; 497.507)

Mr. Woods explained that staff incorporated material changes into the proposed order as a result of Ms. Gilbert's comments, including Attachment F, draft Noxious Weed Control Plan. In the draft Noxious Weed Control Plan, consistent with Morrow County's Weed Control Plan Guidelines and Ms. Gilbert's comments on the draft proposed order, requirements include a pre-construction weed survey to determine weed inventory and pre-disturbance weed conditions; the draft plan specifies that based on the pre-construction weed survey, a treatment schedule be established based on consultation with the Department, Oregon Department of Fish and Wildlife, and Morrow and Umatilla County Weed Control Departments. The Department recommended that the Council find the issue did not justify a contested case.

Council Member Winters asked about a noxious weed plan, when would it be finalized, how will they know.

Mr. Woods replied that it will be similar to the draft plan. Council would approve the draft plan, with the condition it would have to be finalized prior to finalizing the facility construction. The expectation is that the draft plans don't change dramatically when finalized.

3. Failure to assess indirect and direct damage to habitat critical to survival of species

Mr. Woods explained that the Council's Fish and Wildlife Habitat standard and T&E Species standard, OAR 345-022-0060 and -0070, protects habitat for special status state-listed species and state-listed T&E species, respectively. However, consistent with the Oregon Legislative Council memo from Greg Barreto, informational requirements for the Council's Fish and Wildlife Habitat standard as established in OAR 345-021-0010(p)(B) obligate a certificate holder to evaluate and identify presence or historically documented habitat use within the analysis area of federally-listed T&E species within Exhibit P. As presented in RFA4 Exhibit P, there were no federally listed T&E species identified within the analysis area and therefore the issue is not relevant to the amendment request. Further, while federally listed T&E species should be identified in Exhibit P as an informational requirement, Council standards do not currently address federally-listed T&E species. ODFW could make recommendations under its Fish and Wildlife Habitat Mitigation Policy based on information about federally-listed T&E species, which would then be implemented through the Council's standard. The Department recommended that the Council find the issue did not justify a contested case.

Vice Chair Grail thanked Max, and Sarah for being so thorough, and that it seems all the issues were addressed properly.

Council Member Winters commented that essentially the proposed order would have what would be in the contested case order.

Mr. Woods agreed.

Council Member Howe stated that he agreed with Vice Chair Grail the staff did a great job reviewing these contested case issues.

Council Member Howe motioned that the council deny each of the requests for contested case on the Proposed Order for Wheatridge Wind Facility RFA4 because the requests fail to raise significant issue of fact or law that may affect the Council's determination that the facility meets the applicable laws and Council standards, and that the Council issue a written order denying the contested case requests.

Vice Chair Grail seconded the motion.

The motion carried unanimously.

Council Member Howe motioned that the Council adopt the proposed order as the final order and issue the 4<sup>th</sup> amended to the site certificate for the Wheatridge Wind Energy Facility.

Council Member Truitt seconded the motion.

The motion carried unanimously.

**K. [11:45 am] Perennial Wind Chaser Station, Council Decision on Requests for Contested Case; and the Review of the Proposed Order on Request for Amendment 1 of the Site Certificate<sup>9</sup> (Action Item) – Katie Clifford, Senior Siting Analyst.**

Council reviewed the Proposed Order on Amendment 1 (RFA1). RFA1 seeks Council approval to extend the construction commencement and completion timelines by two years. The certificate holder's RFA1 and the Department's Draft Proposed Order on RFA1 are available for review at: [Department's Perennial Wind Chaser Station Webpage](#)

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

12:00 pm paused for lunch until 12:15

Call to order at 12:17 pm

The Council first considered the request for contested case received on RFA1. There were five issues raised jointly by Friends of the Columbia River Gorge, Columbia Riverkeeper and Oregon Wild.

1. The Council cannot approve Perennial's application under invalid rules.

Ms. Clifford explained that Council adopted temporary amendment rules on August 22, 2019 and RFA1 is being reviewed under those rules. On August 30, 2019, Friends of the Columbia Gorge and other organizations submitted a petition for judicial review of the temporary rules to the Oregon Supreme Court. These issues can only be settled by the Oregon Supreme Court and not through a contested case proceeding. OAR 345-027-0371(9) requires the Council to deny a request for contested case if the Council does not have jurisdiction over the issue raised in the request; therefore, the Department recommended that the Council find the issue did not justify a contested case.

2. Perennial's application is incomplete because it failed to include accurate information about the status of its DEQ air permit.

Ms. Clifford explained that this is a completeness issue governed by the application requirements of Division 21. The issue did not raise "a significant issue of law or fact that may affect the Council's determination that the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24" as required by OAR 345-027-0371(9). The Department recommended that the Council find the issue did not justify a contested case.

3. Perennial failed to adequately explain why it needs extensions of the construction deadlines

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<sup>9</sup> Audio for Agenda Item K = 02:34:40 – November 22, 2019

Ms. Clifford explained that there are no substantive review criteria for why the construction timeline extension is needed. The issue requests a contested case based on division 27 information requirements and not based on “applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24” as required by OAR 345-027-0371(9). The Department therefore recommended that the Council find the issue did not justify a contested case.

Chair Jenkins stated that the way he understood it is that our rules don’t have any substantive review criteria for determining what need is; it’s up to the applicant to tell us what their need is for the extension. The applicant has done that by saying they were unable to secure a power purchase agreement.

Ms. Clifford confirmed that was correct, and that the applicant had done that in their request by outlining that they were unable to secure a power purchase agreement.

4. The Council must consider methane emissions from the proposed facility

Ms. Clifford explained that the Council’s Carbon Standard at Division 24, section 0590(1), requires the Council to, “determine the gross carbon dioxide emissions that are reasonably likely to result from the operation of the proposed energy facility.” Where Division 24 refers to methane emissions – at section 0590(2)- it’s strictly in the context of offset projects. It is therefore in the context of offset projects that other greenhouse gases may be considered, while emissions from the facility itself are limited to carbon dioxide emissions for the purposes of the Carbon Standard. Methane emissions from facility operation are not required to be quantified for the purposes of calculating a proposed energy facility’s carbon dioxide emissions under the Council’s Carbon Standard and the relevant statute at ORS 469.503. Because of this, the request does not raise 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 the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24. Accordingly, the Department recommended that the Council find the issue did not justify a contested case.

Council Member Winters stated that if council wanted to, we would have to have criteria to evaluate methane as part of the carbon standard which would have to be done in rule making verses a contested case hearing.

Chair Jenkins stated that the standard states they must provide us the gross carbon dioxide emission and that it’s limited to the carbon dioxide emissions. That it doesn’t require the applicant to submit methane gas emissions. Ms. Clifford agreed. The carbon standard is based on ORS 469.503, and that in the staff report you would find the department looks to the applicable statute for guidance. The rule is consistent with the statute.

Council Member Winters stated that this was raised before, and she was somewhat troubled by this issue. She just didn’t see authority, and we can’t create authority where we don’t have it. There is no other rules or statute that we are missing, correct?

Ms. Clifford explained that Ms. Winters was correct.

Council Members Winters & Jenkins both agreed that the council just didn’t have jurisdiction.

Vice Chair Grail stated that she appreciates the comments that were made. We just have to meet the standards as stated, we are aware, but we are fulfilling our obligation as it is.

Secretary Cornett stated that the carbon standard comes from statute and originated in the mid 90’s. The Oregon Carbon Standard was the first of its kind. It was cutting edge, but no longer is, as it hasn’t been changed since the mid-90’s. I hear the comments regarding concerns about this issue, but we really have to look to the legislature to update this, but until then we must work within our authority. We are confident we are working within our authority regarding this specific issue.

Council Member Howe stated that the paragraph that helped him was on page 12, which laid out that the rules define the amount of greenhouse gas emissions, talks about the pounds of carbon dioxide and carbon dioxide equivalents of other greenhouse gases, but that definition was really for the amount of greenhouse gas emissions, rather than the amount of carbon dioxide emissions, and that's all in the context of emissions reduction projects, as opposed to rules that pertain to measuring stack emissions.

Chair Jenkins stated that again we don't have jurisdiction.

Council Member Winters stated that she trusts staff but did do her own research. Council Member Winters said she found again we just don't have authority.

5. Pursuant to OAR 345-027-0375(2)(b), the Council should consider the rapidly developing climate crisis when deciding whether to approve Perennial's request.

Ms. Clifford stated that this does not relate to the Council's carbon standard and therefore the request does not raise 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 the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24. Accordingly, the Department recommended that the Council find the issue did not justify a contested case.

Council Member Howe motioned that the Council deny each of the requests for contested case on the Proposed Order for the Perennial Wind Chaser Station RFA1 because the requests fail to raise a significant issue of fact or law that may affect the Council's determination that the facility meets applicable laws and Council standards, and that the Council issue a written order denying the contested case requests.

Council Member Truitt seconded the motion.

The motion carried unanimously.

Ms. Clifford outlined the review of Proposed Order.

Ms. Clifford stated that in Section III.F of the Proposed Order, under the Protected Areas standard, the Department added more information about the status of Perennial's Air Contaminant Discharge Permit and information received from DEQ. Regardless of the status of DEQ's review of the facility, Council's rules would require Perennial to come back in to request another amendment from Council if in the future they desire to make changes to the facility that could result in a significant adverse impact to Protected Areas.

Staff from the Confederated Tribes of the Umatilla Indian Reservation recommended that a cultural resources monitor be present during construction ground-disturbing activities. Based upon the information provided by the Tribe the department recommends that the Council require that a cultural resource monitor be present during construction to monitor ground -disturbing activities.

Chair Jenkins asked if the selected monitor would come back to the Department for review and authorization (with consultation with the tribe)?

Ms. Clifford answered yes, that is correct.

Council Member Howe motioned that the Council adopt the proposed order as the final order and issue the 1<sup>st</sup> amended site certificate for the Perennial Wind Chaser Station.

Council Member Truitt seconded the motion.

The motion carried unanimously.

**L. 2020-2022 EFSC Rulemaking Project Schedule<sup>10</sup> (Action Item and Public Comment Opportunity)** – Chris Clark, Rulemaking Coordinator. Council considered proposed rulemaking projects to be undertaken in 2020-2022 time period. Council also received a status update regarding ongoing rulemaking projects.

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

Mr. Clark provided an overview of the rulemaking process and the procedural requirements of the Administrative Procedures Act and ORS chapter 469.

Mr. Clark gave an update of the status of rulemaking projects authorized for 2019. Two projects related to administrative housekeeping and statutory minor corrections were completed. Mr. Clark noted that an issue related to property owner notification that was initially proposed as part of Protected Areas and Scenic Resources project was completed. Mr. Clark summarized progress made on other projects related to Amendments, Solar PV facilities, and the Trojan Independent Spent Fuel Storage Installation.

Mr. Clark discussed a staff proposal to address procedural rulemaking that is not associated with a larger project. Staff proposed that issues that are limited in scope, or do not fit into a larger project, be brought to Council for review on a quarterly basis. Mr. Clark explained that to gather public input on these issues, Staff proposed to either form a general issues Rules Advisory Committee to meet periodically to discuss issues, or to solicit written input.

Chair Jenkins stated that he was challenged to see a need for a RAC for issues that were strictly housekeeping, and felt there would be difficulty getting participation in the RAC.

Mr. Clark responded that he is trying to get away from the general term of "housekeeping" because anything that could have an impact on the siting process or the council review process could be viewed as more than housekeeping. Mr. Clark stated that it's also good practice to hear stakeholders concerns regarding proposed rules. Mr. Clark gave an example of updating the reference to the 2012 National Electric Safety Code in the rules.

Chair Jenkins stated that he sees this as just housekeeping because if the 2017 version is a law and if it's adopted, it would have to be implemented by an applicant.

Mr. Clark replied that for the Council they are only required to submit proof that they are adhering to the 2012 version, although other authorities would make them adhere to the 2017 version. Mr. Clark explained there is a constitutional delegation of authority issue.

Mr. Clark explained that if the council does wish, staff is able to bring back the housekeeping project process.

Chair Jenkins stated the he thinks having a RAC would be frustrating in this situation, and that he would error in caution to make sure the RAC has a purpose.

Mr. Clark stated that one additional purpose for the RAC could be to review some of the larger projects that are of general interest that do not affect a specific stake holder group.

Chair Jenkins asked for input from the rest of the Council.

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<sup>10</sup> Audio for Agenda Item L = 03:19:00 – November 22, 2019



Council Member Howe stated that he did understand that the department is hoping to break down these projects so we can get some of these things done, verses taking a year to do. However, he agreed with Chair Jenkins that there could be frustration with having to participate in the RAC. He stated that maybe having a standing RAC to deal with the narrower issues could be beneficial.

Mr. Clark provided example in the property owner notification issue that was discussed yesterday, as the type of issue that would go through this process.

Chair Jenkins agreed that is a good example because there was existing law and the Council had some discretion in how to apply it.

Council Member Winters stated that the standing RAC seems like that's a good idea, as long as there is some level of policy involved and using people's time wisely.

Chair Jenkins replied that he's not sure if it's necessary to identify it right now, but thinks the concept is a good idea to think about it for the future.

Secretary Cornett proposed to council, at the next time we have a rule making project that would benefit from a standing project, that we bring that to council.

Chair Jenkins, Vice Chair Grail, Council Members Winters, Howe, and Truitt all agreed to Secretary Cornett's proposal to revisit this when it comes up in the future.

Mr. Clark proposed to bring a document outlining the issues that would fit into this category for the Council to review at that time.

Chair Jenkins encouraged Mr. Clark to prioritize, since we can't do this at every meeting, and to make good use of everyone's time.

Secretary Cornett stated that this is exactly the point Mr. Clark is proposing with this. For example, using a RAC for the property owner notification rule language would have allowed some more thought and feedback before presenting it to council.

Mr. Clark provided an overview of the proposed rulemaking schedule for 2020-2021.

Chair Jenkins opened the meeting to public comments.

No public in the room to make comments.

No phone public comments.

No further comments from the council.

Council Member Howe motioned that the Council approve the 2020-2022 EFSC Rulemaking Project Schedule as presented by staff.

Council Member Truitt seconded the motion

The motion carried unanimously.

**M. Blue Marmot Solar Energy Facility, Notice of Intent Extension Request** <sup>11</sup> **(Action Item)** – Maxwell Woods, Senior Policy Advisor. Council considered a request from EDP Renewables LLC to extend the expiration date for the Notice of Intent for the proposed Blue Marmot Solar Energy Facility by one year.

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

Chair Jenkins asked if a public notice of the NOI was done?

Mr. Woods replied that there has been public notice, and the full review of the NOI process including attending a county commissioner meeting in Lake County, but that was over 2 years ago.

Chair Jenkins stated that what he was asking is are there any issues for just the NOI?

Mr. Woods responded that there are no issues at all. This is really just an administrative step.

Council Member Howe motioned that the Council approve the extension of the expiration date of the Notice of Intent for the Blue Marmot Solar Energy Facility by one year, for a new expiration date of January 19, 2021. Council Member Truitt seconds the motion.

The motion carried unanimously.

**Meeting Adjourned at 1:07 P.M.**

For more details visit the [Council Meetings website](#)

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<sup>11</sup> Audio for Agenda Item M = 04:02:38 – November 22, 2019