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Katie Clifford, Senior Siting Analyst
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VIA ELECTRONIC MAIL

Re: Request for Contested Case Proceeding for Perennial Wind Chaser Station, Proposed Order on Request for Amendment 1

Dear Ms. Clifford,

Please see the attached Request for Contested Case Proceeding and related exhibits submitted on behalf of Columbia Riverkeeper, Friends of the Columbia Gorge, and Oregon Wild in regards to the Perennial Wind Chaser Station, Request for Amendment 1.

Sincerely,

Maura Fahey

cc:
Erin Saylor, Columbia Riverkeeper
Nathan Baker, Friends of the Columbia Gorge

BEFORE THE ENERGY FACILITY SITING COUNCIL

OF THE STATE OF OREGON

In the Matter of the Request for Amendment 1 of the Site Certificate for the PERENNIAL WIND CHASER STATION	**COLUMBIA RIVERKEEPER, ET AL.'S REQUEST FOR A CONTESTED CASE PROCEEDING**

I. INTRODUCTION

Pursuant to OAR 345-027-0371 (2019),[1] Columbia Riverkeeper, Friends of the Columbia Gorge, and Oregon Wild (collectively, "Requesters") request that the Energy Facility Siting Council ("EFSC" or "Council") conduct a contested case proceeding on the Request for Amendment 1 of the Site Certificate ("RFA" or "Application") for the Perennial Wind Chaser Station ("Project"), and allow Requesters to participate as parties in the proceeding.[2]

The site certificate holder, Perennial-WindChaser LLC ("Applicant" or "Perennial"), applied for a site certificate more than five years ago, and EFSC approved the site certificate more than four years ago. During the intervening years, a number of changes of both law and fact occurred that warrant the Council denying Perennial's RFA.

First and foremost, the Council cannot approve Perennial's application under invalid administrative rules. Perennial was required to begin construction by September 23, 2018.

[1] For clarity, references to the temporary rules adopted August 22, 2019 will include a 2019 parenthetical, references to the rules adopted by the Council in October 2017 will include a 2018 parenthetical, and references to the rules in place prior to the October 2017 rulemaking will include a 2017 parenthetical.

[2] Requesters incorporate into this Request for a Contested Case all arguments and evidence presented in their August 22, 2019, comment letter to the Council (attached hereto as Exhibit A), as well as in their October 4, 2019, Opening Brief in the case *Friends of the Columbia Gorge, et al. v. Energy Facility Siting Council*, SC No. S066993 (Or. 2019) (attached hereto as Exhibit B).

Perennial failed to either begin construction by that deadline or to submit an application to extend the deadline in compliance with valid Council rules. Instead, Perennial filed, and the Oregon Department of Energy ("ODOE" or "Department") processed, its amendment application pursuant to invalid rules. The Oregon Supreme Court has held that the rules relied on by Perennial in its application "are invalid." *Friends of the Columbia Gorge, et al. v. Energy Facility Siting Council*, 365 Or 371, 396 (2019). Additionally, the Council's August 2019 so-called "temporary rules" are also invalid. Thus, the Council cannot implement or rely upon these rules in approving the application.

The Council has attempted to avoid this outcome by readopting the invalid rules as so-called "temporary" rules. In so doing, however, the Council once again violated the Oregon Administrative Procedures Act ("APA") and the "temporary" rules are also invalid. As Requesters explained in their Opening Brief filed with the Oregon Supreme Court (Exhibit B), the "temporary" rules are invalid for a number of reasons, including that: the Council failed to adopt adequate findings demonstrating an emergency; the Council cannot retroactively apply the "temporary" rules; and the Council is prohibited from readopting as "temporary" rules identical language that had already been in effect for more than 650 days as permanent rules. The so-called "temporary" rules are invalid and cannot be used to review, process, or approve Perennial's RFA. At a minimum, the Council should stay the processing of Perennial's RFA pending the resolution of Requesters' challenge to the "temporary" rules in the Oregon Supreme Court.

Additionally, Perennial's RFA is not complete. Perennial's "Complete Request for Amendment 1," dated June 25, 2019, indicated that the construction commencement deadline in the facility's air permit from the Department of Environmental Quality ("DEQ") was

expired. *See* Complete Request at 5. Perennial noted that it had an opportunity to request an 18-month extension from DEQ, but did not indicate whether it had done so. *Id.* With respect to federally delegated permit applications, Council rules require that applicants submit "evidence that the responsible agency has received a permit application and the estimated date when the responsible agency will complete its review and issue a permit decision." OAR 345-021-0010(1)(e)(D). Perennial did not include this evidence in its RFA; thus, ODOE should never have accepted the RFA as complete.

Perennial's application is also incomplete because its RFA fails to provide a sufficient explanation for why the company has not yet secured a power purchase agreement or what steps it has taken to do so. In the Proposed Order, EFSC asserts that "Council rules include no substantive review criteria for why the extension is needed and requested." Proposed Order at 21. The alleged vagueness of the requirement makes this issue ripe for a contested case hearing. A contested case hearing would provide an opportunity for a hearing officer to assist EFSC with exploring and resolving this issue, given the alleged absence of clear standards. The contested case hearing process would also allow Requesters to seek discovery on this issue to learn from the applicant what its anticipated construction timeline is and what due diligence it has undertaken in furtherance of the project.

The Proposed Order also fails to consider potential methane emissions from the proposed plant as part of the assessment of Perennial's carbon emissions. The Council's Carbon Standard specifically requires that methane be considered as part of the carbon emissions analysis. *See* OAR 345-024-0590(2).

Finally, in the four years since the Council first issued Perennial's site certificate, the environmental impacts of fracked gas have become increasingly apparent. In reviewing a

request for amendment to extend construction deadlines, OAR 345-027-0375(2)(b) (2019) requires the Council to consider "any changes in law or fact since the date the current site certificate was issued." ODOE interprets this provision as requiring, among other things, the review of any change to the existing environment. *See* Proposed Order at 17. The Department dismissed Requesters' concerns about the environmental impacts of a new gas-fired power plant as being outside the scope of the Council's review, noting that the proposed facility does not, itself, include drilling for natural gas. *See* Proposed Order at 5 n.2. However, that statement misses the heart of Requesters' concerns: construction of a new gas-fired power plant, especially one for which there is no established need, will increase demand for fracked gas, which will, in turn, increase drilling, and increased drilling will lead to increased emissions. To combat climate change, we need to rapidly phase out all fossil fuel infrastructure—not construct new gas-fired power plants like Perennial. Climate change is a global problem that will never be fixed if government agencies continue to ignore the global effects of seemingly local actions.

The identified issues justify a contested case hearing for multiple reasons. First, a contested case is needed to allow Requesters to submit new evidence, including sworn expert witness testimony. Second, a contested case is needed to allow Requesters to seek from Perennial discoverable information likely to bear on the disputed issues, and Requesters have no other means of obtaining such information and presenting it to the Council. *See* OAR 345-015-0023(5)(c), OAR 137-003-0568(4), OAR 137-003-0025(4). Third, the Council should utilize the assistance of a neutral hearing officer to resolve disputes of fact, law, and policy regarding these issues (rather than relying solely on ODOE staff), and to ensure that the Council abides by its mandates to follow its own rules and to act consistent with prior Council

decisions or otherwise provide valid reasons for departing from prior decisions. Fourth, the issues involve the setting of standards that "call[] for the factual kind of judgment and procedures appropriate thereto" that can be "made more concrete only in the course of a proceeding focusing on a particular kind of [energy] installation at a particular location." *Marbet v. PGE*, 277 Or 447, 460–63, 561 P2d 154 (1977) (quoting ORS 183.310(2)). In such instances, the Oregon Supreme Court has held that "[t]he procedure for adopting [such] standard[s] to be applied in a few complex, large-scale decisions such as the site certifications entrusted to the council" is via the "'contested case' procedure," which "is to be used in applying statutory or agency policy to specific parties on particular facts." *Id*. And finally, a contested case is needed to allow "the agency and not the courts [to] pass[] first on the contention[s] of the participants"; the Council should allow Requesters to pursue the disputed issues in an "effective[] and meaningful[]" manner and to allow the Council (with the assistance of a hearing officer) to vet and resolve the disputed issues via a contested case, rather than consigning the issues to the Oregon Supreme Court to resolve them on first impression. *Hennesey v. SEC*, 285 F.2d 511, 515 (3d Cir. 1961) (cited in *Marbet*, 277 Or at 455).

The Council should conduct a contested case, which will allow the disputed evidentiary, legal, and policy issues to be fully vetted and resolved by the Council (with the assistance of a hearing officer), rather than consigning these issues to the Oregon Supreme Court to resolve on first impression. Requesters recognize that it is rare for the Council to hold a contested case on proposed amendments to site certificates. However, Requesters implore the Council to do so here, given the numerous unique and heavily disputed issues involving this controversial project.

II. IDENTIFICATION OF REQUESTERS

A. Columbia Riverkeeper

Columbia Riverkeeper ("Riverkeeper") is a nonprofit Washington corporation with offices in Oregon. Riverkeeper's mission is to protect and restore the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. On behalf of its approximately 16,000 members and supporters, Riverkeeper works to stop illegal pollution, protect salmon habitat, and fight climate change.

B. Friends of the Columbia Gorge

Friends of the Columbia Gorge ("Friends") is a nonprofit Oregon corporation with approximately 7,000 members. Friends' mission is to vigorously protect the scenic, natural, cultural, and recreational resources of the Columbia River Gorge. Friends fulfills this mission by ensuring strict implementation of the Columbia River Gorge National Scenic Area Act and other laws protecting the region of the Columbia River Gorge; promoting responsible stewardship of Gorge land, air, and waters; encouraging public ownership of sensitive areas; educating the public about the unique natural values of the Columbia River Gorge and the importance of preserving those values; and working with groups and individuals to accomplish mutual preservation goals.

C. Oregon Wild

Oregon Wild is a nonprofit Oregon corporation with more than 20,000 members and supporters. Oregon Wild's mission is to protect and restore Oregon's wildlands, wildlife, and waters as an enduring legacy for all Oregonians. Founded in 1974, Oregon Wild has been instrumental in securing permanent legislative protection for some of Oregon's most precious landscapes, including approximately two million acres of federally designated wilderness areas

and almost 1,800 miles of federally designated wild and scenic rivers. Oregon Wild works to maintain and enforce environmental laws while building broad community support for its campaigns.

III. REQUESTERS' CONTACT INFORMATION

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C. Oregon Wild

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IV. REQUESTERS' ATTORNEYS

Requesters are represented by the following attorney:

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Requester Columbia Riverkeeper is also represented by the following attorney:

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Requester Friends of the Columbia Gorge is also represented by the following attorney:

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V. REQUEST TO PARTICIPATE AS PARTIES

Requesters request to participate as full parties to the contested case.

VI. REQUESTERS' INTERESTS IN THE PROCEEDING

Requesters are nonprofit public interest organizations, representing more than 43,000 collective members and supporters, with strong interests in responsible energy generation and the proper implementation of state laws and rules governing the review, construction, and operation of large energy facilities in Oregon generally, and the Perennial Wind Chaser Station specifically. Requesters seek to represent the following public interests in this proceeding and are qualified to do so by virtue of Requesters' organizational missions (*see supra* Part II), Requesters' comments on the record in this matter, and Requesters' extensive experience representing public interests in prior administrative and quasi-judicial proceedings (including prior EFSC proceedings).

Requesters have significant interests in whether the Request for Amendment complies with all applicable laws; whether the Department and the Council properly implement and interpret state laws and rules governing energy siting; whether the construction start and completion deadlines for the Project will be extended; and whether the Applicant ultimately constructs and operates the Project.

Requesters' specific interests include: assisting with the evaluation and determination of whether Perennial's requested extensions of the construction deadlines are necessary, appropriate, and consistent with all applicable laws; whether the Council should grant or deny Perennial's request in full or in part; and ensuring that the Application is neither processed nor approved pursuant to invalid rules.

Requesters also have significant interests in the protection and enhancement of the scenic, recreational, and wildlife resources threatened by this Project. Requesters' members and staff regularly lead and participate in recreational activities in the areas affected by this Project and intend to continue these activities. These activities include hiking, running, walking, bicycling, horseback riding, rock climbing, swimming, boating, river rafting, kayaking, canoeing, fishing, hunting, collecting edible and medicinal plants and mushrooms, viewing salmon and other fish and wildlife, birdwatching, botanical identification, viewing and experiencing cultural resources, general sightseeing, and quiet enjoyment.

Requesters' interests would be adversely affected or aggrieved if the Council violates applicable laws or rules in its review of, and decision-making on, the Application; if the Council grants the requested extensions of the construction deadlines; if the Project is constructed and operated despite noncompliance with applicable laws or rules; and/or if the construction and/or operation of the Project adversely affects resources. The Council's approval

of this RFA as proposed may establish adverse precedents; harm resources; and/or diminish the use and enjoyment of these resources by Requesters, their members, and the general public. Requesters seek to advocate for and protect these public interests by participating as parties to the contested case proceeding.

No other persons or organizations can adequately represent the above-described public interests. Requesters are unaware of any other organizations or persons who raised all the same issues as Requesters on the record of the public hearing. Nor are Requesters aware of any other potential parties to this contested case proceeding who possess the same institutional capacities or that intend to fully represent the same interests and issues raised by Requesters.

VII. THE ISSUES THAT REQUESTERS DESIRE TO RAISE IN A CONTESTED CASE PROCEEDING

In reviewing a request to amend a site certificate, the Council must consider "any changes in facts or law" since the current site certificate was executed and whether the facility's amendment application "complies with all laws and Council standards applicable to an original site certificate application." OAR 345-027-0375(2)(b) (2019). In consideration of those standards, Requesters desire to raise the following issues in a contested case proceeding.

A. The Council Cannot Approve Perennial's Application Under Invalid Rules.

The Council cannot approve Perennial's application for a site certificate amendment. Perennial was required to begin construction by September 23, 2018. *See* Site Certificate for the Perennial Wind Chaser Station, Condition No. GEN-G2-02 (Sept. 23, 2015). Perennial failed to begin construction by that deadline and instead submitted an application to extend the deadline pursuant to the October 2017 Council rules. However, the October 2017 rules have since been declared invalid by the Oregon Supreme Court. *See Friends of the Columbia Gorge, et. al. v. Energy Facility Siting Council*, 446 P.3d 53, 67 (2019) ("The rules approved by the

Energy Facility Siting Council through Permanent Administrative Orders EFSC 4-2017 and EFSC 5-2017 are invalid"). Moreover, the Council's so-called "temporary rules" are also invalid and therefore cannot be implemented. The Council cannot approve applications under invalid rules; thus, the Council cannot approve Perennial's application as submitted.

1. The October 2017 rules relied upon by Perennial and the Council are invalid.

In its RFA, Perennial expressly cited to OAR 345-027-0085 (2018) in requesting a three-year extension of its construction commencement deadline. *See* RFA1 at 1. In a letter dated August 22, 2018, EFSC informed Perennial that, pursuant to OAR 345-027-0085(5) (2018), Perennial is only eligible for a two-year extension. Since the provision governing site certificate amendments was renumbered from -0030 to -0085 as part of the October 2017 rulemaking, there is no question that these citations were to the rules adopted in October 2017, which the Oregon Supreme Court has overturned.

The Oregon Supreme Court's recent decision in *Friends of the Columbia Gorge v. EFSC*, substantially changed the law after Perennial submitted its extension request. That opinion held that the Council violated the APA when proposing and adopting the rules at OAR Chapter 345, Division 27, in October 2017. *Friends of the Columbia Gorge v. EFSC*, 365 Or 371, 446 P3d 53 (2019). Therefore, the Court held, the rules "are invalid." *Id* at 396. Oregon courts have long held that invalid rules cannot be implemented, enforced, or relied upon. *See Homestyle Direct, LLC v. Dep't of Human Serv.*, 245 Or App 598, 605, 263 P3d 1118 (2011) (state agencies cannot enforce invalid rules), *rev'd on other grounds*, 354 Or 253, 311 P3d 487 (2013); *Gooderham v. Adult & Family Servs. Div.*, 64 Or App 104, 107–08, 667 P2d 551 (1983) (invalid rule could not be used to reduce or terminate benefits); *Clark v. Pub. Welfare Div.*, 27 Or App 473, 477, 556 P2d 722 (1976) ("The decision of the hearings officer having

been made pursuant to invalid rules is itself invalid."); *Kessler v. Or. Corr. Div.*, 26 Or App 271, 274, 552 P2d 589 (1976) (agency decision reversed and remanded because it applied invalid rules), *overruled on other grounds by Rutherford v. Or. State Penitentiary*, 39 Or App 431, 439, 592 P2d 1028 (1979). Because the October 2017 rules are invalid, the Council cannot approve Perennial's application under those rules.[3]

Requesters raised this issue at pages 1–2 of their August 22, 2019, comment letter to the Council. This issue involves a significant issue of law that directly impacts Perennial's RFA. The Council should hold a contested case, utilizing a neutral hearing officer, to resolve the disputed issues.

2. The August 2019 "temporary" rules are also invalid.

On August 22, 2019, the same day the public comment period on Perennial's RFA closed, the Council attempted to adopt new "temporary" rules governing amendments to site certificates. *See* Temporary Administrative Order, EFSC 9-2019 (Aug. 22, 2019). The Proposed Order cites to these "temporary rules," which are virtually identical in language to the rules recently held invalid by the Oregon Supreme Court. The "temporary" rules are also invalid for a number of reasons, including: a) the Council failed to adopt adequate findings

[3] When the Oregon Supreme Court invalidated the October 2017 rules, the rules that were in effect prior to that rulemaking became the effective rules. *See Gooderham v. Adult & Family Servs. Div.*, 64 Or App 104, 100, 667 P2d 551 (1983) (stating that a rule "not promulgated according to the APA . . . [is] not effective to repeal the previous rule"); *see also Back in Action Physical Therapy v. Liberty Northwest Insuance Corp.*, 259 Or App 743, 752, 316 P3d 324 (2013) (holding that "[t]here is no question that the former permanent rule would be controlling if the temporary rule were determine to be inapplicable or invalid"). However, if the pre-October 2017 rules are applied to Perennial's RFA, its request must be denied because Perennial's application was untimely under that version of the rules. Pursuant to the pre-October 2017 rules, a request to extend construction deadlines must be submitted "no later than six months before the date of the applicable deadline." *See* OAR 345-027-0030(1) (2017). Perennial's application, however, was filed just one month before the construction deadline expired. Thus, under the pre-October 2017 rules, the site certificate expired when Perennial failed to begin construction by the September 23, 2018 deadline. *See* OAR 345-027-0000 (2017) ("[i]f the certificate holder does not begin construction of the facility, the site certificate expires on the construction beginning date specified by the Council in the site certificate or in an amendment of the site certificate *granted* according to the rules of this division.") (emphasis added).

demonstrating an emergency, b) the Council cannot retroactively apply the "temporary" rules to transactions and occurrences prior to the adoption of these rules, and c) the Council is prohibited from readopting as "temporary" rules identical language that had already been in effect for more than 650 days as permanent rules. *See* Exhibit B; *see also* ORS 183.335(6)(a) (stating that a temporary rule may not be in effect for longer than 180 days). Because the so-called "temporary" rules are also invalid, the Council cannot rely on them to review, process, or approve Perennial's RFA. *See supra* Section VII.A.1.

A contested case is warranted because this issue raises significant questions of law that may affect the Council's determination as to whether the proposed facility complies with the applicable laws and rules and, ultimately, whether the Council should grant or deny the requested construction extension. *See* OAR 345-027-0371(9) (2019). Requesters were not able to raise this issue during the public comment period because the Council adopted the "temporary" rules *after* the comment period on the RFA closed. As the Council is no doubt aware, Requesters have challenged the "temporary" rules before the Oregon Supreme Court. *See* Exhibit B. The Council should hold a contested case, utilizing a neutral hearing officer, to resolve whether the "temporary" rules can be relied upon in this matter. At the very least, the Council should stay further action on Perennial's RFA until the Supreme Court has issued a ruling on the validity of the "temporary" rules.

B. Perennial's Application is Incomplete Because it Failed to Include Accurate Information About the Status of its DEQ Air Permit.

Pursuant to OAR 345-021-0000(7), Perennial's RFA application should never have been deemed complete because Perennial failed to submit accurate information regarding the status of its DEQ air permit. In fact, the Council and Department did not receive the required information until after the close of the public comment period, and, thus, Requesters were not

given an opportunity to comment accurately on the issue. A contested case hearing on this issue is appropriate because it involves a significant issue of fact and law that may affect the Council's determination as to whether the proposed facility complies with the applicable laws and rules, and ultimately whether the requested construction extension should be granted or denied. *See* OAR 345-027-0371(9) (2019).

The Council's rules require applicants for site certificates to demonstrate that they have obtained or will obtain all permits needed for construction and operation of proposed energy facilities. With respect to federally delegated permit applications, applicants must submit "evidence that the responsible agency has received a permit application and the estimated date when the responsible agency will complete review and issue a permit decision." OAR 345-021-0010(1)(e)(D). The "[d]epartment may not find the site certificate application to be complete before receiving" this documentation. OAR 345-021-0000(7). The regulations are clear that until the application is affirmatively determined to be complete, it is considered a preliminary application. *See* OAR 345-021-0000(10). On June 25, 2019, the Department published on its website what it determined to be a "complete" request for an amendment. In that document, Perennial notes,

> "[t]he Air Contaminant Discharge Permit and Prevention of Significant Deterioration Permit (Air Permit) were initially issued on January 26, 2016. An application to extend the construction start date was submitted on April 5, 2017. Oregon Department of Environmental Quality (DEQ) approved the extension on May 17, 2017. The Air Permit now has a required start date of January 26, 2019. The DEQ may grant an additional 18 month [*sic*] extension for good cause."

RFA1 at 5. But when Perennial made this allegation in June 2019, the construction commencement deadline in the Air Permit was already six months expired. Perennial failed to disclose this fact, explain whether it ever sought an additional 18-month extension, or indicate DEQ's expected timeframe to complete its review. In the absence of this critical information,

pursuant to OAR 345-021-0000(7), the application should never have been deemed complete and should never have moved beyond the preliminary application stage.

The Council did not receive clarity on the status of Perennial's DEQ air permit until September 9, 2019, long after the close of the public comment period for RFA1. *See* Staff Report to the Council on Perennial Wind Chaser Station, Attachment 1 (Sept. 12, 2019). The September 9th email exchange between ODOE and DEQ fails to provide "the estimated date when the responsible agency will complete review and issue a permit decision" required by OAR 345-021-0010(1)(e)(D). In fact, Requesters posit that Perennial's DEQ permit has expired due to the company's failure to submit a timely application for an extension of its construction deadlines; an argument Requesters raised in their October 10, 2019, comments to DEQ.[4] If Perennial's DEQ permit is indeed expired, the company will have to resubmit a new application for a new air permit to DEQ; a process that is unlikely to be completed before the construction commencement deadline in Perennial's EFSC site certificate expires again.

Requesters raised this issue on pages 2–3 of their August 22, 2019, comment letter to the Council, to the extent information was available before the close of the comment period. A contested case is justified because this issue raises significant issues of fact and law that may affect the Council's determination as to whether the proposed facility complies with the applicable laws and rules, and ultimately whether the requested construction extension should be granted or denied. *See* OAR 345-027-0371(9) (2019).

[4] DEQ issued a public notice for Perennial's proposed air quality permit on September 12, 2019. Requesters have attached their comments to DEQ as Exhibit C.

C. Perennial Failed to Adequately Explain Why it Needs Extensions of the Construction Deadlines.

The Department also erred in determining that Perennial's RFA was complete because Perennial's purported explanation for why it needs an extension of the construction deadlines for the Project is legally inadequate. To the extent EFSC's invalid rules can be applied here, those rules require Perennial to explain the need for an extension. *See* OAR 345-027-0385(1) (2019). Implicit in that rule is a requirement that the applicant's explanation must be compelling. Perennial merely claims it has "been unable to obtain a power purchase agreement and it is unlikely that one will be obtained before the required construction date." However, Perennial failed to explain what, if any, steps it took to attempt to obtain a power purchase agreement. More importantly, Perennial failed to explain why its inability to find customers warrants reviving the void site certificate and keeping it alive even further by granting a construction time extension. Perennial has failed to proffer an explanation sufficient to justify an extension.

In addition, under the invalid rules, the Council has authority to approve an extension for *up to* two years. OAR 345-027-0385(5)(d) (2019). In other words, the Council could approve an extension, but for a period of *less than* two years. Perennial's RFA fails to demonstrate why it needs a full two-year extension of both the construction start deadline and the construction completion deadline, and why an extension of less than two years for either of these deadlines would not be sufficient.

Such an explanation is especially necessary given that Perennial itself has admitted that the construction deadline in its DEQ Air Permit cannot be extended more than 18 months past January 26, 2019. *See* RFA at 5. The regulations governing DEQ's approval of the Air Permit are clear that if construction does not begin within fifty-four months of the initial permit issuance, the permit is void and the permittee must apply for a new permit. See OAR 340-224-

0030(5)(c). The initial Air Permit was issued on January 26, 2016; since the regulations require construction to begin within fifty-four months, the current Air Permit may not be extended beyond July 26, 2020. Since Perennial's Air Permit requires construction to begin, at the absolute latest, by July 26, 2020, there is no reason for EFSC to extend the construction start deadline in the site certificate beyond that date.

Perennial's attempted explanation of the need for construction extensions, in addition to being legally insufficient, admits a lack of market demand for energy from this project. Perennial's application states that "[t]here have been tremendous changes in the energy market and in pending federal regulations covering the energy sector since the issuance of the Site Certificate. Perennial is optimistic that as soon as future energy planning becomes stable, the need for the Facility will become apparent to the marketplace." RFA at 1. Perennial made no effort to explain the source of its optimism that the market will somehow swing in its favor, particularly when state energy policy is clearly moving in the opposite direction, away from fossil fuel infrastructure. There is simply no room in Oregon for a new fracked gas-fired power plant; the Council should not continue to allow this zombie project to linger any longer, given the absolute lack of need for the project.

In the Proposed Order, the Department asserts that "Council rules include no substantive review criteria for why the extension is needed and requested." Proposed Order at 21. The alleged vagueness of the requirement makes this issue ripe for a contested case hearing. A contested case hearing would provide an opportunity for a hearing officer to assist the Council with exploring and resolving this issue, given the alleged absence of clear standards. The contested case hearing process would also allow Requesters to seek discovery on this issue to learn from the applicant what its anticipated construction timeline is and what due diligence it

has undertaken in furtherance of the project. Requesters have no other means of obtaining this important information.

Requesters raised this issue on pages 5–6 of their August 22, 2019, comment letter to the Council. A contested case is justified because this issue raises significant questions of fact and law that may affect the Council's determination as to whether the proposed facility complies with the applicable laws and rules, and ultimately whether the requested construction extension should be granted or denied. *See* OAR 345-027-0371(9) (2019).

D. The Council Must Consider Methane Emissions From the Proposed Facility.

In the Proposed Order, the Department improperly dismisses Requesters' concerns regarding methane emissions from Perennial's fracked-gas fired power plant. Proposed Order at 97 n. 170. Specifically, the Department alleges that "[u]pstream carbon emissions, such as methane released during the production and transportation of natural gas, are not within the scope of the Council's Carbon Standard." *Id*. This ignores Requesters' earlier-stated concerns that new studies have shown that natural gas power plants directly release 21 to 120 times more methane than suggested by EPA's Greenhouse Reporting Program data. *See* Requesters' Comments at 4 n.14. Contrary to the Department's suggestion, the study Requesters cited to in support of that statement does not address methane released during the production and transportation of fracked gas, *it specifically addresses methane released from the power plants themselves* during operation. Methane pollution from Perennial's proposed facility is very much within the scope of the Council's Carbon Standard. In reviewing an application, the Council "must determine the gross carbon dioxide emissions that are reasonably likely to result from the operation of the proposed energy facility." OAR 345-024-0590(1). The term "carbon dioxide emissions" means either carbon dioxide itself or the "carbon dioxide equivalent of

other greenhouse gases," and the rules expressly consider methane as equivalent to 25 pounds of carbon dioxide. *Id.* The Council must consider potential methane emissions related to the operation of the proposed facility.

Requesters raised this issue on page 4 of their August 22, 2019, comment letter to the Council. A contested case is justified because this issue raises significant questions of fact and law that may affect the Council's determination as to whether the proposed facility complies with the applicable laws and rules, and ultimately whether the requested construction extension should be granted or denied. *See* OAR 345-027-0371(9) (2019).

E. 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.

In the four years since EFSC first issued a site certificate to Perennial, the environmental impacts of fracked gas have become increasingly apparent, as have the rapidly growing effects of climate change. This new understanding of the impact of fracked gas on our climate is a factual change that has occurred since the issuance of Perennial's site certificate and that the Council should consider in its review of the RFA. To combat climate change, we need to rapidly phase out all fossil fuel infrastructure—not construct new gas-fired power plants like Perennial.

In reviewing a request for amendment to extend construction deadlines, OAR 345-027-0375(2)(b) (2019) requires the Council to consider "any changes in law or fact since the date the current site certificate was issued." ODOE interprets this provision as requiring, among other things, the review of any change to the existing environment. *See* Proposed Order at 17. In the Proposed Order, the Department dismissed Requesters' concerns about the environmental impacts of a new gas-fired power plant as being outside the scope of the Council's review, noting that the proposed facility itself does not intend to drill for natural gas.

See Proposed Order at 5 n.2. However, that statement misses the heart of Requesters' concerns: Assuming Perennial finds a purchaser for its power, the construction and operation of a new gas-fired power plant will increase demand for fracked gas which will, in turn, increase fracking and related methane emissions. Climate change is a global problem that will never be fixed if government agencies continue to ignore how their seemingly local actions influence global effects.

Since Perennial initially applied for its site certificate in 2014, multiple studies have demonstrated the cradle-to-grave climate change and air pollution impacts of fracked gas. For example, methane released into the atmosphere during the production and transport of fracked gas is a far greater contributor to climate change than previously understood.[5] Additionally, approving Perennial's RFA would contradict Oregon's goals to reduce greenhouse gas emissions. *See* Requester Comments at 5.

Requesters raised this issue on pages 3–5 of their August 22, 2019, comment letter to the Council. A contested case is justified because this issue raises significant issues of fact that may affect the Council's determination as to whether the proposed facility complies with the applicable laws and rules, and ultimately whether the requested construction extension should be granted or denied. *See* OAR 345-027-0371(9) (2019).

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[5] *See* Steven Mufson, *Methane Leaks Offset Much of the Benefits of Natural Gas, Study Says*, Wash. Post, June 24, 2018, https://www.washingtonpost.com/business/economy/methane-leaks-offset-much-of-the-benefits-of-natural-gas-new-study-says/2018/06/21/e381654a-7590-11e8-b4b7-308400242c2e_story.html, *see also* Alvarez, *et al.*, *Assessment of methane emissions from the U.S. oil and gas supply chain*, Science (2018), *available at* https://science.sciencemag.org/content/361/6398/186?rss=1; Sierra Club, *Fracked Gas: Nothing "Natural" About It* (2018) (reviewing literature and estimating leakage rate of 3 percent), *available at* https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/FACTSHEET_FrackedGasClimateImpacts.pdf

F. Responding to Issues, Arguments, and Evidence Raised by Other Parties

Requesters reserve all rights to respond to issues, arguments, and evidence raised by other parties to the contested case. *See* ORS 183.413(2)(e) (all parties to a contested case have "the right to respond to all issues properly before the presiding officer and present evidence and witnesses on those issues"); ORS 183.417(1) (all parties have the right to "respond and present evidence and argument on all issues properly before the presiding officer in the proceeding"); *Marbet*, 277 Or at 453, 455 (a party to an EFSC contested case has the right to seek judicial review on "issues that the agency in fact decided on someone else's initiative").

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III. CONCLUSION

For the reasons stated above, Requesters Columbia Riverkeeper, Friends of the Columbia Gorge, and Oregon Wild respectfully request that the Energy Facility Siting Council conduct a contested case proceeding on the Request for Amendment 1 of the Site Certificate for the Perennial Wind Chaser Station, and admit Requesters as parties to the proceeding.

Dated this 1st day of November, 2019.

Respectfully submitted,

CRAG LAW CENTER

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Exhibit C	Requesters' Comments on Perennial WindChaser, LLC's Proposed DEQ Air Quality Permit Modification, October 10, 2019.

Exhibit A

Requesters' Comments on Perennial Wind Chaser Station – Request for Amendment 1, August 22, 2019

August 22, 2019

Katie Clifford, Senior Siting Analyst
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550 Capitol Street NE, 1st Floor
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Submitted via email to: PER.Comments@Oregon.gov

Re: Perennial Wind Chaser Station — Request for Amendment 1

Dear Ms. Clifford:

Please accept these comments from Columbia Riverkeeper, Sierra Club, Friends of the Columbia Gorge, Northwest Environmental Defense Center, and Oregon Wild. On behalf of our tens of thousands of members and supporters, we urge the Oregon Department of Energy's Energy Facility Siting Council (EFSC) to reject the Request for Amendment (RFA) to Perennial Wind Chaser Station's ("Perennial") site certificate for a proposed gas-fired power plant. In the five years since Perennial applied for a site certificate from EFSC, the environmental impacts of fracked gas have become increasingly apparent. To combat climate change, we need to rapidly phase out all fossil fuel infrastructure, not construct new gas-fired power plants like Perennial.

1) **The site certificate for this project is expired, void, and cannot be amended.**

As an initial matter, the site certificate for this project is expired, void, and cannot be amended. Perennial was required to begin construction by September 23, 2018. Perennial failed to either begin construction by that deadline or to submit a valid application to extend the

deadline in compliance with valid Council rules. Instead, Perennial expressly filed its amendment application pursuant to invalid rules.[1] Specifically, the Oregon Supreme Court has held that the rules relied on by Perennial here "are invalid."[2] Because the RFA was expressly submitted under invalid rules, it cannot be processed by ODOE and cannot be approved by EFSC.[3] Moreover, because the site certificate already expired on September 24, 2018 (one day after the construction start deadline), it is void and cannot be amended. Nor does the Council have authority to adopt any future new rules that might authorize the processing of any amendments to the Perennial certificate, which, again, is expired and void. The requested amendment can neither be processed nor approved. If Perennial wants to move forward, it must submit a new site certificate application.

Perennial could have avoided this result by timely submitting an alternate, contingent application for an amendment to the site certificate under the rules that were in effect prior to October 2017 (which rules are still in effect and valid today) and asking ODOE and EFSC not to process that alternate application unless and until the challenged (October 2017) rules were deemed invalid. In the alternative, Perennial could have commenced construction at any point over the past several years, which likely would have mooted the issue of whether the construction commencement deadline should be extended. By failing to pursue either approach, Perennial is responsible for allowing the site certificate to expire.

Requesters respectfully request a confirmation that (1) the Perennial site certificate has expired and is void because construction was not commenced prior to the September 23, 2018 deadline, (2) the RFA was submitted pursuant to invalid rules, and for these reasons, (3) the RFA will not be processed any further and/or will be rejected or denied.

2) **Perennial's application is incomplete because the record indicates that its DEQ air permit is expired.**

EFSC's rules require applicants for site certificates to demonstrate that they have obtained or will obtain all permits needed for construction and operation of proposed energy facilities. With respect to federally delegated permit applications, applicants must submit "evidence that the responsible agency has received a permit application and the estimated date

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[1] *See* RFA at § 1.

[2] *Friends of the Columbia Gorge, et al. v. Energy Facility Siting Council,* 365 Or 371, 396 (2019) ("The rules approved by the Energy Facility Siting Council through Permanent Administrative Orders EFSC 4-2017 and EFSC 5-2017 are invalid.").

[3] The Oregon Court of Appeals has repeatedly held that invalid rules cannot be applied or enforced. *See Homestyle Direct, LLC v. Dep't of Human Serv.*, 245 Or. App. 598, 263 P.3d 1118 (2011) (state agencies cannot enforce invalid rules); *Clark v. Public Welfare Division,* 27 Or. App. 473, 556 P.2d 722 (1976) ("The decision of the hearings officer having been made pursuant to invalid rules is itself invalid."); *Kessler v. Or. Corr. Div.*, 26 Or. App. 271, 552 P.2d 589 (1976) (agency decision reversed and remanded because it applied invalid rules).

when the responsible agency will complete its review and issue a permit decision."[4] In its completed RFA, dated June 26, 2019, Perennial notes that "[t]he Air Contaminant Discharge Permit and Prevention of Significant Deterioration Permit (Air Permit) were initially issued on January 26, 2016. An application to extend the construction start date was submitted on April 5, 2017. Oregon Department of Environmental Quality (DEQ) approved the extension on May 17, 2017. The Air Permit now has a required start date of January 26, 2019. The DEQ may grant an additional 18 month extension for good cause."[5] But when Perennial made this statement, the Air Permit had apparently already expired. Perennial failed to disclose this fact, and failed to explain whether an 18-month extension was ever sought or approved by DEQ. Columbia Riverkeeper has confirmed with DEQ that Perennial did, in fact, apply for an 18-month extension, but as far as the record shows, the Air Permit has expired. At a minimum, Perennial's application is incomplete and should never have been deemed complete by EFSC, and Perennial's failure to address this issue should result in denial of the RFA.

3) Fracked gas is no longer considered a climate-friendly energy alternative

When evaluating a request to extend construction deadlines under its invalid rules, EFSC must consider "any changes in facts or law since the date the current site certificate was executed."[6] ODOE interprets this rule as requiring the review of any change to facility design, the existing environment, or changes in law since the current site certificate was issued. Since Perennial's current site certificate was initially approved in 2015, multiple studies have demonstrated the cradle-to-grave climate change and air pollution impacts of fracked gas. For example, methane released into the atmosphere during the production and transport of fracked gas is a far greater contributor to climate change than previously understood.[7] Additionally, Governor Brown has recognized climate change as "one of the most significant threats to Oregon's economy, environment, and way of life."[8] Fracked gas infrastructure, like Perennial's 415-megawatt gas-powered facility, threatens the health of our communities and our climate.

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[4] OAR 345-021-0010(1)(e)(D).
[5] RFA at 5.
[6] *See* OAR 345-027-0075(2)(b) (2018).
[7] *See* Steven Mufson, *Methane Leaks Offset Much of the Benefits of Natural Gas, Study Says*, Wash. Post, June 24, 2018, https://www.washingtonpost.com/business/economy/methane-leaks-offset-much-of-the-benefits-of-natural-gas-new-study-says/2018/06/21/e381654a-7590-11e8-b4b7-308400242c2e_story.html, *see also* Alvarez, *et al.*, *Assessment of methane emissions from the U.S. oil and gas supply chain*, Science (2018), *available at* https://science.sciencemag.org/content/361/6398/186?rss=1; Sierra Club, *Fracked Gas: Nothing "Natural" About It* (2018) (reviewing literature and estimating leakage rate of 3 percent), *available at* https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/FACTSHEET_FrackedGasClimateImpacts.pdf
[8] https://www.oregon.gov/gov/policy/Pages/energy_climatechange.aspx

Specifically, the Council should consider and require accounting for the significant methane releases that would be connected to the Perennial project.[9] The Council must "determine the gross carbon dioxide emissions that are reasonably likely to result from the operation of the proposed energy facility."[10] The term "carbon dioxide emissions" means either carbon dioxide itself or the "carbon dioxide equivalent of other greenhouse gases," and the rules expressly consider methane as equivalent to 25 pounds of carbon dioxide.[11] In fact, EPA estimates methane to be 28 to 36 times more potent than carbon dioxide over 100 years.[12] Methane leaks are "reasonably likely to result from the operation" of Perennial. Many researchers have calculated the national average gas leakage rate with a central estimate of about three percent of total production.[13] Additionally, a new study, which utilized special flying lab-planes to collect data, found that natural gas power plants release 21 to 120 times more methane than what has been suggested in the EPA's Greenhouse Reporting Program data. This fly-over data collection method allowed the scientists to measure not only the regular emissions that came out of the plant's smokestacks, but also spilled methane that later rises to the atmosphere.[14] The Council must account for the methane emissions that will result from Perennial before issuing a site certificate, including methane leaks associated with the production, processing, storage, transmission, distribution, and use of the fracked gas.

Furthermore, recent experience with the Carty Generating Station has shown that gas-fired power plants have the potential to emit far greater levels of volatile organic compounds (VOCs) than energy companies such as Perennial have led permitting authorities and the public to believe. Perennial estimates 500 startups and shutdowns every year.[15] Pollution levels are much higher during startup and shutdown events because carbon monoxide and volatile organic compounds increase during partial load operations, and because pollution control devices like selective catalytic reduction controls cannot operate until the temperature reaches a certain threshold.[16] Perennial's DEQ Air Permit (if it is still in effect) allows it to emit pollution beyond

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[9] *See* OAR 345-024-0500–OAR 345-024-0720.
[10] OAR 345-024-0590(1)(emphasis added).
[11] *Id*.
[12] EPA, Understanding Global Warming Potentials, *available at* https://www.epa.gov/ghgemissions/understanding-global-warming-potentials
[13] *See* note 2.
[14] Tegan N. Lavoie, Paul B. Shepson, Chloe A. Gore, Brian H. Stirm, Robert Kaeser, Bernard Wulle, David Lyon, and Joseph Rudek, *Assessing the Methane Emissions from Natural Gas-Fired Power Plants and Oil Refineries* Environmental Science & Technology 2017 51 (6), 3373-3381, *available at* https://pubs.acs.org/doi/abs/10.1021/acs.est.6b05531?_ga=2.16124726.1022368715.1566343387-837264606.1566343387
[15] Standard Air Contaminant Discharge Permit, Permit No. 30-0039-ST-01, Section 3.9 (Jan. 26, 2016).
[16] *See* Permit No.: 30-0039-ST-01, Application No.: 27470, Page 13 of 62; *see also* Joseph J. Macak III, *Evaluation of Gas Turbine Startup and Shutdown Emissions for New Source Permitting*, *available at* https://d3pcsg2wjq9izr.cloudfront.net/files/6709/articles/5647/evaluationofpermitting.pdf

normal levels during startup and shutdown events, and fails to impose any limits on the amount of emissions during these events.[17]

Approving Perennial's RFA would contradict Oregon's goals to reduce greenhouse gas emissions. Oregon is one of twenty-four states that have signed the U.S. Climate Alliance, pledging to reduce greenhouse gas emissions consistent with the goals of the Paris Agreement. By joining the Alliance, Governor Brown committed to "implement policies that advance the goals of the Paris Agreement, aiming to reduce greenhouse gas emissions by at least 26–28 percent below 2005 levels by 2025" and to "accelerate new and existing policies to reduce carbon pollution and promote clean energy deployment at the state and federal level."[18] We must move rapidly away from fossil fuel infrastructure and toward renewable energy alternatives. Approving Perennial's RFA would be a step backwards.

At the time Perennial received its initial site certificate, so called "natural gas" was still considered a "bridge fuel" between coal and cleaner energy alternatives. In the intervening years, it has become abundantly clear that switching from coal to fracked gas is almost a wash from a climate perspective; the health of our planet demands investment in cleaner alternatives now.[19] The construction of a new fracked gas-fired power plant would lock the state into decades of dependence on fossil fuel that would impede the development of cleaner, safer alternatives. We no longer have the luxury of a "bridge"; the time to move away from fracked gas is now.[20]

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

Perennial's purported explanation why it needs an extension of the construction deadlines for this project is legally inadequate. To the extent that EFSC's invalid rules can be applied here, those rules require Perennial to explain the need for an extension.[21] Implicit in that rule is a requirement that the applicant's explanation must be compelling. For example, an "explanation" that a project's backers were in jail for fraud or negligently missed the deadline to apply for an RFA would neither satisfy OAR 345-027-0085, nor entitle the applicant to an extension. Perennial merely claims it has "been unable to obtain a power purchase agreement and it is unlikely that one will be obtained before the required construction start date." However, Perennial failed to explain what, if any, steps it took to attempt to obtain a power purchase agreement. More importantly, Perennial failed to explain *why* its inability to find customers

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[17] *See* Permit No. 30-0039-ST-01 at 3.3,3.4, 3.5,3.6 (excluding startup and shutdown periods from nitrogen oxide, carbon monoxide, and volatile organic compound limits); *see also* Permit No. 30-0039-ST-01 at 3.9 (limiting the time and frequency of startup and shutdown periods but not the emissions levels).
[18] *See* https://www.usclimatealliance.org/alliance-principles
[19] *See* https://www.ucsusa.org/clean-energy/coal-and-other-fossil-fuels/infographic-climate-change-risks-natural-gas
[20] *See* The Guardian, *World has no capacity to absorb new fossil fuel plants, warns IEA* (November 12, 2018).
[21] *See* OAR 345-027-0085 (2018).

warrants reviving the void site certificate and keeping it alive even further by granting a construction time extension. Perennial has failed to proffer an explanation sufficient to justify an extension.

In addition, under the invalid rules, EFSC has authority to approve an extension for *up to* two years.[22] In other words, EFSC could approve an extension, but for a period of *less than* two years. Perennial's RFA fails to demonstrate why it needs full two-year extensions of *both* the construction start deadline and the construction completion deadline, and why extensions of less than two years for either of these deadlines would not be sufficient.

Such an explanation is especially necessary given that Perennial itself has admitted that the construction deadline in its DEQ Air Permit cannot be extended more than 18 months past Jan. 26, 2019.[23] The regulations governing DEQ's approval of the Air Permit are clear that if construction does not begin within 54 months of the initial permit issuance, the permit is void and the permittee must apply for a new permit.[24] The initial Air Permit was issued on Jan. 26, 2016; since the regulations require construction to begin within fifty-four months, the current Air Permit may not be extended beyond July 26, 2020. Since Perennial's Air Permit requires construction to begin, at the absolute latest, by July 26, 2020, there is no reason for EFSC to extend the construction start deadline in the site certificate beyond that date.

Perennial's attempted explanation of the need for construction extensions, in addition to being legally insufficient, admits a lack of market demand for energy from this project. Perennial's application states that "[t]here have been tremendous changes in the energy market and in pending federal regulations covering the energy sector since the issuance of the Site Certificate. Perennial is optimistic that as soon as future energy planning becomes stable, the need for the Facility will become apparent to the marketplace." Perennial made no effort to explain the source of its optimism that the market will somehow swing in its favor, particularly when state energy policy is clearly moving in the opposite direction, away from fossil fuel infrastructure. There is simply no room in Oregon for a new fracked gas-fired power plant; EFSC should not continue to allow this zombie project to linger any longer, given the absolute lack of need for the project.

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[22] OAR 345-027-0085(5)(d) (2018)
[23] RFA at 5.
[24] OAR 340-224-0030(5)(c) ([e]xcept as provided in subsection (i), the permit will be terminated 54 months after it was initially issued if construction does not commence during that 54 month period. If the owner or operator wants approval to construct beyond the termination of the permit, the owner or operator must submit an application for a new Major NSR or Type A State NSR permit).

For these reasons, Perennial's RFA should be denied. Thank you for considering this comment.

Sincerely,

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Exhibit B

Petitioners' Opening Brief and Excerpt of Record in
Friends of the Columbia Gorge, et al. v. Energy Facility Siting Council, SC No. S066993 (Or. 2019),
filed October 4, 2019

IN THE SUPREME COURT OF THE STATE OF OREGON

FRIENDS OF THE COLUMBIA GORGE, OREGON WILD, CENTRAL OREGON LANDWATCH, WILDLANDS DEFENSE, THRIVE HOOD RIVER, GREATER HELLS CANYON COUNCIL, OREGON NATURAL DESERT ASSOCIATION, OREGON COAST ALLIANCE, AUDUBON SOCIETY OF PORTLAND, and COLUMBIA RIVERKEEPER,

Petitioners,

v.

ENERGY FACILITY SITING COUNCIL and OREGON DEPARTMENT OF ENERGY,

Respondents.

Energy Facility Siting Council No. EFSC 9-2019

SC No. S066993

PETITIONERS' OPENING BRIEF AND EXCERPT OF RECORD

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A. FIRST ASSIGNMENT OF ERROR: The 2019 rules are invalid because EFSC failed to demonstrate an emergency via adequate "findings that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice," as required by ORS 183.335(5)(a) 24

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I. STATEMENT OF THE CASE

A. Nature of the Proceeding and Relief Sought

This proceeding is a rulemaking appeal, brought pursuant to ORS 469.490 and 183.400, and involving temporary rules adopted by Respondent Energy Facility Siting Council ("EFSC" or "Council"), upon the recommendation of Respondent Oregon Department of Energy ("ODOE"). The challenged rules were adopted via Energy Facility Siting Council Temporary Administrative Order No. EFSC 9-2019 ("Order EFSC 9-2019") (ER-1–ER-70).

The language of the challenged rules will be familiar to this Court, because this language is almost entirely identical to that of a prior set of rules that was recently held invalid by this Court in *Friends of the Columbia Gorge v. Energy Facility Siting Council* ("*Friends v. EFSC*"), 365 Or 371, 446 P3d 53 (2019). That prior case involved rules adopted by EFSC in an October 2017 rulemaking, via Energy Facility Siting Council Permanent Administrative Orders EFSC 4-2017 and EFSC 5-2017.

This Brief will refer to three different sets of rules: (1) the permanent, valid rules in effect prior to October 2017 (which will be referred to herein as the "2017 rules"),[1] (2) the permanent rules adopted in October 2017 and later held invalid by the Supreme Court in *Friends v. EFSC* (which will be referred to as the "2018 rules"), and (3) the temporary rules adopted in August 2019 that are the subject of

[1] The 2017 rules are in Petitioners' Appendix at App-7–App-37.

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the instant appeal (which will be referred to as the "2019 rules").[2] All three sets of rules involve the same subject matter: the procedural requirements and criteria that EFSC and ODOE use to accept, review, process, and decide proposals to amend previously issued energy site certificates for large energy projects throughout the State of Oregon pursuant to the Energy Facility Siting Act ("Siting Act"), ORS 469.300–.619. Most of the rules in question are at OAR Chapter 345, Division 27, while a small number of the rules are at Divisions 15 and 25.[3]

Under the First Assignment of Error, Petitioners respectfully request that this Court declare the 2019 rules invalid. Under the Second Assignment of Error, Petitioners request that this Court declare OAR 345-027-0311(1) (2019) invalid. Under the Third Assignment of Error, Petitioners request that this Court declare invalid the majority of the 2019 rules (all rule language from the 2018 rules that Respondents readopted as identical 2019 rules).

If this Court declares any of the 2019 rules invalid, the Court should also clarify that the corresponding 2017 rules are reinstated. *See Back in Action Physical Therapy v. Liberty Nw. Ins. Corp.*, 259 Or App 743, 752, 316 P3d 324 (2013) ("There is no question that the former permanent rule would be controlling if the temporary rule were determined to be inapplicable or invalid."). The Court should also specify that its decision is effective immediately. *See* ORAP 14.05(2)(c).

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[2] The 2019 rules are in Petitioners' Excerpt of Record at ER-8–ER-70.

[3] The relevant rules in OAR Chapter 345, Division 25 within the 2019 rules were previously found in OAR Chapter 345, Division 27 within the 2017 rules.

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B. Nature of the Decision Sought to be Reviewed

The decision sought to be reviewed is EFSC's decision to adopt the 2019 rules. Judicial review of an agency rulemaking is governed in part by ORS 183.400(4). That section directs courts to declare rules invalid if they (a) violate constitutional provisions, (b) exceed the statutory authority of the agency, or (c) were adopted without compliance with applicable rulemaking procedures. ORS 183.400(4). In addition, ORS 183.335(11)(a) directs that "a rule is not valid unless adopted in substantial compliance with the provisions of [ORS 183.335]."

C. Statutory Basis for Original Appellate Jurisdiction

This Court has original appellate jurisdiction of this matter pursuant to ORS 469.490, which provides that "[t]he validity of any rule adopted by [EFSC] may be determined only upon a petition by any person to the Supreme Court."

D. Timeliness of Appeal

A petition for judicial review of a rule adopted by EFSC "must be filed within 60 days after the date the rule becomes effective under ORS 183.355." ORS 469.490. Here, the 2019 rules became effective on August 22, 2019, the same day they were adopted. (ER-1.)[4] Petitioners timely filed the Petition for Judicial Review with this Court on August 30, 2019, well within the sixty days required by ORS 469.490. Petitioners later filed an Amended Petition for Judicial Review (to add

[4] *See also* ORS 183.355(3) ("Each rule is effective upon filing . . . .").

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two parties as Petitioners) on September 13, 2019, which was also within the sixty days required by ORS 469.490.

E. Nature and Jurisdictional Basis of the Agency Action

The agency action at issue in this matter is a rulemaking action. EFSC purported to adopt the Rules under the statutory authority of ORS 469.470. (*See* ER-8–ER-70.) EFSC has authority to "adopt standards and rules to perform the functions vested by law in the council." ORS 469.470(2). Petitioners do not dispute EFSC's general authority to promulgate rules, but rather the sufficiency of EFSC's rulemaking procedures in adopting the 2019 rules, as well as EFSC's statutory authority to adopt these rules.

F. Questions Presented on Appeal

1. Are the 2019 rules invalid because EFSC failed to substantially comply with applicable rulemaking procedures in that it failed to demonstrate an emergency via adequate findings "that [EFSC's] failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice," as required for temporary rules by ORS 183.335(5)(a)?

2. Is OAR 345-027-0311(1) (2019) invalid because it applies retroactively for a period of more than 650 days to "all requests for amendment and amendment determination requests submitted on or after October 24, 2017," thus

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violating the 180-day maximum allowable duration for temporary rules under ORS 183.335(6)(a)?

3. In the alternative, is OAR 345-027-0311(1) (2019) invalid because it unlawfully attempts to retroactively legitimize the invalid 2018 rules?

4. Assuming *arguendo* that the 2018 rules were valid and/or effective until they were readopted by the 2019 rules, then are the 2019 rules invalid because they are a readoption and continuation of rule language identical to that of the 2018 permanent rules, which had already been in effect for more than 650 days at the time the 2019 rules were adopted, thus violating the 180-day maximum allowable duration for temporary rules under ORS 183.335(6)(a)?

G. Summary of the Arguments

First Assignment of Error: Under the Oregon Administrative Procedures Act, ORS ch. 183, "a rule is not valid unless adopted in substantial compliance with the provisions of [ORS 183.335]." ORS 183.335(11)(a); *see also* ORS 183.400(4)(c) (Agency rules "adopted without compliance with applicable rulemaking procedures" are "invalid."). Here, Respondents chose to bypass the APA's normal rulemaking requirements and instead quickly adopt the 2019 rules as temporary rules, without soliciting comments from the general public and without allowing the public to request an oral hearing. In so doing, EFSC violated ORS 183.335(5)(a) by failing to demonstrate an emergency via adequate findings "that its failure to act promptly will result in serious prejudice to the public interest or the

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interest of the parties concerned and the specific reasons for its findings of prejudice." The purpose of this requirement is to allow an abbreviated, expedited rulemaking process only where there is, effectively, an emergency. That purpose has not been met here.

Specifically, Respondents contrived a false emergency by adopting the legal fiction that there were (or would be) no rules in place following the Supreme Court's decision in the prior case. In fact, the 2017 rules were reinstated by the Supreme Court's decision, and there was no need whatsoever for EFSC "to act promptly" to adopt new temporary rules on an expedited basis without full compliance with the rulemaking requirements of the APA. ORS 183.335(5)(a).

In addition, EFSC violated ORS 183.335(5)(a) by failing to adopt adequate findings of "serious prejudice to the public interest or the interest of the parties concerned." Instead, EFSC merely adopted findings that energy developers should not have to experience "unnecessary delays and costs" and that adopting the "temporary rules may also improve the prospects for continuity in the processing of applications." (ER-7.) EFSC's findings are inadequate to demonstrate the "serious prejudice" required by the APA for temporary rules. ORS 183.335(5)(a).

Moreover, EFSC readily admitted in its findings that the 2019 rules were adopted to effectively make a policy choice to (temporarily) replace the procedural requirements and criteria of the valid 2017 rules with that of the invalid 2018 rules, so that one preferred set of rules could be used over the other. (*See* ER-3, ER-7.)

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EFSC failed to establish that this policy choice was an emergency warranting prompt action to adopt a temporary rule under ORS 183.335, thereby bypassing the APA's procedural requirements for permanent rules.

Because the 2019 rules were not adopted in substantial compliance with the requirements of ORS 183.335(5)(a), they are invalid pursuant to ORS 183.335(11)(a) and ORS 183.400(4)(c).

Second Assignment of Error: Under the APA, a rule that "[e]xceeds the statutory authority of the agency" is "invalid." ORS 183.400(4)(b). Here, OAR 345-027-0311(1) (2019), which was adopted on August 22, 2019, is invalid because it expressly applies retroactively for a period of more than 650 days to "all requests for amendment and amendment determination requests submitted on or after October 24, 2017." Furthermore, Respondents have in fact implemented this rule to apply the 2019 rules retroactively to past actions that occurred as long ago as one year and seven months prior to the adoption of the temporary rules. This far exceeds the 180-day maximum allowable duration for temporary rules under the APA. *See* ORS 183.335(6)(a) (A temporary rule "may be effective for a period of not longer than 180 days."). Because this rule exceeds Respondents' statutory authority, it is invalid pursuant to ORS 183.400(4)(b). And because this rule was not adopted in substantial compliance with ORS 183.335(6)(a), it is invalid pursuant to ORS 183.335(11)(a).

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In the alternative, OAR 345-027-0311(1) (2019) is invalid because it unlawfully attempts to retroactively legitimize the invalid 2018 rules, which this Court has held "are invalid." *Friends v. EFSC*, 365 Or at 396. OAR 345-027-0311(1) (2019) exceeds Respondents' statutory authority, and is therefore invalid pursuant to ORS 183.400(4)(b).

Third Assignment of Error: Assuming *arguendo* that the 2018 rules were valid and/or effective until they were readopted by the 2019 rules, then virtually all of the 2019 rules[5] violate ORS 183.335(6)(a) because these rules are a readoption and continuation of rule language identical to that of the 2018 permanent rules, which had already been in effect for more than 650 days at the time the 2019 rules were adopted. ORS 183.335(6)(a) expressly prohibits the language of temporary rules from being in effect for more than 180 days. Thus, rule language that had previously been in effect for more than 650 days may only be readopted or continued as permanent rules, not as temporary rules. *See* ORS 183.335(6)(a). Because the 2019 rules exceed Respondents' statutory authority, they are invalid pursuant to ORS 183.400(4)(b). And because the rules were not adopted in substantial compliance with ORS 183.335(6)(a), they are invalid pursuant to ORS 183.335(11)(a).

/ / /

[5] All of the 2019 rules except for OAR 345-027-0311 (2019) and the three rule subsections modified by EFSC in response to this Court's decision, which were OAR 345-027-0368(3)(e)(E), 345-027-0372(3)(d), and 345-027-0372(5) (2019).

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H. Statement of Facts

This matter concerns judicial review of an agency rulemaking that adopted temporary rules. The challenged rules, adopted by EFSC with assistance from ODOE, substantially revised the procedures and criteria by which previously approved large energy projects throughout the State of Oregon (and the permits approving these projects) may be modified after receiving EFSC approval. The majority of the rules in question are found at OAR Chapter 345, Division 27.

Petitioners are nonprofit public interest organizations, with more than 60,000 collective members and supporters, with a strong interest in responsible energy generation and the proper implementation of state law governing the approval, construction, and modification of large energy facilities in Oregon. (*See* Decl. of Doug Heiken in Supp. of Pet'rs' Mot. for Prelim. Inj. ("Heiken Decl.") at ¶¶ 4, 8.)

1. Statutory Background

Respondent EFSC is a subsidiary agency of Respondent ODOE,[6] and ODOE provides staff support to EFSC.[7] For purposes of this appeal, the organic statute for these agencies' authority is the Siting Act, found at ORS 469.300 through 469.619. *See Marbet v. PGE*, 277 Or 447, 449, 561 P2d 154 (1977).

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[6] ORS 469.450(1) ("There is established in the State Department of Energy an Energy Facility Siting Council . . . .").

[7] ORS 469.450(6) ("The State Department of Energy shall provide clerical and staff support to the council . . . ."); 469.040(1) ("[ODOE] shall be under the supervision of the Director of [ODOE], who shall . . . [s]upervise and facilitate the work and research on energy facility siting applications at the direction of [EFSC].").

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EFSC is responsible for reviewing and deciding whether to approve proposals for large energy facilities in Oregon, such as coal and natural gas plants, wind facilities, and high-capacity transmission lines. *See* ORS 469.300(11) (types of facilities under EFSC's jurisdiction). When EFSC decides to approve such a facility, it issues a "site certificate," which is a "binding agreement between the State of Oregon and the applicant, authorizing the applicant to construct and operate a facility on an approved site, incorporating all conditions imposed by the council on the applicant." ORS 469.300(12). With limited exceptions, "no facility shall be constructed or expanded unless a site certificate has been issued for the site thereof." ORS 469.320(1). "[A site] certificate or any amended site certificate with any conditions . . . shall authorize the applicant to construct, operate and retire the facility subject to the conditions set forth in the site certificate or amended site certificate." ORS 469.401(1). "A site certificate may be amended with the approval of [EFSC]." ORS 469.405(1).

In the rulemaking context, EFSC is authorized to "adopt standards for the siting, construction, operation and retirement of [energy] facilities." ORS 469.501(1); *see also* ORS 469.470(2) (authorizing EFSC to "adopt standards and rules to perform the functions vested by law in the council including the adoption of standards and rules for the siting of energy facilities pursuant to ORS 469.501.").

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2. Rulemaking Background

EFSC's rules for amending previously issued site certificates are primarily found at OAR Chapter 345, Division 27. Both the 2018 and 2019 rules substantially changed the procedural and substantive provisions of these rules. As described by Respondents themselves, the 2018 rules were a "wholesale re-write" of the 2017 rules. *Friends v. EFSC*, 365 Or at 374.[8]

The language of the 2019 temporary rules, in turn, is virtually identical to that of the 2018 rules (which, again, were held invalid by this Court), with only two substantive differences, which will be discussed below. Finally, the 2019 rules have been relocated and assigned new section numbers within the Oregon Administrative Rules, as compared to the 2018 rules.[9]

In the prior case, the Supreme Court held on August 1, 2019 that EFSC had failed to comply with the procedural requirements of the APA in purporting to adopt the 2018 rules, and as a result, the entire rulemaking package was invalid: "The rules approved by the Energy Siting Council through Permanent Administrative Orders EFSC 4-2017 and EFSC 5-2017 *are invalid*." *Friends v. EFSC*, 365 Or at 396 (emphasis added). Notably, the Supreme Court held that the challenged rules "are invalid," carefully using the same present-tense language as in the APA: "[A] rule *is not valid* unless adopted in substantial compliance with the

[8] As will be discussed below, *infra* § I.H.3, there are numerous meaningful differences in the 2018 and 2019 rules, as compared to the 2017 rules.

[9] The new OAR sections are at OAR 345-27-0311 through 345-27-400 (2019).

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provisions of [ORS 183.335]." ORS 183.335(11)(a) (emphasis added); *see also Gooderham v. Adult & Family Servs. Div.*, 64 Or App 104, 110, 667 P2d 551 (1983) ("A rule not promulgated according to the APA *is not a rule*.") (emphasis added).

In other words, the Supreme Court did not state that it was "invalidating" the 2018 rules, nor that the rules would be invalid (or invalidated) at a future date. Rather, the Court held, consistent with the language of the APA, that the 2018 rules "are invalid," thus confirming that the 2018 rules were never valid in the first place because they were not promulgated in compliance with mandatory rulemaking procedures required by the APA. *See Gooderham*, 64 Or App at 110.

As a result of the Supreme Court's ruling that the 2018 rules "are invalid," the obvious result should have been that the 2017 rules were automatically back in effect. *See Back in Action Physical Therapy*, 259 Or App at 752.

Respondents, however, did not see it that way. Following the Supreme Court's opinion, Respondents adopted the position that the 2018 rules were still in effect and would, only later, be "invalidated" when the Supreme Court issues its final judgment in the case. (Heiken Decl. at ¶ 19; *see also* ER-1, ER-7.) Thus, Respondents stated that they believed they could continue implementing and enforcing the 2018 rules while awaiting the Court's judgment, and they in fact continued to do so, over the objections of Petitioners. (Heiken Decl. at ¶¶ 19, 23, 25; *see also* App-57 n 7.)

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The disagreements between Petitioners and Respondents did not end there. Rather than concede that the entire rulemaking package (the entire set of 2018 rules) is invalid and that the entire set of 2017 rules was back in effect, Respondents took the novel position that any 2017 rules that had been *repealed* by the 2018 rules *were still repealed* (or, to be more exact, that these 2017 rules would still be repealed upon issuance of the Court's judgment). (ER-1–ER-2, ER-7; *see also* Heiken Decl. at ¶ 20.) Respondents reached this unprecedented interpretation by parsing the following sentence at the end of the Court's opinion:

> *The rules approved by* the Energy Facility Siting Council through Permanent Administrative Orders EFSC 4-2017 and EFSC 5-2017 are invalid.

Friends v. EFSC, 365 Or at 396 (emphasis added). Respondents argued that because the Court referred to "[t]he rules approved by" these rulemaking orders, the Court's intent was to only hold invalid the rules that *adopted new or modified* rule language, while not holding invalid any of the 2018 rules that *repealed* specific 2017 rule sections. (ER-1–ER-2, ER-7; *see also* Heiken Decl. at ¶ 20.) Thus, under Respondents' interpretation, there would be administrative chaos, because core provisions of the 2017 rules had been repealed and would remain repealed even after the Supreme Court's decision, and thus there would be no rules in effect at all and Respondents "may be unable to process requests for amendment until permanent rules are adopted." (ER-2, *see also* ER-1, ER-7; Heiken Decl. at ¶ 20.)

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Finally, at the time of the Supreme Court's August 1, 2019 decision, there were at least six applications for site certificate amendments pending before Respondents. (ER-2.) These applications were expressly filed under, and tailored to, the 2018 rules, and were at various stages of the review process under the 2018 rules at the time of the Court's decision. (ER-2–ER-6.) Immediately following the Supreme Court's ruling that the 2018 rules "are invalid," Petitioners asked Respondents to stop processing and to reject these applications, and to not accept any new applications under the 2018 rules (Heiken Decl. at ¶ 18), because agencies cannot implement or enforce invalid rules.[10] In addition, Petitioners asked Respondents to confirm that new applications could be filed and reviewed under the 2017 rules, which were now back in effect as a result of the Supreme Court's decision. (Heiken Decl. at ¶ 18.)

In response, Respondents once again disagreed with Petitioners. Respondents took the position that they could continue processing and reviewing the pending applications under the 2018 rules, given Respondents' earlier interpretations that

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[10] *See Homestyle Direct, LLC v. Dep't of Human Serv.*, 245 Or App 598, 605, 263 P3d 1118 (2011) (state agencies cannot enforce invalid rules), *rev'd on other grounds*, 354 Or 253, 311 P3d 487 (2013); *Gooderham*, 64 Or App at 107–08 (invalid rule could not be used to reduce or terminate benefits); *Clark v. Pub. Welfare Div.*, 27 Or App 473, 477, 556 P2d 722 (1976) ("The decision of the hearings officer having been made pursuant to invalid rules is itself invalid."); *Kessler v. Or. Corr. Div.*, 26 Or App 271, 274, 552 P2d 589 (1976) (agency decision reversed and remanded because it applied invalid rules), *overruled on other grounds by Rutherford v. Or. State Penitentiary*, 39 Or App 431, 439, 592 P2d 1028 (1979).

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the 2018 rules were still valid and in effect and could still be implemented until the Supreme Court's judgment, and that any repealed 2017 rules would still be repealed even after the Court's judgment. (Heiken Decl. at ¶¶ 19, 20.)

From there, Respondents advanced their novel interpretations of the Supreme Court's decision one step further. Relying on the false emergency that there would soon be no rules in effect at all, ODOE argued that this warranted the immediate adoption of temporary rules in order to "improve the prospects for continuity in the processing of applications for site certificate amendments," and that "failure to promptly adopt [the 2019] temporary rules . . . would impose unnecessary delays and costs to certificate holders seeking site certificate amendments." (ER-7; *see also* Heiken Decl. at ¶ 20.) ODOE then scheduled the consideration of a temporary rulemaking at EFSC's August 22–23, 2019 regular meeting (with no public hearing), and chose not to solicit comments on the proposed rules from the public at large, but instead only solicited written statements from energy site certificate holders alleging the "serious prejudice" that they believed they might endure as a result of the Supreme Court's decision. (*See* ER-3–ER-7; Rulemaking Record ("RR") Ex A3–A7; Heiken Decl. at ¶¶ 20, 21.)

On the first day of the August 22–23, 2019 meeting, EFSC acted on ODOE's recommendation and adopted the proposed temporary rules. (ER-1; Heiken Decl. at ¶ 21.) At this meeting, shortly before the 2019 rules were adopted, EFSC's Rules

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Coordinator stated that the 2019 rules were designed to "readopt" the 2018 rules "in substantially the same form that they were then." (ER-91, lines 8–12.)

The temporary rules (*i.e.*, the 2019 rules) temporarily suspend the 2018 rules for 180 days, while also temporarily readopting, verbatim, virtually all of the same language from the 2018 rules but at new OAR sections, with only two substantive differences as compared to the 2018 rules.[11] Those two substantive differences are as follows.

First, EFSC modified the language of three specific rule subsections involving judicial review of EFSC final orders.[12] EFSC made these changes in response to the Supreme Court's holding that the 2018 rule language in these three subsections exceeded EFSC's statutory authority, *Friends v. EFSC*, 365 Or at 394–95. (ER-2; *see also* ER-109; Heiken Decl. at ¶ 21.)

Second, EFSC made substantial changes to a specific section of OAR Chapter 345, Division 27 that governs the applicability of that Division. This section read as follows in the 2017 rules:

> The rules in this division do not apply to facilities covered by ORS 469.410(1), including the Trojan energy facility.

OAR 345-027-0011 (2017).

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[11] The two substantive differences are shown in a memo by the EFSC Rules Coordinator, at ER-109–ER-110.

[12] *Compare* OAR 345-027-0368(3)(e)(E), 345-027-0372(3)(d), 345-027-0372(5) (2019) *with* OAR 345-027-0068(3)(e)(E), 345-027-0072(3)(d), 345-027-

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The same section read as follows in the 2018 rules:

> The rules in this division apply to all facilities under the Council's jurisdiction except those facilities described in ORS 469.410(1), including the Trojan energy facility, *and except that rules OAR 345-027-0050 through 345-027-0100 that were in effect prior to October 24, 2017 apply to requests for amendments to site certificates and change requests that have been received by the Department prior to October 24, 2017.*

OAR 345-027-0011 (2018) (emphasis added). In other words, under the 2018 rules, applications filed prior to October 24, 2017 were to be processed under the 2017 rules, while applications filed after that date were to be processed under the 2018 rules.

And finally, that rule language was substantially revised to read as follows in the 2019 rules:

> (1) The rules in this division apply to all requests for amendment to a site certificate and amendment determination requests for facilities under the Council's jurisdiction that are submitted to, or were already under review by, the Council on or after the effective date of the rules. The Department and Council will continue to process all requests for amendment and amendment determination requests submitted on or after October 24, 2017 for which Council has not made a final decision prior to the effective date of these rules, without requiring the certificate holder to resubmit the request or to repeat any steps taken as part of the request prior to the effective date of these rules.
>
> (2) Notwithstanding section (1) of this rule, these rules do not apply to facilities described in ORS 469.410(1).

345-027-0311 (2019); *see also* ER-110.

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0072(5) (2018). *See also* ER-110 (showing these rule revisions).

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The primary intent behind temporary subsection (1), combined with the readoption of the vast majority of the 2018 rule language, was to resurrect the invalid 2018 rules as temporary 2019 rules and to retroactively apply these rules to the then-pending site certificate amendment applications (which were already being processed under the 2018 rules), going all the way back to October 24, 2017.[13] Respondents made this intent clear in the meeting agenda for EFSC's August 22–23, 2019 meeting (at which the 2019 rules were adopted):

> [The 2019 rules] would . . . [e]stablish that the Department and Council will apply the temporary rules to requests for amendments and other review processes submitted on or after October 24, 2017 for which Council or the Department has not yet made a final decision, without requiring certificate holders to resubmit a new request for amendment or amendment determination request.

(App-39.) In addition, a secondary intent behind this rule language was to also apply the same set of rules to all future applications submitted while the 2019 rules are in effect.[14]

Within the order adopting the 2019 rules, EFSC announced that the 2019 rules will be effective through February 17, 2020. (ER-1.) Respondents have also decided to initiate a new rulemaking process to adopt permanent rules that will supersede the 2019 temporary rules. (ER-106–ER-107; App-45.)

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[13] *See* ER-2, ER-7, ER-84, ER-90, ER-91–ER-93; Heiken Decl. at ¶ 22; App. 52–62.

[14] ER-7; *see also* ER-84, ER-90–ER-91; Heiken Decl. at ¶¶ 22, 27.

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3. The 2019 rules contain numerous procedural and substantive changes as compared to the 2017 rules.

There are numerous differences between the 2017 and 2019 rules.[15] Most of these differences are procedural, but some are substantive. Generally speaking, the 2019 rules eliminate or reduce public participation rights and opportunities that had been available in the 2017 rules, while also creating new hurdles and barriers to public participation that had not existed in the 2017 rules. (Heiken Decl. at ¶ 13.)

For example, under the 2017 rules, the public had an early right to comment on proposed applications to amend site certificates—thus informing the agencies, site certificate holders, and other stakeholders of any specific concerns, and thereby potentially influencing the substantive review of the application—*before* the ODOE staff prepared a draft proposed order on the proposed amendment. *See* OAR 345-027-0070(1)(a) (2017). But this right to provide comments early in the process has been stripped from the 2019 rules, and instead under these new rules the ODOE staff must prepare the entire draft proposed order with no input from the public. OAR 345-027-0365(1)(b)(C) (2019).

In addition, under the 2017 rules, the public had the right to request a contested case hearing for each proposal to amend a site certificate. OAR 345-027-

[15] Because the relevant language of the 2019 rules is identical to that of the 2018 rules, all changes in the 2019 rules discussed in this section were also previously found in the 2018 rules. However, for brevity, this section will not cite the 2018 rules.

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0070(6) (2017). But under the 2019 rules, that right has been removed from the rules and replaced with a completely different framework involving the newly created "Type A," "Type B," and "Type C" review paths, and the ODOE staff have been given unilateral authority to decide which applications will be processed as "Type B" matters, for which there is no public hearing and no opportunity for the public to even request a contested case. *See* OAR 345-027-0359, -0360, -0363, -0365, -0367, -0368, -0371, -0372, -0375, -0380 (2019). Under the 2019 rules, only the site certificate holder—and not interested members of the public, nor even the Council itself—is allowed to request Council review of ODOE staff determinations of which applications will be subject to the more truncated "Type B" process. OAR 345-027-0357(7) (2019). In these ways, Petitioners have lost important rights they once had under the 2017 rules, and are now subject to the whims of ODOE staff, with no recourse within the administrative review process itself if and when those whims are arbitrarily exercised.

The 2019 rules also impose new burdensome requirements on persons seeking contested cases on requests for amendments to site certificates by requiring them to submit a variety of information, including "[a] detailed description of the person's interest in the proceeding and how that interest may be affected by the outcome of the proceeding," "[a] statement of whether the person's request to participate in a contested case is as a party or a limited party, and if as a limited party, the precise area or areas in which participation is sought," "[i]f the person

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seeks to protect a personal interest in the outcome of the proceeding, a detailed statement of the person's interest, economic or otherwise, and how such interest may be affected by the results of the proceeding," "[i]f the person seeks to represent a public interest in the results of the proceeding, a detailed statement of such public interest, the manner in which such public interest will be affected by the results of the proceeding, and the person's qualifications to represent such public interest," and "[a] statement of the reasons why others who commented on the record of the public hearing cannot adequately represent the interest identified in [prior rule subsections]." OAR 345-027-0371(6)(e), (h), (i), (j) (2019). None of these requirements applied under the 2017 rules.

There are substantive differences as well. For example, under the 2017 rules, when a site certificate holder requested an amendment to extend a deadline for beginning or completing construction of a project, the Council retained discretion to approve extensions for any period of time up to two years, and thereby protect the public by preventing reviews of approved but not-yet-built projects from becoming stale in the face of changing circumstances. OAR 345-027-0030(4) (2017). But for extension applications under the 2019 rules, it is an all-or-nothing proposition: any extension granted must be *exactly three* years; no time period less than three years may be approved. OAR 345-027-0385(3)(a) (2019).

Also for applications to extend construction deadlines, the 2017 rules required such applications to be submitted at least six months prior to the deadline

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in question. OAR 345-027-0030(1) (2017). But under the 2019 rules, such applications may be submitted as late as *one day prior* to the applicable deadline. OAR 345-027-0385(1) (2019).

For proposals to expand project site boundaries, the 2017 rules required an analysis of whether "the facility" (*i.e.*, the entire facility, including any new portions within expanded site boundaries) would comply with the applicable rules. OAR 345-027-0070(10)(a) (2017). But under the 2019 rules, only "the portion of the facility within the area added to the site by the amendment" need be evaluated for compliance. OAR 345-027-0375(2)(a) (2019). By narrowing the scope in this way, the newer rules weaken the substance of the rules. For example, if a developer proposes to expand the size of an approved wind energy facility, the Council is no longer required to evaluate whether the facility as a whole, taking into account both previously approved components and new proposed components, complies with applicable noise, scenic, wildlife, and other standards.

In addition, the 2019 rules purport to add temporal limitations on which set of rules applies to the agencies' review of proposed site certificate amendments. Specifically, the 2019 rules require an analysis of whether a proposed amendment "complies with all laws and Council standards applicable to an original site certificate application." 345-027-0375(2)(a), (b) (2019). This new rule language appears to only require an analysis of laws and rules that were in effect on the date the site certificate was originally issued, rather than current laws and rules in effect

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when a proposed amendment to the site certificate is under review. This limitation was not found in the 2017 rules.

These are just a few of the numerous procedural and substantive changes made in the 2019 rules, as compared to the 2017 rules. Again, Respondents themselves have characterized the 2018 rules as a "wholesale re-write" of the 2017 rules, *Friends v. EFSC*, 365 Or at 374, and with only two substantive exceptions, discussed *supra* § I.H.2, the 2019 rules are identical to the 2018 rules (but placed at new section numbers within the Oregon Administrative Rules).

I. Preservation of Errors

Because this appeal challenges a rulemaking action and because this Court has original jurisdiction, there was no court below and no requirement for Petitioners to raise and preserve errors below. Moreover, there was no *opportunity* for Petitioners to have raised the errors, because Respondents chose to not hold a public hearing nor solicit comments from the general public prior to adopting the challenged rules.

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II. ARGUMENT

A. FIRST ASSIGNMENT OF ERROR: The 2019 rules are invalid because EFSC failed to demonstrate an emergency via adequate "findings that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice," as required by ORS 183.335(5)(a).

1. Standard of Review: Whether the challenged Rules were adopted without substantial compliance with applicable rulemaking procedures.

Under the APA, "a rule is not valid unless adopted in substantial compliance with the provisions of [ORS 183.335]." ORS 183.335(11)(a); *see also* ORS 183.400(4)(c) (Agency rules "adopted without compliance with applicable rulemaking procedures" are "invalid.") Accordingly, "noncompliance with [applicable provisions of ORS 183.335] will result in invalidation." *Fremont Lumber Co. v. Energy Facility Siting Council*, 325 Or 256, 263, 936 P2d 968 (1997) (citing ORS 183.335(2)(b)(E), 183.335(11)).

2. Respondents failed to adopt adequate findings demonstrating an emergency to justify the adoption of temporary rules.

The APA authorizes state agencies to adopt "temporary rules,"[16] also commonly called "emergency rules."[17] However, such rules may be adopted "only

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[16] ORS 18.335(6)(a) ("A rule adopted, amended or suspended under [ORS 183.335(5) is temporary . . . ."); *see also Edmunson v. Dep't of Ins. & Fin.*, 314 Or 291, 293, 838 P2d 589 (1992) ("temporary rules"); *Back in Action Physical Therapy*, 259 Or App at 748–50, 752 ("temporary rule"); *Harsh Inv. Corp. v. State ex rel. State Hous. Div.*, 88 Or App 151, 153 & n 2, 744 P2d 588 (1987) ("temporary rule").

[17] *See, e.g.*, *Edmunson*, 314 Or at 293 ("emergency [rule] provisions"); *Vier ex rel. Torry v. State Office for Servs. to Children & Families*, 159 Or App 369, 375,

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under limited circumstances." *Metro. Hosps., Inc. v. State Health Planning & Dev. Agency*, 52 Or App 621, 625, 628 P2d 783 (1981) (citing ORS 183.335). Here, EFSC failed to demonstrate an emergency via adequate "findings that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice," as required by ORS 183.335(5)(a). Because Respondents failed to comply with the procedural requirements of ORS 183.335(5)(a), "[i]t follows that the challenged rules are invalid." *Fremont Lumber*, 325 Or 256 at 267–68.

ORS 183.335(5)(a) allows temporary rules only if the agency first "prepare[s] [a] statement of its findings that its failure to act promptly will result in serious prejudice to the public interest of the parties concerned and the specific reasons for its findings of prejudice." ORS 183.335(5)(a) thus effectively requires an agency, before adopting a temporary rule, "to demonstrate an emergency." *Vier ex rel. Torry*, 159 Or App at 375. The legislature deliberately set the bar high for the required findings, expressly requiring agencies to find not mere "prejudice," but

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977 P2d 425 (1999) (ORS 183.335(5)(a) requires agencies "to demonstrate an emergency"); *Van Horn v. Senior Servs. Div.*, 76 Or App 15, 16, 707 P2d 1294 (1985) ("emergency rule"); *Gooderham*, 64 Or App at 111 ("emergency rule"); *Kids Against the Cut v. Or. Wage & Hour Comm'n*, 41 Or App 179, 183, 597 P2d 1264 (1979) (rule amended "on an emergency basis"); *Gray Panthers v. Pub. Welfare Div.*, 28 Or App 841, 845 n 3, 561 P2d 674 (1977) ("the emergency rule making procedure set forth in ORS 183.335(5)"); David B. Frohnmayer, *The Oregon Administrative Procedure Act: An Essay on State Administrative Rulemaking Procedure Reform*, 58 Or. L. Rev. 411, 439 (1980) ("[t]he provisions for temporary emergency rulemaking in ORS 183.335(5)").

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rather "serious prejudice." ORS 183.335(5)(a).[18] An agency's findings under ORS 183.335(5)(a) must "provide adequate support for the promulgation of the temporary rule." *Waterwatch of Or., Inc. v. Or. Water Res. Comm'n*, 97 Or App 1, 6, 774 P2d 1118 (1989); *see also Van Horn*, 76 Or App at 16 (temporary rules must be supported by "adequate" findings).

In adopting the 2019 rules, Respondents chose to bypass the APA's normal rulemaking requirements, and instead rush the adoption of the rules as temporary rules, without soliciting comments from the general public and without allowing the public to request an oral hearing. In so doing, EFSC violated ORS 183.335(5)(a) by failing to demonstrate an emergency via adequate findings "that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice." The purpose of this requirement is to allow an abbreviated, expedited rulemaking process only in emergency situations, where "prompt action" is necessary to prevent "serious prejudice." ORS 183.335(5)(a). That purpose has not

[18] The legislative history supports this reading. Before the Legislature adopted the requirements of ORS 183.335(5)(a), the House Judiciary Committee removed the word "serious" from the bill, but later the Senate Judiciary Committee added it back in, and the bill ultimately became law requiring findings of "serious prejudice to the public interest or the interest of the parties concerned." ORS 183.335(5)(a); *see also* Bill File, HB 1213 (1971) (House Committee on Judiciary, Exhibit D (removing "serious" from p. 4, line 17); Senate Committee on Judiciary, Exhibit D (adding "serious" back to p. 5, line 1)).

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been met here. Respondents have violated both the letter and spirit of the requirements of ORS 183.335(5)(a).

Specifically, Respondents contrived a false emergency by adopting the legal fiction that, following the Supreme Court's decision in the prior case that the 2018 rules "are invalid," *Friends v. EFSC*, 365 Or at 396, there were (or would be[19]) no rules in place:

> [W]hen Council adopted the [2018] rules in October 2017, it also repealed OAR 345-027-0070 [(2017)] (the rule that had previously governed the process for site certificate amendments) in Order EFSC 5-2017. Given the Council's prior repeal of the pre-October 2017 amendment rule, if the Council does not take any action now, upon the Supreme Court's entry of the appellate judgment, it is possible that there will be no rules in place governing site certificate amendments whatsoever. Therefore, certificate holders have questions and significant concerns regarding how the Council will proceed with pending requests for amendment, and ODOE is uncertain how to process any new requests that it may receive.
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> * * *

[19] Despite this Court's holding that the 2018 rules "are invalid," Respondents took the position that they could nevertheless keep implementing the invalid 2018 rules until the Court issues its final judgment in the prior appeal. (Heiken Decl. at ¶ 19; *see also* ER-1, ER-7.) Respondents' position ignores the plain language of this Court's decision, which confirmed, in present-tense language, that the 2018 rules "are invalid." *Friends v. EFSC*, 365 Or at 396; *see also* ORS 183.335(11)(a) ("[A] rule *is not valid* unless adopted in substantial compliance with the provisions of [ORS 183.335]."') (emphasis added); *Gooderham*, 64 Or App at 110 ("A rule not promulgated according to the APA *is not a rul*e.") (emphasis added). In addition, agencies may not implement or enforce invalid rules. *See Homestyle Direct*, 245 Or App at 601; *Clark v. Pub. Welfare Div.*, 27 Or App at 477; *Kessler*, 26 Or App at 275.

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> If a certificate holder were to apply for an amendment to a site certificate at this time, it is not clear what, if any, rules would govern the Department and Council's review of that request.
>
> The Supreme Court's decision concludes "The rules approved by the Energy Facility Siting Council through Permanent Administrative Orders EFSC 4-2017 and EFSC 5-2017 are invalid." It does not state, for example, that "all actions taken" by EFSC under those Administrative Orders are invalid. Therefore, given that [Order] EFSC 5-2017 repealed OAR 345-027-0070 [(2017)] (the rule that had previously governed the process for site certificate amendments) if Council does not take action, upon the Court's issuing an appellate judgment it is possible that there will be no rules in place governing site certificate amendments.

(ER-1–ER-2, ER-6–ER-7; *see also* ER-83–ER-84, ER-90.)

Respondents' interpretation, of course, quickly falls apart when the definition of "rule" in the APA is consulted. In pertinent part, that definition states that "[t]he term ["rule"] includes the . . . repeal of a prior rule." ORS 183.310(9). Thus, any 2018 rule within EFSC Orders 4-2017 and 5-2017 that purported to repeal a 2017 rule is, in and of itself, a "rule." And when the Supreme Court held that "[t]he rules approved by" these two orders "are invalid," *Friends v. EFSC*, 365 Or at 396, that necessarily included *all* rules within these orders, including rules that purported to repeal prior rules. Thus, the attempted repeals in the 2018 rules are invalid as well, and the 2017 rules were never repealed. *See Gooderham*, 64 Or App at 110 (because rule was "not promulgated according to the APA, [it] was not effective to repeal the previous rule.") The entire set of 2017 rules was automatically back in effect following the Supreme Court's decision. *See Back in Action Physical Therapy*, 259 Or App at 752 ("There is no question that the former permanent rule

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would be controlling if the temporary rule were determined to be inapplicable or invalid.”).

Thus, contrary to EFSC findings, the 2017 rules were reinstated in their entirety by the Supreme Court’s decision. But rather than recognize that outcome, Respondents fabricated the false premise that “if the Council does not take any action now, . . . it is possible that there will be no rules in place governing site certificate amendments whatsoever.” (ER-2). By expressly basing the 2019 rules on this false premise (which Respondents themselves were apparently not even sure about, given their inclusion of the equivocal language “it is possible that”), Respondents failed to establish an emergency via adequate findings that EFSC’s “failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned,” and thereby violated ORS 183.335(5)(a).

EFSC also violated ORS 183.335(5)(a) by merely adopting findings that energy developers should not have to experience “unnecessary delays and costs” and that adopting the “temporary rules may also improve the prospects for continuity in the processing of applications.” (ER-7.) EFSC’s findings are inadequate to demonstrate the “serious prejudice” required by the APA for temporary rules. ORS 183.335(5)(a); *see also Metro. Hosps., Inc.*, 52 Or App at 626 (temporary rules were invalid because agency’s findings that the rules would “provide a more thorough, equitable and less expensive hearing to four applications

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currently granted their requests for reconsideration" were insufficient to demonstrate the "serious prejudice" required by the APA).

EFSC also adopted findings for five specific pending applications (all of which had been submitted under the 2018 rules), and found that it would be "unfair and substantially prejudicial to require [these] certificate holders . . . to resubmit their requests for amendment under the pre-October 2017 rules and restart the entire amendment process." (ER-2–ER-7.) These findings completely fail to address, however, why the permanent rulemaking process (rather than the temporary rulemaking process) could not be utilized to address these projects. Instead, the findings focus on whether these applicants should be required to refile new applications under the 2017 rules, which is an entirely different question than whether a solution might be provided through permanent rulemaking. Respondents failed to demonstrate that an emergency required "prompt action" via temporary rulemaking. ORS 183.335(5)(a).

EFSC's findings also fail to recognize that the site certificates for two of the five projects, the Summit Ridge Wind Farm ("Summit Ridge") and the Perennial Wind Chaser Station ("Perennial"), have already expired,[20] and cannot be revived

[20] The Summit Ridge site certificate, originally issued on August 19, 2011, expired on August 20, 2018. The Perennial site certificate, originally issued on September 18, 2015, expired on September 19, 2018. These certificates expired when the certificate holders failed to either begin construction by the construction start deadlines or file valid applications under valid rules to extend those deadlines. (*See* Heiken Decl. at ¶¶ 23, 25.)

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through any amount of rulemaking—whether temporary or permanent. For these two projects, the developers' remedy is to file new applications for site certificates. This is hardly an unfair result given that their prior site certificates were applied for many years ago and the developers are single-handedly responsible for taking the risk of allowing the certificates to expire without ever beginning construction. In any event, the temporary 2019 rules do not, and cannot, revive these two expired certificates, and thus the findings of "serious prejudice" for these projects do not justify the temporary rulemaking.

In addition, EFSC readily admitted within its findings that it effectively made a policy choice to temporarily replace the procedural requirements and criteria of the valid 2017 rules with that of the invalid 2018 rules, so that one preferred set of rules could be (temporarily) used over the other, particularly for new site certificate amendment applications:

> Additionally, if it does not adopt temporary rules, as new amendment requests are submitted, Council would also have to process them under the [2017] rules (the legality of which is uncertain) or refuse to process such requests until it has an opportunity to adopt new permanent amendment rules. Were Council to begin processing new amendment applications under the . . . 2017 rules, Council would have to determine how to handle those applications once new permanent amendment rules are adopted.
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> * * *
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> At best, [in the absence of temporary rules] the amendment rules would revert to the [2017 rules]. It is necessary to take immediate action to resolve this situation, not only to avoid serious prejudice to

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> certificate holders with pending requests for amendments, but also to provide regulatory certainty to certificate holders seeking new site certificate amendments regarding what rules apply. Adopting the temporary rules will provide certainty that the temporary rules govern the amendment process until the Council can adopt new permanent rules. Further, adopting the temporary rules may also improve the prospects for continuity in the processing of applications for site certificate amendments once the permanent rules are adopted, as the new permanent rules are likely to be more similar to the temporary rules than the . . . 2017 amendment rules.

(ER-3, ER-7.) Again, in these findings EFSC readily admitted that it was making a policy choice to readopt nearly the entire set of invalid 2018 rules as temporary rules, rather than keep the valid 2017 rules in place while new, permanent rules could be considered and adopted. This policy choice was not an emergency warranting prompt action to adopt a temporary rule under ORS 183.335, thereby bypassing the APA's procedural requirements for permanent rules. *See Waterwatch of Or.*, 97 Or App at 6 (agency's temporary rule was invalid because it "was clearly a change in the substance of the regulation rather than a mere attempt to clarify for which the need was found," agency's "findings and statement of need [did] not provide adequate support for the promulgation of the temporary rule[,] and . . . the rule was therefore adopted without compliance with applicable rulemaking procedures").

Moreover, EFSC purported to readopt the 2018 rules as temporary rules in order to avoid alleged "serious prejudice" to site certificate holders with pending applications. (ER-2–ER-7.) However, with regard to new site certificate amendment applications submitted in the future, EFSC did not adopt *any* findings

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that the 2019 rules were necessary to avoid "serious prejudice," but instead merely found that the 2019 rules would provide "regulatory certainty" for such future applications. (ER-7.) EFSC admitted as much in this sentence within its findings:

> It is necessary to take immediate action to resolve this situation, not only to avoid serious prejudice to certificate holders with pending requests for amendments, *but also to provide regulatory certainty to certificate holders seeking new site certificate amendments regarding what rules apply*.

(ER-7 (emphasis added).) In other words, EFSC freely admitted that *there was no serious prejudice* to developers desiring to file new applications in the future. Yet, despite the absence of such findings, EFSC nevertheless proceeded to readopt the language of the 2018 rules as temporary rules, and make that rule language immediately applicable not only to pending applications, but also to all future applications. (ER-7; *see also* OAR 345-027-0311(1) (2019).)

EFSC made these changes despite the fact that at least one site certificate holder, PGE, asked ODOE and EFSC to *not* temporarily readopt or apply the language of the 2018 rules to future applications, and instead apply the language of the 2017 rules (which, if ODOE and EFSC had agreed to do so, would not have required *any* temporary rulemaking for such applications):

> PGE recommends that the temporary rulemaking adopted only apply to pending site certificate amendments. Until final rules can be promulgated, future amendments should be processed under the pre-October 24, 2017 rules. PGE looks forward to participating with all concerned stakeholders in a careful evaluation of any new permanent rulemaking to govern future site certificate amendments.

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(RR Ex A7 at 1.) The fact that PGE made this explicit request severely undermines EFSC's findings that the immediate readoption of the 2018 rules was necessary for future amendment applications, given that PGE urged EFSC *not* to do so.

Much like the outcome in *Waterwatch of Oregon*, *see* 97 Or App at 6, the course of action that EFSC pursued here (readopting the 2018 rules as temporary rules and applying these rules to future site certificate amendment applications) was not supported by adequate findings demonstrating an emergency. Therefore, EFSC violated ORS 183.335(5)(a) and the 2019 rules are invalid.

Because the 2019 rules were not adopted in substantial compliance with the requirements of ORS 183.335(5)(a), they are invalid pursuant to ORS 183.335(11)(a) and ORS 183.400(4)(c).

B. SECOND ASSIGNMENT OF ERROR: OAR 345-027-0311(1) (2019) is invalid because it exceeds EFSC's statutory authority and was not adopted in substantial compliance with the provisions of ORS 183.335.

1. <u>Standards of Review</u>: Whether the challenged rule exceeds Respondents' statutory authority and whether the rule was not adopted in substantial compliance with the provisions of ORS 183.335.

The Court "shall declare [a] rule invalid" when that rule "[e]xceeds the statutory authority of the agency." ORS 183.400(4)(b) (made applicable by ORS 469.490). When evaluating an agency's rules under the APA, "the first question is whether the action fell within the reach of [the agency's] authority." *Planned Parenthood Ass'n v. Dep't of Human Res.*, 297 Or 562, 565, 687 P3d 785 (1984).

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"Assuming that proper procedures were followed, the next question is whether the substance of the action, though within the scope of the agency's . . . general authority, departed from a legal standard expressed or implied in the particular law being administered, or contravened some other applicable statute. These steps are designed to assure that the challenged action . . . in fact was authorized by the state's . . . politically accountable policy makers." *Id.*

In making these inquiries, this Court interprets the agency's organic statute and any other applicable statutes, which is a question of law. *See Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19*, 290 Or 217, 224, 621 P2d 547 (1980) ("The determination of the meaning of a statute is one of law, ultimately for the court."); *see also Coast Sec. Mortg. Corp. v. Real Estate Agency*, 331 Or 348, 353, 15 P3d 29 (2000). Save for the limited circumstance—inapplicable here—in which the legislature has delegated broad discretion to an agency to establish policy, the agency's interpretation of the applicable statute is entitled to no deference. *Blachana, LLC v. Bureau of Labor & Indus.*, 354 Or 676, 687, 318 P3d 735 (2014). In this case, EFSC derives its limited authority from the Energy Facility Siting Act, ORS 469.300–.619, and the Administrative Procedures Act, ORS ch. 183.

In addition, as under the First Assignment of Error, rules not adopted in substantial compliance with the provisions of ORS 183.335 are invalid. ORS 183.335(11)(a).

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2. OAR 345-027-0311(1) (2019) is invalid because it exceeds the 180-day maximum allowable duration for temporary rules under ORS 183.335(6)(a).

The APA limits the duration of temporary rules to no more than 180 days: "A rule adopted, amended or suspended under [ORS 183.335(5)(a)] is temporary and may be effective for a period of not longer than 180 days." ORS 183.335(6)(a). Here, Respondents violated this requirement by adopting OAR 345-027-0311(1) (2019), which expressly applies the 2019 rules retroactively to "all requests for amendment and amendment determination requests submitted on or after October 24, 2017." Respondents themselves described the 2019 rules in exactly that way:

> [The 2019 rules] would . . . [e]stablish that the Department and Council will apply the temporary rules to requests for amendments and other review processes submitted on or after October 24, 2017 for which Council or the Department has not yet made a final decision, without requiring certificate holders to resubmit a new request for amendment or amendment determination request.

(App-39.) This retroactive rule far exceeds the 180-day maximum allowable duration for temporary rules under the APA. Because this rule exceeds Respondents' statutory authority, it is invalid pursuant to ORS 183.400(4)(b).

The exact language of the rule in question is as follows:

> The rules in this division [OAR Chapter 345, Division 27] apply to all requests for amendment to a site certificate and amendment determination requests for facilities under the Council's jurisdiction that are submitted to, or were already under review by, the Council on or after the effective date of the rules. The Department and Council will continue to process all requests for amendment and amendment determination requests submitted on or after October 24, 2017 for which Council has not made a final decision prior to the effective date of these rules, without requiring the certificate holder to resubmit the

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> request or to repeat any steps taken as part of the request prior to the effective date of these rules.

OAR 345-027-0311(1) (2019).

This newly adopted rule language reaches back in time—all the way back to October 24, 2017—to expressly apply the 2019 rules to all applications submitted on or after that 2017 date. The rule language further states that any site certificate holders with pending applications submitted as long ago as October 24, 2017 will not be required to "resubmit the request or to repeat any steps taken as part of the request prior to the effective date of the rules." *Id.* In other words, the 2019 rules are the operative rules for any such pending applications, going back in time to October 24, 2017.

For example, OAR 345-027-0385(1) (2019) expressly authorizes site certificate holders to submit applications to extend construction deadlines as late as one day "before the applicable construction deadline."[21] In turn, OAR 345-027-0385(2) (2019) prevents site certificates from expiring so long as applications are timely submitted in accordance with OAR 345-027-0385(1) (2019). Under the plain language of OAR 345-027-0311(1) (2019), these two rules apply retroactively to applications submitted "on or after October 24, 2017." Thus, for all applications submitted in the last nine weeks of 2017 or in all of 2018, OAR 345-027-0385(1) (2019) and OAR 345-027-0385(2) (2019) will be used—retroactively—to resolve

[21] The 2017 rules imposed a very different deadline: "no later than six months before the date of the applicable deadline." OAR 345-027-0030(1) (2017).

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any questions about whether such applications were timely submitted and whether the lack of a timely application results in expiration of the site certificate.

Respondents' actual implementation of OAR 345-027-0311(1) (2019) further demonstrates their intent to make this rule applicable retroactively. For example, at the same August 22–23, 2019 meeting at which the 2019 rules were adopted, EFSC went on to use OAR 345-027-0311(1) (2019)—and by extension, the 2019 rules—to immediately approve two pending applications that had been submitted long before the 2019 rules were adopted (in one case approximately ten months prior,[22] and in the other case approximately twenty months prior[23]). (App-48–App-49, App-52–App-62.) Throughout its final orders on these two applications, EFSC relied on OAR 345-027-0311(1) (2019) to repeatedly cite and apply numerous 2019 rules, including for multiple past actions and events in ODOE's and EFSC's reviews that had occurred as long ago as February 20, 2018—nineteen months prior to the August 22, 2019 adoption of the 2019 rules. (App-52–App-62; *see also* Heiken Decl. at ¶¶ 23, 24.)

This included EFSC's retroactive application of OAR 345-027-0385(1) (2019) (adopted on August 22, 2019) to determine whether the Summit Ridge application, which was filed with ODOE on August 17, 2018, was timely submitted, valid, and complete at the time of filing (and, in turn, whether the

[22] The Preliminary Request for Amendment 4 to the site certificate for the Summit Ridge Wind Farm was submitted on August 17, 2018. (App-57.)

[23] The Preliminary Request for Amendment 4 to the site certificate for the

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August 17, 2018 submittal of that application extended the August 19, 2018 construction start deadline for the project). (*See* App-56 n 1, App-62.) Because the 2017 rules on these and other questions are very different from the 2019 rules (*see supra* § I.H.3), the retroactive application of the 2019 rules to transactions and events that occurred in 2018 led to much different results than would have occurred under the 2017 rules.

Respondents may argue that the rule language is prospective, not retroactive. But as this Court has noted, "[d]etermining what constitutes 'retroactive' application of a statute can be a difficult task because of the notoriously slippery nature of the notion of "retroactivity." *Vill. at Main St. Phase II, LLC v. Dep't of Rev.*, 356 Or 164, 183, 339 P3d 428 (2014); *see also Whipple v. Howser*, 291 Or 475, 488–89, 632 P2d 782 (1981) (Linde, J., concurring) ("'Retroactivity' itself is a deceptively simple word for a complex set of problems. In real time, all laws can operate only prospectively, prescribing legal consequences after their enactment; they cannot change the past. On the other hand, all new laws operate upon a state of affairs formed to some extent by past events.").

Ultimately, OAR 345-027-0311(1) (2019) meets this Court's definition of a retroactive legislative action. "[A]s a general matter, a retroactive legislative action is one that affects existing legal rights or obligations arising out of past transactions or occurrences." *U.S. Bancorp v. Dept. of Rev.*, 337 Or 625, 636–37, 103 P3d 85

Montague Wind Power Facility was submitted on January 9, 2018. (App-53.)

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(2004) (citing *Fromme v. Fred Meyer, Inc.*, 306 Or 558, 561–62, 761 P2d 515 (1988); *Whipple v. Howser*, 291 Or at 488–89 (Linde, J., concurring)). Here, as described above, OAR 345-027-0385(1) (2019) does "affect[] existing legal rights or obligations arising out of past transactions or occurrences," and has in fact already been implemented in that manner by Respondents, and thus is "retroactive legislative action." *U.S. Bancorp*, 337 Or at 636–37.

If the challenged rule were intended to be only prospective, it would not expressly include the October 24, 2017 date (more than 650 days prior to the adoption of this rule), nor would it specify that the 2019 rules apply to applications submitted on or after that date, nor would it refer to and legitimize past "steps" taken for such applications. OAR 345-027-0311(1) (2019). Nor would ODOE and EFSC utilize the 2019 rules for evaluating compliance for events that occurred in 2018, as they have now done for multiple projects. (*See, e.g.*, App-52–App-62.) The obvious intent (as well as Respondents' actual implementation) of OAR 345-027-0311(1) (2019) is to apply the 2019 rules retroactively to such applications.

Because OAR 345-027-0311(1) (2019) applies retroactively for more than 650 days prior to its adoption, the rule exceeds the maximum 180 days allowed under ORS 183.335(6)(a), and is thus invalid pursuant to ORS 183.400(4)(b).

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3. In the alternative, OAR 345-027-0311(1) (2019) is invalid because it unlawfully attempts to retroactively legitimize the invalid 2018 rules.

Respondents have argued,[24] and may continue to argue, that the 2019 rules are not retroactive. As explained above, *supra* § II.B.2, that argument is legally incorrect, because OAR 345-027-0311(1) (2019) expressly states that the 2019 rules apply to all applications submitted on or after October 24, 2017, and that the site certificate holders for such applications are not required to "repeat any steps taken" under those rules (and because Respondents are in fact implementing the 2019 rules retroactively). But if the 2019 rules are *not* intended to be retroactively applied, then the language in OAR 345-027-0311(1) (2019) that "[t]he Department and Council will continue to process all requests for amendment and amendment determination requests submitted on or after October 24, 2017 for which Council has not made a final decision prior to the effective date of these rules, without requiring the certificate holder to resubmit the request or to repeat any steps taken as part of the request prior to the effective date of these rules" is an unlawful attempt to retroactively legitimize the invalid 2018 rules.

Again, this Court has held that the 2018 rules "are invalid," *Friends v. EFSC*, 365 Or at 396, and the Court of Appeals has held that "[a] rule not promulgated according to the APA *is not a rule*." *Gooderham*, 64 Or App at 110 (emphasis added). Thus, the 2018 rules are not valid rules, and cannot be enforced or applied. *See Kessler*, 26 Or App at 274 (state agencies cannot base their decisions on invalid

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rules). Yet OAR 345-027-0311(1) (2019), by its own express language, purports to legitimize past "steps" taken under the 2018 invalid rules:

> The Department and Council will continue to process all requests for amendment and amendment determination requests submitted on or after October 24, 2017 for which Council has not made a final decision prior to the effective date of these rules, *without requiring the certificate holder to resubmit the request or to repeat any steps taken as part of the request prior to the effective date of these rules*.

OAR 345-027-0311(1) (2019) (emphasis added). The italicized language in the above-quoted sentence is an attempted legitimization of past events that occurred under the invalid 2018 rules.

The instant case is exactly on point with *Gooderham*, in which a retroactivity clause of a 1982 rule was invalid because it "attempted to legitimize the action that had already been taken" under an earlier 1980 rule that was also invalid because it had not been promulgated in compliance with APA rulemaking procedures. 64 Or App at 110–12. Here, we have the exact same fact pattern. First, EFSC purported to adopt the 2018 rules, but in so doing failed to comply with the APA's mandatory rulemaking procedures, and as a result, the 2018 rules "are invalid." *Friends v. EFSC*, 365 Or at 396. Yet, despite the fact that the 2018 rules are invalid, EFSC and ODOE nevertheless proceeded to use these invalid rules to accept, process, review, and even approve applications while the prior appeal was pending (and continued to do so even following this Court's decision in the prior appeal[25]), and

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[24] *See* Resp'ts' Resp. to Pet'rs' Mot. for Prelim. Inj. at 13–14.

[25] For example, on August 23, 2019, EFSC adopted its Final Order approving a

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have now adopted OAR 345-027-0311(1) (2019), which expressly states that site certificate holders whose applications were submitted under the 2018 rules are not required to "resubmit" their applications, "[n]or to repeat any steps taken" under the 2018 rules. This is a blatant effort to retroactively legitimize ODOE's and EFSC's past actions implementing the invalid 2018 rules. Respondents lack statutory authority to implement, apply, enforce, or retroactively ratify prior rules that were never adopted in compliance with the APA's procedural requirements. OAR 345-027-0311(1) (2019) is invalid for the same reasons as the rule in *Gooderham*.

C. THIRD ASSIGNMENT OF ERROR: The 2019 rules are invalid because they exceed EFSC's authority for temporary rules and were not adopted in substantial compliance with the provisions of ORS 183.335.

1. Standards of Review: Whether the challenged rules exceed Respondents' statutory authority and whether the rules were not adopted in substantial compliance with the provisions of ORS 183.335.

As under the Second Assignment of Error, this Court reviews the challenged rules to determine whether they exceed EFSC's authority. *See* ORS 183.400(4)(b) (made applicable by ORS 469.490); *Planned Parenthood Ass'n*, 297 Or at 565. In addition, as under the First and Second Assignments of Error, rules not adopted in

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proposed amendment to the site certificate for the Summit Ridge Wind Farm, in which EFSC concluded that "[w]hile . . . the [2018] rules are being challenged in the Oregon Supreme Court, a stay of the rules or any other injunction against using the [2018] rules has not been issued. As such, the [2018] rules are valid and are applicable to the amendment request, as well as all other amendment requests pending with EFSC at this time. The [2017] rules were repealed in 2017, and are not applicable to the review of the [request for amendment of the site certificate]." (App-57 n 7.)

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substantial compliance with the provisions of ORS 183.335 are invalid. ORS 183.335(11)(a).

2. The 2019 rules are invalid because they are a readoption and continuation of language identical to rules that had already been in effect for more than 650 days, thus exceeding the 180-day maximum allowable duration for temporary rules under ORS 183.335(6)(a).

As discussed above, the 2018 rules were not promulgated consistent with the APA's mandatory rulemaking procedures, and thus "are invalid"—and in fact, were never valid rules to begin with. *Friends v. EFSC*, 365 Or at 396; *see also Gooderham*, 64 Or App at 110. But if Petitioners are incorrect in that assertion, and the 2018 rules were valid and/or effective until they were readopted by the 2019 rules, then most of the 2019 rules (all rules except for OAR 345-027-0311 (2019) and the three rule subsections modified by EFSC in response to the Supreme Court's prior decision[26]) violate ORS 183.335(6)(a) because these rules are a readoption and continuation of rule language identical to that of the 2018 permanent rules, which had already been in effect for more than 650 days at the time the 2019 rules were adopted, thus violating the APA's 180-day limit for temporary rule language.

ORS 183.335(6)(a) expressly prohibits the language of temporary rules from being in effect for more than 180 days. Thus, the 2018 rule language that had

[26] The three rule subsections are OAR 345-027-0368(3)(e)(E), 345-027-0372(3)(d), and 345-027-0372(5) (2019).

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previously been in effect for more than 650 days may only be readopted or continued as permanent rules, not as temporary rules. *See* ORS 183.335(6)(a). Because the 2019 rules exceed Respondents' statutory authority, they are invalid pursuant to ORS 183.400(4)(b). And because the rules were not adopted in substantial compliance with ORS 183.335(6)(a), they are invalid pursuant to ORS 183.335(11)(a).

As explained by Respondents themselves, the 2019 rules were designed to "readopt" the 2018 rules "in substantially the same form that they were then," but at "new numbers" within the Oregon Administrative Rules:

> Essentially, these would readopt the rules adopted in 2017 in substantially the same form that they were then. To do that, we would amend the effective rules in Division 15 and 25 to readopt the changes made in October 2017. We would then propose suspending all the Division 27 rules that were adopted or amended by that rulemaking. That includes, I think, all of the Division 27 rules, except for 120 and 140. There's maybe two rules that were unaffected.
>
> . . . We would then adopt new rules to . . . replace those invalidated rules with the—and they would be substantially similar to the rules that were suspended . . . .
>
> . . . And then just to clarify that these are new rules, the new Division 27 rules would be adopted under new numbers. We're proposing to start with the 300 series, so they would start with rule 345-027-0311 and then continue from there with the same last two digits, as the existing rules have.

(ER-91–ER-92.) (statement of Christopher Clark, EFSC Rules Coordinator). To

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summarize, only four rule sections or subsections contained new rule language[27]; all other language in the 2019 rules was identical to the 2018 rules, except that it was placed at new OAR numbers. (*See* ER-91–ER-92, ER-110.)

The APA expressly prohibits temporary rule language from being in effect for more than 180 days. ORS 183.335(6)(a).[28] It also allows temporary rule language to be subsequently adopted as an "identical" permanent rule. *Id.* But the converse is not true: the APA does *not* allow a permanent rule to be subsequently adopted as (or converted to) an identical temporary rule[29]—*especially not* rule language that has already been in effect in excess of 180 days.

In fact, the Oregon Attorney General specifically cautions agencies against using the temporary/emergency rule procedures to readopt rule language that was already in effect, describing this as "circumvent[ing] permanent rulemaking procedures":

> A temporary rule is effective for a maximum of 180 days. ORS 183.335(6)(a). No temporary rule may be renewed to give it effect for more than 180 calendar days. ORS 183.335(6)(a). The agency may,

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[27] OAR 345-027-0311, 345-027-0368(3)(e)(E), 345-027-0372(3)(d), 345-027-0372(5) (2019); *see also* ER-110 (showing the rule revisions).

[28] "A rule adopted, amended, or suspended under [ORS 183.335(5)] is temporary and may be effective for a period of not longer than 180 days. The adoption of a rule under this subsection does not preclude the subsequent adoption of an identical rule under [ORS 183.335(1) to 183.335(4)]." ORS 183.335(6)(a).

[29] ORS 183.335(6)(a) authorizes the making of temporary rules permanent. But there is no authorization to readopt permanent rules as temporary rules. The Legislature obviously knew how to authorize the adoption and sequencing of rules, and here, chose to allow that sequencing in only one direction.

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> however, adopt an identical permanent rule upon appropriate notice in accordance with ORS 183.335(1)–(4).
>
> An agency should not attempt to circumvent permanent rulemaking procedures by adopting temporary rules. ORS 183.335(11)(a) states that "a rule is not valid unless adopted in substantial compliance with the provisions of this section in effect on the date that the notice required under subsection (1) of this section is delivered to the Secretary of State." Arguably, if a temporary rule has been in effect for 180 days, adopting a "new" temporary rule that is essentially the same as a prior temporary rule does not substantially comply with ORS 183.335(5) and (6). Similarly, it would not be appropriate to readopt a temporary rule after a short interval of time following the lapse of the 180 days from initial adoption of the temporary rule. In addition, a party to a contested case may recover reasonable attorney fees against the agency if that party successfully appeals from a contested case order that was based upon an invalid temporary rule. ORS 183.497.

Oregon Attorney General's Administrative Law Manual at 48 (2014).

Here, the rule language in question had already been in effect for more than 650 days, at which time this language was readopted as "new" temporary rules. Although the "new" temporary rules were placed at new OAR sections, the 2019 rules in question are otherwise identical to the 2018 rules.

This Court should not allow state agencies, such as EFSC and ODOE, to circumvent the APA's rulemaking procedures and limits, nor to exploit the APA's emergency rulemaking procedures, by readopting as so-called "temporary" rules the same rule language that had already been in effect in excess of 180 days. The APA's 180-day limit on temporary rules is mandatory and must be complied with. EFSC's action here in "readopting" the 2018 permanent rules as identical temporary rules exceeds the APA's 180-day limit, and thus was not "within the

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reach of [EFSC's] authority," and also "departed from a legal standard expressed or implied in the particular law being administered." *Planned Parenthood Ass'n*, 297 Or at 565. As a result, the challenged 2019 rules are invalid, and EFSC's decision to adopt them must be reversed.

D. Petitioners intend to seek attorney fees and costs pursuant to ORS 183.497.

If Petitioners prevail in this matter, Petitioners will seek attorney fees and costs pursuant to ORS 183.497. Petitioners intend to seek fees and costs under ORS 183.497(1)(b), which mandates an award of reasonable fees and costs if the Court finds in favor of Petitioners and determines that Respondents acted without a reasonable basis in fact or law. In addition, Petitioners intend to seek fees and costs under ORS 183.497(1)(a), which allows an award of reasonable fees and costs, in the discretion of the Court, if the Court finds in favor of Petitioners.

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III. CONCLUSION

For the reasons stated above, this Court should declare the 2019 rules invalid, should clarify that the 2017 rules are reinstated, and should specify pursuant to ORAP 14.05(2)(c) that its decision is effective immediately.

Dated this 4th day of October, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I hereby certify that this Opening Brief complies with the word-count limitation in ORAP 5.05(1)(b)(i)(A), and that the word-count of this Opening Brief (as described in ORAP 5.05(1)(a)) is 11,147 words.

I further certify that the size of the type in this Opening Brief is not smaller than 14 point for both the text of the Brief and the footnotes as required by ORAP 5.05(3)(a)(ii).

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Sept. 2017	OAR ch. 345, div. 15 (select provisions) OAR ch. 345, div. 27	App-7 – App-37
Aug. 22–23, 2019	Oregon Energy Facility Siting Council, Meeting Notice and Agenda	App-38 – App-41
Aug. 22–23, 2019	Oregon Energy Facility Siting Council, Meeting Minutes	App-42 – App-51
Aug. 23, 2019	Oregon Energy Facility Siting Council, Final Order on Request for Amendment 4 to the Site Certificate for the Montague Wind Power Facility (excerpts)	App-52 – App-54
Aug. 23, 2019	Oregon Energy Facility Siting Council, Final Order on Request for Amendment 4 to the Site Certificate for the Summit Ridge Wind Farm (excerpts)	App-55 – App-62

183.335 Notice; content; public comment; temporary rule adoption, amendment or suspension; substantial compliance required. (1) Prior to the adoption, amendment or repeal of any rule, the agency shall give notice of its intended action:

(a) In the manner established by rule adopted by the agency under ORS 183.341 (4), which provides a reasonable opportunity for interested persons to be notified of the agency's proposed action;

(b) In the bulletin referred to in ORS 183.360 at least 21 days prior to the effective date;

(c) At least 28 days before the effective date, to persons who have requested notice pursuant to subsection (8) of this section; and

(d) Delivered only by electronic mail, at least 49 days before the effective date, to the persons specified in subsection (15) of this section.

(2)(a) The notice required by subsection (1) of this section must include:

(A) A caption of not more than 15 words that reasonably identifies the subject matter of the agency's intended action. The agency shall include the caption on each separate notice, statement, certificate or other similar document related to the intended action.

(B) An objective, simple and understandable statement summarizing the subject matter and purpose of the intended action in sufficient detail to inform a person that the person's interests may be affected, and the time, place and manner in which interested persons may present their views on the intended action.

(b) The agency shall include with the notice of intended action given under subsection (1) of this section:

(A) A citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule;

(B) A citation of the statute or other law the rule is intended to implement;

(C) A statement of the need for the rule and a statement of how the rule is intended to meet the need;

(D) A list of the principal documents, reports or studies, if any, prepared by or relied upon by the agency in considering the need for and in preparing the rule, and a statement of the location at which those documents are available for public inspection. The list may be abbreviated if necessary, and if so abbreviated there shall be identified the location of a complete list;

(E) A statement of fiscal impact identifying state agencies, units of local government and the public that may be economically affected by the adoption, amendment or repeal of the rule and an estimate of that economic impact on state agencies, units of local government and the public. In considering the economic effect of the proposed action on the public, the agency shall utilize available information to project any significant economic effect of that action on businesses which shall include a cost of compliance effect on small businesses affected. For an agency specified in ORS 183.530, the statement of fiscal impact shall also include a housing cost impact statement as described in ORS 183.534;

(F) If an advisory committee is not appointed under the provisions of ORS 183.333, an explanation as to why no advisory committee was used to assist the agency in drafting the rule; and

(G) A request for public comment on whether other options should be considered for achieving the rule's substantive goals while reducing the negative economic impact of the rule on business.

(c) The Secretary of State may omit the information submitted under paragraph (b) of this subsection from publication in the bulletin referred to in ORS 183.360.

(d) When providing notice of an intended action under subsection (1)(c) of this section, the agency shall provide a copy of the rule that the agency proposes to adopt, amend or repeal, or an explanation of how the person may acquire a copy of the rule. The copy of an amended rule shall show all changes to the rule by striking through material to be deleted and underlining all new material, or by any other method that clearly shows all new and deleted material.

(3)(a) When an agency proposes to adopt, amend or repeal a rule, it shall give interested persons reasonable opportunity to submit data or views. Opportunity for oral hearing shall be granted upon request received from 10 persons or from an association having not less than 10 members before the earliest date that the rule could become effective after the giving of notice pursuant to subsection (1) of this section. An agency holding a hearing upon a request made under this subsection shall give notice of the hearing at least 21 days before the hearing to the person who has requested the hearing, to persons who have requested notice pursuant to subsection (8) of this section and to the persons specified in subsection (15) of this section. The agency shall publish notice of the hearing in the bulletin referred to in ORS 183.360 at least 14 days before the hearing. The agency shall consider fully any written or oral submission.

(b) If an agency is required to conduct an oral hearing under paragraph (a) of this subsection, and the rule for which the hearing is to be conducted applies only to a limited geographical area within this state, or affects only a limited geographical area within this state, the hearing shall be conducted within the geographical area at the place most convenient for the majority of the residents within the geographical area. At least 14 days before a hearing conducted under this paragraph, the agency shall publish notice of the hearing in the bulletin referred to in ORS 183.360 and in a newspaper of general circulation published within the geographical area that is affected by the rule or to which the rule applies. If a newspaper of general circulation is not published within the geographical area that is affected by the rule or to which the rule applies, the publication shall be made in the newspaper of general circulation published closest to the geographical area.

(c) Notwithstanding paragraph (a) of this subsection, the Department of Corrections and the State Board of Parole and Post-Prison Supervision may adopt rules limiting participation by inmates in the proposed adoption, amendment or repeal of any rule to written submissions.

(d) If requested by at least five persons before the earliest date that the rule could become effective after the agency gives notice pursuant to subsection (1) of this section, the agency shall provide a statement that identifies the objective of the rule and a statement of how the agency will subsequently determine whether the rule is in fact accomplishing that objective.

(e) An agency that receives data or views concerning proposed rules from interested persons shall maintain a record of the data or views submitted. The record shall contain:

(A) All written materials submitted to an agency in response to a notice of intent to adopt, amend or repeal a rule.

(B) A recording or summary of oral submissions received at hearings held for the purpose of receiving those submissions.

(C) Any public comment received in response to the request made under subsection (2)(b)(G) of this section and the agency's response to that comment.

(D) Any statements provided by the agency under paragraph (d) of this subsection.

(4) Upon request of an interested person received before the earliest date that the rule could become effective after the giving of notice pursuant to subsection (1) of this section, the agency shall postpone the date of its intended action no less than 21 nor more than 90 days in order to allow the requesting person an opportunity to submit data, views or arguments concerning the

proposed action. Nothing in this subsection shall preclude an agency from adopting a temporary rule pursuant to subsection (5) of this section.

(5) Notwithstanding subsections (1) to (4) of this section, an agency may adopt, amend or suspend a rule without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, if the agency prepares:

(a) A statement of its findings that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice;

(b) A citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule;

(c) A statement of the need for the rule and a statement of how the rule is intended to meet the need;

(d) A list of the principal documents, reports or studies, if any, prepared by or relied upon by the agency in considering the need for and in preparing the rule, and a statement of the location at which those documents are available for public inspection; and

(e) For an agency specified in ORS 183.530, a housing cost impact statement as defined in ORS 183.534.

(6)(a) A rule adopted, amended or suspended under subsection (5) of this section is temporary and may be effective for a period of not longer than 180 days. The adoption of a rule under this subsection does not preclude the subsequent adoption of an identical rule under subsections (1) to (4) of this section.

(b) A rule temporarily suspended shall regain effectiveness upon expiration of the temporary period of suspension unless the rule is repealed under subsections (1) to (4) of this section.

(7) Notwithstanding subsections (1) to (4) of this section, an agency may amend a rule without prior notice or hearing if the amendment is solely for the purpose of:

(a) Changing the name of an agency by reason of a name change prescribed by law;

(b) Changing the name of a program, office or division within an agency as long as the change in name does not have a substantive effect on the functions of the program, office or division;

(c) Correcting spelling;

(d) Correcting grammatical mistakes in a manner that does not alter the scope, application or meaning of the rule;

(e) Correcting statutory or rule references; or

(f) Correcting addresses or telephone numbers referred to in the rules.

(8)(a) Any person may request in writing that an agency send to the person copies of the agency's notices of intended action issued under subsection (1) of this section. The person must provide an address where the person elects to receive notices. The address provided may be a postal mailing address or, if the agency provides notice by electronic mail, may be an electronic mailing address.

(b) A request under this subsection must indicate that the person requests one of the following:

(A) The person may request that the agency mail paper copies of the proposed rule and other information required by subsection (2) of this section to the postal mailing address.

(B) If the agency posts notices of intended action on a website, the person may request that the agency mail the information required by subsection (2)(a) of this section to the postal mailing

address with a reference to the website where electronic copies of the proposed rule and other information required by subsection (2) of this section are posted.

(C) The person may request that the agency electronically mail the information required by subsection (2)(a) of this section to the electronic mailing address, and either provide electronic copies of the proposed rule and other information required by subsection (2) of this section or provide a reference to a website where electronic copies of the proposed rule and other information required by subsection (2) of this section are posted.

(c) Upon receipt of any request under this subsection, the agency shall acknowledge the request, establish a mailing list and maintain a record of all mailings made pursuant to the request. Agencies may establish procedures for establishing the mailing lists and keeping the mailing lists current. Agencies by rule may establish fees necessary to defray the costs of mailings and maintenance of the lists.

(d) Members of the Legislative Assembly who receive notices under subsection (15) of this section may request that an agency furnish paper copies of the notices.

(9) This section does not apply to rules establishing an effective date for a previously effective rule or establishing a period during which a provision of a previously effective rule will apply.

(10) This section does not apply to ORS 279.835 to 279.855, 279A.140 to 279A.161, 279A.250 to 279A.290, 279A.990, 279B.050 to 279B.085, 279B.200 to 279B.240, 279B.270, 279B.275, 279B.280, 279C.360, 279C.365, 279C.370, 279C.375, 279C.380, 279C.385, 279C.500 to 279C.530, 279C.540, 279C.545, 279C.550 to 279C.570, 279C.580, 279C.585, 279C.590, 279C.600 to 279C.625, 279C.650 to 279C.670 and 279C.800 to 279C.870 relating to public contracts and purchasing.

(11)(a) Except as provided in paragraph (c) of this subsection, a rule is not valid unless adopted in substantial compliance with the provisions of this section in effect on the date that the notice required under subsection (1) of this section is delivered to the Secretary of State for the purpose of publication in the bulletin referred to in ORS 183.360.

(b) In addition to all other requirements with which rule adoptions must comply, a rule other than a rule amended for a purpose described in subsection (7) of this section is not valid if the rule has not been submitted to the Legislative Counsel in the manner required by ORS 183.355 and 183.715.

(c) A rule is not subject to judicial review or other challenge by reason of failing to comply with subsection (2)(a)(A) of this section.

(12)(a) Notwithstanding the provisions of subsection (11) of this section, but subject to paragraph (b) of this subsection, an agency may correct its failure to substantially comply with the requirements of subsections (2) and (5) of this section in adoption of a rule by an amended filing, as long as the noncompliance did not substantially prejudice the interests of persons to be affected by the rule.

(b) An agency may use an amended filing to correct a failure to include a fiscal impact statement in a notice of intended action, as required by subsection (2)(b)(E) of this section, or to correct an inaccurate fiscal impact statement, only if the agency developed the fiscal impact statement with the assistance of an advisory committee or fiscal impact advisory committee appointed under ORS 183.333.

(13) Unless otherwise provided by statute, the adoption, amendment or repeal of a rule by an agency need not be based upon or supported by an evidentiary record.

(14) When an agency has established a deadline for comment on a proposed rule under the provisions of subsection (3)(a) of this section, the agency may not extend that deadline for another agency or person unless the extension applies equally to all interested agencies and persons. An agency shall not consider any submission made by another agency after the final deadline has passed.

(15) The notices required under subsections (1) and (3) of this section must be given by the agency to the following persons:

(a) If the proposed adoption, amendment or repeal results from legislation that was passed within two years before notice is given under subsection (1) of this section, notice shall be given to the legislator who introduced the bill that subsequently was enacted into law, and to the chair or cochairs of all committees that reported the bill out, except for those committees whose sole action on the bill was referral to another committee.

(b) If the proposed adoption, amendment or repeal does not result from legislation that was passed within two years before notice is given under subsection (1) of this section, notice shall be given to the chair or cochairs of any interim or session committee with authority over the subject matter of the rule.

(c) If notice cannot be given under paragraph (a) or (b) of this subsection, notice shall be given to the Speaker of the House of Representatives and to the President of the Senate who are in office on the date the notice is given.

(16)(a) Upon the request of a member of the Legislative Assembly or of a person who would be affected by a proposed adoption, amendment or repeal, the committees receiving notice under subsection (15) of this section shall review the proposed adoption, amendment or repeal for compliance with the legislation from which the proposed adoption, amendment or repeal results.

(b) The committees shall submit their comments on the proposed adoption, amendment or repeal to the agency proposing the adoption, amendment or repeal. [1971 c.734 §3; 1973 c.612 §1; 1975 c.136 §11; 1975 c.759 §4; 1977 c.161 §1; 1977 c.344 §6; 1977 c.394 §1a; 1977 c.798 §2; 1979 c.593 §11; 1981 c.755 §2; 1987 c.861 §2; 1993 c.729 §3; 1995 c.652 §5; 1997 c.602 §3; 1999 c.123 §1; 1999 c.334 §1; 2001 c.220 §1; 2001 c.563 §1; 2003 c.749 §5; 2003 c.794 §206; 2005 c.17 §1; 2005 c.18 §1; 2005 c.382 §1; 2005 c.807 §5; 2007 c.115 §1; 2007 c.768 §58; 2011 c.380 §2; 2017 c.518 §2]

OAR 345-027-0311
Applicability

(1) The rules in this division apply to all requests for amendment to a site certificate and amendment determination requests for facilities under the Council's jurisdiction that are submitted to, or were already under review by, the Council on or after the effective date of the rules. The Department and Council will continue to process all requests for amendment and amendment determination requests submitted on or after October 24, 2017 for which Council has not made a final decision prior to the effective date of these rules, without requiring the certificate holder to resubmit the request or to repeat any steps taken as part of the request prior to the effective date of these rules.

(2) Notwithstanding section (1) of this rule, these rules do not apply to facilities described in ORS 469.410(1).

Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.501
History:
EFSC 9-2019, temporary adopt filed 08/22/2019, effective 08/22/2019 through 02/17/2020

OAR CHAPTER 345
DIVISION 15

PROCEDURES GOVERNING COUNCIL AND DEPARTMENT OF ENERGY PROCEEDINGS, INCLUDING SITE CERTIFICATE HEARINGS

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345-015-0014

Contested Case Notices

(1) The Department shall issue notices for Council contested case proceedings as provided in OAR 137-003-0001 and shall include in the notices:

(a) A date by which persons must request party or limited party status.

(b) The date of the pre-hearing conference.

(c) The time and place of the hearing.

(2) In addition to the requirements of section (1), for a contested case notice on a proposed order as described in OAR 345-015-0230 or following a Council decision to grant a contested case hearing under 345-015-0310, the Department shall include in the notice a statement that participation as a party or limited party in the contested case proceeding and the opportunity to raise any issue are subject to the limitations described in OAR 345-015-0016.

(3) The Department shall send a contested case notice by registered or certified mail to the following persons:

(a) For a contested case notice on a proposed order as described in OAR 345-015-0230, to the applicant and to all persons who commented in person or in writing on the record of the public hearing described in 345-015-0220.

(b) Following the Council's decision to grant a contested case proceeding on a proposed order on an application for a site certificate for a special criteria facility, to the applicant and to all persons who commented in person or in writing on the record of the public hearing on the proposed order described in OAR 345-015-0320.

(c) Following a Council decision to grant a contested case proceeding on a proposed site certificate amendment under OAR 345-027-0070, 345-027-0080 or 345-027-0090, to the certificate holder and to all persons who requested a contested case proceeding as described in 345-027-0070(6) or 345-027-0080(5).

(d) For Council contested case proceedings described under OAR 345-029-0070, 345-029-0100 or 345-060-0004, to persons who have an interest or represent a public interest in the outcome of the proceeding.

(4) The Department shall request that the applicant notify the hearing officer and the Department, by the date described in subsection (1)(a), of any issues the applicant desires to raise in the contested case proceedings described in subsections (3)(a) and (b).

Stat. Auth.: ORS 469.373 & 469.470
Stats. Implemented: ORS 183.415, 469.085, 469.370, 469.405, 469.440, 469.605, 469.615 & 469.992
Hist.: EFSC 5-1994, f. & cert. ef. 11-30-94; EFSC 3-1995, f. & cert. ef. 11-16-95; EFSC 2-1999, f. & cert. ef. 4-14-99; EFSC 1-2002, f. & cert. ef. 4-3-02; EFSC 1-2007, f. & cert. ef. 5-15-07; EFSC 1-2012, f. & cert. ef. 5-15-12

345-015-0016

Requests for Party or Limited Party Status

(1) Notwithstanding OAR 137-003-0005(2), a person requesting to participate as a party or limited party in a contested case proceeding shall submit a petition to the hearing officer by the date specified in the Department of Energy's contested case notice issued under OAR 345-015-0014.

(2) Persons who have an interest in the outcome of the Council's contested case proceeding or who represent a public interest in such result may request to participate as parties or limited parties.

(3) Except as described in section (4), only those persons who have commented in person or in writing on the record of the public hearing described in OAR 345-015-0220 may request to participate as a party or limited party in a contested case proceeding on an application for a site certificate. To raise an issue in a contested case proceeding, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing, unless the Department of Energy did not follow the requirements of ORS 469.370(2) or (3) or unless the action recommended in the proposed order described in OAR 345-015-230, including any recommended conditions of approval, differs materially from the action recommended in the draft proposed order, in which case the person may raise only new issues within the jurisdiction of the Council that are related to such differences. If a person has not raised an issue at the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, the hearing officer shall not consider the issue in the contested case proceeding. To have raised an issue with sufficient specificity, the person must have presented facts at the public hearing that support the person's position on the issue.

(4) Following a Council decision to grant a contested case hearing under OAR 345-015-0310, only those persons who have commented in person or in writing on the record of the public

hearing described in OAR 345-015-0320 may request to participate as a party or limited party in a contested case proceeding on an application for a site certificate. To raise an issue in a contested case proceeding, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing. If a person has not raised an issue at the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, the hearing officer shall not consider the issue in the contested case proceeding. To have raised an issue with sufficient specificity, the person must have presented facts at the public hearing that support the person's position on the issue.

(5) In a petition to request party or limited party status, the person requesting such status shall include:

(a) The information required under OAR 137-003-0005(3).

(b) A short and plain statement of the issue or issues that the person desires to raise in the contested case proceeding.

(c) A reference to the person's comments at the public hearing showing that the person raised the issue or issues at the public hearing.

(d) A detailed description of the person's interest in the contested case proceeding and how that interest may be affected by the outcome of the proceeding.

(6) The hearing officer's determination on a request to participate as a party or limited party is final unless the requesting person submits an appeal to the Council within seven days after the date of service of the hearing officer's determination.

Stat. Auth.: ORS 469.373 & 469.470
Stats. Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615 & 469.992
Hist.: EFSC 14, f. & ef. 10-12-76; EFSC 8-1980, f. & ef. 10-31-80; EFSC 6-1986, f. & ef. 9-12-86; EFSC 1-1993, f. & cert. ef. 1-15-93; EFSC 5-1994, f. & cert. ef. 11-30-94; EFSC 3-1995, f. & cert. ef. 11-16-95; EFSC 2-1999, f. & cert. ef. 4-14-99; EFSC 1-2002, f. & cert. ef. 4-3-02; EFSC 1-2007, f. & cert. ef. 5-15-07

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345-015-0080

Participation by Government Agencies

(1) Any state or local government agency other than the Department of Energy may request participation in a contested case as a party, limited party or interested agency, subject to the limitations described in OAR 345-015-0016. The agency shall submit the request to the hearing officer in writing by the date specified in the Department of Energy's contested case notice issued under OAR 345-015-0014.

(2) The Department of Energy shall participate in all contested case proceedings conducted by the Council and shall have all the rights of a party.

Stat. Auth.: ORS 469.470
Stats. Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615 & 469.992
Hist.: EFSC 14, f. & ef. 10-12-76; EFSC 8-1980, f. & ef. 10-31-80; EFSC 6-1986, f. & ef. 9-12-86; EFSC 1-1993, f. & cert. ef. 1-15-93, Renumbered from 345-015-0026; EFSC 5-1994, f. & cert. ef. 11-30-94; EFSC 2-1999, f. & cert. ef. 4-14-99; EFSC 1-2002, f. & cert. ef. 4-3-02; EFSC 1-2007, f. & cert. ef. 5-15-07

345-015-0083

Prehearing Conference and Prehearing Order

(1) The hearing officer may cancel or reschedule any previously noticed prehearing conference.

(2) The hearing officer may conduct one or more prehearing conferences for the purposes and in the manner described in OAR 137-003-0035. At the conclusion of the conference(s), the hearing officer shall issue a prehearing order stating the issues to be addressed in the contested case hearing and, in a contested case on an application for a site certificate, limiting parties to those issues they raised on the record of the public hearing described in OAR 345-015-0220. The hearing officer shall not receive evidence or hear legal argument on issues not identified in the prehearing order.

(3) Failure to raise an issue in the prehearing conference(s) for the contested case hearing constitutes a waiver of that issue.

Stat. Auth.: ORS 469.470
Stats. Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615 & 469.992
Hist.: EFSC 1-1993, f. & cert. ef. 1-15-93; EFSC 5-1994, f. & cert. ef. 11-30-94; EFSC 3-1995, f. & cert. ef. 11-16-95; EFSC 2-1999, f. & cert. ef. 4-14-99; EFSC 1-2007, f. & cert. ef. 5-15-07

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OAR CHAPTER 345
DIVISION 27

SITE CERTIFICATE CONDITIONS, AMENDMENT, TRANSFER AND TERMINATION AND DEPARTMENT OF ENERGY APPROVAL OF GAS STORAGE TESTING PIPELINES

345-027-0000

Certificate Expiration

If the certificate holder does not begin construction of the facility, the site certificate expires on the construction beginning date specified by the Council in the site certificate or in an amendment of the site certificate granted according to the rules of this division.

Stat. Auth.: ORS 469.470
Stats. Implemented: ORS 469.370 & 469.501
Hist.: EFSC 1-1993, f. & cert. ef. 1-15-93; EFSC 5-1994, f. & cert. f. 11-30-94; EFSC 2-1999, f. & cert. ef. 4-14-99; EFSC 1-2007, f. & cert. ef. 5-15-07

345-027-0011

Applicability

The rules in this division do not apply to facilities covered by ORS 469.410(1), including the Trojan energy facility.

Stat. Auth.: ORS 469.470
Stats. Implemented: ORS 469.501
Hist.: EFSC 1-1995, f. & cert. f. 5-15-95; EFSC 2-1999, f. & cert. ef. 4-14-99

345-027-0020

Mandatory Conditions in Site Certificates

The Council shall impose the following conditions in every site certificate. The Council may impose additional conditions.

(1) The Council shall not change the conditions of the site certificate except as provided for in OAR Chapter 345, Division 27.

(2) The certificate holder shall submit a legal description of the site to the Department of Energy within 90 days after beginning operation of the facility. The legal description required by this rule means a description of metes and bounds or a description of the site by reference to a map

and geographic data that clearly and specifically identify the outer boundaries that contain all parts of the facility.

(3) The certificate holder shall design, construct, operate and retire the facility:

(a) Substantially as described in the site certificate;

(b) In compliance with the requirements of ORS Chapter 469, applicable Council rules, and applicable state and local laws, rules and ordinances in effect at the time the site certificate is issued; and

(c) In compliance with all applicable permit requirements of other state agencies.

(4) The certificate holder shall begin and complete construction of the facility by the dates specified in the site certificate.

(5) Except as necessary for the initial survey or as otherwise allowed for wind energy facilities, transmission lines or pipelines under this section, the certificate holder shall not begin construction, as defined in OAR 345-001-0010, or create a clearing on any part of the site until the certificate holder has construction rights on all parts of the site. For the purpose of this rule, "construction rights" means the legal right to engage in construction activities. For wind energy facilities, transmission lines or pipelines, if the certificate holder does not have construction rights on all parts of the site, the certificate holder may nevertheless begin construction, as defined in OAR 345-001-0010, or create a clearing on a part of the site if the certificate holder has construction rights on that part of the site and:

(a) The certificate holder would construct and operate part of the facility on that part of the site even if a change in the planned route of a transmission line or pipeline occurs during the certificate holder's negotiations to acquire construction rights on another part of the site; or

(b) The certificate holder would construct and operate part of a wind energy facility on that part of the site even if other parts of the facility were modified by amendment of the site certificate or were not built.

(6) If the certificate holder becomes aware of a significant environmental change or impact attributable to the facility, the certificate holder shall, as soon as possible, submit a written report to the Department describing the impact on the facility and any affected site certificate conditions.

(7) The certificate holder shall prevent the development of any conditions on the site that would preclude restoration of the site to a useful, non-hazardous condition to the extent that prevention of such site conditions is within the control of the certificate holder.

(8) Before beginning construction of the facility, the certificate holder shall submit to the State of Oregon, through the Council, a bond or letter of credit in a form and amount satisfactory to the Council to restore the site to a useful, non-hazardous condition. The certificate holder shall

maintain a bond or letter of credit in effect at all times until the facility has been retired. The Council may specify different amounts for the bond or letter of credit during construction and during operation of the facility.

(9) The certificate holder shall retire the facility if the certificate holder permanently ceases construction or operation of the facility. The certificate holder shall retire the facility according to a final retirement plan approved by the Council, as described in OAR 345-027-0110. The certificate holder shall pay the actual cost to restore the site to a useful, non-hazardous condition at the time of retirement, notwithstanding the Council's approval in the site certificate of an estimated amount required to restore the site.

(10) The Council shall include as conditions in the site certificate all representations in the site certificate application and supporting record the Council deems to be binding commitments made by the applicant.

(11) Upon completion of construction, the certificate holder shall restore vegetation to the extent practicable and shall landscape all areas disturbed by construction in a manner compatible with the surroundings and proposed use. Upon completion of construction, the certificate holder shall remove all temporary structures not required for facility operation and dispose of all timber, brush, refuse and flammable or combustible material resulting from clearing of land and construction of the facility.

(12) The certificate holder shall design, engineer and construct the facility to avoid dangers to human safety presented by seismic hazards affecting the site that are expected to result from all maximum probable seismic events. As used in this rule "seismic hazard" includes ground shaking, landslide, liquefaction, lateral spreading, tsunami inundation, fault displacement and subsidence.

(13) The certificate holder shall notify the Department, the State Building Codes Division and the Department of Geology and Mineral Industries promptly if site investigations or trenching reveal that conditions in the foundation rocks differ significantly from those described in the application for a site certificate. After the Department receives the notice, the Council may require the certificate holder to consult with the Department of Geology and Mineral Industries and the Building Codes Division and to propose mitigation actions.

(14) The certificate holder shall notify the Department, the State Building Codes Division and the Department of Geology and Mineral Industries promptly if shear zones, artesian aquifers, deformations or clastic dikes are found at or in the vicinity of the site.

(15) Before any transfer of ownership of the facility or ownership of the site certificate holder, the certificate holder shall inform the Department of the proposed new owners. The requirements of OAR 345-027-0100 apply to any transfer of ownership that requires a transfer of the site certificate.

(16) If the Council finds that the certificate holder has permanently ceased construction or operation of the facility without retiring the facility according to a final retirement plan approved

by the Council, as described in OAR 345-027-0110, the Council shall notify the certificate holder and request that the certificate holder submit a proposed final retirement plan to the Office within a reasonable time not to exceed 90 days. If the certificate holder does not submit a proposed final retirement plan by the specified date, the Council may direct the Department to prepare a proposed final retirement plan for the Council's approval. Upon the Council's approval of the final retirement plan, the Council may draw on the bond or letter of credit described in section (8) to restore the site to a useful, non-hazardous condition according to the final retirement plan, in addition to any penalties the Council may impose under OAR Chapter 345, Division 29. If the amount of the bond or letter of credit is insufficient to pay the actual cost of retirement, the certificate holder shall pay any additional cost necessary to restore the site to a useful, non-hazardous condition. After completion of site restoration, the Council shall issue an order to terminate the site certificate if the Council finds that the facility has been retired according to the approved final retirement plan.

Stat. Auth.: ORS 469.470
Stats. Implemented: ORS 469.401 & 469.501
Hist.: NTEC 9, f. 2-13-75, ef. 3-11-75; EFSC 6-1980, f. & ef. 8-26-80; EFSC 1-1985, f. & ef. 1-7-85; EFSC 4-1986, f. & ef. 9-5-86; EFSC 1-1993, f. & cert. ef. 1-15-93; Renumbered from 345-026-0035, 345-026-0040, 345-026-0130, 345-026-0180; 345-079-0011, 345-100-0011, 345-111-0010, 345-115-0040, 345-125-0060 & 345-125-0065; EFSC 5-1994, f. & cert. f. 11-30-94; EFSC 3-1995, f. & cert. ef. 11-16-95; EFSC 2-1999, f. & cert. ef. 4-14-99; EFSC 1-2000, f. & cert. ef. 2-2-00; EFSC 1-2002, f. & cert. ef. 4-3-02; EFSC 1-2007, f. & cert. ef. 5-15-07; EFSC 1-2012, f. & cert. ef. 5-15-12

345-027-0023

Site-Specific Conditions

The Council may include the following conditions, as appropriate, in the site certificate:

(1) If the facility uses coal, the certificate holder shall take all necessary steps to ensure that surface and groundwater are not contaminated by run off or seepage associated with coal or ash storage, transport or disposal. The certificate holder shall handle coal and ash so as to minimize the likelihood of coal dust and ash being windblown and causing an environmental or public health problem. If the certificate holder permanently disposes of ash on the facility site, the certificate holder shall cover the ash with a layer of topsoil and revegetate the area.

(2) If the energy facility or related or supporting facility is a natural gas pipeline, the certificate holder shall submit to the Department copies of all incident reports involving the pipeline required under 49 CFR Sec. 191.15.

(3) If the facility includes any pipeline under Council jurisdiction:

(a) The certificate holder shall design, construct and operate the pipeline in accordance with the requirements of the U.S. Department of Transportation as set forth in Title 49, Code of Federal Regulations, Part 192, in effect on August 15, 2011; and

(b) The certificate holder shall develop and implement a program using the best available practicable technology to monitor the proposed pipeline to ensure protection of public health and safety.

(4) If the facility includes any transmission line under Council jurisdiction:

(a) The certificate holder shall design, construct and operate the transmission line in accordance with the requirements of the 2012 Edition of the National Electrical Safety Code approved on June 3, 2011, by the American National Standards Institute; and

(b) The certificate holder shall develop and implement a program that provides reasonable assurance that all fences, gates, cattle guards, trailers, or other objects or structures of a permanent nature that could become inadvertently charged with electricity are grounded or bonded throughout the life of the line.

(5) If the proposed energy facility is a pipeline or a transmission line or has, as a related or supporting facility, a pipeline or transmission line, the Council shall specify an approved corridor in the site certificate and shall allow the certificate holder to construct the pipeline or transmission line anywhere within the corridor, subject to the conditions of the site certificate. If the applicant has analyzed more than one corridor in its application for a site certificate, the Council may, subject to the Council's standards, approve more than one corridor.

(6) If the facility is a surface facility related to an underground gas storage reservoir, the Council shall, in the site certificate, specify the site boundary and total permitted daily throughput of the facility.

(7) If the facility is subject to a carbon dioxide emissions standard adopted by the Council or enacted by statute, the Council shall include in the site certificate appropriate conditions as described in OAR 345-024-0550, 345-024-0560, 345-024-0590, 345-024-0600, 345-024-0620, 345-024-0630 and 345-024-0710.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 469.470
Stats. Implemented: ORS 469.401, 469.501 & 469.503
Hist.: EFSC 5-1994, f. & cert. f. 11-30-94; EFSC 2-1999, f. & cert. ef. 4-14-99; EFSC 1-2000, f. & cert. ef. 2-2-00; EFSC 1-2003, f. & cert. ef. 9-3-03; EFSC 1-2007, f. & cert. ef. 5-15-07; EFSC 1-2012, f. & cert. ef. 5-15-12; EFSC 2-2015, f. & cert. ef. 10-20-15

345-027-0028

Monitoring and Mitigation Conditions

In the site certificate, the Council shall include conditions that address monitoring and mitigation to ensure compliance with the standards contained in OAR Chapter 345, Division 22 and Division 24. The site certificate applicant, or for an amendment, the certificate holder, shall

develop proposed monitoring and mitigation plans in consultation with the Department and, as appropriate, other state agencies, local governments and tribes. Monitoring and mitigation plans are subject to Council approval. The Council shall incorporate approved monitoring and mitigation plans in applicable site certificate conditions.

Stat. Auth.: ORS 469.470
Stats. Implemented: ORS 469.401, 469.501, 469.503 & 469.507
Hist.: EFSC 5-1994, f. & cert. f. 11-30-94; EFSC 3-1995, f. & cert. ef. 11-16-95; EFSC 2-1999, f. & cert. ef. 4-14-99; EFSC 1-2007, f. & cert. ef. 5-15-07; EFSC 1-2012, f. & cert. ef. 5-15-12

345-027-0030

Amendment to Extend Construction Beginning and Completion Deadlines

(1) The certificate holder may request an amendment to extend the deadlines for beginning or completing construction of the facility that the Council has specified in a site certificate or an amended site certificate. The certificate holder shall submit a request that includes an explanation of the need for an extension and that conforms to the requirements of 345-027-0060 no later than six months before the date of the applicable deadline, or, if the certificate holder demonstrates good cause for the delay in submitting the request, no later than the applicable deadline.

(2) A request within the time allowed in section (1) to extend the deadlines for beginning or completing construction suspends those deadlines until the Council acts on the request.

(3) The Council shall review the request for amendment as described in OAR 345-027-0070.

(4) If the Council grants an amendment under this rule, the Council shall specify new deadlines for beginning or completing construction that are not more than two years from the deadlines in effect before the Council grants the amendment.

(5) To grant an amendment extending the deadline for beginning or completing construction of an energy facility subject to OAR 345 024 0550, 345 024 0590, or 345 024 0620, the Council must find that the facility complies with the carbon dioxide standard in effect at the time of the Council's order on the amendment.

Stat. Auth.: ORS 469.470
Stats. Implemented: ORS 469.370, 469.405 & 469.503
Hist.: EFSC 1-1993, f. & cert. ef. 1-15-93; EFSC 5-1994, f. & cert. ef. 11-30-94; EFSC 2-1999, f. & cert. ef. 4-14-99; EFSC 1-2007, f. & cert. ef. 5-15-07; EFSC 1-2012, f. & cert. ef. 5-15-12

345-027-0050

When an Amendment is Required

(1) Except as allowed under sections (2) and (6), the certificate holder must submit a request to amend the site certificate to design, construct or operate a facility in a manner different from the description in the site certificate if the proposed change:

(a) Could result in a significant adverse impact that the Council has not addressed in an earlier order and the impact affects a resource protected by Council standards;

(b) Could impair the certificate holder's ability to comply with a site certificate condition; or

(c) Could require a new condition or a change to a condition in the site certificate.

(2) A site certificate amendment is not required if a proposed change in the design, construction or operation of a facility is in substantial compliance with the terms and conditions of the site certificate and is a change:

(a) To an electrical generation facility that would increase the electrical generating capacity and would not increase the number of electric generators at the site, change fuel type, increase fuel consumption by more than 10 percent or enlarge the facility site;

(b) To the number or location of pipelines for a surface facility related to an underground gas storage reservoir that would not result in the facility exceeding permitted daily throughput or enlarge the facility site;

(c) To the number, size or location of pipelines for a geothermal energy facility that would not enlarge the facility site;

(d) To a pipeline or transmission line that is a related or supporting facility that would extend or modify the pipeline or transmission line or expand the right-of-way, when the change is to serve customers other than the energy facility; or

(e) To an aspect or feature of the facility, operating procedures or management structures not addressed in the site certificate.

(3) If the certificate holder concludes that a proposed change does not require a site certificate amendment under section (1), the certificate holder shall, nevertheless, complete an investigation sufficient to demonstrate that the proposed change in the design, construction or operation of the facility would comply with applicable Council standards. The certificate holder shall complete the investigation before implementing the proposed change. The certificate holder shall prepare a written evaluation describing the investigation and shall make the evaluation available to the Department for inspection at any time.

(4) In the annual reports and semiannual construction progress reports required by OAR 345-026-0080, the certificate holder shall describe all significant changes made during the reporting period to the design, construction and operation of the facility without an amendment of the site certificate. The certificate holder shall keep a written record of the basis for concluding that an amendment of the site certificate was not required. The Department, at any time, may inspect the

changes made to the facility and may inspect the certificate holder's written record of the basis for concluding that an amendment of the site certificate was not required.

(5) A certificate holder may submit a change request in writing to the Department for a determination whether a proposed change requires a site certificate amendment. In the change request, the certificate holder must describe the proposed change, explain the basis for the certificate holder's conclusion that an amendment is not required under section (1), and provide the written evaluation described in section (3). The Department shall respond in writing as promptly as possible. The Department may refer its determination to the Council for concurrence, modification or rejection. At the request of the certificate holder or a Council member, the Department must refer its determination to the Council for concurrence, modification or rejection.

(6) A site certificate amendment is not required for the construction of a pipeline less than 16 inches in diameter and less than five miles in length that is proposed to be constructed to test or maintain an underground gas storage reservoir. If the proposed pipeline would connect to a surface facility related to an underground gas storage reservoir for which the Council has issued a site certificate or to a gas pipeline for which the Council has issued a site certificate, the certificate holder must obtain, prior to construction, the approval of the Department for the construction, operation and retirement of the proposed pipeline. To obtain Department approval, the certificate holder shall submit a request as described in OAR 345-027-0210 through 345-027-0240.

Stat. Auth.: ORS 469.470
Stats. Implemented: ORS 469.405
Hist.: EFSC 1-1993, f. & cert. ef. 1-15-93; EFSC 5-1994, f. & cert. ef. 11-30-94; EFSC 3-1995, f. & cert. ef. 11-16-95; EFSC 2-1999, f. & cert. ef. 4-14-99; EFSC 1-2000, f. & cert. ef. 2-2-00; EFSC 1-2007, f. & cert. ef. 5-15-07; EFSC 1-2012, f. & cert. ef. 5-15-12

345-027-0060

Request to Amend Certificate

(1) To request an amendment of a site certificate, the certificate holder shall submit a written request to the Department of Energy that includes the information described in section (2) and the following:

(a) The name and mailing address of the certificate holder and the name, mailing address, email address and phone number of the individual responsible for submitting the request.

(b) A description of the facility including its location and other information relevant to the proposed change.

(c) A detailed description of the proposed change and the certificate holder's analysis of the proposed change under the criteria of OAR 345-027-0050(1).

(d) The specific language of the site certificate, including affected conditions, that the certificate holder proposes to change, add or delete by an amendment.

(e) A list of the Council standards relevant to the proposed change.

(f) An analysis of whether the facility, with the proposed change, would comply with the requirements of ORS Chapter 469, applicable Council rules, and applicable state and local laws, rules and ordinances if the Council amends the site certificate as requested. For the purpose of this rule, a law, rule or ordinance is "applicable" if the Council would apply or consider the law, rule or ordinance under OAR 345-027-0070(10).

(g) An updated list of the owners of property located within or adjacent to the site of the facility, as described in OAR 345-021-0010(1)(f).

(2) In a request to amend a site certificate, the certificate holder shall provide the information described in applicable subsections of OAR 345-021-0000 and OAR 345-021-0010. The certificate holder may incorporate by reference relevant information that the certificate holder has previously submitted to the Department or that is otherwise included in the Department's administrative record on the facility.

(3) Before submitting a request to amend a site certificate, the certificate holder may prepare a draft request and may confer with the Department about the content of the request. Although the Council does not require the certificate holder to prepare a draft request and confer with the Department, the Council recommends that the certificate holder follow this procedure.

(4) The certificate holder shall submit an original and two printed copies of the amendment request to the Department. Upon a request by the Department, the certificate holder must submit printed copies of the amendment request for members of the Council. In addition to the printed copies, the certificate holder shall submit the full amendment request in a non-copy-protected electronic format acceptable to the Department. The certificate holder shall provide additional copies of the amendment request to the Department upon request and copies or access to copies to any person requesting copies. If requested by the Department, the certificate holder shall send copies of the request to persons on a mailing list provided by the Department.

Stat. Auth.: ORS 469.470
Stats. Implemented: ORS 469.405
Hist.: EFSC 1-1993, f. & cert. ef. 1-15-93; EFSC 5-1994, f. & cert. ef. 11-30-94; EFSC 2-1999, f. & cert. ef. 4-14-99; EFSC 1-2000, f. & cert. ef. 2-2-00; EFSC 1-2002, f. & cert. ef. 4-3-02; EFSC 1-2003, f. & cert. ef. 9-3-03; EFSC 1-2007, f. & cert. ef. 5-15-07; EFSC 1-2012, f. & cert. ef. 5-15-12

345-027-0070

Review of a Request for Amendment

Except as specified in OAR 345-027-0080, the Council shall review a request for amendment of a site certificate as follows:

(1) Within 15 days after receiving a request to amend a site certificate, the Department of Energy shall determine whether the amendment requires extended review based on the criteria in section (2) and:

(a) Distribute copies of the request, or instruct the certificate holder to distribute copies of the request, to the persons on a distribution list that includes the reviewing agencies as defined in OAR 345-001-0010 and that may include additional persons, with a request for comments on the request by a specified date. The distribution may be done by courier delivery or mailing of printed copies or, with the approval of the Department, any form of electronic delivery.

(b) Send a notice of the amendment request by mail or email to all persons on the Council's general mailing list as defined in OAR 345-011-0020, to any special list established for the facility and to the updated property owner list supplied by the certificate holder under 345-027-0060(1)(g) and specify a date by which comments on the request are due.

(c) Post an announcement on the Department's website to notify the public that an amendment request has been received.

(d) Send a notice by mail or email to the certificate holder specifying a date for issuance of a proposed order. The Department shall specify a date that is no later than 60 days after the date of the notice unless the Department has determined that the amendment requires extended review. For extended review, the Department shall explain the basis of its determination and specify a date that is not more than 180 days after the date of the notice. Within 10 days after the Department sends notification that an amendment requires extended review, the certificate holder may request Council review of the determination. Upon a request for Council review, the Department shall refer its determination to the Council for concurrence, modification or rejection.

(2) The Department may determine that an amendment requires extended review if:

(a) The certificate holder requests extended review;

(b) The Department finds that the amendment request does not contain the information required by OAR 345-027-0060 or does not contain information sufficient for the Department to prepare a proposed order;

(c) The Department needs to hire a consultant to assist in reviewing the request;

(d) The amendment:

(A) Would require construction on land zoned residential or exclusive farm use;

(B) Would require construction in a zone for which the use is not permitted;

(C) Would require construction on land that may qualify as Habitat Category 1 or 2 land as described in OAR 635-415-0025;

(D) Would result in incremental carbon dioxide emissions that the certificate holder elects to offset, in compliance with the applicable carbon dioxide emissions standard, by a means other than by payments described under OAR 345-024-0560(3), 345-024-0600(3) and (4) or 345-024-0630(2), (4) and (5); or

(E) Could require the Council to determine, according to OAR 345-022-0000(2), that the overall public benefits of the facility outweigh any adverse effects on a resource or interest that is protected by an applicable standard the facility would not meet if the amendment is approved; or

(e) The Department anticipates a high volume of public comment.

(3) The Office may hold one or more public meetings during the review of a request for amendment of the site certificate.

(4) Except as otherwise provided in this section, no later than the date the Department has specified in the notice described in subsection (1)(d), the Department shall issue a proposed order, recommending approval, modification or disapproval of the requested amendment. If the Department needs additional time to prepare the proposed order, the Department may issue the proposed order at a later date, but the Department shall, no later than the date the Department has specified in the notice, notify the certificate holder in writing of the circumstances that justify the delay.

(5) After issuing the proposed order, the Department shall send a notice of the proposed order by mail or email to the persons on the Council's general mailing list as defined in OAR 345-011-0020, to any special list established for the facility, to the updated property owner list supplied by the certificate holder under OAR 345-027-0060(1)(g) and to the distribution list described in subsection (1)(a). In the notice, the Department shall state that all comments must be submitted in writing and must be received by the Department by a specified deadline that is at least 30 days from the date of the notice. The Department shall post an announcement on its website to notify the public of the issuance of the proposed order.

(6) Any person may, by written request submitted to the Department no later than the deadline described in section (5), ask the Council to hold a contested case proceeding on the proposed order. For the purpose of this rule, the request is submitted when it is received by the Department. 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.

(7) 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. If the Council does not have jurisdiction over the issue raised in the request, the Council must deny the request.

(8) The Council shall determine whether any issue identified in a request for a contested case proceeding justifies a contested case proceeding, and:

(a) If the Council finds that the request identifies one or more issues that justify a contested case proceeding, the Council shall conduct a contested case proceeding according to the applicable provisions of OAR 345-015-0012 to OAR 345-015-0085 limited to the issues that the Council found sufficient to justify the proceeding.

(b) 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 and send a notice of the amended proposed order to the persons described in section (5). Any person may, by written request submitted to the Department within 30 days after the Department issues the notice of the amended proposed order, ask the Council to hold a contested case proceeding limited to issues raised by the amendment to the proposed order. For the purpose of this rule, the request is submitted when it is received by the Department. 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. As described in this section, the Council shall determine whether any issue identified in the request for a contested case proceeding justifies a contested case proceeding.

(c) If the Council finds that the request does not identify any issue that justifies a contested case proceeding, the Council shall deny the request. In a written order denying the request, the Council shall state the basis for the denial. The Council shall then adopt, modify or reject the proposed order based on the considerations described in section (10). In a written order, the Council shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council shall issue an amended site certificate, which is effective upon execution by the Council Chair and by the applicant.

(9) If there is no request for a contested case proceeding as described in section (6) or subsection (8)(b), the Council, may adopt, modify or reject the proposed order based on the considerations described in section (10). In a written order, the Council shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council shall issue an amended site certificate, which is effective upon execution by the Council Chair and by the applicant.

(10) In making a decision to grant or deny issuance of an amended site certificate, the Council shall apply the applicable substantive criteria, as described in OAR 345-022-0030, in effect on the date the certificate holder submitted the request for amendment and all other state statutes, administrative rules, and local government ordinances in effect on the date the Council makes its decision. The Council shall consider the following:

(a) For an amendment that would change the site boundary or the legal description of the site, the Council shall consider, for the area added to the site by the amendment, whether the facility complies with all Council standards;

(b) For an amendment that extends the deadlines for beginning or completing construction, the Council shall consider:

(A) Whether the Council has previously granted an extension of the deadline;

(B) Whether there has been any change of circumstances that affects a previous Council finding that was required for issuance of a site certificate or amended site certificate; and

(C) Whether the facility complies with all Council standards, except that the Council may choose not to apply a standard if the Council finds that:

(i) The certificate holder has spent more than 50 percent of the budgeted costs on construction of the facility;

(ii) The inability of the certificate holder to complete the construction of the facility by the deadline in effect before the amendment is the result of unforeseen circumstances that are outside the control of the certificate holder;

(iii) The standard, if applied, would result in an unreasonable financial burden on the certificate holder; and

(iv) The Council does not need to apply the standard to avoid a significant threat to the public health, safety or the environment;

(c) For any amendment not described above, the Council shall consider whether the amendment would affect any finding made by the Council in an earlier order.

(d) For all amendments, the Council shall consider whether the amount of the bond or letter of credit required under OAR 345-022-0050 is adequate.

Stat. Auth.: ORS 469.470
Stats. Implemented: ORS 469.405
Hist.: EFSC 1-1993, f. & cert. ef. 1-15-93; EFSC 5-1994, f. & cert. ef. 11-30-94; EFSC 2-1999, f. & cert. ef. 4-14-99; EFSC 1-2000, f. & cert. ef. 2-2-00; EFSC 2-2000, f. & cert. ef. 11-20-00; EFSC 1-2002, f. & cert. ef. 4-3-02; EFSC 1-2003, f. & cert. ef. 9-3-03; EFSC 1-2007, f. & cert. ef. 5-15-07; EFSC 1-2012, f. & cert. ef. 5-15-12; EFSC 1-2015, f. & cert. ef. 5-18-15

345-027-0080

Review of a Request by a Certificate Holder for Expedited Amendment

(1) A certificate holder may ask the Council Chair to grant expedited review of an amendment request. The certificate holder shall submit a request for expedited review to the Department of Energy in writing and, in addition, the certificate holder shall submit the full amendment request in a non-copy-protected electronic format acceptable to the Department. The certificate holder shall include in the request:

(a) The information listed in OAR 345-027-0060(1) and (2), and

(b) Reasons why the certificate holder needs expedited review of its request and an explanation of why the need for expedited review arose and could not have reasonably been foreseen by the certificate holder.

(2) The Chair may grant a request for expedited review if the Chair finds that a delay would unduly harm the certificate holder and if the facility, with the proposed change, would not likely result in a significant new adverse impact. If the Chair decides not to grant the request for expedited review, the Chair shall issue a written decision as soon as is reasonably practicable. In a written decision denying the request, the Chair shall give an explanation of the reasons for the denial.

(3) Within 7 days after the Chair grants expedited review, the Department shall:

(a) Send copies of the amendment request by mail or email to the reviewing agencies as defined in OAR 345-001-0010 and ask those agencies to comment on the request within not more than 21 days after the date of the notice.

(b) Send a notice of the amendment request by mail or email to all persons on the Council's general mailing list as defined in OAR 345-011-0020, to any special list established for the facility and to the updated property owner list supplied by the certificate holder under OAR 345-027-0060(1)(g) specifying a date, not more than 21 days after the date of the notice, by which comments are due.

(c) Post an announcement of the amendment request on its website.

(4) Within 60 days after the Chair grants expedited review, the Department shall issue a proposed order, recommending approval, modification or disapproval of the requested amendment. If the Department recommends approval, the Department shall include in the proposed order any new or modified conditions it recommends and shall explain why expedited Council action was warranted.

(5) The Department shall send a notice of the proposed order by mail or email to the persons on the Council's general mailing list, to any special list established for the facility and to the updated property owner list supplied by the certificate holder under OAR 345-027-0060(1)(g). In addition, the Department shall post the notice on its website. In the notice, the Department shall include information on the availability of the proposed order, the date of the Council meeting when the Council will consider the proposed order and issue a temporary order as described in

section (5), a date by which comments on the proposed order are due and the deadline for any person to request a contested case proceeding on the Council's temporary order.

(6) After considering the proposed order, the Council may issue an order temporarily amending the site certificate. In making a decision whether to issue a temporary order under this rule, the Council shall consider the factors listed in OAR 345-027-0070(10). The Council shall apply the applicable substantive criteria, as described in OAR 345-022-0030, in effect on the date the certificate holder submitted the request for amendment and all other state statutes, administrative rules, and local government ordinances in effect on the date the Council issues the temporary order.

(7) Before implementing any change approved by the Council’s temporary order, the certificate holder must submit an authorized acknowledgement that the certificate holder accepts all terms and conditions of the temporary order. The acknowledgement may be submitted to the Department by fax or email if the certificate holder promptly submits a signed original to the Department by mail or hand delivery.

(8) 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. For the purpose of this rule, the request is submitted when it is received by the Department. 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.

(9) The Council shall determine whether any issue identified in a request for a contested case proceeding justifies a contested case proceeding.

(a) If the Council finds that the request identifies one or more issues that justify a contested case proceeding, the Council shall conduct a contested case proceeding according to the applicable provisions of OAR 345-015-0012 to OAR 345-015-0085 limited to the issues that the Council found sufficient to justify the proceeding.

(b) If the Council finds that the request does not identify any issue that justifies a contested case proceeding, the Council shall deny the request. In a written order denying the request, the Council shall state the basis for the denial. The Council shall adopt the temporary order as a final order. In the final order, the Council may modify the language of the temporary order, consistent with due process. In the final order, the Council shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council shall issue an amended site certificate, which is effective upon execution by the Council Chair and by the applicant.

(10) If there is no request for a contested case proceeding as described in section (8), the Council shall adopt the temporary order as a final order. In the final order, the Council may modify the language of the temporary order, consistent with due process. In the final order, the Council shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an

amended site certificate, the Council shall issue an amended site certificate, which is effective upon execution by the Council Chair and by the applicant.

(11) The certificate holder shall not abuse this rule by failing to make timely application for an amendment and thus creating the need for expedited review.

Stat. Auth.: ORS 469.470
Stats. Implemented: ORS 469.405
Hist.: EFSC 1-1993, f. & cert. ef. 1-15-93; EFSC 5-1994, f. & cert. ef. 11-30-94; EFSC 2-1999, f. & cert. ef. 4-14-99; EFSC 1-2000, f. & cert. ef. 2-2-00; EFSC 1-2002, f. & cert. ef. 4-3-02; EFSC 1-2007, f. & cert. ef. 5-15-07; EFSC 1-2012, f. & cert. ef. 5-15-12

345-027-0090

Request by Any Person for Amendment to Apply Subsequent Laws or Rules

(1) Any person may submit to the Department of Energy a request for an amendment of a site certificate to apply a local government ordinance, statute or Council rule adopted after the date the site certificate was executed. The Department itself may initiate such a request.

(2) In an amendment request under this rule, the person shall include the following:

(a) The name, mailing address, email address and telephone number of the person submitting the request;

(b) The name and address of the certificate holder;

(c) Identification of the facility for which the site certificate in question was granted and its location;

(d) Identification of the local government ordinance, statute or Council rule that the person seeks to apply to the facility;

(e) The particular facts that the person believes demonstrate that failure to apply the ordinance, statute or rule identified in subsection (d) presents a significant threat to the public health or safety or to the environment; and

(f) The specific language of the site certificate that the person proposes to change, delete or add by an amendment.

(3) If the Department receives a request to amend a site certificate as described in this rule from any person other than the certificate holder, the Department shall send a copy of the request to the certificate holder with a notice stating the date by which the certificate holder must submit a response.

(4) The Council shall review the request for amendment as described in OAR 345-027-0070, except that:

(a) After receiving the certificate holder's response as requested under (3), the Department may ask the Council to determine whether the request demonstrates that failure to apply the ordinance, statute or rule identified in subsection (2)(d) presents a significant threat to the public health or safety or to the environment. If the Council determines that applying the ordinance, statute or rule is not justified by a significant threat to the public health or safety or to the environment, then the Council may deny the amendment request.

(b) Within 15 days after receiving the certificate holder's response as requested under (3) or within 15 days after a Council determination under (a) that applying the ordinance, statute or rule is justified by a significant threat to the public health or safety or to the environment, the Department shall determine whether the amendment request requires expedited review, based on the criteria in OAR 345-027-0070(2), and shall send the notices described in OAR 345-027-0070(1)(a), (b) and (d).

(c) If the Department recommends approval or modification of the requested amendment, the Department shall include in the proposed order described in OAR 345-027-0070(4) any new or modified site certificate conditions necessary to assure compliance with the statutes, Council rules, and local government ordinances applied to the facility under the proposed order;

(d) If the Department in its proposed order recommends approval or modification of the requested amendment, the certificate holder may, by written request submitted to the Department within 30 days after the Department issues the proposed order, ask the Council to hold a contested case proceeding on the proposed order. For the purpose of this rule, the request is submitted when it is received by the Department. In the request, the certificate holder shall provide a description of the issues to be contested and a statement of the facts believed to be at issue. If the site certificate holder requests a contested case proceeding, the Council shall conduct a contested case proceeding according to the applicable provisions of OAR 345-015-0012 to 345-015-0085 limited to the issues stated by the certificate holder; and

(e) The Council shall include new conditions in a site certificate amended under this rule only if the certificate holder agrees to the new conditions or the Council finds that the conditions are necessary based upon a clear showing of a significant threat to the public health, safety or the environment.

Stat. Auth.: ORS 469.470
Stats. Implemented: ORS 469.401 & 469.405
Hist.: EFSC 1-1993, f. & cert. ef. 1-15-93; EFSC 5-1994, f. & cert. ef. 11-30-94; EFSC 2-1999, f. & cert. ef. 4-14-99; EFSC 1-2000, f. & cert. ef. 2-2-00; EFSC 1-2007, f. & cert. ef. 5-15-07; EFSC 1-2012, f. & cert. ef. 5-15-12

345-027-0100

Transfer of a Site Certificate

(1) For the purpose of this rule:

(a) A transfer of ownership requires a transfer of the site certificate when the person who will have the legal right to possession and control of the site or the facility does not have authority under the site certificate to construct, operate or retire the facility;

(b) “Transferee” means the person who will become the new applicant and site certificate holder.

(2) When a certificate holder has knowledge that any transfer of ownership of the facility that requires a transfer of the site certificate is or may be pending, the certificate holder shall notify the Department of Energy. In the notice, the certificate holder shall include, if known, the name, mailing address and telephone number of the transferee and the date of the transfer of ownership. If possible, the certificate holder shall notify the Department at least 60 days before the date of the transfer of ownership.

(3) The transferee is not allowed to construct or operate the facility until an amended site certificate as described in section (10) or a temporary amended site certificate as described in section (11) becomes effective.

(4) To request a transfer of the site certificate, the transferee shall submit a written request to the Department that includes the information described in OAR 345-021-0010(1)(a), (d), (f) and (m), a certification that the transferee agrees to abide by all terms and conditions of the site certificate currently in effect and, if known, the date of the transfer of ownership. If applicable, the transferee shall include in the request the information described in OAR 345-021-0010(1)(y)(O)(iv).

(5) The Department may require the transferee to submit a written statement from the current certificate holder, or a certified copy of an order or judgment of a court of competent jurisdiction, verifying the transferee’s right, subject to the provisions of ORS Chapter 469 and the rules of this chapter, to possession of the site or the facility.

(6) Within 15 days after receiving a request to transfer a site certificate, the Department shall send a notice of the request by mail or email to the reviewing agencies as defined in OAR 345-001-0010, to all persons on the Council's general mailing list as defined in OAR 345-011-0020, to any special list established for the facility and to the updated property owner list submitted by the transferee under subsection (4). In the notice, the Department shall describe the transfer request, specify a date by which comments are due and state that the date of the Council's informational hearing will be announced on the Department’s website.

(7) Before acting on the transfer request, the Council shall hold an informational hearing. The Council shall hold the informational hearing during a Council meeting and shall provide notice of the hearing on its meeting agenda, which will be sent by mail or email to the Council’s general mailing list in advance of the meeting. The informational hearing is not a contested case hearing.

(8) At the conclusion of the informational hearing or at a later meeting, the Council may issue an order approving the transfer request if the Council finds that:

(a) The transferee complies with the standards described in OAR 345-022-0010, 345-022-0050 and, if applicable, 345-024-0710(1); and

(b) The transferee is or will be lawfully entitled to possession or control of the site or the facility described in the site certificate.

(9) Except as described in section (12), the Council shall not otherwise change the terms and conditions of the site certificate in an order approving the transfer request.

(10) Upon issuing the order described in section (8), the Council shall issue an amended site certificate that names the transferee as the new certificate holder. The amended site certificate is effective upon execution by the Council chair and the transferee. The Council shall issue the amended site certificate in duplicate counterpart originals and each counterpart, upon signing, will have the same effect.

(11) If the Council chair determines that special circumstances justify emergency action, the Council chair may, upon a written request from the transferee that includes a showing that the transferee can meet the requirements of section (8), issue a temporary amended site certificate that names the transferee as the new certificate holder. The temporary amended site certificate is effective upon execution by the Council chair and the transferee. The temporary amended site certificate expires when an amended site certificate as described in section (10) becomes effective or as the Council otherwise orders.

(12) The Council may act concurrently on a request to transfer a site certificate and any other amendment request subject to the procedures described in this rule for the transfer request and:

(a) The procedures described in OAR 345-027-0030 for an amendment to extend construction beginning and completion deadlines.

(b) The procedures described in OAR 345-027-0090 for an amendment to apply subsequent laws or rules.

(c) The procedures described in OAR 345-027-0060 and 345-027-0070 for any amendment request not described in (a) or (b).

Stat. Auth.: ORS 469.470
Stats. Implemented: ORS 469.401 & 469.405
Hist.: EFSC 1-1993, f. & cert. ef. 1-15-93; EFSC 5-1994, f. & cert. ef. 11-30-94; EFSC 2-1999, f. & cert. ef. 4-14-99; EFSC 1-2002, f. & cert. ef. 4-3-02; EFSC 1-2007, f. & cert. ef. 5-15-07; EFSC 1-2012, f. & cert. ef. 5-15-12

345-027-0110

Termination of a Site Certificate

(1) A certificate holder may apply to the Council to terminate a site certificate at any time, subject to the requirements of this rule.

(2) A certificate holder must apply to the Council to terminate a site certificate within two years following cessation of construction or operation of the facility.

(3) If the certificate holder fails to apply to the Council to terminate the site certificate and the Council finds that the certificate holder has permanently ceased construction or operation of the facility, then the Council may terminate the site certificate according to the procedure described in OAR 345-027-0020(16).

(4) In an application for termination of the site certificate, the certificate holder shall include a proposed final retirement plan for the facility and site. The certificate holder shall submit an original and two printed copies of the application for termination and the proposed final retirement plan to the Department. Upon a request by the Department, the certificate holder must submit printed copies of the application for termination and the proposed final retirement plan for members of the Council. In addition to the printed copies, the certificate holder shall submit the full copies of the application for termination and the proposed final retirement plan in a non-copy-protected electronic format acceptable to the Department.

(5) In the proposed final retirement plan, the certificate holder shall include:

(a) A plan for retirement that provides for completion of retirement without significant delay and that protects public health, safety and the environment.

(b) A description of actions the certificate holder proposes to take to restore the site to a useful, non-hazardous condition, including information on how impacts to fish, wildlife and the environment would be minimized during the retirement process.

(c) A current detailed cost estimate and a plan for ensuring the availability of adequate funds for completion of retirement.

(d) An updated list of the owners of property located within or adjacent to the site of the facility, as described in OAR 345-021-0010(1)(f).

(6) Within 15 days after receiving an application for termination of a site certificate, the Department of Energy shall:

(a) Send a notice of the application by mail or email to all persons on the Council's general mailing list as defined in OAR 345-011-0020, to any special list established for the facility and to the updated property owner list submitted by the certificate holder under subsection (5) specifying a date by which comments on the application are due.

(b) Send copies of the application for termination by mail or email to the reviewing agencies as defined in OAR 345-001-0010 and shall ask those agencies to comment by a specified date.

(c) Post an announcement of the application for termination on the Department's website.

(7) The Council shall review the proposed final retirement plan and shall consider any comments received from the public and the reviewing agencies. The Council may approve the proposed final retirement plan or modify the plan to comply with the rules of this chapter and applicable conditions in the site certificate. The Council shall issue an order authorizing retirement according to the approved or modified final retirement plan and subject to any conditions the Council finds appropriate. The Council's order may be appealed as described in ORS 183.480.

(8) When the Council finds that the certificate holder has completed the retirement of the facility according to the Council's order authorizing retirement, the Council shall issue an order terminating the site certificate.

(9) When the Council finds that the site certificate has expired as described in OAR 345-027-0000, the Council shall issue an order terminating the site certificate.

Stat. Auth.: ORS 469.470
Stats. Implemented: ORS 469.405 & 469.501
Hist.: EFSC 1-1993, f. & cert. ef. 1-15-93; EFSC 5-1994, f. & cert. ef. 11-30-94; EFSC 2-1999, f. & cert. ef. 4-14-99; EFSC 1-2002, f. & cert. ef. 4-3-02; EFSC 1-2003, f. & cert. ef. 9-3-03; EFSC 1-2007, f. & cert. ef. 5-15-07; EFSC 1-2012, f. & cert. ef. 5-15-12

Department of Energy Approval of Gas Storage Testing Pipelines

345-027-0210

General

(1) A person shall not construct a gas storage testing pipeline unless the certificate holder of the Council certified facility to which the pipeline would connect obtains, before construction, the approval of the Department of Energy for the construction, operation and retirement of the proposed pipeline as required under ORS 469.405(3).

(2) For the purposes of OAR 345-027-0210 through OAR 345-027-0240:

(a) "Gas storage testing pipeline" means a pipeline, but not a temporary pipeline, that is less than 16 inches in diameter and less than five miles in length, that is used to test or maintain an underground gas storage reservoir and that would connect to a Council certified facility if the storage reservoir proves feasible for operational use;

(b) "Temporary pipeline" means a pipeline that has no potential for operational use;

(c) “Council certified facility” means an energy facility for which the Council has issued a site certificate that is either a surface facility related to an underground gas storage reservoir or a gas pipeline;

(d) “Connect” means join for the purpose of operational use;

(e) “Test or maintain” means transporting gas to an underground gas storage reservoir for the purposes of determining whether the reservoir is feasible for operational use or maintaining the gas storage capacity of the reservoir but does not include operational use;

(f) “Operational use” means transporting gas to an underground gas storage reservoir for the purpose of storing gas until it is needed for sale or for withdrawing gas from an underground gas storage reservoir for the purpose of sale;

(g) “Council substantive standards” means the following standards:

(A) Structural Standard, OAR 345-022-0020;

(B) Soil Protection, OAR 345-022-0022;

(C) Protected Areas, OAR 345-022-0040(1) but excluding (2) and (3);

(D) Retirement and Financial Assurance, OAR 345-022-0050;

(E) Fish and Wildlife Habitat, OAR 345-022-0060;

(F) Threatened and Endangered Species, OAR 345-022-0070

(G) Scenic Resources, OAR 345-022-0080;

(H) Historic, Cultural and Archaeological Resources, OAR 345-022-0090;

(I) Recreation, 345-022-0100;

(J) Public Services, OAR 345-022-0110;

(K) Waste Minimization, OAR 345-022-0120; and

(L) Public Health and Safety, OAR 345-024-0030(2), (3) and (4);

(h) “Information requirements” means information that would support the findings described in OAR 345-024-0030(2) and the information described in OAR 345-021-0010(1)(h), (i), (j), (L), (m), (p), (q), (r), (s), (t), (u), (v), and (w).

Stat. Auth.: ORS 469.405
Stats. Implemented: ORS 469.405

Hist.: EFSC 1-2000, f. & cert. ef. 2-2-00; EFSC 1-2002, f. & cert. ef. 4-3-02; EFSC 1-2007, f. & cert. ef. 5-15-07; EFSC 1-2012, f. & cert. ef. 5-15-12

345-027-0220

Request for Approval

(1) Before submitting a request for approval to construct, operate and retire a gas storage testing pipeline, the certificate holder shall:

(a) Inform the Department of Energy of the proposed pipeline, including its diameter, length, location, capacity and maximum operating pressure; and

(b) Provide to the Department a map showing the location of the proposed pipeline.

(2) After receiving the information described in section (1), the Department shall confer with the certificate holder about the Council substantive standards and information requirements that might apply to the proposed pipeline and any extraordinary circumstances that might affect the time requirements for completing the approval process. Within 7 days after conferring with the certificate holder, the Department shall send a letter to the certificate holder that includes the following:

(a) Identification of the Council substantive standards that are applicable to the request for approval of the proposed pipeline;

(b) Identification of the information requirements that are applicable to the request for approval of the proposed pipeline;

(c) The time requirements for the approval process, if different from the time requirements described in OAR 345-027-0230.

(3) The certificate holder shall submit to the Department a written request for approval to construct, operate and retire a gas storage testing pipeline with the fee required by the fee schedule established under ORS 469.441. The certificate holder shall submit the original and two paper copies of the request to the Department. The certificate holder shall provide additional copies to the Department upon request and copies or access to copies to any person requesting copies. In addition to the printed copies of the request for approval, the certificate holder shall submit the full request in a non-copy-protected electronic format acceptable to the Department.

(4) In a request for approval, the certificate holder shall include:

(a) The name and mailing address of the certificate holder and the name, mailing address, email address and phone number of the individual responsible for submitting the request;

(b) A description of the purpose and operation of the proposed pipeline and a discussion of whether the use of the gas storage testing pipeline for reservoir testing or maintenance will

require an increase in the compression available in the Council certified facility to which the proposed pipeline would connect in addition to the compression that is permitted under the site certificate;

(c) Identification of the Council certified facility to which the proposed pipeline would connect;

(d) A description of the proposed pipeline, including its diameter, length, location, capacity and maximum operating pressure;

(e) A map showing the location of the proposed pipeline;

(f) A list of the names and mailing addresses of all owners of record, as shown on the most recent property tax assessment role, of property where the proposed pipeline is located and within 500 feet of the location of the proposed pipeline;

(g) The information that the Department has identified in the letter described in section (2); and

(h) Any other information that the Department requests as needed to make the findings described in the applicable standards.

Stat. Auth.: ORS 469.405
Stats. Implemented: ORS 469.405, 469.421 & 469.441
Hist.: EFSC 1-2000, f. & cert. ef. 2-2-00; EFSC 1-2007, f. & cert. ef. 5-15-07; EFSC 1-2012, f. & cert. ef. 5-15-12

345-027-0230

Review of a Request for Approval

(1) Within 7 days after receiving a request for approval to construct, operate and retire a gas storage testing pipeline, the Department of Energy shall:

(a) Send copies of the request by mail, email or any other form of electronic delivery to the following agencies with a notice asking the agencies to submit written comments on the request within 14 days from the date of the notice:

(A) Oregon Department of Fish and Wildlife;

(B) Oregon Department of Geology and Mineral Industries;

(C) Oregon Public Utility Commission;

(D) Oregon Department of Agriculture;

(E) Division of State Lands; and

(F) State Historic Preservation Office.

(b) Send a notice of the request, including a map showing the location of the proposed pipeline, by mail, email or any other form of electronic delivery to the following stating that the agencies and planning authority may submit written comments on the request within 14 days from the date of the notice:

(A) Oregon Department of Forestry;

(B) Oregon Department of Environmental Quality; and

(C) The planning authority of the county or counties where the proposed pipeline is located.

(c) Send a notice of the request, including a map showing the location of the proposed pipeline, by mail or email to the property owners the certificate holder has listed in the request stating that property owners may submit written comments on the request within 14 days from the date of the notice.

(d) Post an announcement of the request on the Department's website.

(2) Within 21 days from the deadline for comments described in section (1) or such longer period as the Department has specified in the letter described in OAR 345-027-0220(2), the Department shall issue a final order stating its findings on the applicable Council substantive standards and its approval or disapproval of the request. In an order approving a request, the Department shall include conditions that the Department finds necessary to ensure compliance with the applicable standards and conditions required by OAR 345-027-0240.

(3) The Department shall send a notice of the final order to the certificate holder, to the property owners the certificate holder listed in the request and to any person who commented on the request. In the notice, the Department shall state that judicial review of the order is as provided in ORS 469.403.

(4) The Department may amend an order approving the construction, operation and retirement of a gas storage testing pipeline.

(5) Notwithstanding ORS 469.503(3), the Department shall not review the proposed pipeline for compliance with other state standards.

(6) Notwithstanding ORS 469.401(3), the approval of a gas storage testing pipeline by the Department does not bind any state or local agency.

Stat. Auth.: ORS 469.405
Stats. Implemented: ORS 469.405 & 469.992
Hist.: EFSC 1-2000, f. & cert. ef. 2-2-00; EFSC 1-2002, f. & cert. ef. 4-3-02; EFSC 1-2007, f. & cert. ef. 5-15-07; EFSC 1-2012, f. & cert. ef. 5-15-12

345-027-0240

Conditions

In an order approving the construction, operation and retirement of a gas storage testing pipeline, the Department may impose conditions it finds necessary to ensure compliance with the Council substantive standards it identified as applicable in the letter described in OAR 345-027-0220(2). In addition, the Department shall impose the following conditions:

(1) The certificate holder shall design, construct, operate and retire the gas storage testing pipeline in compliance with applicable Council rules and applicable federal, state and local laws, rules and ordinances in effect at the time the Department issues the order;

(2) The certificate shall design, construct, operate and retire the gas storage testing pipeline substantially as described in representations in the request for approval and supporting record that the Department finds to be binding commitments made by the certificate holder;

(3) The certificate holder shall prevent the development of any conditions in the area of the gas storage testing pipeline that would preclude restoration of the area to a useful, non-hazardous condition to the extent that prevention of such conditions is within the control of the certificate holder;

(4) Upon completion of construction of the pipeline, the certificate holder shall dispose of all refuse and remove all temporary structures not needed to test or maintain an underground gas storage reservoir;

(5) The certificate holder shall notify the Department of Energy, the State Building Codes Division and the Department of Geology and Mineral Industries promptly if investigations or trenching in the area of the pipeline reveal soil or geological conditions that differ significantly from those described in the request for approval;

(6) The certificate holder shall submit to the Department copies of all incident reports involving the gas storage testing pipeline required under 49 CFR Sec. 191.15;

(7) The certificate holder shall allow properly identified representatives of the Council or Department of Energy to inspect the pipeline at any time, including all materials, activities, premises and records pertaining to design, construction, operation or retirement of the pipeline;

(8) The certificate holder shall notify the Department when it begins construction, shall keep the Department informed of construction progress and any unusual events or circumstances and shall notify the Department when it begins to use the pipeline for reservoir testing or maintenance;

(9) The certificate holder shall notify the Department if it terminates use of the gas storage testing pipeline; and

(10) If the certificate holder decides to convert the gas storage testing pipeline to operational use, the certificate holder shall notify the Department and, if required under OAR 345-027-0050, submit a request to amend the site certificate.

Stat. Auth.: ORS 469.405
Stats. Implemented: ORS 469.405 & 469.992
Hist.: EFSC 1-2000, f. & cert. ef. 2-2-00; EFSC 1-2007, f. & cert. ef. 5-15-07

OREGON DEPARTMENT OF ENERGY

ENERGY FACILITY SITING COUNCIL

Energy Facility Siting Council
Meeting Notice and Agenda

Port of Morrow – Riverfront Room
2 Marine Drive
Boardman, OR

Thursday, August 22, 2019 at 3:00 p.m.
Friday, August 23, 2019 at 8:30 a.m.

Please Note: Every effort will be made to consider items as they are indicated. However, the Council agenda and the order of agenda items are subject to change.

Thursday, August 22, 2019

Roll Call and Opening Remarks

A. **Wheatridge Wind Energy Facility, Draft Proposed Order on Request for Amendment 4 of the Site Certificate (Information Item)** – Sarah Esterson, Senior Siting Analyst. The Council will receive a presentation on the Draft Proposed Order on Request for Amendment 4 of the Wheatridge Wind Energy Facility site certificate; a public hearing will be conducted as Agenda Item C; the comment period extends through September 9, 2019. Request for Amendment 4 (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 megawatts (MW) of photovoltaic solar energy facility components, up to 41 distributed energy storage (battery) system sites and expansion 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.

B. **Perennial Wind Chaser Station, Draft Proposed Order on Request for Amendment 1 of the Site Certificate (Information Item)** – Katie Clifford, Senior Siting Analyst. The Council will receive a presentation on the Draft Proposed Order on Request for Amendment 1 of the Perennial Wind Chaser Station site certificate; a public hearing will be conducted as Agenda Item D, which will then conclude the public comment period. Request for Amendment 1 (RFA1) seeks Council approval to extend the construction commencement and completion timelines by two years for the previously approved 450 MW natural gas-fueled power generation facility and related or supporting facility components. 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.

C. **Site Certificate Amendment Process Rulemaking (Action Item)** – Patrick Rowe, Department of Justice and Christopher Clark, Rulemaking Coordinator. On October 24, 2017, the Energy Facility Siting Council filed Permanent Administrative Orders EFSC 4-2017 and EFSC 5-2017, amending OAR 345-025 and 345-027. The rules were intended to improve the process by which the Council reviews requests for amendments to site certificates. On August 1, 2019, the Oregon Supreme Court decided that these rules were invalid because the Council failed to substantially comply with ORS 183.335(3)(d) because Council did not provide a written statement identifying how it would later determine whether the proposed rules were accomplishing their objective. In addition, the Court held that the Council exceeded its statutory authority by adopting rules that limited the scope of judicial review of an order amending a site certificate under the Type B review process. Council will consider two actions to address these issues:

I. The Council will first consider adopting temporary rules to replace the amendment rules adopted on October 24, 2017. The temporary rules would be similar to the October 2017 amendment rules, except that they would include modifications to:
   1. Establish that the Department and Council will apply the temporary rules to requests for amendments and other review processes submitted on or after October 24, 2017 for which Council or the Department has not yet made a final decision, without requiring certificate holders to resubmit a new request for amendment or amendment determination request.
   2. Amend provisions identified by the Supreme Court as exceeding the Council's statutory authority because they limited judicial review under the Type B review process.

II. The Council will then consider initiating a rulemaking process to adopt permanent rules for the review of amendments to site certificates. Council must adopt permanent rules within 180 days. Council may adopt permanent rules that are the same as temporary rules, or may make modifications based on input from stakeholders. Staff recommends Council solicit written advice from stakeholders on potential improvements to the amendment rules prior to issuing a Notice of Proposed Rulemaking.

D. **[5:00 pm] Wheatridge Wind Energy Facility, Public Hearing on the Draft Proposed Order on Request for Amendment 4 of the Site Certificate (Hearing)** – Barry Beyeler, Council Chair/Presiding Officer. The public hearing on the Draft Proposed Order on Request for Amendment 4 (RFA4) of the Wheatridge Wind Energy Facility site certificate will begin after Council receives a brief overview from staff. The purpose of the hearing is for members of the public to provide verbal comments to Council members on RFA4 and the Draft Proposed Order on 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 written comment period on the draft proposed order and amendment request is open until September 9, 2019 at 5:00 PM, unless extended by Council.

E. **[5:45pm] Perennial Wind Chaser Station, Public Hearing on the Draft Proposed Order on Request for Amendment 1 of the Site Certificate (Hearing)** – Barry Beyeler, Council Chair/Presiding Officer. The public hearing on the Draft Proposed Order on Request for Amendment 1 (RFA1) of the Perennial Wind Chaser site certificate will begin after Council receives a brief overview from staff. The purpose of the hearing is for members of the public to provide verbal comments to Council members on RFA1 and the Draft Proposed Order on RFA1. RFA1 seeks Council approval to extend the

construction commencement and completion timelines by two years. The comment period on the Draft Proposed Order and RFA1 closes at the end of the hearing, unless extended by Council.

Friday, August 23, 2019

F. **Consent Calendar** – Approval of minutes; Council Secretary Report; and other routine Council business.

G. **The Climate Trust Audit Update (Information Item)** – Maxwell Woods, Acting Council Secretary. The Council will receive a presentation on The Climate Trust's 2017 Financial Audit.

H. **[9:00 am] Rulemaking Hearing: 2019 Housekeeping Rulemaking Project (Hearing)** – Christopher Clark, Rules Coordinator. The Council will receive oral public comments on the proposed amendments to OAR chapter 345. The deadline to provide the Council with oral or written comments on the proposed rule amendments is the close of the hearing.

I. **Perennial Wind Chaser Station, Council Review of Draft Proposed Order on Request for Amendment 1 of the Site Certificate (Information Item)** – Katie Clifford, Senior Siting Analyst. Council will review the Draft Proposed Order, consider comments received on the record of the Draft Proposed Order public hearing, and may provide comments to staff on the Draft Proposed Order for consideration in the Proposed Order.

J. **Public Comment** – 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.

K. **Nolin Hills Wind Power Project, Request for Extension of Notice of Intent Timeline (Action Item)** – Katie Clifford, Senior Siting Analyst. Council will consider a request from Capitol Power Corporation to extend the expiration date for the Notice of Intent for the proposed Nolin Hills Wind Power Project by one year.

L. **Montague Wind Power Facility, Council Review and Decision on Amendment 4 of the Site Certificate (Action Items)** – Chase McVeigh-Walker Senior Siting Analyst. Council will review the Proposed Order on Amendment 4 and will either adopt, modify, or reject the proposed order as the final order. Request for Amendment 4 seeks Council approval of the following: Expansion of the site boundary and micro-siting corridor; construction and operation of up to 81 wind turbines; construction and operation of a solar photovoltaic generating system of up to 1,189 acres; construction and operation of up to a 100-megawatt battery storage system, and related or supporting facility components.

M. **Summit Ridge Wind Farm, Council Decision on Requests for Contested Case; and the Amended Proposed Order on Request for Amendment 4 of the Site Certificate (Action Items)** – Maxwell Woods, Acting Council Secretary. The Council will first consider requests for contested case on the Amended Proposed Order on Request for Amendment 4 of the Summit Ridge Wind Farm site certificate. If Council accepts a contested case request, it will direct a contested case to be conducted. If Council denies all contested case requests, Council will proceed to review the Amended Proposed Order on Amendment 4 and will either adopt, modify, or reject the Amended Proposed

Order as the final order. Request for Amendment 4 seeks Council approval to extend the construction commencement and completion deadlines by two years.

I. **Council Decision on Requests for Contested Case** – The Council will consider requests for contested case on the Amended Proposed Order on Request for Amendment 4.
II. **Council Decision on Proposed Order** – Unless a contested case proceeding is granted, Council will proceed to review the Amended Proposed Order on Amendment 4 and will either adopt, modify, or reject the Amended Proposed Order as the final order.

N. Rulemaking: 2019 Housekeeping – Council Deliberation (Action Item) – Christopher Clark, Rules Coordinator. After considering all the comments received on the record for this rulemaking (i.e. before the comment deadline at the close of the hearing that occurred as Agenda Item H), the Council will deliberate and decide whether to approve final rule language, or provide additional direction to staff.

Adjourn

Anticipated Future Energy Facility Siting Council Meetings:

- **September 26-27, 2019** – Clatskanie
- **October 24-25, 2019** – location to be determined
- **November 21-22, 2019** – location to be determined
- **December 19-20, 2019** – location to be determined

To participate by teleconference please call toll-free: 1-877-873-8017 and enter code 799345.

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Meeting Materials associated with the agenda items are available at**:**
https://www.oregon.gov/energy/facilities-safety/facilities/Pages/Council-Meetings.aspx

Requests to the Council to Address an Issue:
Pursuant to Oregon Administrative Rule 345-011-0035, the public may ask the Council formally to address relevant issues within the Council's jurisdiction at future meetings. Please be sure to include information about why the issue should be on the agenda. Your request must be in writing and received at least 14 days before the Council meeting.

To ask the Council to address an issue, call or write:

EFSC Secretary
Energy Siting Division/ODOE
550 Capitol St. NE
Salem, OR 97301-3737

Toll-Free (in Oregon): 1-800-221-8035
Phone: 503-378-8328
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OREGON DEPARTMENT OF ENERGY

ENERGY FACILITY SITING COUNCIL

Barry Beyeler, Chair ■ Hanley Jenkins, Vice-Chair ■ Marcy Grail ■ Ann Gravatt ■ Kent Howe ■ Mary Winters

Energy Facility Siting Council
August 22-23, 2019
Meeting Minutes

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Friday, August 23, 2019 at 8:30 a.m.
Port of Morrow - Riverfront Room
2 Marine Drive Boardman, OR

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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, August 22, 2019 - Boardman

Call to Order: The meeting was called to order at 3:00 p.m. on August 22, 2019 by Chair Barry Beyeler.

Roll Call: Council Chair Barry Beyeler, Council Members Marcy Grail and Kent Howe were present. Council Member Mary Winters arrived shortly after roll call at approximately 3:10 p.m. Council Member Ann Gravatt attended remotely via telephone but did not attend until 5 p.m.

Oregon Department of Energy representatives present were Senior Policy Advisor Maxwell Woods, Senior Siting Analyst Sarah Esterson, Senior Siting Analyst Katie Clifford, Senior Siting Analyst Chase McVeigh-Walker, Rules Coordinator Christopher Clark, Operations Analyst Sean Mole, Temporary Division Assistant Erica Euen, and Communications Outreach Jennifer Kalez. EFSC Counsel Patrick Rowe of the Department of Justice was also present.

A. Wheatridge Wind Energy Facility, Draft Proposed Order on Request for Amendment 4 of the Site Certificate (Information Item) – Sarah Esterson, Senior Siting Analyst, gave a presentation on the Draft Proposed Order on Request for Amendment 4 of the Wheatridge Wind Energy Facility site certificate; a public hearing was conducted as Agenda Item D; the written comment period extended through September 9, 2019. Request for Amendment 4 (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 megawatts (MW) of photovoltaic solar energy facility components, up to 41 distributed energy storage (battery) system sites and expansion 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.

Council Member Kent Howe asked Sarah if the Conditional Use Permit must be applied for through Morrow County or if the permit is incorporated into the EFSC process. Sarah answered that it is incorporated in the process.

B. Perennial Wind Chaser Station, Draft Proposed Order on Request for Amendment 1 of the Site Certificate (Information Item) – Katie Clifford, Senior Siting Analyst, gave a presentation on the Draft Proposed Order on Request for Amendment 1 of the Perennial Wind Chaser Station site certificate; a public hearing was conducted as Agenda Item D, which concluded the public comment period. Request for Amendment 1 (RFA1) seeks Council approval to extend the construction commencement and completion timelines by two years for the previously approved 450 MW natural gas-fueled power generation facility and related or supporting facility components. 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.

Council Member Mary Winters asked Katie to clarify why the department thought the certificate holder had met two or more criteria under ORS 215.274 / UCDC § 152.617(II)(7)(B).
Katie explained the department's findings and conclusion.

Max requested Katie explain the ZLD (zero liquid discharge) options.
Katie explained that it is an option for managing cooling tower system water.

Max asked to make sure Council understood the monetary path option for compliance with the EFSC Carbon standard.

Max noted that the meeting was ahead of schedule and asked to move to agenda item G.
Chair Beyeler approved the agenda modification.

G. The Climate Trust Audit Update (Information Item) – Maxwell Woods, Acting Council Secretary, gave a presentation on The Climate Trust's 2017 Financial Audit.

C. Site Certificate Amendment Process Rulemaking (Action Item) – Patrick Rowe, Department of Justice and Christopher Clark, Rulemaking Coordinator. Christopher Clark provided an overview of the history of the 2017 Amendment Rulemaking project, including adoption of permanent rules in October 2017 through Administrative Orders EFSC 4-2017 and EFSC 5-2017. Patrick Rowe provided an overview of the decision that the Supreme Court issued on August 1, 2019. He explained that the Court held that there had been one procedural error and one substantive error in the rulemaking. The procedural error said that the October 2017 rules were invalid because the Council had failed to substantially comply with ORS 183.335(3)(d). The substantive error appeared in three rules, which stated that the right to seek judicial review of an amendment proceeding under the Type B review process was limited to those persons who had provided written comments by the written comment deadline, and that judicial review would be limited to the issues raised in that person's comments. Mr. Rowe explained that the rules were based on ORS 469.403, which limits judicial review for decisions that have gone through a contested case proceeding. Mr. Rowe explained that because Type B review does not allow for contested cases, the Court held a different statute, ORS 183.482, governs judicial review of Type B amendment decisions and that that statute does not include any requirement for a person to have commented on the record to obtain judicial review. Mr. Rowe and Mr. Clark explained the Department's recommendation for Council to adopt temporary rules to replace the rules that were held invalid. Mr. Clark discussed the procedures for adopting temporary rules. Mr. Rowe discussed the justification for adopting temporary rules, including the State's position that failure to adopt temporary rules could result in serious prejudice to certificate holders with pending amendment requests who are dependent on a timely decision on their request from Council. Mr. Clark and Mr. Rowe also recommended the Council initiate rulemaking to adopt permanent rules within 180 days.

Mary Winters asked if there was any case law interpreting authority to adopt temporary rules in a similar situation where a rule was invalidated.
Patrick Rowe answered yes, about four that he knows of. He explained that in one of those situations it was interpreted that the court would not put itself in the agency's position, so if the agency identifies the need for the temporary rules the court would uphold the temporary rules.

Kent Howe asked for clarification of which facilities are included under ORS 469.410(1), which the temporary rules would not be applied to.
Christopher Clark answered that the rules would not apply to old facilities existing prior to the siting process.

Christopher Clark provided a projected timeline for adoption of permanent rules, which include a 30-day period to solicit written input from stakeholders prior to considering proposed rules in October, a rulemaking hearing in November, and consideration of permanent rules in December.

Marcy Grail noted that the timeline to make new permanent rules seems too ambitious and that there could be weather or other issues delaying the process.

Max Woods explained that the Department had that in mind when creating the timeline and there is a buffer around the timeline to ensure accordance with the 180-day expiration of the temporary rules.

Chair Beyeler asked what would happen if the temporary rules expired before new rules were adopted.
Patrick explained that if that happened we would be in a similar situation as we are now.

Ann Gravatt asked for clarification on the timeline for new rulemaking process and noted that she would like to hear from stakeholders/public.
Max and Chris explained that a public comment period and hearing would take place for the permanent rule making.

Marcy Grail moved to adopt recommended temporary rules and file rules immediately.
Kent Howe seconded that motion commenting that because of extreme prejudice against and comments from certificate holders in the process it is important to move forward with temporary rules.
Motion passed unanimously.

Marcy Grail moved to initiate permanent rule making, direct staff to solicit permanent rules to propose, and propose those permanent rules at the Oct 2019 EFSC meeting.
Mary Winters seconded the motion.
Motion passed unanimously.

D. [5:00 pm] Wheatridge Wind Energy Facility, Public Hearing on the Draft Proposed Order on Request for Amendment 4 of the Site Certificate (Hearing) – Sarah Esterson, Senior Siting Analyst, gave a brief presentation. Barry Beyeler, Council Chair/Presiding Officer, opened the public hearing at 5:55 pm on the Draft Proposed Order on Request for Amendment 4 (RFA4) of the Wheatridge Wind Energy Facility site certificate after Council received a brief overview from staff. The purpose of the hearing was for members of the public to provide verbal comments to Council members on RFA4 and the Draft Proposed Order on 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 written comment period on the draft proposed order and amendment request was open until September 9, 2019 at 5:00 PM.

NextEra Energy (Certificate Holder) Mike Papalardo – Thanked the department and council for their efforts.

Carla McLane – Representing Morrow County clarified that Next Era does have a conditional use permit and are working diligently toward other permits. The county has encountered a few things that they will be asking for clarification on, but nothing problematic or too concerning. She mentioned working with NextEra staff has been pleasant. She offered to answer any questions concerning the county on the matter.

Irene Gilbert – Noted there was extreme prejudice and that she doesn't like that EFSC approved temporary rules without input from the public.

Chair Beyeler asked the certificate holder if they would like to request the comment period to be extended.
Certificate holder answered, "No."

Written public comment period closed September 9, 2019 at 5pm.

Chair Beyeler closed the public hearing at 6:10PM

E. [5:45pm] Perennial Wind Chaser Station, Public Hearing on the Draft Proposed Order on Request for Amendment 1 of the Site Certificate (Hearing) – Barry Beyeler, Council Chair/Presiding Officer, opened the public hearing on the Draft Proposed Order on Request for Amendment 1 (RFA1) of the Perennial Wind Chaser site certificate. The purpose of the hearing was for members of the public to provide verbal comments to Council members on RFA1 and the Draft Proposed Order on RFA1. RFA1 seeks Council approval to extend the construction commencement and completion timelines by two years. The comment period on the Draft Proposed Order and RFA1 closed at the end of the hearing.

Richard Allen (Certificate Holder's legal representation) – Thanked Katie and the department/council. Spoke to applying for an amendment under the rules. Touched on comments they had received and explained that they had responded to them. Offered to answer any questions and asked the Council to refer to their written comment submittal.

Ryan Rittenhouse (Friends of the Columbia Gorge) – Stated that the site certificate is expired and cannot be renewed or changed. Thinks the request for amendment was submitted under invalid rules. Thinks they must submit a new application for a site certificate. Asking ODOE/Council not to process amendment request. Reiterated that the cite certificate is expired and void. Mentioned public health and environment concerns including climate change issues. Other methane gas power plants are nearby, so this would create a hotspot of emissions.

Dan Serres (Columbia Riverkeeper) – Agreed with prior testimony by Ryan Rittenhouse. Stated that site certificate is void. Council must consider changes in facts or law, such as the cradle-to-grave impacts of fracked gas and more information about how climate change is a threat to Oregon and the Columbia River watershed. Methane leaks are likely from facility

operation. The facility would also result in VOC emissions and other air pollution. The Carty Generating Station emitted more air pollution than the facility was originally permitted for. The Perennial Wind Chaser Station would be non-base load, and air emissions are not limited by the DEQ permit during facility startup/shutdown; therefore, VOCs from Perennial are likely to be more than expected too. Smog-forming pollution from the facility may impact air quality at protected areas. The DEQ Air Contaminant Discharge Permit expires July 26, 2020 if Perennial does not commence construction by that date, but their request for amendment to their site certificate is for a construction commencement date later than that. There is no place for natural gas in Oregon's energy future. The facility is not needed and hasn't demonstrated a market for it.

(by phone) Emily Krafft (350 PDX) – Presented concern with the DPO and stated the site certificate is invalid. Adverse impacts on environment, health, and climate. Significant changes since site certificate was issued. We must reduce GHGs and phase out fossil fuels and increase renewable energy. Does this facility promote Oregon's energy policy (ORS 469.010)? The facility would impede OR's transition to renewable energy. Fracked gas is now known to be comparable to coal instead of a bridge fuel. Perennial Power Holdings, Inc. owns a 40 percent stake in American Bituminous Power Partners. In 2018 the Associated Press reported that American Bituminous Power Partners was at risk of bankruptcy. The U.S. Environmental Protection Agency has found that the coal waste plant was not fully in compliance with Clean Air Act requirements. Urged council to deny the request.

(by phone) Dena Turner – Urged council to deny the RFA stating that there are no customers for the facility and noting they do not have a power purchase agreement. Fracked gas has cradle-to-grave impacts. Changes in fact or law include climate science that shows natural gas is no longer a bridge fuel. The site certificate is invalid.

(by phone) Janine O'Rourke (350 PDX) – Facility will negatively affect our future. Approving would go against OR's GHG reduction goals. There is no market need for this facility. Urged council to review public comments and to deny request.

(by phone) Eileen Fromer – Reject the request for amendment due to the climate change implications. Threatens health and climate. Oregon energy policy is moving away from natural gas infrastructure. There is no power purchase agreement, and this facility is not needed or wanted. Urged council to deny the request.

Richard Allen (Certificate Holder) – Council does not have authority over federally-delegated programs so air quality permits do not fall under council but instead DEQ. As for climate the council has the Carbon Dioxide standard. Responding to the comment that the plant is not needed he said there is no need standard that council has and that the market will decide whether they get a purchase agreement.

Marcy Grail asked if Richard Allen would be present tomorrow.
Richard Allen responded yes.

Chair Beyeler closed the hearing at 6:57PM

Meeting Adjourned at 6:58PM

Friday, August 23, 2019 - Boardman

Call to Order: The meeting was called to order at 8:30 p.m. on August 23, 2019 by Chair Barry Beyeler.

Roll Call: Council Chair Barry Beyeler and Council Members Marcy Grail, Kent Howe, and Mary Winters were present. Council Member Ann Gravatt attended remotely via telephone.

Oregon Department of Energy representatives present were Senior Policy Advisor Maxwell Woods, Senior Siting Analyst Sarah Esterson, Senior Siting Analyst Katie Clifford, Senior Siting Analyst Chase McVeigh-Walker, Rules Coordinator Christopher Clark, Operations Analyst Sean Mole, Temporary Division Assistant Erica Euen, and Communications Outreach Jennifer Kalez. EFSC Counsel Patrick Rowe of the Department of Justice was also present.

F. Consent Calendar – Approval of minutes; Council Secretary Report; and other routine Council business.

Marcy Grail moved that meeting minutes from May and June be approved.
The motion passed unanimously.

Availability for future meetings –
September: Mary Winters is unavailable
October: Kent Howe and Ann Gravatt are unavailable

(Agenda Item G occurred between B & C)

H. [9:00 am] Rulemaking Hearing: 2019 Housekeeping Rulemaking Project (Hearing) – Christopher Clark, Rules Coordinator, introduced the hearing and invited public comments on the proposed amendments to OAR chapter 345. Mr. Clark confirmed that the deadline to provide the Council with oral or written comments on the proposed rule amendments was the close of the hearing.

Ann Gravatt asked for Patrick Rowe's advice on the verbiage of "will" vs. "shall."
Max assured Ann that Patrick would speak to that later in the meeting, as part of Agenda Item N.

Marcy noted that there was concern mentioned in public comment that we did not give enough notice.

No one expressed interest in providing public comment so Mr. Clark recessed the hearing at 9:04 am. The hearing was reopened at 9:30 am during discussion of Agenda Item I. No one expressed interest in providing public comment and the hearing was adjourned.

I. Perennial Wind Chaser Station, Council Review of Draft Proposed Order on Request for Amendment 1 of the Site Certificate (Information Item) – Katie Clifford, Senior Siting Analyst. Council will review the Draft Proposed Order, consider comments received on the record of the Draft Proposed Order public hearing, and may provide comments to staff on the Draft Proposed Order for consideration in the Proposed Order.

Katie discussed the Confederated Tribes of the Umatilla Indian Reservation's request that a cultural resources monitor be present during construction ground-disturbing activities. In response to a question from Chair Beyeler, Katie stated that the Department would have to consider whether construction worker training would still be necessary if a cultural resources monitor is present.

Kent Howe asked if the PUC has determined that the facility is needed to meet the State of Oregon's energy needs.
Max explained that is a little outside our scope but that the PUC considers whether power generating plants are needed when they evaluate rate cases (rate recovery requested by regulated investor-owned utilities). However, Council cannot consider whether it is needed or not because by statute, Council is precluded from considered "need" for a power generating facility.

Mary Winters asked about the limits of the information request based on testimony about a parent company going into bankruptcy. She wanted to know if they can only ask for information or if they can check into the legitimacy of the information. Katie responded by going over the applicable rules that requires the certificate holder to explain the need for the timeline extension and let council know it is just an information requirement.
Max said not having a power purchase agreement is a common reason for a timeline extension request. He added that regarding the concern about the parent company, ODOE staff will need to investigate that further and consider that in light of the Organization Expertise standard before they can speak to that.

Marcy asked about a comment that indicated the certificate holder did not meet the timeline for submitting an amendment. Max explained that they did meet the deadline.

Mary said that if the Council must simply take at face value the certificate holder's explanation of the need for a timeline extension, it's not particularly helpful information to Council. Max suggested that the permanent rulemaking contemplate this.

Ann commented that she does not see any evidence that the facility is something that one of the utilities has included in their integrated resource plan; therefore, Council cannot look to the PUC for any indication that the facility is needed by an investor-owned utility in Oregon.

Mary asked for staff comment on the comments made about the DEQ air quality permit.
Katie responded that they need to investigate that further before they can discuss it in depth.
Max added that the council does not have an air quality standard, but the Council considers visibility and plumes related to the Protected Areas and Scenic Resources.

Marcy asked how in-depth the Council should look into changes in fact or law.
Max and Katie provided examples and said that Council should look into changes as they pertain to Council standards.
Marcy said it's important to help the public understand the scope of Council's review (specifically, any limits on that scope).

Ann noted that the Council is under a fair level of public scrutiny and that members of the Council have been appointed by the Governor and approved by the legislature to act as representatives of the public. Ann takes public comment seriously. She is aware of what the Council's limitations are, but also notes that Council members are there to act as representatives of the public.

Based on staff recommendation, Council carried over the review of comments and the DPO to the September 26-27, 2019 meeting.

J. Public Comment – This time was reserved for the public to address the Council regarding any item within the Council's jurisdiction that was not otherwise closed for comment.

Jodi Parker – encouraged council and local government to adopt hiring standards for construction on energy facilities to require utilizing local workforces.

Carla McLane – wanted to remind council about the disconnect between county process and council process, specifically goal 3 and goal 5 standards.

Chair Beyeler closed the public comment period at 9:40 a.m.

K. Nolin Hills Wind Power Project, Request for Extension of Notice of Intent Timeline (Action Item) –
Katie Clifford, Senior Siting Analyst. Council considered a request from Capitol Power Corporation to extend the expiration date for the Notice of Intent for the proposed Nolin Hills Wind Power Project by one year.

Marcy moved that council approve request to extend the expiration date for the Notice of Intent for the proposed Nolin Hills Wind Power Project by one year.
Kent Howe Seconded the motion.
Motion passed unanimously.

L. Montague Wind Power Facility, Council Review and Decision on Amendment 4 of the Site Certificate (Action Items) – Chase McVeigh-Walker Senior Siting Analyst. Council reviewed the Proposed Order on Amendment 4. Request for Amendment 4 seeks Council approval of the following: Expansion of the site boundary and micro-siting corridor; construction and operation of up to 81 wind turbines; construction and operation of a solar photovoltaic generating system of up to 1,189 acres; construction and operation of up to a 100-megawatt battery storage system, and related or supporting facility components.

Chair Beyeler asked if turbines would be constructed in the same area as the solar array as depicted in the image.

Chase explained the image was of a combination of options so no, it would be either solar or turbines in that specific area on the map.

Kent Howe asked about turbine set back requirement terminology.
Max clarified for him.

Beyeler asked about a minor discrepancy in the DPO.
Chase noted he mislabeled a condition (52) so a numbering typo made two conditions 52, the second one should be 53.

Marcy moved to approve the Proposed Order on Amendment 4 with modifications.
Kent Howe seconded.
Motioned passed unanimously.

M. Summit Ridge Wind Farm, Council Decision on Requests for Contested Case; and the Amended Proposed Order on Request for Amendment 4 of the Site Certificate (Action Items) – Sarah Esterson, Senior Siting Analyst. The Council first considered requests for contested case on the Amended Proposed Order on Request for Amendment 4 of the Summit Ridge Wind Farm site certificate, and then reviewed the Amended Proposed Order on Amendment 4. Request for Amendment 4 seeks Council approval to extend the construction commencement and completion deadlines by two years.

Max explained Supreme Court decision.

Marcy asked for clarification on why the department did not seek out more information regarding Irene Gilbert's comment.
Marcy asked for clarification on why the department did not seek out more information regarding to Gilberts comment.
Sarah explained it was because it wasn't applicable to this actual site.

Mary asked how public participation and response will work into the process.
Sarah explained how public will be noticed and given the opportunity to comment.

Action Item 1:
Sarah explained the 3 action options.
Council deliberated.
Marcy Grail moved to deny contested case because the request did not raise significant issues of law or fact.
Motion was seconded by Kent Howe
Motion passed unanimously.

Action Item 2:
Sarah explained the 3 action options.
Marcy Grail moved to approve the Amended Proposed Order and adopt the Final Order with modifications related to renumbering rule references.
Motion was seconded by Kent Howe
Barry Beyeler, Mary Winters, Kent Howe, and Marcy Grail voted yes. Ann Gravatt voted no. Motion passed 4-1.

N. Rulemaking: 2019 Housekeeping – Council Deliberation (Action Item) – Christopher Clark, Rules Coordinator, provided an overview of the rulemaking project and summarized public comments received before the close of the public comment period. As of that time, the Council had received two public comment letters and one comment letter from staff. Mr. Clark summarized the issues raised in the public comment letters rand provided department responses. The first issue was to reject all rule changes which would revise rules declared invalid in Friends v. EFSC. Mr. Clark explained that the department agrees with this recommendation for separate reasons. The second issue is to retain the word "shall" to denote an obligation instead of "must" or "will."

Marcy Grail expressed hesitancy to discuss this issue before counsel has reviewed.
Patrick Rowe stated that Council could discuss, but may choose to defer a decision pending further review.

Ann Gravatt asked what the intent of the changes from “shall” to “must” and “will” was.
Mr. Clark explained the rationale behind the department’s drafting choices and explained that there was not an intent to create a substantive change in the operation of the rules.

Mary Winters stated that there is a legal debate about use of the word shall, and that there is a general move away from its use.

Mr. Clark recommended Council defer action until counsel has reviewed.

Marcy Grail asked why we have received comments that this change was not properly noticed.
Mr. Clark explained that non-substantive changes are often not specifically described in notice, but that the language was included in both draft and proposed rules provided to stakeholders.

Mr. Clark summarized the third recommendation to revise the term “by mail or email” to state that notices will be sent by “mail and email” in all proposed and existing rules. Mr. Clark explained that the Department does not recommend taking action on this issue at this time.

Mr. Clark summarized the Department’s testimony and recommendations on the rules.

Council deliberated.
Council decided to defer action until September.

Irene Gilbert commented on the rulemaking off the record.
Mr. Clark added that Irene did provide advice on this rulemaking project.

Meeting adjourned at approximately 12:30 pm.

For more details visit the Council Meetings website

BEFORE THE
ENERGY FACILITY SITING COUNCIL
OF THE STATE OF OREGON

In the Matter of Request for Amendment 4 for the Montague Wind Power Facility Site Certificate	))))	FINAL ORDER ON REQUEST FOR AMENDMENT 4 TO THE SITE CERTIFICATE

August 23, 2019

I.D. Procedural History

The Council issued the *Final Order on the Application for Site Certificate for the Montague Wind Power Facility (Final Order on the Application)* on September 10, 2010, which authorized construction and operation of a 404 MW wind energy generation facility, with up to 269 wind turbines and related or supporting facilities.

On December 28, 2012, the certificate holder submitted to the Department its Request for Amendment 1 (RFA1) for the facility. RFA1 requested extension of the construction commencement and completion deadlines by two years, reduction in the minimum aboveground blade-tip clearance, and transfer of the site certificate.[4] The Council issued a *Final Order on Amendment 1 of the Site Certificate* on June 21, 2013, which authorized an extension of the construction commencement deadline from September 14, 2013 to September 14, 2015; and, extension of the construction completion deadline from September 14, 2016 to September 14, 2018.

On March 11, 2015, the certificate holder submitted to the Department its Request for Amendment 2 (RFA2). RFA2 requested extension of the construction commencement and completion deadlines by two years. The Council issued a *Final Order on Amendment 2 of the Site Certificate* on December 4, 2015 which authorized an extension of the construction commencement deadline from September 14, 2015 to September 14, 2017; and, extension of the construction completion deadline from September 14, 2018 to September 14, 2020.

On May 4, 2017, the certificate holder submitted to the Department its Request for Amendment 3 (RFA3). RFA3 requested authorization to change a wind turbine dimension – to reduce the minimum aboveground blade-tip clearance. The Council issued a *Final Order on Amendment 3 of the Site Certificate* on July 12, 2017, which authorized the change in minimum aboveground blade-tip clearance.

On January 9, 2018, the Department received the preliminary Request for Amendment (pRFA4) to the Montague Wind Power Facility's existing site certificate.[5] The Department initiated consultation with reviewing agencies and posted an announcement on the Department's website notifying the public that pRFA4 had been submitted. Under OAR 345-027-0363(5), an RFA is complete when the Department finds that a certificate holder has submitted information adequate for the Council to make findings or impose conditions on all applicable laws and Council standards. Pursuant to OAR 345-027-0363(2), on February 20, 2018 the Department

[4] Transfer of the site certificate to Portland General Electric was not completed and Montague Wind Power Facility LLC remains the site certificate holder.

[5] The Department received pRFA4 on November 21, 2017. However, based on outstanding unpaid invoices for ongoing siting work related to the Montague Wind Power facility at the time, the Department was restricted from commencing work on pRFA4 by a "stop work order" to be lifted upon unpaid invoice resolution. On January 9, 2018, Avangrid Renewables, the parent company of Montague Wind Power Facility, LLC made full payment of fees and the Stop Work Order was lifted.

determined pRFA4 to be incomplete. The Department issued requests for additional information on March 9, May 24, June 15, July 25, August 15, September 21, and December 7, 2018.[6] The certificate holder provided revised exhibits, responses to the information requests, and additional revisions to the scope of the amendment request from April through December, 2018. After reviewing the revised exhibits, the Department determined the RFA to be complete and, on January 15, 2019, the certificate holder filed a complete RFA4. On March 25, 2019, the certificate holder submitted an amended RFA4, which was found to be complete on April 4, 2019. The certificate holder filed a complete revised RFA4 on April 5, 2019 and on the same day, the Department posted an announcement on the Department's website notifying the public that the complete RFA had been received.

II. AMENDMENT PROCESS

II.A. Requested Amendment

In RFA4, the certificate holder requests Council approval to amend its site certificate for the construction and operation of new facility components (referred to as "Phase 2"); addition of new area within the site boundary and micrositing corridor; and, new and amended site certificate conditions.

The certificate holder seeks flexibility to install any combination of the wind and solar energy facility components as long as the total maximum output of Phase 2 would not exceed 202 MW.[7] The certificate holder states that the combined maximum output from Phase 1 and 2 would not exceed 404 MW.[8] To support the flexibility requested, the certificate holder performed comprehensive field surveys to support the requested increase in micrositing

[6] MWPAMD4. Request for Additional Information. 2018-03-09; 2018-05-24; 2018-06-15; 2018-07-25; 2018-08-15; 2018-09-21; 2018-12-07.

[7] MWPAMD DPO Comments Gilbert 2019-05-16. On the record of the draft proposed order, as an individual and on behalf of the Friends of the Grande Ronde Valley (collectively referred to as Ms. Gilbert), Ms. Gilbert expresses concerns that there is not enough evidence on the record to ensure that the facility would comply with ORS 469.310. However, ORS 469.310 is a policy statement and does not contain substantive review criteria. Additionally, Ms. Gilbert states that the site certificate fails to meet the requirements of ORS 469.401(2) and does not provide information necessary to determine compliance with the standards, statutes and rules described in ORS 469.501. Ms. Gilbert indicates that the provided flexibility denies the public, reviewing agencies, and any other interested party the information necessary to evaluate impacts to any of the evaluated criteria contained in Division's 22 and 24 (visual, noise, health and safety, land use, habitat impacts, impacts to threatened and endangered wildlife, etc.). As presented in Section III. *Review of the Requested Amendment* of this the draft proposed order and this proposed order, the Department, recognizing the potential of the final Phase 2 design layout differing from the three design scenarios provided, recommends that Council impose conditions, as needed, based on the methodology and maximum impact evaluated for each design scenario but not be prescriptive to a design scenario or specific facility component. The Department has evaluated the full range of potential impacts in accordance with Council rule and standards, and stands by its recommendations and findings that Council approve RFA4.

[8] The specific power generating capacity of an energy facility or facility components, such as an individual wind turbine, is not relevant to a Council standard.

BEFORE THE
ENERGY FACILITY SITING COUNCIL
OF THE STATE OF OREGON

In the Matter of Request for Amendment 4 for the Summit Ridge Wind Farm Site Certificate	))))	FINAL ORDER ON REQUEST FOR AMENDMENT 4 TO THE SITE CERTIFICATE

August 23, 2019

I. INTRODUCTION

The Oregon Energy Facility Siting Council (Council or EFSC) issues this final order, in accordance with Oregon Revised Statute (ORS) 469.405(1) and Oregon Administrative Rule (OAR) 345-027-0371, based on its review of Request for Amendment 4 (amendment request or RFA4) to the Summit Ridge Wind Farm site certificate, as well as comments and recommendations received by specific state agencies, local and Tribal governments, and members of the public during the draft proposed order comment period. The certificate holder is Summit Ridge Wind, LLC (Summit Ridge or certificate holder) which is wholly owned by Pattern Energy Group 2 LP.

The certificate holder requests that Council approve changes to the site certificate to extend the construction commencement and completion deadlines. In accordance with the existing site certificate, construction must have begun by August 19, 2018 and be completed by August 19, 2021.[1] The amendment requests that the construction deadlines be extended by two years; the amendment requests that the construction commencement deadline be extended to August 19, 2020 and that the construction completion deadline be extended to August 19, 2023. For amendments requesting to extend construction deadlines, the Oregon Department of Energy (Department or ODOE) and Council evaluate whether there have been "changes in fact or law" since the site certificate or amended site certificate was issued to determine whether, based on changes in fact or law, the facility would continue to satisfy requirements of the standard.[2]

Based upon review of this amendment request, in conjunction with comments received by members of the public and recommendations received by state agencies and local governments, the Council issues a fourth amended site certificate for the Summit Ridge Wind Farm, subject to the existing, new, and amended conditions set forth in this final order.

I.A. Name and Address of Certificate Holder

Summit Ridge Wind, LLC
c/o Pattern Renewables 2 LP
Pier 1, Bay 3
San Francisco, CA 94111

Parent Company of the Certificate Holder

Pattern Renewables 2 LP (subsidiary of Pattern Energy Group 2 LP)
Pier 1, Bay 3
San Francisco, CA 94111

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[1] The certificate holder submitted the request to extend the construction commencement and completion deadlines before the applicable construction deadlines and therefore satisfies the requirements of OAR 345-027-0385(1), and suspends the deadlines until Council decides on the amendment request.
[2] OAR 345-027-0375(2)(b)

II. AMENDMENT PROCESS

II.A. Requested Amendment

The certificate holder requests an amendment to the site certificate to extend the deadline (1) to begin construction from August 19, 2018 to August 19, 2020, and (2) to complete construction from August 19, 2021 to August 19, 2023.

OAR 345-027-0360(1)(d) requires that the certificate holder provide the specific language for changes in the site certificate, including affected conditions. The certificate holder proposes altering the dates contained within conditions 4.1 and 4.2 to reflect its proposed changes to construction deadlines.

II.B. Amendment Review Process

Council rules describe the differences in review processes for the Type A and Type B review paths at OAR 345-027-0351.[7] The Type A review is the standard or "default" amendment review process for changes that require an amendment. A key procedural difference between the Type A and Type B review process is that the Type A review requires a public hearing on the draft proposed order, and provides an opportunity to request a contested case proceeding on the Department's proposed order. Another difference between the Type A and Type B review process relates to the time afforded to the Department in its determination of completeness of the amendment and issuance of the draft proposed order. It is important to note that Council rules authorize the Department to adjust the timelines for these specific procedural requirements, if necessary.

A certificate holder may submit an amendment determination request to the Department for a written determination of whether a request for amendment justifies review under the Type B review process. The certificate holder has the burden of justifying the appropriateness of the Type B review process as described in OAR 345-027-0351(3). The Department may consider, but is not limited to, the factors identified in OAR 345-027-0357(8) when determining whether to process an amendment request under Type B review.

On August 17, 2018, the certificate holder submitted a Type B review amendment determination request (Type B Review ADR) in conjunction with its preliminary Request for Amendment 4

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[7] SRWAMD4. Draft Proposed Order Public Comments FOCG. 2019-02-22. On the record of the draft proposed order, Friends of the Columbia Gorge (FOCG) assert that because Council's OAR Chapter 345 Division 27 rules (adopted October 2017) are on appeal at the Oregon Supreme, the amendment request is invalid. While portions of the rules are being challenged in the Oregon Supreme Court, a stay of the rules or any other injunction against using the rules has not been issued. As such, the rules are valid and are applicable to the amendment request, as well as all other amendment requests pending with EFSC at this time. The prior rules were repealed in 2017, and are not applicable to the review of the RFA4.

(pRFA4). The Type B Review ADR requested that the Department review and determine whether, based on evaluation of the factors contained within OAR 345-027-0357(8), the RFA should be reviewed under the Type B review process. On August 23, 2018, the Department determined that Type A review be maintained due to the insufficiency of the certificate holder's Type B Review ADR evaluation of OAR 345-027-0357(8) factors. On September 5, 2018, the certificate holder submitted a supplement to its Type B Review ADR and requested that the Department re-evaluate its Type A Review determination. On November 28, 2018, based upon review of the certificate holder's supplemental material and responses to the Department's Request for Additional Information, the Department determined that the RFA4 could be reviewed under the Type B review process.

Pursuant to OAR 345-027-0363(2), on September 28, 2018, the Department determined pRFA4 to be incomplete and issued a request for additional information.[8] On November 20, 2018, the Department issued its second request for additional information. The certificate holder provided responses to the information requests on November 7 and November 30, 2018.

After reviewing the responses to its information request, the Department determined the RFA to be complete on January 10, 2019. Under OAR 345-027-0363(5), an RFA is complete when the Department finds that a certificate holder has submitted information adequate for the Council to make findings or impose conditions for all applicable laws and Council standards. On January 16, 2019, the Department posted an announcement on its project website notifying the public that the complete RFA had been received. The Department issued its DPO on RFA4, under the Type B process, on January 16, 2019, and opened a public comment period.

On February 1, 2019, the certificate holder requested to withdraw the Type B review request and instead process the RFA under the Type A review process. As such, the Department reissued its DPO and processed the amendment request in accordance with Type A procedures at OAR 345-027-0367. The Council held a public hearing on the reissued DPO at is February 22, 2019 EFSC meeting at 10 AM at the Columbia Gorge Discovery Center in The Dalles.

All comments previously submitted on the January 16 DPO were valid and wee addressed by the Department in its proposed order on the RFA, which was issued on April 2, 2019.

Reviewing Agency Comments on Preliminary Request for Amendment 4

As presented in Attachment B of the order, the Department received comments on pRFA4 from the following reviewing agencies:

- Oregon Department of Fish and Wildlife
- Oregon State Historic Preservation Office
- Oregon Department of Geology and Mineral Industries

[8] SRWAMD4Doc5. Incomplete Determination Letter and RAIs. 2018-09-28.

- Wasco County Board of County Commissioners (Special Advisory Group)
- Wasco County Planning Department
- Confederated Tribes of the Warm Springs Reservation of Oregon

II.C. Council Review Process

Draft Proposed Order

On January 16, 2019 the Department issued the draft proposed order, and a notice of a comment period on RFA4 and the draft proposed order (notice) under the Type B review process. The notice was distributed to all persons on the Council's general mailing list, to the special mailing list established for the facility, to an updated list of property owners supplied by the certificate holder, and to a list of reviewing agencies as defined in OAR 345-001-0010(52).

On February 1, 2019, at the request of the certificate holder, the Department reissued the DPO under the Type A review process, and a notice of comment period on the RFA4 and the DPO (notice) on the same day. The notice was distributed to all persons on the Council's general mailing list, to the special mailing list established for the facility, to an updated list of property owners supplied by the certificate holder, and to a list of reviewing agencies as defined in OAR 345-001-0010(52). The comment period extended from January 16, 2019 through the close of the draft proposed order public hearing (11:51 a.m.) at the February 22, 2019 Council meeting.

On February 22, 2019, Council Chair Beyeler conducted a public hearing on the draft proposed order in The Dalles, Oregon.[9] The record of the public hearing closed on February 22, 2019 at the conclusion of the public hearing, as provided in the public notice of the draft proposed order. The Council reviewed the draft proposed order and comments received on the record of the public hearing at its regularly scheduled Council meeting on February 22, 2019 and March 22, 2019.

The Department received approximately 900 comments on the record of the draft proposed order. Attachment C of this proposed order includes an index presenting date comment received, commenter name and organization. Issues raised that are within the Council's jurisdiction and related to the amendment request are addressed under the applicable standards section below.

On February 20, 2019, the Department provided Council copies of all distinct comments that had been received to date. On February 22, 2019 at 7:30 a.m., prior to the draft proposed order public hearing, the Department provided Council electronic access to a complete set of comments, which was again updated on February 25, 2019 based on all comments received through the close of the draft proposed order public hearing (which occurred at 11:51 a.m. on

[9] SRWAMD4. Draft Proposed Order Public Comments FOCG. 2019-02-22. On the record of the draft proposed

February 22, 2019), as posted to its project website. All comments received on the record of the DPO were transmitted to Council.[10]

The comments related, in pertinent part, to issues including: (1) the "need" for the deadline extension; (2) reliance on outdated habitat and species surveys; (3) using best available science (technologies) to evaluate and mitigate potential impacts to (avian) species; (4) legitimacy of Department's actions due to pending Oregon Supreme Court review of amendment rules; (5) significance of wind turbine visibility to the Deschutes River; (6) division 27 procedural rules; (7) water use; (8) weed management; (9) Wasco County land use zoning ordinances. These issues are discussed within this proposed order.

Proposed Order

The Department issued its initial proposed order on April 2, 2019, taking into consideration Council comments, any comments received "on the record of the public hearing" (i.e., oral testimony provided at the public hearing and written comments received by the Department after the date of the notice of the public hearing and before the close of the public hearing comment period, including comments submitted on the record of the DPO), including any comments from reviewing agencies, special advisory groups, and Tribal Governments. Concurrent with the issuance of the April 2, 2019 proposed order, the Department also issued a Notice of Opportunity to Request a Contested Case and a public notice of the proposed order.[11]

Contested Case Requests on Proposed Order

Only those persons who commented on the record of the draft proposed order were eligible to request a contested case proceeding on the proposed order. The opportunity to request a contested case on the proposed order extended from April 2 through May 2, 2019. The following three individuals or groups requested Council grant a contested case to evaluate specific issues on the proposed order: 1) a group of five organizations, jointly: Friends of the Columbia Gorge, Oregon Wild, Oregon Natural Desert Association, Central Oregon LandWatch, and the East Cascades Audubon Society (Friends); 2) Irene Gilbert, as an individual and also representing Friends of the Grande Ronde Valley (Gilbert); and Fuji and Jim Kreider.

A summary of issues raised in the three requests for contested case received is provided below. The analysis and Council decision denying the requests for a contested case proceeding are provided in the July 2019 Order on Requests for Contested Case on the Proposed Order on Request for Amendment 4 of the Summit Ridge Wind Farm Site Certificate (July Order on Requests).

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order, Friends of the Columbia Gorge note that all comments received on the record must be considered by the Council as required by OAR 345-027-0367 and OAR 345-027-0371.

[11] See OAR 345-027-0371.

If the Council does not issue an order in response to a petition for reconsideration, per OAR 345-001-0080(4) and ORS 183.484(2), the petition for reconsideration shall be deemed denied the 60th day following the date the petition was filed, and in such case, a petition for judicial review shall be filed within 60 days only following such date.

Amended Proposed Order

During review of issues raised in requests for a contested case proceeding on the proposed order, while Council denied a contested case proceeding, as allowed under OAR 345-027-0371(10)(b), Council found that two issues could be could be settled in a manner satisfactory to the Council with amendments to the proposed order, including modifications to conditions.
Council directed the Department to amend Condition 10.7, which as previously imposed required that the certificate holder submit to the Department and ODFW a pre-construction habitat assessment based on field surveys conducted in accordance with an ODFW-approved protocol. Council directed the Department to amend the condition to require that the pre-construction habitat survey include all area within the micrositing corridor, or site boundary, not including lands actively used for agricultural activities. Council also directed the Department to amend Condition 10.7 requiring that the field survey report be posted to the Department's website and be presented by the Department and ODFW to Council at a future Council meeting.

Council directed the Department to amend Condition 10.5, which as previously imposed required that, prior to construction, the certificate holder finalize and obtain approval from the Department in consultation with ODFW, of a Wildlife Monitoring and Mitigation Plan (WMMP), to be implemented during operation. Council directed the Department to amend Condition 10.5 to require consultation with ODFW to review the results of the two-year post construction bird and bat fatality monitoring study; require mitigation if the results show exceedances of thresholds of concern in the WMMP; require Department staff and ODFW staff to present the results of the fatality monitoring study and consultation outcomes to Council. Finally, Council directed the Department to amend condition 10.4 to provide clarity that the habitat assessment conducted at the habitat mitigation sites be field-based (rather than a desk-top analysis).

The Department issued its Amended Proposed Order on RFA4 on July 3, 2019, including changes to findings and conditions imposed under the Council's Fish and Wildlife Habitat and Threatened and Endangered (T&E) Species standards (Conditions 10.4, 10.5 and 10.7) as directed by Council during its May 16-17, 2019 Council meeting based on its review of the three requests for contested case received on the Department's April 2, 2019 Proposed Order on RFA4. On the same day, the Department issued Notice of the Amended Proposed Order and Notice of an Opportunity Request a Contested Case Proceeding on the Amended Proposed Order in accordance with OAR 345-027-0071(10)(b), specifying August 5, 2019 as the deadline for requests for a contested case on the material changes presented in the Amended Proposed Order.

Contested Case Requests on Amended Proposed Order

extend the construction commencement deadline from 2018 until 2020. As approved, RFA4 results in a construction extension of 6 years, with the construction commencement deadline representing 9 years in duration from the issuance of the initial site certificate.

OAR 345-028-0385(5) addresses energy facilities such as Summit Ridge that were issued a site certificate by Council prior to October 24, 2017. Under OAR 345-027-0385(5), there is no specified maximum allowable number of time extensions that can be authorized by Council, but each extension can be no more than two years from the deadline in effect before Council grants the amendment.[18] The Council notes that while there is no maximum allowable time extension for the Summit Ridge facility, given that the current RFA 4 would result in a construction commencement extension of a total of 6 years, the extension request would allow a timeline to construct the facility consistent with what would be available to a site certificate holder for an energy facility approved after the Council's amendment rules took effect, October 24, 2017 (OAR 345-027-0385(3) and (4)).

Site Certificate Expiration [OAR 345-027-0313]

Under OAR 345-027-0313, in order to avoid expiration of the site certificate, the certificate holder must begin construction of the facility no later than the construction beginning date specified in the site certificate, unless expiration of the site certificate is suspended pending final action by the Council on a request for amendment to a site certificate pursuant to OAR 345-027-0385(2). The certificate holder submitted the request to extend the construction commencement and completion deadlines before the applicable construction deadlines and therefore satisfies the requirements of OAR 345-027-0385(1).

OAR 345-027-0385(5) authorizes Council to grant construction commencement and completion deadline extensions of up to two years from the deadlines in effect prior to the Council's decision on the amendment.[19] In RFA4, the certificate holder requests to amend Conditions 4.1 and 4.2 to extend its construction commencement and completion deadlines by two years, the maximum extension allowed by rule.

Council approves the construction commencement and completion deadline extension request and imposes the following amended site certificate conditions:

> **Amended Condition 4.1:** The certificate holder shall begin construction of the facility by August 19, 2020. The Council may grant an extension of the deadline to begin construction in accordance with OAR 345-027--0385 or any successor rule in effect at the time the request for extension is submitted.

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[18] SRWAMD4. In a request for contested case on the proposed order, Friends et al raised issues related to the certificate holders' ability to properly explain the need for the construction deadline extension request, which is evaluated in the Council's July 9, 2019 Order on Requests for Contested Case on the Proposed Order for the Summit Ridge Wind Farm Site Certificate (July Order on Requests).

[19] OAR 345-027-0385(5) is specific to facility site certificates approved prior to October 24, 2017.

INDEX TO EXCERPT OF RECORD FOR PETITIONERS' OPENING BRIEF

Rec. Page Nos.	Date	Description of Document	ER Page Nos.
Rec. 4–73	8/22/2019	EFSC Temporary Administrative Order No. EFSC 9-2019	ER-1–ER-70
Tr. 1–38	8/22/2019	Transcript of August 2019 EFSC Meeting, Agenda Item C: Site Certificate Amendment Process Rulemaking	ER-71–ER-108
Rec. Ex. A9	8/20/2019	Memorandum to EFSC from Christopher M. Clark, EFSC Rules Coordinator	ER-109–ER-110

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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

EFSC 9-2019
CHAPTER 345
DEPARTMENT OF ENERGY
ENERGY FACILITY SITING COUNCIL

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FILING CAPTION: Temporary rules governing the process for amending energy facility site certificates.

EFFECTIVE DATE: 08/22/2019 THROUGH 02/17/2020

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Filed By:
Christopher Clark
Rules Coordinator

NEED FOR THE RULE(S):

Given the Oregon Supreme Court's August 1, 2019 decision in Friends of the Columbia River Gorge v. EFSC, S065478, the Oregon Energy Facility Siting Council ("EFSC" or the "Council") needs to adopt temporary rules governing the process for amending energy facility site certificates in order to ensure that the Oregon Department of Energy ("ODOE") and the Council may process pending applications for site certificate amendments without prejudice to the certificate holders that submitted those applications and to provide regulatory certainty and continuity in the processing of new applications for site certificate amendments.

JUSTIFICATION OF TEMPORARY FILING:

(1) Specific consequences that would result from the failure to immediately adopt, temporary rules.

In October 2017, the Council amended its administrative rules relating to the procedures for the amendment of site certificates. Those rules were challenged in the Oregon Supreme Court by the Friends of the Columbia River Gorge (Friends) and other groups. On August 1, 2019, the Supreme Court issued a decision declaring that the rules are invalid. That decision will become legally effective on the date that the appellate judgment issues; that future date is unknown, but could occur as soon as August 22, 2019. Because the Council repealed its previous rules for the amendment of site certificates, the invalidation of the October 2017 rules could result in there being no rules in place to allow for amendment of a site certificate. As a result, there is confusion among interested parties as to how applications that are already pending should be processed, and what, if any, rules will be in effect when the appellate judgment issues.

While the current rules are legally operative until the entry of the appellate judgment, EFSC will respect the decision of the court even before the appellate judgment issues. The petitioners in the court case have taken the position that, following the Supreme Court ruling invalidating the current rules, the pre-October 2017 rules are in effect and certificate holders that had applied for amendments under the now invalidated rules must reapply for amendments under the pre-October 2017 rules. However, when Council adopted the amendment rules in October 2017, it also

repealed OAR 345-027-0070 (the rule that had previously governed the process for site certificate amendments) in Order EFSC 5-2017. Given the Council's prior repeal of the pre-October 2017 amendment rule, if the Council does not take any action now, upon the Supreme Court's entry of the appellate judgment, it is possible that there will be no rules in place governing site certificate amendments whatsoever. Therefore, certificate holders have questions and significant concerns regarding how the Council will proceed with pending requests for amendment, and ODOE is uncertain how to process any new requests that it may receive. Further, even if Council assumed that the pre-October 2017 rules are effective, it would be unfair and substantially prejudicial to require certificate holders who have pending applications for site certificate amendments to resubmit their requests for amendment under the pre-October 2017 rules and restart the entire amendment process.

The specific consequences for each of the six pending amendment requests, as well as amendment requests that may be filed before permanent rules are adopted, are more specifically set forth in the discussion below.

(2) Who would suffer these consequences.

The consequences of the uncertainty will fall on the public, the applicants, the agency, and on participants in the site certificate amendment process, as further discussed below.

(3) Why or how failure to immediately take rulemaking action would cause these consequences.

If no action is taken, the Council may be unable to process requests for amendment until permanent rules are adopted or, at best, the amendment rules would revert to the version that was in effect prior to October 24, 2017 and Council would need to require all certificate holders with pending applications for site certificate amendments to resubmit their requests under the pre-October 2017 rules, causing those certificate holders to suffer serious prejudice.

(4) How the temporary action will avoid or mitigate those consequences.

The adoption of temporary rules will allow the orderly processing of amendment requests, including requests in progress, by allowing those amendments to be addressed under the temporary rules without requiring the certificate holder to reapply for an amendment and restart the amendment process. The temporary rules will also remove particular provisions regarding judicial review that the Supreme Court held were not within the Council's statutory authority.

Statement of Findings that failure to act promptly will result in serious prejudice to the interest of parties concerned:

There are currently six site certificate amendment requests in process with the Council. (Although not directly relevant to the Council's adopting temporary rules, it bears noting that each of these requests has been proceeding under the Type A amendment process, which does not implicate the legal concerns regarding judicial review of Type B

amendments identified in the Supreme Court decision).

If it does not adopt temporary rules governing the process for reviewing and taking action on those amendment requests, in order to process those requests Council would have to assume that the pre-October 2017 amendment rules are in effect (which is a legally questionable position) and require those six certificate holders to resubmit their requests for amendment under the pre-October 2017 rules, thus restarting the amendment process under those rules. As discussed further below, pursuing this course of action would cause serious prejudice to the interests of those certificate holders.

Additionally, if it does not adopt temporary rules, as new amendment requests are submitted, Council would also have to process them under the pre-October 2017 amendment rules (the legality of which is uncertain) or refuse to process such requests until it has an opportunity to adopt new permanent amendment rules. Were Council to begin processing new amendment applications under the pre-October 2017 rules, Council would have to determine how to handle those applications once new permanent amendment rules are adopted.

In addition to the findings above, the Council makes the following findings with regard to each of the six projects currently under review by the Council:

Summit Ridge Wind Farm

On August 16, 2018, the holder of the site certificate submitted a request for amendment to extend the construction start and end deadlines by two years. The certificate holder responded to a number of requests for additional information, and on January 16, 2019, ODOE issued a draft proposed order (DPO) under the Type B amendment process. After issuance of the DPO, the certificate holder voluntarily requested to use the Type A process. ODOE issued a new DPO in accordance with the Type A amendment process on February 1. The Council heard testimony on the proposal on February 22, 2019, and a written comment period was also open until the close of the public hearing on February 22, 2019, and ODOE prepared a Proposed Order (PO) and contested case notice, released on April 2, 2019. Three requests for contested case were received, which were evaluated by the Council at its May 17, 2019 meeting. Council directed ODOE to prepare an amended PO addressing issues raised in the contested case requests. ODOE prepared an amended PO and contested case notice, released on July 3, 2019, and two contested case requests were filed on August 5, 2019. At the August Council meeting, Council is scheduled to consider the contested case requests, and if contested case requests are denied, Council will also consider the amended PO.

The certificate holder advises, and the Council finds, that if, as the result of the Supreme Court opinion, the certificate holder were forced to start the site certificate amendment process anew, it would result in serious prejudice to the interests of the certificate holder because it will have lost a year of time and the significant financial expenditures made on the amendment to date. (See August 12, 2019 letter from counsel for the Summit Ridge Wind Farm certificate holder). The certificate holder advises, and the Council finds, that if the certificate holder were forced to reapply for an amendment (or is otherwise subject to substantial delay), it would result in serious prejudice to the interests of the certificate holder because processing the request anew under the pre-October 2017 amendment rules would likely result in a final decision on the request for amendment being pushed well into 2020. The delay would likely impact the

certificate holder's ability to retain construction contractors, procure equipment, and market the power to be produced.

Further, petitioners in the lawsuit have taken the position that as a result of the Supreme Court's decision, the permission to construct the Summit Ridge Wind Farm has expired and if the certificate holder still desires to pursue the project it must file an application for a new site certificate – "effectively starting the permitting process over from scratch." (See August 1, 2019 Friends of the Columbia River Gorge press release). Under such circumstances, the entire facility may then be in jeopardy, causing serious prejudice to the certificate holder.

The Council finds that failure to act promptly by adopting these temporary rules will result in serious prejudice to the interests of the Summit Ridge Wind Farm certificate holder. The Council finds that this prejudice presents a separate and independent basis for the need to adopt temporary rules for the amendment of site certificates.

Perennial Wind Chaser Station

The certificate holder submitted a request to extend the deadlines for starting and completing construction on August 2, 2018. On July 8, 2019, ODOE issued a DPO on the project and initiated a public comment period, which extends through the close of a public hearing scheduled for August 22, 2019.

The Council finds that Perennial will be seriously prejudiced if it were to have to resubmit an amendment request because the certificate holder will have lost at least a year of time and financial resources invested. If Perennial were to proceed under the rules in effect prior to October 2017, the DPO already issued, the public comment period currently running, and the public hearing scheduled for August 22 would all be set aside to ensure compliance with the procedures required under the earlier rules. Perennial contends (See August 12, 2019 letter from Perennial Power Holdings, Inc.) and the Council finds that Perennial would be harmed and seriously prejudiced by the delay.

Further, petitioners in the lawsuit have taken the position that as a result of the Supreme Court's decision, the permission to construct the Perennial Wind Chaser facility has expired and if the certificate holder still desires to pursue the project it must file applications for new site certificates – "effectively starting the permitting process over from scratch." (See August 1, 2019 Friends of the Columbia River Gorge press release). Under such circumstances, the entire facility may then be in jeopardy.

The Council finds that failure to act promptly by adopting these temporary rules will result in serious prejudice to the interests of the Perennial Wind Chaser Station certificate holder. The Council finds that this prejudice alone presents a separate and independent basis for the need to adopt temporary rules for the amendment of site certificates.

Council further finds that failure to act promptly by adopting these temporary rules will result in serious prejudice to the interests of the public and in particular those who have or intend to submit comments regarding the requested amendment to the Perennial Wind Chaser Station site certificate, by having their concerns set aside and deferred.

Wheatridge Wind Energy Facility

The certificate holder submitted a request for amendment to the site certificate on November 30, 2018, seeking a number of amendments to the original certificate. The certificate holder responded to a number of requests for information from ODOE, and its application was deemed complete on July 1, 2019. ODOE issued a DPO on July 25, and the Council is scheduled to hold a public hearing on August 22, 2019. A written comment period is open until September 9, 2019.

Like other applicants, Wheatridge will lose significant time and financial resources already expended if forced to start the amendment process again. The approval process would likely extend well into 2020. The certificate holder advises (See August 9, 2019 letter from counsel or Wheatridge Wind Energy LLC), and the Council finds that, if required to start the amendment process again, the Wheatridge Wind Energy Facility certificate holder would be in jeopardy of not meeting contractual obligations to begin construction of certain components of the facility in 2021.

The Council finds that failure to act promptly by adopting these temporary rules will result in serious prejudice to the interests of the Wheatridge Wind Energy Facility certificate holder. The Council finds that this prejudice alone presents a separate and independent basis for the need to adopt temporary rules for the amendment of site certificates.

Council further finds that failure to act promptly by adopting these temporary rules will result in serious prejudice to the interests of the public and in particular those who have or intend to submit comments regarding the requested amendment to the Wheatridge Wind Energy Facility site certificate, by having their concerns set aside and deferred.

Port Westward Generating Project

The certificate holder, Portland General Electric, submitted a request for amendment to the site certificate on April 23, 2019 requesting Council approval to amend the site certificate in order to construct and operate a battery energy storage facility adjacent to the existing power generating station. The certificate holder did not request Type B review, although the amendment is considered by PGE to be minor, and the request is being processed as a Type A amendment. Before the Supreme Court decision was issued, ODOE informed the certificate holder that the amendment request was complete on July 17, 2019, and that ODOE intended to issue a DPO on or before August 30. Assuming that to be the case, the certificate holder expects that a final order could issue as soon as November 2019. The certificate holder has stated, and the Council finds, that any delay would have serious implications for the certificate holder, in that HB 2193 (2015) requires electric companies like the certificate holder to invest in energy storage projects and to have a contract to procure 5 MWh of energy storage executed by January 1, 2020. (See August 13, 2019 letter from Portland General Electric).

If the certificate holder were required to start a new amendment request, the best case scenario would be that a final order could issue in early 2020. The certificate holder might then be required to enter into the energy storage contract without knowing fully what conditions might be imposed on any amendment that is approved, or could be forced to

meet the statutory requirement with a different project not requiring council approval; until bids are received, it is unknown if another project might meet the statutory mandate. (See August 13, 2019 letter from Portland General Electric). Adoption of temporary rules allowing for the continued processing of the current request for amendment would likely eliminate these uncertainties.

For the foregoing reasons, the Council finds that failure to act promptly by adopting these temporary rules will result in serious prejudice to the interests of Portland General Electric – the Port Westward Generating Project certificate holder. The Council finds that this prejudice alone presents a separate and independent basis for the need to adopt temporary rules for the amendment of site certificates.

The Council further finds that failure to act promptly by adopting these temporary rules will also result in serious prejudice to the interests of the public and in particular those who have submitted comments regarding the requested amendment by having their concerns set aside and deferred.

Montague Wind Power Facility

The certificate holder filed a request for amendment on January 9, 2018. Throughout 2018, the certificate holder responded to a number of requests for information from ODOE, and the certificate holder also changed certain details regarding the facility design. The department deemed the request for amendment complete on April 4, 2019. A DPO was issued on April 5, 2019. A public hearing was held in front of Council on May 16, 2019. On July 9, 2019, ODOE issued a PO and contested case notice. No requests for contested case were made. The Council is scheduled to consider the PO at its August 22-23, 2019 meeting. Because this request is at the final decision stage, requiring Montague to file a new request at a later date, after permanent rulemaking was completed, would result in the complete loss of the time and financial resources expended on this request, as well as the efforts of ODOE staff and members of the public who may have reviewed. Further, as the certificate holder has pointed out, regulatory uncertainty regarding the current status of the amendment rules can pose increased risk for project financing, contract obligations, and investor relations. (See August 13, 2019 letter from Avangrid Renewables).

The Council finds that failure to act promptly by adopting these temporary rules will result in serious prejudice to the interests of the Montague Wind Power Facility certificate holder. The Council finds that this prejudice alone presents a separate and independent basis for the need to adopt temporary rules for the amendment of site certificates.

The Council further finds that failure to act promptly by adopting these temporary rules will result in serious prejudice to the interests of the public and in particular those who have or intend to submit comments regarding the requested amendment to the Montague Wind Power Facility site certificate, by having their concerns set aside and deferred.

Other Facilities

If a certificate holder were to apply for an amendment to a site certificate at this time, it is not clear what, if any, rules

would govern the Department and Council's review of that request.

The Supreme Court's decision concludes "The rules approved by the Energy Facility Siting Council through Permanent Administrative Orders EFSC 4-2017 and EFSC 5-2017 are invalid." It does not state, for example, that "all actions taken" by EFSC under those Administrative Orders are invalid. Therefore, given that EFSC 5-2017 repealed OAR 345-027-0070 (the rule that had previously governed the process for site certificate amendments) if Council does not take action, upon the Court's issuing an appellate judgment it is possible that there will be no rules in place governing site certificate amendments. At best, the amendment rules would revert to the version that was in effect prior to October 24, 2017. It is necessary to take immediate action to resolve this situation, not only to avoid serious prejudice to certificate holders with pending requests for amendments, but also to provide regulatory certainty to certificate holders seeking new site certificate amendments regarding what rules apply. Adopting the temporary rules will provide certainty that the temporary rules govern the amendment process until the Council can adopt new permanent rules. Further, adopting the temporary rules may also improve the prospects for continuity in the processing of applications for site certificate amendments once the permanent rules are adopted, as the new permanent rules are likely to be more similar to the temporary rules than the pre-October 2017 amendment rules.

In addition, the rules adopted on October 24, 2017 contained provisions allowing for streamlined review of requests for amendment under the Type B process. A primary focus of the challenge to the rules was the Council's authority to enact these provisions. The opinion of the Supreme Court confirmed the Council's authority to develop the amendment process "largely as [Council] sees fit", which includes processing amendments under the Type B review. The Council finds that failure to promptly adopt these temporary rules, which will continue to allow for the possibility of a Type B review, would impose unnecessary delays and costs to certificate holders seeking site certificate amendments that qualify for Type B review under the rules. This would run contrary to the public interest in the development of important energy facilities and to the interests of certificate holders that may need to amend existing certificates. The Council finds that failure to act promptly by adopting these temporary rules will result in serious prejudice to the interests of the public in the orderly processing of requests for amendment of site certificates and serious prejudice to the interests of certificate holders of site certificates that may require amendment.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

The following documents were relied upon in development of rules and the Statements of Need and Justification:

August 12, 2019 letter from counsel for the Summit Ridge Wind Farm certificate holder
August 1, 2019 Friends of the Columbia River Gorge press release
August 12, 2019 letter from Perennial Power Holdings, Inc.
August 9, 2019 letter from counsel of Wheatridge Wind Energy LLC
August 13, 2019 letter from Portland General Electric
August 13, 2019 letter from Avangrid Renewables
EFSC 5-2017

All documents are available from the Oregon Department of Energy upon request, and may be accessed at:
https://www.oregon.gov/energy/Get-Involved/Pages/Energy-Facility-Siting-Council-Rulemaking.aspx

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RULES:
345-015-0014, 345-015-0016, 345-015-0080, 345-015-0083, 345-025-0006, 345-025-0010, 345-025-0016, 345-027-0011, 345-027-0013, 345-027-0050, 345-027-0051, 345-027-0053, 345-027-0055, 345-027-0057, 345-027-0059, 345-027-0060, 345-027-0063, 345-027-0065, 345-027-0067, 345-027-0068, 345-027-0071, 345-027-0072, 345-027-0075, 345-027-0080, 345-027-0085, 345-027-0090, 345-027-0100, 345-027-0311, 345-027-0313, 345-027-0350, 345-027-0351, 345-027-0353, 345-027-0355, 345-027-0357, 345-027-0359, 345-027-0360, 345-027-0363, 345-027-0365, 345-027-0367, 345-027-0368, 345-027-0371, 345-027-0372, 345-027-0375, 345-027-0380, 345-027-0385, 345-027-0390, 345-027-0400

AMEND: 345-015-0014

RULE SUMMARY: States how and to whom the Department sends notice of a contested case. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-015-0014
Contested Case Notices ¶

(1) The Department shall issue notices for Council contested case proceedings as provided in OAR 137-003-0001.¶
(a) Contested case notices regarding proposed orders for site certificate applications shall include:¶
(A) A date by which persons must request party or limited party status.¶
(B) The date of the pre-hearing conference.¶
(C) The time and place of the hearing.¶
(b) Contested case notices regarding proposed orders for site certificate amendments shall include:¶
(A) The date of the pre-hearing conference.¶
(B) The time and place of the hearing.¶
(C) The issues and the parties the Council identified for the contested case as described in OAR 345-027-0071.¶
(2) In addition to the requirements of section (1), for a contested case notice on a proposed order as described in OAR 345-015-0230 or following a Council decision to grant a contested case hearing under 345-015-0310, the Department shall include in the notice a statement that participation as a party or limited party in the contested case proceeding and the opportunity to raise any issue are subject to the limitations described in OAR 345-015-0016.¶
(3) The Department shall send a contested case notice by registered or certified mail to the following persons:¶
(a) For a contested case notice on a proposed order as described in OAR 345-015-0230, to the applicant and to all persons who commented in person or in writing on the record of the public hearing described in 345-015-0220.¶
(b) Following the Council's decision to grant a contested case proceeding on a proposed order on an application for a site certificate for a special criteria facility, to the applicant and to all persons who commented in person or in writing on the record of the public hearing on the proposed order described in OAR 345-015-0320.¶
(c) Following a Council decision to grant a contested case proceeding on a proposed site certificate amendment under OAR 345-027-0071 or 345-027-0090, to the certificate holder and to the parties the Council granted contested case party status to.¶
(d) For Council contested case proceedings described under OAR 345-029-0070, 345-029-0100 or 345-060-0004, to persons who have an interest or represent a public interest in the outcome of the proceeding.¶
(4) The Department shall request that the applicant notify the hearing officer and the Department, by the date described in subsection (1)(a), of any issues the applicant desires to raise in the contested case proceedings described in subsections (3)(a) and (b).
Statutory/Other Authority: ORS 469.373, 469.470
Statutes/Other Implemented: ORS 183.415, 469.085, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

AMEND: 345-015-0016

RULE SUMMARY: States who is eligible to request party status to a contested case on an application for a site certificate and the process by which those requests must be made. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-015-0016
Requests for Party or Limited Party Status in Contested Cases on Applications for a Site Certificate ¶

(1) Notwithstanding OAR 137-003-0005(2), a person requesting to participate as a party or limited party in a contested case proceeding shall submit a petition to the hearing officer by the date specified in the Department of Energy's contested case notice issued under OAR 345-015-0014.¶
(2) Persons who have an interest in the outcome of the Council's contested case proceeding or who represent a public interest in such result may request to participate as parties or limited parties.¶
(3) Except as described in section (4), only those persons who have commented in person or in writing on the record of the public hearing described in OAR 345-015-0220 may request to participate as a party or limited party in a contested case proceeding on an application for a site certificate. To raise an issue in a contested case proceeding, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing, unless the Department of Energy did not follow the requirements of ORS 469.370(2) or (3) or unless the action recommended in the proposed order described in OAR 345-015-230, including any recommended conditions of approval, differs materially from the action recommended in the draft proposed order, in which case the person may raise only new issues within the jurisdiction of the Council that are related to such differences. If a person has not raised an issue at the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, the hearing officer shall not consider the issue in the contested case proceeding. To have raised an issue with sufficient specificity, the person must have presented facts at the public hearing that support the person's position on the issue.¶
(4) Following a Council decision to grant a contested case hearing under OAR 345-015-0310, only those persons who have commented in person or in writing on the record of the public hearing described in 345-015-0320 may request to participate as a party or limited party in a contested case proceeding on an application for a site certificate. To raise an issue in a contested case proceeding, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing. If a person has not raised an issue at the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, the hearing officer shall not consider the issue in the contested case proceeding. To have raised an issue with sufficient specificity, the person must have presented facts at the public hearing that support the person's position on the issue.¶
(5) In a petition to request party or limited party status, the person requesting such status shall include:¶
(a) The information required under OAR 137-003-0005(3).¶
(b) A short and plain statement of the issue or issues that the person desires to raise in the contested case proceeding.¶
(c) A reference to the person's comments at the public hearing showing that the person raised the issue or issues at the public hearing.¶
(d) A detailed description of the person's interest in the contested case proceeding and how that interest may be affected by the outcome of the proceeding.¶
(6) The hearing officer's determination on a request to participate as a party or limited party is final unless the requesting person submits an appeal to the Council within seven days after the date of service of the hearing officer's determination.
Statutory/Other Authority: ORS 469.373, 469.470
Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

AMEND: 345-015-0080

RULE SUMMARY: States the process by which any state or local government agency may request to participate in a contested case. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-015-0080
Participation by Government Agencies ¶

(1) Any state or local government agency other than the Department of Energy may request participation in a contested case as a party, limited party or interested agency, subject to the limitations described in OAR 345-015-0016. For a contested case on a site certificate application, the agency shall submit the request to the hearing officer in writing by the date specified in the Department of Energy's contested case notice issued under 345-015-0014. For a contested case on a site certificate amendment, the agency shall submit the request to the Department by the date specificed in the notice of the opportunity to request a contested case issued under OAR 345-027-0071.¶
(2) The Department of Energy shall participate in all contested case proceedings conducted by the Council and shall have all the rights of a party.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

AMEND: 345-015-0083

RULE SUMMARY: States the purpose and requirements of the prehearing conference and prehearing order related to contested cases. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-015-0083
Prehearing Conference and Prehearing Order ¶

(1) The hearing officer may cancel or reschedule any previously noticed prehearing conference.¶
(2) The hearing officer may conduct one or more prehearing conferences for the purposes and in the manner described in OAR 137-003-0035. At the conclusion of the conference(s), the hearing officer shall issue a prehearing order stating the issues to be addressed in the contested case hearing and, in a contested case on an application for a site certificate, limiting parties to those issues they raised on the record of the public hearing described in OAR 345-015-0220. The hearing officer shall not receive evidence or hear legal argument on issues not identified in the prehearing order.¶
(3) Failure to raise an issue in the prehearing conference(s) for the contested case hearing on an application for a site certificate constitutes a waiver of that issue.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

AMEND: 345-025-0006

RULE SUMMARY: Provides conditions to be included in every site certificate. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-025-0006
Mandatory Conditions in Site Certificates ¶

The Council shall impose the following conditions in every site certificate. The Council may impose additional conditions.¶
(1) The Council shall not change the conditions of the site certificate except as provided for in OAR chapter 345, division 27.¶
(2) The certificate holder shall submit a legal description of the site to the Department of Energy within 90 days after beginning operation of the facility. The legal description required by this rule means a description of metes and bounds or a description of the site by reference to a map and geographic data that clearly and specifically identify the outer boundaries that contain all parts of the facility.¶
(3) The certificate holder shall design, construct, operate and retire the facility:¶
(a) Substantially as described in the site certificate;¶
(b) In compliance with the requirements of ORS Chapter 469, applicable Council rules, and applicable state and local laws, rules and ordinances in effect at the time the site certificate is issued; and¶
(c) In compliance with all applicable permit requirements of other state agencies.¶
(4) The certificate holder shall begin and complete construction of the facility by the dates specified in the site certificate.¶
(5) Except as necessary for the initial survey or as otherwise allowed for wind energy facilities, transmission lines or pipelines under this section, the certificate holder shall not begin construction, as defined in OAR 345-001-0010, or create a clearing on any part of the site until the certificate holder has construction rights on all parts of the site. For the purpose of this rule, "construction rights" means the legal right to engage in construction activities. For wind energy facilities, transmission lines or pipelines, if the certificate holder does not have construction rights on all parts of the site, the certificate holder may nevertheless begin construction, as defined in OAR 345-001-0010, or create a clearing on a part of the site if the certificate holder has construction rights on that part of the site and:¶
(a) The certificate holder would construct and operate part of the facility on that part of the site even if a change in the planned route of a transmission line or pipeline occurs during the certificate holder's negotiations to acquire construction rights on another part of the site; or¶
(b) The certificate holder would construct and operate part of a wind energy facility on that part of the site even if other parts of the facility were modified by amendment of the site certificate or were not built.¶
(6) If the certificate holder becomes aware of a significant environmental change or impact attributable to the facility, the certificate holder shall, as soon as possible, submit a written report to the Department describing the impact on the facility and any affected site certificate conditions.¶
(7) The certificate holder shall prevent the development of any conditions on the site that would preclude restoration of the site to a useful, non-hazardous condition to the extent that prevention of such site conditions is within the control of the certificate holder.¶
(8) Before beginning construction of the facility, the certificate holder shall submit to the State of Oregon, through the Council, a bond or letter of credit in a form and amount satisfactory to the Council to restore the site to a useful, non-hazardous condition. The certificate holder shall maintain a bond or letter of credit in effect at all times until the facility has been retired. The Council may specify different amounts for the bond or letter of credit during construction and during operation of the facility.¶
(9) The certificate holder shall retire the facility if the certificate holder permanently ceases construction or operation of the facility. The certificate holder shall retire the facility according to a final retirement plan

approved by the Council, as described in OAR 345-027-0110. The certificate holder shall pay the actual cost to restore the site to a useful, non-hazardous condition at the time of retirement, notwithstanding the Council's approval in the site certificate of an estimated amount required to restore the site.¶
(10) The Council shall include as conditions in the site certificate all representations in the site certificate application and supporting record the Council deems to be binding commitments made by the applicant.¶
(11) Upon completion of construction, the certificate holder shall restore vegetation to the extent practicable and shall landscape all areas disturbed by construction in a manner compatible with the surroundings and proposed use. Upon completion of construction, the certificate holder shall remove all temporary structures not required for facility operation and dispose of all timber, brush, refuse and flammable or combustible material resulting from clearing of land and construction of the facility.¶
(12) The certificate holder shall design, engineer and construct the facility to avoid dangers to human safety and the environment presented by seismic hazards affecting the site that are expected to result from all maximum probable seismic events. As used in this rule "seismic hazard" includes ground shaking, ground failure, landslide, liquefaction triggering and consequences (including flow failure, settlement buoyancy, and lateral spreading), cyclic softening of clays and silts, fault rupture, directivity effects and soil-structure interaction. For coastal sites, this also includes tsunami hazards and seismically-induced coastal subsidence.¶
(13) The certificate holder shall notify the Department, the State Building Codes Division and the Department of Geology and Mineral Industries promptly if site investigations or trenching reveal that conditions in the foundation rocks differ significantly from those described in the application for a site certificate. After the Department receives the notice, the Council may require the certificate holder to consult with the Department of Geology and Mineral Industries and the Building Codes Division to propose and implement corrective or mitigation actions.¶
(14) The certificate holder shall notify the Department, the State Building Codes Division and the Department of Geology and Mineral Industries promptly if shear zones, artesian aquifers, deformations or clastic dikes are found at or in the vicinity of the site. After the Department receives notice, the Council may require the certificate holder to consult with the Department of Geology and Mineral Industries and the Building Codes Division to propose and implement corrective or mitigation actions.¶
(15) Before any transfer of ownership of the facility or ownership of the site certificate holder, the certificate holder shall inform the Department of the proposed new owners. The requirements of OAR 345-027-0100 apply to any transfer of ownership that requires a transfer of the site certificate.¶
(16) If the Council finds that the certificate holder has permanently ceased construction or operation of the facility without retiring the facility according to a final retirement plan approved by the Council, as described in OAR 345-027-0110, the Council shall notify the certificate holder and request that the certificate holder submit a proposed final retirement plan to the Office within a reasonable time not to exceed 90 days. If the certificate holder does not submit a proposed final retirement plan by the specified date, the Council may direct the Department to prepare a proposed final retirement plan for the Council's approval. Upon the Council's approval of the final retirement plan, the Council may draw on the bond or letter of credit described in section (8) to restore the site to a useful, non-hazardous condition according to the final retirement plan, in addition to any penalties the Council may impose under OAR chapter 345, division 29. If the amount of the bond or letter of credit is insufficient to pay the actual cost of retirement, the certificate holder shall pay any additional cost necessary to restore the site to a useful, non-hazardous condition. After completion of site restoration, the Council shall issue an order to terminate the site certificate if the Council finds that the facility has been retired according to the approved final retirement plan.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.401, 469.501

AMEND: 345-025-0010

RULE SUMMARY: Provides site-specific conditions which may be included in a site certificate. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-025-0010
Site-Specific Conditions ¶

The Council may include the following conditions, as appropriate, in the site certificate:¶
(1) If the facility uses coal, the certificate holder shall take all necessary steps to ensure that surface and groundwater are not contaminated by run off or seepage associated with coal or ash storage, transport or disposal. The certificate holder shall handle coal and ash so as to minimize the likelihood of coal dust and ash being windblown and causing an environmental or public health problem. If the certificate holder permanently disposes of ash on the facility site, the certificate holder shall cover the ash with a layer of topsoil and revegetate the area.¶
(2) If the energy facility or related or supporting facility is a natural gas pipeline, the certificate holder shall submit to the Department copies of all incident reports involving the pipeline required under 49 CFR Sec. 191.15.¶
(3) If the facility includes any pipeline under Council jurisdiction:¶
(a) The certificate holder shall design, construct and operate the pipeline in accordance with the requirements of the U.S. Department of Transportation as set forth in Title 49, Code of Federal Regulations, Part 192, in effect on August 15, 2011; and¶
(b) The certificate holder shall develop and implement a program using the best available practicable technology to monitor the proposed pipeline to ensure protection of public health and safety.¶
(4) If the facility includes any transmission line under Council jurisdiction:¶
(a) The certificate holder shall design, construct and operate the transmission line in accordance with the requirements of the 2012 Edition of the National Electrical Safety Code approved on June 3, 2011, by the American National Standards Institute; and¶
(b) The certificate holder shall develop and implement a program that provides reasonable assurance that all fences, gates, cattle guards, trailers, or other objects or structures of a permanent nature that could become inadvertently charged with electricity are grounded or bonded throughout the life of the line.¶
(5) If the proposed energy facility is a pipeline or a transmission line or has, as a related or supporting facility, a pipeline or transmission line, the Council shall specify an approved corridor in the site certificate and shall allow the certificate holder to construct the pipeline or transmission line anywhere within the corridor, subject to the conditions of the site certificate. If the applicant has analyzed more than one corridor in its application for a site certificate, the Council may, subject to the Council's standards, approve more than one corridor.¶
(6) If the facility is a surface facility related to an underground gas storage reservoir, the Council shall, in the site certificate, specify the site boundary and total permitted daily throughput of the facility.¶
(7) If the facility is subject to a carbon dioxide emissions standard adopted by the Council or enacted by statute, the Council shall include in the site certificate appropriate conditions as described in OAR 345-024-0550, 345-024-0560, 345-024-0590, 345-024-0600, 345-024-0620, 345-024-0630 and 345-024-0710.¶
[Publications: Publications referenced are available from the agency.]
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.401, 469.501, 469.503

AMEND: 345-025-0016

RULE SUMMARY: Provides procedures related to monitoring and mitigation plans. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-025-0016
Monitoring and Mitigation Conditions ¶

In the site certificate, the Council shall include conditions that address monitoring and mitigation to ensure compliance with the standards contained in OAR Chapter 345, Division 22 and Division 24. The site certificate applicant, or for an amendment, the certificate holder, shall develop proposed monitoring and mitigation plans in consultation with the Department and, as appropriate, other state agencies, local governments and tribes. Monitoring and mitigation plans are subject to Council approval. The Council shall incorporate approved monitoring and mitigation plans in applicable site certificate conditions.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.401, 469.501, 469.503, 469.507

SUSPEND: 345-027-0011

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0011~~
~~Applicability ¶~~

~~The rules in this division apply to all facilities under the Council's jurisdiction except those facilities described in ORS 469.410(1), including the Trojan energy facility, and except that rules OAR 345-027-0050 through 345-027-0100 that were in effect prior to October 24, 2017 apply to requests for amendments to site certificates and change requests that have been received by the Department prior to October 24, 2017.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.501~~

SUSPEND: 345-027-0013

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0013~~
~~Certificate Expiration ¶~~

~~If the certificate holder does not begin construction of the facility by the construction beginning date specified in the site certificate or amended site certificate, the site certificate expires on the construction beginning date specified, unless expiration of the site certificate is suspended pending final action by the Council on a request for amendment to a site certificate pursuant to OAR 345-027-0085(2).~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.370, 469.501~~

SUSPEND: 345-027-0050

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0050~~
~~Changes Requiring an Amendment ¶~~

~~Except for changes allowed under OAR 345-027-0053 of this rule, an amendment to a site certificate is required to:¶~~
~~(1) Transfer ownership of the facility or the certificate holder as described in OAR 345-027-0100;¶~~
~~(2) Apply later-adopted law(s) as described in OAR 345-027-0090;¶~~
~~(3) Extend the construction beginning or completion deadline as described in OAR 345-027-0085;¶~~
~~(4) Design, construct or operate a facility in a manner different from the description in the site certificate if the proposed change: ¶~~
~~(a) Could result in a significant adverse impact that the Council has not addressed in an earlier order and the impact affects a resource or interest protected by a Council standard; ¶~~
~~(b) Could impair the certificate holder's ability to comply with a site certificate condition; or ¶~~
~~(c) Could require a new condition or a change to a condition in the site certificate.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.405~~

SUSPEND: 345-027-0051

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0051~~
~~Review Processes for Requests for Amendment~~
~~(1) The transfer review process, described in 345-027-0100, shall apply to the Council's review of a request for amendment to a site certificate to transfer a site certificate.¶~~
~~(2) The type A review process, consisting of rules 345-027-0059, -0060, -0063, -0065, -0067, -0071 and -0075, is the default review process and shall apply to the Council's review of a request for amendment proposing a change described in 345-027-0050(2), (3), and (4).¶~~
~~(3) The type B review process, consisting of rules 345-027-0059, -0060, -0063, -0065, -0068, -0072, and -0075, shall apply to the Council's review of a request for amendment that the Department or the Council approves for type B review under 345-027-0057.¶~~
~~(4) The type C review process, described in 345-027-0080, shall apply to the Council's review of a request for amendment that the Department or the Council approves for type C review under 345-027-0080. ¶~~
~~(5) The Council may act concurrently on any combination of proposed changes included in a request for amendment. Concurrent proposed changes are subject to the substantive requirements applicable to each respective proposed change and the Council shall review all proposed changes through the process with the more procedural steps applicable to any one of the proposed changes.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.405~~

SUSPEND: 345-027-0053

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0053~~
~~Changes Exempt from Requiring an Amendment~~
~~An amendment to a site certificate is not required if the proposed change in the design, construction or operation of a facility is in substantial compliance with the terms and conditions of the site certificate, and is a change: ¶~~
~~(1) To an electrical generation facility that would increase the electrical generating capacity and would not increase the number of electric generators at the site, change fuel type, increase fuel consumption by more than 10 percent or enlarge the facility site;¶~~
~~(2) To the number or location of pipelines for a surface facility related to an underground gas storage reservoir that would not result in the facility exceeding permitted daily throughput or a change to the site boundary;¶~~
~~(3) To the number, size or location of pipelines for a geothermal energy facility that would not result in a change to the site boundary;¶~~
~~(4) To a pipeline that is a related or supporting facility that delivers natural gas to the energy facility if the change would extend or modify the pipeline or expand the right-of-way, when the change is exclusively to serve gas users other than the energy facility;¶~~
~~(5) To a transmission line that is a related or supporting facility if the change would extend or modify the transmission line or expand the right-of-way, when the change is exclusively to serve the transmission needs of a separate energy facility or energy user; or ¶~~
~~(6) To construct a pipeline less than 16 inches in diameter and less than five miles in length to test or maintain an underground gas storage reservoir. If the proposed pipeline would connect to a surface facility related to an underground gas storage reservoir for which the Council has issued a site certificate or to a gas pipeline for which the Council has issued a site certificate, the certificate holder must obtain, prior to construction, the approval of the Department of Energy for the construction, operation and retirement of the proposed pipeline. To obtain Department approval, the certificate holder must submit a request as described in OAR 345-027-0210 through OAR 345-027-0240.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.405~~

SUSPEND: 345-027-0055

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0055~~
~~Written Evaluations for Changes Not Requiring Amendment~~
~~(1) For a proposed change that would add area to the site boundary, see OAR 345-027-0057(1). For a proposed change to the facility that does not include adding area to the site boundary, the certificate holder may evaluate OAR 345-027-0050 and 345-027-0053 and conclude that the proposed change does not require an amendment. If the certificate holder concludes that a proposed change to the facility does not require an amendment to the site certificate, the certificate holder must complete a written evaluation if the change:¶~~
~~(a) Could be included in and governed by the site certificate, but the certificate holder has concluded the change is not described in 345-027-0050; or¶~~
~~(b) Is exempt from requiring an amendment under 345-027-0053. ¶~~
~~(2) The written evaluation must explain why an amendment is not required, must be completed before implementing any change, and must be included in the next semiannual construction progress report or the Facility Modification Report required under 345-026-0080. The written evaluation must be retained for the life of the facility. ¶~~
~~(3) The Department of Energy may, at any time, inspect the changes made to the facility and may inspect the certificate holder's written evaluation concluding that the change did not require an amendment.¶~~
~~(4) When the certificate holder implements a change without an amendment, the Department may initiate an enforcement action as described in Division 29 if the Department determines the change required an amendment to the site certificate.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.405~~

SUSPEND: 345-027-0057

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0057~~
~~Amendment Determination Request~~
~~(1) For a proposed change that would add area to the site boundary, the certificate holder must either:¶~~
~~(a) submit a request for amendment to the Department of Energy; or¶~~
~~(b) submit an amendment determination request to the Department for a written determination of whether the proposed change requires an amendment under OAR 345-027-0050 and is not exempt under 345-027-0053.¶~~
~~(2) For a proposed change that would not add area to the site boundary, the certificate holder may submit an amendment determination request to the Department for a written determination of:¶~~
~~(a) whether the proposed change requires an amendment under OAR 345-027-0050; or ¶~~
~~(b) whether the proposed change is exempt from requiring an amendment under 345-027-0053.¶~~
~~(3) For any request for amendment, the certificate holder may submit an amendment determination request to the Department for a written determination of whether a request for amendment justifies review under the type B review process described in 345-027-0051(3).¶~~
~~(4) Requests described in section (1), (2), and (3) must be submitted in writing to the Department and must include:¶~~
~~(a) A narrative description of the proposed change;¶~~
~~(b) Maps and/or geospatial data layers representing the effects and/or location of the proposed change; ¶~~
~~(c) The certificate holder's evaluation of the determination(s) it is requesting under sections (1), (2), and (3); and¶~~
~~(d) Any additional information the certificate holder believes will assist the Department's evaluation.¶~~
~~(5) After receiving an amendment determination request, the Department shall post an announcement on the Department's website to notify the public that an amendment determination request has been received. The announcement shall include a copy of the amendment determination request.¶~~
~~(6) Upon receiving a request for a written determination described in section (1) and (2), the Department shall, as promptly as possible, issue a written determination to the certificate holder. After the Department issues its written determination, the Department shall, as promptly as possible, provide the request and the written determination to the Council and post the written determination to its website. At the first Council meeting after the Department issues its written determination, the Department shall provide verbal notice of the request and the written determination to the Council during the consent calendar agenda item. The Department may refer its determination to the Council for concurrence, modification, or rejection. At the request of the certificate holder or a Council member, the Department must refer its determination to the Council for concurrence, modification or rejection.¶~~
~~(7) Upon receiving a request for a written determination described in section (3), the Department shall, as promptly as possible, issue a written determination to the certificate holder. At the request of the certificate holder, the Department must refer its determination to the Council for concurrence, modification, or rejection.¶~~
~~(8) In determining whether a request for amendment justifies review under the type B review process described in 345-027-0051(3), the Department and the Council may consider factors including but not limited to:¶~~
~~(a) The complexity of the proposed change;¶~~
~~(b) The anticipated level of public interest in the proposed change;¶~~
~~(c) The anticipated level of interest by reviewing agencies;¶~~
~~(d) The likelihood of significant adverse impact; and¶~~
~~(e) The type and amount of mitigation, if any.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.405~~

SUSPEND: 345-027-0059

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0059~~
~~Pre-Amendment Conference~~
~~(1) Prior to submitting a preliminary request for amendment to the site certificate as described in OAR 345-027-0060, the certificate holder may request a pre-amendment conference with the Department of Energy to discuss the scope, timing, and applicable laws and Council standards associated with the request for amendment. ¶~~
~~(2) A pre-amendment conference request must be in writing and must include a description of the proposed change and, if applicable, maps or geospatial data layers representing the location of the proposed change.¶~~
~~(3) Upon receipt of a request as described in section (1), the Department must, as promptly as possible, set a date and time for a pre-amendment conference.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.405~~

SUSPEND: 345-027-0060

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0060~~
~~Preliminary Request for Amendment ¶~~

~~(1) To request an amendment to the site certificate required by OAR 345-027-0050(3) and (4), the certificate holder shall submit a written preliminary request for amendment to the Department of Energy that includes the following: ¶~~
~~(a) The name of the facility, the name and mailing address of the certificate holder, and the name, mailing address, email address and phone number of the individual responsible for submitting the request.¶~~
~~(b) A detailed description of the proposed change, including:¶~~
~~(A) a description of how the proposed change affects the facility,¶~~
~~(B) a description of how the proposed change affects those resources or interests protected by applicable laws and Council standards, and¶~~
~~(C) the specific location of the proposed change, and any updated maps and/or geospatial data layers relevant to the proposed change. ¶~~
~~(c) References to any specific Division 21 information that may be required for the Department to make its findings.¶~~
~~(d) The specific language of the site certificate, including conditions, that the certificate holder proposes to change, add or delete through the amendment.¶~~
~~(e) A list of the Council standards and all other laws - including statutes, rules and ordinances - applicable to the proposed change, and an analysis of whether the facility, with the proposed change, would comply with those applicable laws and Council standards. For the purpose of this rule, a law or Council standard is "applicable" if the Council would apply or consider the law or Council standard under OAR 345-027-0075(2). ¶~~
~~(f) An updated list of the owners of property located within or adjacent to the site of the facility, as described in OAR 345-021-0010(1)(f).¶~~
~~(2) After receiving a preliminary request for amendment, the Department shall post an announcement on its website to notify the public that a preliminary request for amendment has been received. The announcement shall include a copy of the preliminary request for amendment. ¶~~
~~(3) For any Council standard that requires evaluation of impacts within an analysis area, the analysis area shall be the larger of either the study area(s) as defined in OAR 345-001-0000(59) or the analysis area(s) described in the project order for the application for site certificate, unless otherwise approved in writing by the Department following a pre-amendment conference.¶~~
~~(4) The certificate holder may incorporate, by specific reference, evidence previously submitted to the Department in the application for site certificate or previous request for amendment, or evidence that is otherwise included in the Department's record on the facility.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.405~~

SUSPEND: 345-027-0063

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0063~~
~~Determination of Completeness for a Request for Amendment~~
~~(1) Until the Department of Energy determines the request for amendment to the site certificate is complete, it is a preliminary request for amendment. After receiving a preliminary request for amendment, the Department may seek comments from reviewing agencies to determine whether that request is complete.¶~~
~~(2) Unless the certificate holder agrees to additional time, within 60 days after receipt of a preliminary request for amendment under type A review, and within 21 days after receipt of a preliminary request for amendment under type B review, the Department shall notify the certificate holder whether the request for amendment is complete. In the notification, the Department shall:¶~~
~~(a) State that the request for amendment is complete; or¶~~
~~(b) State that the request for amendment is incomplete and:¶~~
~~(A) Describe any additional information needed to complete the request for amendment to the extent known to the Department at the time of the notification, including identification of applicable laws and Council standards not addressed in the preliminary request for amendment, ¶~~
~~(B) Ask the certificate holder to submit the additional information by the due dates described in section (4), and¶~~
~~(C) Estimate the additional time the Department will need to make a determination of completeness following the submittal of the additional information by the certificate holder.¶~~
~~(3) If the Department does not notify the certificate holder as described in section (2), the request for amendment under type A review is deemed complete 60 days after receipt of a preliminary request for amendment, and the request for amendment under type B review is deemed complete 21 days after receipt of a preliminary request for amendment. Otherwise, the request for amendment is complete as determined under section (5). ¶~~
~~(4) The Department may specify a date by which the certificate holder must submit additional information needed to complete the request for amendment. If follow-up requests for additional information are needed, the Department may specify dates by which the certificate holder must submit the information. At the request of the certificate holder, the Department may allow additional time for submission of the information. If the certificate holder does not submit the information by the deadline specified by the Department, including any allowed extension, the Council may reject the preliminary request for amendment. The rejection of a preliminary request for amendment is subject to appeal under ORS 469.403(3).¶~~
~~(5) A request for amendment is complete when the Department finds that the certificate holder has submitted information adequate for the Council to make findings or impose conditions on all applicable laws and Council standards. The Department shall notify the certificate holder when the Department finds that the request for amendment is complete.¶~~
~~(6) After receiving notification from the Department that the preliminary request for amendment is complete, the Department may require the certificate holder to prepare a consolidated request for amendment that includes all revisions to the preliminary request for amendment and all additional information requested by the Department before the determination of completeness. Upon a request by the Department, the certificate holder shall submit paper and non-copy-protected electronic copies of the consolidated request for amendment to the Department as specified by the Department.¶~~
~~(7) If, after a determination that a request for amendment is complete, the Department identifies a need for additional information during its review of the request for amendment, the Department may request additional information from the certificate holder.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.405~~

SUSPEND: 345-027-0065

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0065~~
~~Draft Proposed Order for a Request for Amendment~~
~~(1) Within 7 days after a request for amendment to the site certificate described in OAR 345-027-0050(3) and(4), or a request for amendment to apply later-adopted laws described in OAR 345-027-0090, is determined to be complete, the Department of Energy shall:¶~~
~~(a) Send notice to the certificate holder specifying a date for issuance of a draft proposed order. The date of issuance of a draft proposed order for a type A request for amendment shall be no later than 120 days after the date of the notice. The date of issuance of a draft proposed order for a type B request for amendment shall be no later than 60 days after the date of the notice. ¶~~
~~(b) Post an announcement on the Department's website to notify the public that a complete request for amendment has been received. The announcement shall include: ¶~~
~~(A) A copy of the complete request for amendment;¶~~
~~(B) The date the draft proposed order will be issued, as specified in the notice required by subsection (1)(a); and¶~~
~~(C) A statement that the public comment period begins upon issuance of the draft proposed order.¶~~
~~(2) No later than the date specified in the notice required by subsection (1)(a), the Department shall issue a draft proposed order recommending approval, modification, or denial of the requested amendment. The Department may issue the draft proposed order at a later date, but the Department shall, no later than the date the Department has specified in the notice required by subsection (1)(a), notify the certificate holder in writing of the reasons for the delay. The draft proposed order may include, but is not limited to draft proposed findings of fact, conclusions of law, and conditions concerning the facility's compliance with applicable laws and Council Standards.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.405~~

SUSPEND: 345-027-0067

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0067~~
~~Public Comment and Hearing on the Draft Proposed Order for Requests for Amendment Under Type A Review~~
~~(1) After issuance of the draft proposed order as described in OAR 345-027-0065, the Council shall conduct a public hearing on the request for amendment to the site certificate in the vicinity of the facility. The public hearing must be held at least 20 days after the draft proposed order is issued. The public hearing is not a contested case hearing.¶~~
~~(2) Concurrent with the issuance of the draft proposed order as described in OAR 345-027-0065, the Department of Energy shall:¶~~
~~(a) Send the notice described in section (3) of this rule by mail or email to:¶~~
~~(A) Persons on the Council's general mailing list as defined in OAR 345-011-0020;¶~~
~~(B) Persons on any special mailing list established for the facility;¶~~
~~(C) The reviewing agencies as defined in OAR 345-001-0010(52); and¶~~
~~(D) The updated property owner list as described in OAR 345-021-0010(1)(f) Exhibit F,¶~~
~~(b) Post the complete request for amendment, draft proposed order, and the notice of the draft proposed order and public hearing on the Department website, and¶~~
~~Make physical copies of the draft proposed order available to the public for inspection.¶~~
~~(3) Notice of the complete request for amendment, draft proposed order and public hearing shall include:¶~~
~~(a) A description of the facility and the facility's general location.¶~~
~~(b) The date, time and location of the public hearing described in this rule.¶~~
~~(c) The name, address, email address and telephone number of the Department representative to contact for additional information.¶~~
~~(d) Addresses of the physical location(s) and the website where the public may review copies of the complete request for amendment and draft proposed order.¶~~
~~(e) The deadline for the public to submit written comments to be included in the record of the public hearing and how such comments should be submitted.¶~~
~~(f) A statement that:¶~~
~~(A) A complete request for amendment has been received and reviewed by the Department.¶~~
~~(B) The Department has issued a draft proposed order.¶~~
~~(C) To raise an issue on the record of the public hearing, a person must raise the issue in person at the public hearing or in a written comment submitted after the date of the notice of the public hearing and received by the Department before the close of the record of the public hearing.¶~~
~~(D) A person's failure to raise an issue in person or in writing on the record of the public hearing precludes the Council's consideration of whether to grant that person's subsequent contested case request. ¶~~
~~Failure to raise an issue with sufficient specificity to afford the Council, the Department, and the certificate holder an opportunity to respond to the issue precludes the Council from considering whether that issue justifies a contested case proceeding.¶~~
~~(F) To raise an issue with sufficient specificity, a person must present facts, on the record of the public hearing, that support the person's position on the issue.¶~~
~~(G) The Council will not accept or consider any further public comment on the request for amendment or on the draft proposed order after the close of the record of the public hearing.¶~~
~~(4) During the public hearing, the Department shall explain the amendment process, including the means and opportunities for the general public to participate in the process. The Department may provide this explanation by a written handout.¶~~
~~(5) At the commencement of the public hearing, the presiding officer shall read aloud the following:¶~~
~~(a) A person who intends to request a contested case on the proposed order for a site certificate amendment must~~

~~comment in person or in writing on the record of the public hearing.¶~~
~~(b) A person who intends to raise an issue that may be the basis for granting a contested case proceeding must raise that issue on the record of the public hearing with sufficient specificity to afford the Council, the department and the certificate holder an adequate opportunity to respond to the issue. To raise an issue with sufficient specificity, a person must present facts, on the record of the public hearing, that support the person's position on the issue.¶~~
~~(6) At the public hearing, any person may present information regarding the pending request for amendment without administration of an oath. The presiding officer shall record all presentations made during the public hearing. The presentations are part of the decision record for the request for amendment.¶~~
~~(7) Following the close of the record of the public hearing on the draft proposed order, the Council shall review the draft proposed order, shall consider all comments received on the record of the hearing, and may provide comments to the Department regarding the draft proposed order. When the Council meets to review a draft proposed order, the Council does not permit the certificate holder, reviewing agencies or the public to comment on any issue that may be the basis for a contested case request.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.405~~

SUSPEND: 345-027-0068

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0068~~
~~Public Written Comment on the Draft Proposed Order for Requests for Amendment Under Type B Review~~
~~(1) After issuance of the draft proposed order as described in OAR 345-027-0065, the Council shall solicit and receive written public comments on the draft proposed order. The Department of Energy shall specify a written comment deadline at least 20 days after the draft proposed order is issued. ¶~~
~~(2) Concurrent with the issuance of the draft proposed order as described in OAR 345-027-0065, the Department shall:¶~~
~~(a) Send the notice described in section (3) of this rule by mail or email to:¶~~
~~(A) Persons on the Council's general mailing list as defined in OAR 345-011-0020;¶~~
~~(B) Persons on any special mailing list established for the facility;¶~~
~~(C) The reviewing agencies as defined in OAR 345-001-0010(52); and¶~~
~~(D) The updated property owner list as described in OAR 345-021-0010(1)(f) Exhibit F,¶~~
~~(a) Post the complete request for amendment, draft proposed order, and the notice of the draft proposed order and written comment deadline on the Department website, and¶~~
~~(b) Make physical copies of the draft proposed order available to the public for inspection.¶~~
~~(3) Notice of the complete request for amendment, draft proposed order and written comment deadline shall include:¶~~
~~(a) A description of the facility and the facility's general location.¶~~
~~(b) The name, address, email address and telephone number of the Department representative to contact for additional information.¶~~
~~(c) Addresses of the physical location(s) and the website where the public may review copies of the complete request for amendment and draft proposed order.¶~~
~~(d) The deadline for the public to submit written comments to be included in the record of the draft proposed order and how such comments should be submitted.¶~~
~~(e) A statement that:¶~~
~~(A) A complete request for amendment has been received and reviewed by the Department.¶~~
~~(B) The Department has issued a draft proposed order.¶~~
~~(C) To raise an issue on the record of the draft proposed order, a person must raise the issue in a written comment submitted after the date of the notice of the draft proposed order and written comment deadline, and received by the Department before the written comment deadline.¶~~
~~(D) The Council will not accept or consider any further public comment on the request for amendment or on the draft proposed order after the written comment deadline that closes the record on the draft proposed order.¶~~
~~(E) Only those persons, including the site certificate holder, who provided written comment by the written comment deadline may seek judicial review as provided in ORS 469.403 and issues eligible for judicial review are limited to the issues raised in that person's written comments.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.405~~

SUSPEND: 345-027-0071

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0071~~
~~Proposed Order, Requests for Contested Case and Council's Final Decision on Requests for Amendment Under Type A Review~~
~~(1) No later than 30 days after the Council has reviewed the draft proposed order and considered all comments received on the record of the public hearing under 345-027-0067, the Department of Energy shall issue a proposed order recommending approval, modification or denial of the request(s) for amendment to the site certificate. The Department must consider any oral comments made at the public hearing, written comments received before the close of the record of the public hearing, agency consultation, and any Council comments. The Department may issue the proposed order at a later date, but the Department shall, no later than 30 days after the Council has reviewed the draft proposed order and considered all comments received on the record of the public hearing, notify the certificate holder in writing of the reasons for the delay.¶~~
~~(2) Concurrent with issuing the proposed order, the Department shall issue public notice of the proposed order by posting public notice as an announcement on its website and by sending public notice by mail or email to:¶~~
~~(a) Persons on the Council's general mailing list as defined in OAR 345-011-0020,¶~~
~~(b) Persons on any special list established for the facility,¶~~
~~(c) The reviewing agencies as defined in OAR 345-001-0010(52), and¶~~
~~(d) The updated property owner list as described in OAR 345-021-0010(1)(f) Exhibit F.¶~~
~~(3) Notice of the proposed order shall include: ¶~~
~~(a) A description of the facility and the facility's general location.¶~~
~~(b) A description of the process for requesting a contested case.¶~~
~~(c) The physical and website addresses of where the public may review copies of the proposed order.¶~~
~~(d) The name, address, email address and telephone number of the Department representative to contact for more information.¶~~
~~(4) On the same date the notice of proposed order as described in section (2) is issued, the Department shall send a notice of the opportunity to request a contested case to the certificate holder and to all persons who commented in person or in writing on the record of the public hearing as described in OAR 345-027-0067. The notice shall include the deadline for requesting a contested case and restatements of sections (5), (6), (7), (8) and (9).¶~~
~~(5) Only those persons, including the site certificate holder, who commented in person or in writing on the record of the public hearing described in OAR 345-027-0067 may request a contested case proceeding on the proposed order for an amendment to the site certificate. To properly raise an issue in a request for a contested case proceeding on the proposed order for an amendment, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing, unless the Department of Energy did not follow the requirements of OAR 345-027-0067, or unless the action recommended in the proposed order differs materially from the draft proposed order, including any recommended conditions of approval, in which case the person may raise only new issues within the jurisdiction of the Council that are related to such differences. If a person has not raised an issue at the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, the Council shall not grant a contested case proceeding for that issue. To have raised an issue with sufficient specificity, the person must have presented facts at the public hearing that support that person's position on the issue.¶~~
~~(6) Contested case requests must be submitted in writing and must be received by the Department by a specified deadline that is at least 30 days from the date of notice in section (4). Contested case requests must include:¶~~
~~(a) The person's name, mailing address and email address and any organization the person represents; ¶~~
~~(b) A short and plain statement of the issue or issues the person desires to raise in a contested case proceeding;¶~~
~~(c) A statement that describes why the Council should find that the requester properly raised each issue, as described in section (7), including a specific reference to the person's prior comments to demonstrate that the~~

~~person raised the specific issue or issues on the record of the public hearing, if applicable;¶~~
~~(d) A statement that describes why the Council should determine that each identified issue justifies a contested case, under the evaluation described in section (9); ¶~~
~~(e) A detailed description of the person's interest in the proceeding and how that interest may be affected by the outcome of the proceeding;¶~~
~~(f) Name and address of the person's attorney, if any; ¶~~
~~(g) A statement of whether the person's request to participate in a contested case is as a party or a limited party, and if as a limited party, the precise area or areas in which participation is sought; ¶~~
~~(h) If the person seeks to protect a personal interest in the outcome of the proceeding, a detailed statement of the person's interest, economic or otherwise, and how such interest may be affected by the results of the proceeding; ¶~~
~~(i) If the person seeks to represent a public interest in the results of the proceeding, a detailed statement of such public interest, the manner in which such public interest will be affected by the results of the proceeding, and the person's qualifications to represent such public interest; and¶~~
~~(j) A statement of the reasons why others who commented on the record of the public hearing cannot adequately represent the interest identified in subsections (h) or (i). ¶~~
~~(7) Before considering whether an issue justifies a contested case proceeding under section (9), the Council must determine that the person requesting a contested case commented in person or in writing on the record of the public hearing and properly raised each issue included in the request. To determine that a person properly raised each issue included in the request, the Council must find that: ¶~~
~~The person making the contested case request raised the issue on the record of the public hearing described in OAR 345-027-0067 with sufficient specificity to afford the Council, the Department and the certificate holder an adequate opportunity to respond to the issue;¶~~
~~The Department did not follow the requirements of OAR 345-027-0067; or¶~~
~~If the action recommended in the proposed order, including any recommended conditions of approval, differs materially from the action recommended in the draft proposed order, the contested case request identified new issues that are related to such material differences.¶~~
~~(8) If the Council finds that the person requesting a contested case failed to comment in person or in writing on the record of the public hearing or failed to properly raise any issue, as described in section (7), the Council must deny that person's contested case request. If the Council finds that the person requesting a contested case commented in person or in writing on the record of the public hearing and properly raised one or more issues, the Council's determination of whether an issue justifies a contested case, as described in section (9), shall be limited to those issues the Council finds were properly raised.¶~~
~~(9) After identifying the issues properly raised the Council shall determine whether any properly raised issue justifies a contested case proceeding on that issue. To determine that an issue justifies a contested case proceeding, 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 the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24. If the Council does not have jurisdiction over the issue raised in the request, the Council must deny the request.¶~~
~~(10) The Council must take one of the following actions when determining if a request identifying one or more properly raised issues justifies a contested case proceeding:¶~~
~~(a) If the Council finds that the request identifies one or more properly raised issues that justify a contested case proceeding, the Council shall conduct a contested case proceeding according to the applicable provisions of OAR 345-015-0012 to -0014 and 345-015-0018 to -0085. The Council shall identify the contested case parties and shall identify the issues each contested case party may participate on. The parties to a contested case proceeding shall be limited to those persons who commented on the record of the public hearing and who properly raised issues in their contested case request that the Council found sufficient to justify a contested case, except that the certificate holder is an automatic party to a contested case. The issues a party to a contested case proceeding may participate on shall be limited to those issues that party properly raised in its contested case request that the~~

~~Council found sufficient to justify a contested case, except that the certificate holder may participate on any issue the Council found sufficient to justify a contested case proceeding.¶~~
~~(b) If the Council finds that the request identifies one or more properly raised issues that an amendment to the proposed order, including modification to conditions, 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 and send a notice of the amended proposed order to the persons described in section (4). Only the certificate holder and those persons who commented on the record of the hearing may, in a writing received by the Department within 30 days after the Department issues the notice of the amended proposed order, request a contested case proceeding limited to issues related to the amendment to the proposed order. As described in section (9), the Council shall determine whether any issue identified in the request for a contested case proceeding justifies a contested case proceeding. A person's contested case request under this subsection shall include:¶~~
~~(A) The person's name, mailing address and email address;¶~~
~~(B) A statement of the contested issues related to the amendment to the proposed order, including facts believed to be at issue; and¶~~
~~(C) A statement that describes why the Council should find an issue justifies a contested case, as described in section (8).¶~~
~~(c) If the Council finds that the request does not identify a properly raised issue that justifies a contested case proceeding, the Council shall deny the request. In a written order denying the request, the Council shall state the basis for the denial. The Council shall then adopt, modify or reject the proposed order based on the considerations described in OAR-345-027-0075. In a written order the Council shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council shall issue an amended site certificate, which is effective upon execution by the Council Chair and by the certificate holder.¶~~
~~(11) If there is no request for a contested case proceeding as described in section (6) or subsection (10)(b), the Council, may adopt, modify or reject the proposed order based on the considerations described in OAR 345-027-0075. In a written order, the Council shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council shall issue an amended site certificate, which is effective upon execution by the Council Chair and by the certificate holder.¶~~
~~(12) Judicial review of the Council's final order either granting or denying an amended site certificate shall be as provided in ORS 469.403.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.405~~

SUSPEND: 345-027-0072

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0072~~
~~Proposed Order and Councils Final Decision on Requests for Amendment Under Type B Review~~
~~(1) No later than 21 days after the written comment deadline that closes the record on the draft proposed order, the Department of Energy shall issue a proposed order recommending approval, modification or denial of the request(s) for amendment to the site certificate. The Department must consider any written comments received before the close of the record on the draft proposed order and any agency consultation. The Department may issue the proposed order at a later date, but the Department shall, no later than 21 days after the close of the record on the draft proposed order, notify the certificate holder in writing of the reasons for the delay.¶~~
~~(2) Concurrent with issuing the proposed order, the Department shall issue public notice of the proposed order by posting public notice as an announcement on its website and by sending public notice by mail or email to:¶~~
~~(a) Persons on the Council's general mailing list as defined in OAR 345-011-0020,¶~~
~~(b) Persons on any special list established for the facility,¶~~
~~(c) The reviewing agencies as defined in OAR 345-001-0010(52), and¶~~
~~(d) The updated property owner list as described in OAR 345-021-0010(1)(f) Exhibit F.¶~~
~~(3) Notice of the proposed order shall include: ¶~~
~~(a) A description of the facility and the facility's general location.¶~~
~~(b) The physical and website addresses of where the public may review copies of the proposed order.¶~~
~~(c) The name, address, email address and telephone number of the Department representative to contact for more information.¶~~
~~(d) A statement that only those persons, including the site certificate holder, who provided written comment by the written comment deadline may seek judicial review as provided in ORS 469.403 and issues eligible for judicial review are limited to the issues raised in that person's written comments. ¶~~
~~(4) The Council, may adopt, modify or reject the proposed order based on the considerations described in OAR 345-027-0075. In a written order, the Council shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council shall issue an amended site certificate, which is effective upon execution by the Council Chair and by the certificate holder.¶~~
~~(5) Judicial review of the Council's final order either granting or denying an amended site certificate shall be as provided in ORS 469.403, provided that only those persons, including the site certificate holder, who provided written comment by the written comment deadline may seek judicial review as provided in ORS 469.403 and issues eligible for judicial review are limited to the issues raised in that person's written comments.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.405~~

SUSPEND: 345-027-0075

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0075~~
~~Scope of Council's Review~~
~~(1) In making a decision to grant or deny issuance of an amended site certificate, the Council shall apply the applicable laws and Council standards required under section (2) and in effect on the dates described in section (3). ¶~~
~~(2) To issue an amended site certificate, the Council shall determine that the preponderance of evidence on the record supports the following conclusions:¶~~
~~(a) For a request for amendment proposing to add new area to the site boundary, the portion of the facility within the area added to the site by the amendment complies with all laws and Council standards applicable to an original site certificate application.¶~~
~~(b) For a request for amendment to extend the deadlines for beginning or completing construction, after considering any changes in facts or law since the date the current site certificate was executed, the facility complies with all laws and Council standards applicable to an original site certificate application. However, for requests to extend completion deadlines, the Council need not find compliance with an applicable law or Council standard if the Council finds that: ¶~~
~~(A) The certificate holder has spent more than 50 percent of the budgeted costs on construction of the facility; ¶~~
~~(B) The inability of the certificate holder to complete the construction of the facility by the deadline in effect before the amendment is the result of unforeseen circumstances that are outside the control of the certificate holder; ¶~~
~~(C) The standard, if applied, would result in an unreasonable financial burden on the certificate holder; and ¶~~
~~(D) The Council does not need to apply the standard to avoid a significant threat to the public health, safety or the environment;¶~~
~~(c) For any other requests for amendment not described above, the facility, with the proposed change, complies with the applicable laws or Council standards that protect a resource or interest that could be affected by the proposed change. ¶~~
~~(d) For all requests for amendment, the amount of the bond or letter of credit required under OAR 345-022-0050 is adequate.¶~~
~~(3) In making the findings required to grant an amendment under section (2), the Council shall apply the applicable law and Council standards in effect on the following dates:¶~~
~~(a) For the applicable substantive criteria under the Council's land use standard, as described in OAR 345-022-0030, the date the certificate holder submitted the request for amendment, and¶~~
~~(b) For all other applicable laws and Council standards, the date the Council issues the amended site certificate.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.405~~

SUSPEND: 345-027-0080

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0080~~
~~Type C Review Process for Pre-Operational Requests for Amendment ¶~~

~~(1) A certificate holder may only request the type C review for a request for amendment when the change proposed in the request for amendment relates to the facility, or portion/phase of the facility, not yet in operation, but approved for construction in the site certificate or amended site certificate. A certificate holder cannot request type C review of a request for amendment proposing to extend construction deadlines.¶~~
~~(2) Requests under section (1) must be submitted in writing to the Department of Energy and must include:¶~~
~~(a) A complete request for amendment, including the information described in 345-027-0060(1);¶~~
~~(b) The reasons why the certificate holder needs type C review of its request for amendment;¶~~
~~(c) An explanation of why the proposed change could not have been reasonably foreseen by the certificate holder;¶~~
~~(d) An explanation of why the proposed change is unavoidable; and¶~~
~~(e) Reasons why the type C review is adequate to prevent significant adverse impacts to the resources and interests protected by Council standards.¶~~
~~(3) Upon receiving a request under sections (1) and (2), the Department shall post the request and the request for amendment on the Department's website.¶~~
~~(4) Within 3 business days after receiving a request under sections (1) and (2), the Department shall issue a written determination either granting or denying type C review. Upon issuance, the Department shall post the written determination on its website.¶~~
~~(5) If the Department denies type C review, the certificate holder may request the Department's determination to be referred to the Council. If requested, the Department must refer its determination to the Council for concurrence, modification or rejection. Upon a Department determination being referred to the Council, the Council chair shall convene a Council meeting as promptly as possible as described in OAR 345-011-0015. ¶~~
~~(6) To grant a request under section (1), the Department or the Council must find:¶~~
~~(a) Construction of the certificated energy facility, or portion of the certificated energy facility, has not been deemed complete;¶~~
~~(b) The request for amendment is complete;¶~~
~~(c) Type C review is necessary;¶~~
~~(d) The proposed change could not have been reasonably foreseen by the certificate holder;¶~~
~~(e) The proposed change is unavoidable; and¶~~
~~(f) Type C review is adequate to prevent significant adverse impacts to the resources and interests protected by the Council's standards.¶~~
~~(7) Within 7 days after a request under section (1) is granted, the Department shall:¶~~
~~(a) Issue a draft temporary order approving or denying the request for amendment, including a recommendation to the Council on whether Council review should be completed through the type A or type B review process; and¶~~
~~(b) Post the draft temporary order on the Department's website. ¶~~
~~(8) The Council shall, at its first meeting following the Department's issuance of a draft temporary order, consider the draft temporary order and consider whether review should be completed though the type A or type B review process. Upon issuance of a draft temporary order, the Council chair may call a special Council meeting, as described in OAR 345-011-0015, to be held as promptly as possible.¶~~
~~(9) After considering the draft temporary order and the Department's recommendation on whether review should be completed through the type A or type B review process, the Council shall adopt, modify, or reject the draft temporary order based on the considerations described in OAR 345-027-0075, and the Council shall decide whether review should be completed through the type A or type B review process. In a written temporary order,~~

~~the Council shall either temporarily grant issuance of an amended site certificate, or deny issuance of an amended site certificate.¶~~
~~(10) Before implementing any change approved by the Council's temporary order, the certificate holder must submit an authorized acknowledgement that the certificate holder accepts all terms and conditions of the temporary order.¶~~
~~(11) If review is to be completed through the type A review process, review proceeds as described in 345-027-0067, -0071, and -0075, where the temporary order replaces all references to the draft proposed order. ¶~~
~~(12) If review is to be completed through the type B review process, review proceeds as described in 345-027-0068, -0072, and -0075, where the temporary order replaces all references to the draft proposed order.¶~~
~~(13) Action taken by the certificate holder under the authority of the temporary order that is inconsistent with the language and conditions of the final order is not a violation so long as the inconsistency is remedied by the certificate holder as specified by the Council in the final order.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.405~~

SUSPEND: 345-027-0085

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0085~~
~~Request for Amendment to Extend Construction Deadlines ¶~~

~~(1) The certificate holder may request an amendment to the site certificate to extend the deadlines for beginning or completing construction of the facility, or portion/phase of the facility, that the Council has approved in a site certificate or an amended site certificate by submitting a preliminary request for amendment in accordance with 345-027-0060. The preliminary request for amendment must include an explanation of the need for an extension and must be submitted to the Department of Energy before the applicable construction deadline, but no earlier than the date twelve months before the applicable construction deadline. ¶~~
~~(2) A preliminary request for amendment received by the Department within the time allowed under section (1) to extend the deadlines for beginning and completing construction suspends expiration of the site certificate or amended site certificate until the Council acts on the request for amendment. If the Council denies the extension request after the applicable construction deadline, the site certificate is deemed expired as of the applicable construction deadline specified in the site certificate or amended site certificate. ¶~~
~~(3) If the Council grants an amendment under this rule, the Council shall specify new deadlines for beginning or completing construction that are the later of: ¶~~
~~(a) Three years from the deadlines in effect before the Council grants the amendment, or¶~~
~~(b) Following a contested case proceeding conducted pursuant to OAR 345-027-0071, two years from the date the Council grants the amendment. ¶~~
~~(4) For requests for amendment to the site certificate received under this rule to extend construction deadlines for facilities or portions of the facility the Council shall not grant more than two amendments to extend the deadline for beginning construction of a facility or a phase of a facility. ¶~~
~~(5) For requests for an amendment to the site certificate to extend construction deadlines for facilities, or portions/phases of facilities, not yet in construction, but already approved for construction in the site certificate or amended site certificate prior to October 24, 2017:¶~~
~~(a) Sections (1) and (2) of this rule apply; ¶~~
~~(b) Sections (3) and (4) of this rule do not apply;¶~~
~~(c) When considering whether to grant a request for amendment for a deadline extension made under this section, the Council shall consider how many extensions it has previously granted; and¶~~
~~(d) If a request for amendment for a deadline extension made under this section is granted, the Council shall specify new deadlines for beginning or completing construction that are not more than two years from the deadlines in effect before the Council grants the amendment.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.370, 469.405, 469.503~~

SUSPEND: 345-027-0090

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0090~~
~~Request by Any Person for Amendment to Apply Later-Adopted Laws ¶~~

~~(1) Any person may request an amendment of a site certificate to apply a law(s), including local government ordinances, statutes, rules or Council standards, adopted after the date the site certificate was executed, if the person contends failure to apply the law(s) results in a significant threat to the public health or safety or to the environment. The Department of Energy itself may initiate such a request.¶~~
~~(2) To request an amendment to apply later-adopted law(s) under this rule, the person shall submit a preliminary request for amendment to the Department with the information described in 345-027-0060(1)(a),(c),(d) and the following: ¶~~
~~(a) Identification of the law(s) that the person seeks to apply to the facility; and ¶~~
~~(b) The particular facts that the person believes clearly show a significant threat to the public health, safety or the environment that requires application of the later adopted law(s).¶~~
~~(3) If the Department receives a preliminary request for amendment to apply later-adopted law(s) as described in this rule from any person other than the certificate holder, the Department shall send a copy of the request to the certificate holder. The transmittal shall include a deadline by which the certificate holder must submit a response to the Department. In its response, the certificate holder shall state whether it agrees that there is a clear showing of a significant threat to the public health, safety or the environment that requires application of the later-adopted law(s).¶~~
~~(a) If the certificate holder concludes the later-adopted law(s) should be applied to the facility, the Council shall review the request to apply later-adopted law(s) as a complete request for amendment in accordance with section (5).¶~~
~~(b) If the certificate holder concludes that the law(s) should not be applied to the facility, or if the certificate holder does not respond with its conclusion before the specified deadline, the Department shall ask the Council to determine whether the request clearly shows a significant threat to the public health, safety or the environment that requires application of the later-adopted law(s).¶~~
~~(A) If the Council determines there is not a clear showing of a significant threat to the public health, safety or the environment that requires application of the later adopted law(s), the Council shall deny the request to apply later-adopted law(s).¶~~
~~(B) If the Council determines there is a clear showing of a significant threat to the public health, safety or the environment that requires application of the later adopted law(s), the Council shall review the request to apply later-adopted law(s) as a complete request for amendment in accordance with section (5).¶~~
~~(4) A preliminary request for amendment to apply later-adopted law(s) under this rule is considered a complete request for amendment for purposes of OAR 345-027-0063 on:¶~~
~~(a) If the request to apply later-adopted law(s) is made by the certificate holder, the date the request is received by the Department.¶~~
~~(b) If the request to apply later-adopted law(s) is made by a person other than the certificate holder, and if the certificate holder responds as described in subsection (3)(a), the date the response described in subsection (3)(a) is received by the Department.¶~~
~~(c) If the request to apply later-adopted law(s) is made by a person other than the certificate holder, and if the certificate holder responds as described in subsection (3)(b) or does not respond before the specified deadline under section (3), the date of the Council's determination under paragraph (3)(b)(B).¶~~
~~(5) After receiving a complete request for amendment under section (4) of this rule, the Council shall review the request for amendment as described in OAR 345-027-0065, 345-027-0067, 345-027-0071 and 345-027-0075, except that: ¶~~

~~(a) If the Department recommends approval or modified approval of the requested amendment, the Department shall include in the proposed order described in OAR 345-027-0071 any new or modified site certificate conditions necessary to assure compliance with the law(s) applied to the facility under the proposed order;¶~~
~~(b) If the Department in its proposed order recommends approval or modified approval of the requested amendment, the certificate holder may, by written request submitted to and received by the Department within 30 days after the Department issues the proposed order, ask the Council to hold a contested case proceeding on the proposed order. In the request, the certificate holder shall provide a description of the issues to be contested and a statement of the facts believed to be at issue. If the certificate holder requests a contested case proceeding, the Council shall conduct a contested case proceeding according to the applicable provisions of OAR 345-015-0012 to -0014, and 345-015-0018 to 345-015-0085 limited to the issues stated by the certificate holder; and ¶~~
~~(c) The Council shall include new conditions in a site certificate amended under this rule only if the Council finds that the conditions are necessary based upon a clear showing of a significant threat to the public health, safety or the environment.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.401, 469.405~~

SUSPEND: 345-027-0100

RULE SUMMARY: Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017.

CHANGES TO RULE:

~~345-027-0100~~
~~Request for Amendment to Transfer Ownership, Possession or Control of the Facility or the Certificate Holder~~
~~(1) For the purpose of this rule:¶~~
~~(a) A request for amendment to a site certificate to transfer the site certificate is required for a transaction that results in a change in the ownership, possession or control of the facility or the certificate holder. ¶~~
~~(b) "New owner" means the person or entity that will gain ownership, possession or control of the facility or the certificate holder. ¶~~
~~(2) When the certificate holder has knowledge that a transaction that requires a transfer of the site certificate as described in section (1)(a) is or may be pending, the certificate holder shall notify the Department of Energy. In the notice, the certificate holder shall include the name and contact information of the new owner, and the date of the transfer of ownership. If possible, the certificate holder shall notify the Department at least 60 days before the date of the transfer of ownership. ¶~~
~~(3) A transaction that would require a transfer of the site certificate as described in subsection (1)(a) does not terminate the transferor's duties and obligations under the site certificate until the Council approves a request for amendment to transfer the site certificate and issues an amended site certificate. The new owner is not allowed to construct or operate the facility until an amended site certificate as described in section (10) or a temporary amended site certificate as described in section (11) becomes effective. ¶~~
~~(4) To request an amendment to transfer the site certificate, the new owner shall submit a written request to the Department that includes the information described in OAR 345-021-0010(1)(a), (d), (f) and (m), a certification that the new owner agrees to abide by all terms and conditions of the site certificate currently in effect and, if known, the expected date of the transaction. If applicable, the new owner shall include in the request the information described in OAR 345-021-0010(1)(y)(O)(iv). ¶~~
~~(5) The Department may require the new owner to submit a written statement from the current certificate holder, or a certified copy of an order or judgment of a court of competent jurisdiction, verifying the new owner's right, subject to the provisions of ORS Chapter 469 and the rules of this chapter, to possession or control of the site or the facility. ¶~~
~~(6) Within 15 days after receiving a request for amendment to transfer the site certificate, the Department shall send a notice of the request by mail or email to the reviewing agencies as defined in OAR 345-001-0010, to all persons on the Council's general mailing list as defined in OAR 345-011-0020, to any special list established for the facility and to the updated property owner list submitted by the new owner under section (4). In the notice, the Department shall describe the request for amendment to transfer the site certificate, specify a date by which comments are due and state that the date of the Council's transfer hearing will be announced on the Department's website. ¶~~
~~(7) Before acting on the request for amendment to transfer the site certificate, the Council shall hold a transfer hearing. The Council shall hold the transfer hearing during a Council meeting and shall provide notice of the hearing on its meeting agenda, which will be sent by mail or email to the Council's general mailing list in advance of the meeting. The transfer hearing is not a contested case hearing. During the hearing the Council will accept comments from the public, reviewing agencies and new owner regarding the new owner's compliance with the Council standards described in subsection (8)(a). ¶~~
~~(8) At the conclusion of the transfer hearing or at a later meeting, the Council may issue an order approving the request for amendment to transfer the site certificate if the Council finds that: ¶~~
~~(a) The new owner complies with the Council standards described in OAR 345-022-0010, 345-022-0050 and, if applicable, OAR 345-024-0710(1); and ¶~~
~~(b) The new owner is or will be lawfully entitled to possession or control of the site or the facility described in the site certificate. ¶~~

~~(9) Except as described in OAR 345-027-0051(5), the Council shall not otherwise change the terms and conditions of the site certificate in an order approving the request for amendment to transfer the site certificate. ¶~~
~~(10) Upon issuing the order described in section (8), the Council shall issue an amended site certificate that names the new owner as the new certificate holder or as the new owner of the certificate holder. The amended site certificate is effective upon execution by the Council chair and the new owner. The Council shall issue the amended site certificate in duplicate counterpart originals and each counterpart, upon signing, will have the same effect. ¶~~
~~(11) If the Council chair determines that special circumstances justify emergency action, the Council chair may, upon a written request from the new owner that includes a showing that the new owner can meet the requirements of section (8), issue a temporary amended site certificate that names the new owner as the new certificate holder or as the new owner of the certificate holder. The temporary amended site certificate is effective upon execution by the Council chair and the new owner. The temporary amended site certificate expires when an amended site certificate as described in section (10) becomes effective or as the Council otherwise orders.~~
~~Statutory/Other Authority: ORS 469.470~~
~~Statutes/Other Implemented: ORS 469.401, 469.405~~

ADOPT: 345-027-0311

RULE SUMMARY: States applicability of temporary rules related to site certificate amendments. Clarifies that the Department and Council will continue to process all requests for amendment and amendment determination requests submitted on or after October 24, 2017 for which Council has not made a final decision prior to the effective date of these rules, without requiring the certificate holder to resubmit the request or to repeat any steps taken as part of the request prior to the effective date of these rules.

CHANGES TO RULE:

345-027-0311
Applicability
(1) The rules in this division apply to all requests for amendment to a site certificate and amendment determination requests for facilities under the Council's jurisdiction that are submitted to, or were already under review by, the Council on or after the effective date of the rules. The Department and Council will continue to process all requests for amendment and amendment determination requests submitted on or after October 24, 2017 for which Council has not made a final decision prior to the effective date of these rules, without requiring the certificate holder to resubmit the request or to repeat any steps taken as part of the request prior to the effective date of these rules.¶
(2) Notwithstanding section (1) of this rule, these rules do not apply to facilities described in ORS 469.410(1).
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.501

ADOPT: 345-027-0313

RULE SUMMARY: Provides that site certificates expire when deadlines to begin construction are not met. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-027-0313
Certificate Expiration
If the certificate holder does not begin construction of the facility by the construction beginning date specified in the site certificate or amended site certificate, the site certificate expires on the construction beginning date specified, unless expiration of the site certificate is suspended pending final action by the Council on a request for amendment to a site certificate pursuant to OAR 345-027-0385(2).
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.370, 469.501

ADOPT: 345-027-0350

RULE SUMMARY: States what types of changes require a certificate holder to submit a request for amendment to the Department. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-027-0350
Changes Requiring an Amendment
Except for changes allowed under OAR 345-027-0353 of this rule, an amendment to a site certificate is required to:¶
(1) Transfer ownership of the facility or the certificate holder as described in OAR 345-027-0400;¶
(2) Apply later-adopted law(s) as described in OAR 345-027-0390;¶
(3) Extend the construction beginning or completion deadline as described in OAR 345-027-0385;¶
(4) Design, construct or operate a facility in a manner different from the description in the site certificate if the proposed change:¶
(a) Could result in a significant adverse impact that the Council has not addressed in an earlier order and the impact affects a resource or interest protected by a Council standard;¶
(b) Could impair the certificate holder's ability to comply with a site certificate condition; or¶
(c) Could require a new condition or a change to a condition in the site certificate.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.405

ADOPT: 345-027-0351

RULE SUMMARY: States the different review processes for different types of requests for amendments. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-027-0351
Review Processes for Requests for Amendment
(1) The transfer review process, described in 345-027-0400, shall apply to the Council's review of a request for amendment to a site certificate to transfer a site certificate.¶
(2) The type A review process, consisting of rules 345-027-0359, -0360, -0363, -0365, -0367, -0371 and -0375, is the default review process and shall apply to the Council's review of a request for amendment proposing a change described in 345-027-0350(2),(3), and (4).¶
(3) The type B review process, consisting of rules 345-027-0359, -0360, -0363, -0365, -0368, -0372, and -0375, shall apply to the Council's review of a request for amendment that the Department or the Council approves for type B review under 345-027-0357.¶
(4) The type C review process, described in 345-027-0380, shall apply to the Council's review of a request for amendment that the Department or the Council approves for type C review under 345-027-0380.¶
(5) The Council may act concurrently on any combination of proposed changes included in a request for amendment. Concurrent proposed changes are subject to the substantive requirements applicable to each respective proposed change and the Council shall review all proposed changes through the process with the more procedural steps applicable to any one of the proposed changes.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.405

ADOPT: 345-027-0353

RULE SUMMARY: States what types of changes are exempt from requiring an amendment to the site certificate. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-027-0353
Changes Exempt from Requiring an Amendment
An amendment to a site certificate is not required if the proposed change in the design, construction or operation of a facility is in substantial compliance with the terms and conditions of the site certificate, and is a change:¶
(1) To an electrical generation facility that would increase the electrical generating capacity and would not increase the number of electric generators at the site, change fuel type, increase fuel consumption by more than 10 percent or enlarge the facility site;¶
(2) To the number or location of pipelines for a surface facility related to an underground gas storage reservoir that would not result in the facility exceeding permitted daily throughput or a change to the site boundary;¶
(3) To the number, size or location of pipelines for a geothermal energy facility that would not result in a change to the site boundary;¶
(4) To a pipeline that is a related or supporting facility that delivers natural gas to the energy facility if the change would extend or modify the pipeline or expand the right-of-way, when the change is exclusively to serve gas users other than the energy facility;¶
(5) To a transmission line that is a related or supporting facility if the change would extend or modify the transmission line or expand the right-of-way, when the change is exclusively to serve the transmission needs of a separate energy facility or energy user; or¶
(6) To construct a pipeline less than 16 inches in diameter and less than five miles in length to test or maintain an underground gas storage reservoir. If the proposed pipeline would connect to a surface facility related to an underground gas storage reservoir for which the Council has issued a site certificate or to a gas pipeline for which the Council has issued a site certificate, the certificate holder must obtain, prior to construction, the approval of the Department of Energy for the construction, operation and retirement of the proposed pipeline. To obtain Department approval, the certificate holder must submit a request as described in OAR 345-027-0210 through OAR 345-027-0240.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.405

ADOPT: 345-027-0355

RULE SUMMARY: States that a certificate holder must perform a written evaluation for changes that it determines do not require an amendment, and states what the certificate holder must do with that evaluation. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-027-0355
Written Evaluations for Changes Not Requiring Amendment
(1) For a proposed change that would add area to the site boundary, see OAR 345-027-0357(1). For a proposed change to the facility that does not include adding area to the site boundary, the certificate holder may evaluate OAR 345-027-0350 and 345-027-0353 and conclude that the proposed change does not require an amendment. If the certificate holder concludes that a proposed change to the facility does not require an amendment to the site certificate, the certificate holder must complete a written evaluation if the change:¶
(a) Could be included in and governed by the site certificate, but the certificate holder has concluded the change is not described in 345-027-0350; or¶
(b) Is exempt from requiring an amendment under 345-027-0353.¶
(2) The written evaluation must explain why an amendment is not required, must be completed before implementing any change, and must be included in the next semiannual construction progress report or the Facility Modification Report required under 345-026-0080. The written evaluation must be retained for the life of the facility.¶
(3) The Department of Energy may, at any time, inspect the changes made to the facility and may inspect the certificate holder's written evaluation concluding that the change did not require an amendment.¶
(4) When the certificate holder implements a change without an amendment, the Department may initiate an enforcement action as described in Division 29 if the Department determines the change required an amendment to the site certificate.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.405

ADOPT: 345-027-0357

RULE SUMMARY: States the process a certificate holder must go through when submitting an Amendment Determination Request to the Department. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-027-0357
Amendment Determination Request
(1) For a proposed change that would add area to the site boundary, the certificate holder must either:¶
(a) submit a request for amendment to the Department of Energy; or¶
(b) submit an amendment determination request to the Department for a written determination of whether the proposed change requires an amendment under OAR 345-027-0350 and is not exempt under 345-027-0353.¶
(2) For a proposed change that would not add area to the site boundary, the certificate holder may submit an amendment determination request to the Department for a written determination of:¶
(a) whether the proposed change requires an amendment under OAR 345-027-0350; or¶
(b) whether the proposed change is exempt from requiring an amendment under 345-027-0353.¶
(3) For any request for amendment, the certificate holder may submit an amendment determination request to the Department for a written determination of whether a request for amendment justifies review under the type B review process described in 345-027-0351(3).¶
(4) Requests described in section (1), (2), and (3) must be submitted in writing to the Department and must include:¶
(a) A narrative description of the proposed change;¶
(b) Maps and/or geospatial data layers representing the effects and/or location of the proposed change;¶
(c) The certificate holder's evaluation of the determination(s) it is requesting under sections (1), (2), and (3); and¶
(d) Any additional information the certificate holder believes will assist the Department's evaluation.¶
(5) After receiving an amendment determination request, the Department shall post an announcement on the Department's website to notify the public that an amendment determination request has been received. The announcement shall include a copy of the amendment determination request.¶
(6) Upon receiving a request for a written determination described in section (1) and (2), the Department shall, as promptly as possible, issue a written determination to the certificate holder. After the Department issues its written determination, the Department shall, as promptly as possible, provide the request and the written determination to the Council and post the written determination to its website. At the first Council meeting after the Department issues its written determination, the Department shall provide verbal notice of the request and the written determination to the Council during the consent calendar agenda item. The Department may refer its determination to the Council for concurrence, modification, or rejection. At the request of the certificate holder or a Council member, the Department must refer its determination to the Council for concurrence, modification or rejection.¶
(7) Upon receiving a request for a written determination described in section (3), the Department shall, as promptly as possible, issue a written determination to the certificate holder. At the request of the certificate holder, the Department must refer its determination to the Council for concurrence, modification, or rejection.¶
(8) In determining whether a request for amendment justifies review under the type B review process described in 345-027-0351(3), the Department and the Council may consider factors including but not limited to:¶
(a) The complexity of the proposed change;¶
(b) The anticipated level of public interest in the proposed change;¶
(c) The anticipated level of interest by reviewing agencies;¶
(d) The likelihood of significant adverse impact; and¶
(e) The type and amount of mitigation, if any.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.405

ADOPT: 345-027-0359

RULE SUMMARY: States that a certificate holder may elect to participate in a pre-amendment conference with the Department. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-027-0359
Pre-Amendment Conference
(1) Prior to submitting a preliminary request for amendment to the site certificate as described in OAR 345-027-0360, the certificate holder may request a pre-amendment conference with the Department of Energy to discuss the scope, timing, and applicable laws and Council standards associated with the request for amendment.¶
(2) A pre-amendment conference request must be in writing and must include a description of the proposed change and, if applicable, maps or geospatial data layers representing the location of the proposed change.¶
(3) Upon receipt of a request as described in section (1), the Department must, as promptly as possible, set a date and time for a pre-amendment conference.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.405

ADOPT: 345-027-0360

RULE SUMMARY: States what a certificate holder must submit to the Department when making a request for amendment, and that this submittal is considered a preliminary request for amendment until the Department determines the request is complete. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-027-0360
Preliminary Request for Amendment
(1) To request an amendment to the site certificate required by OAR 345-027-0350(3) and (4), the certificate holder shall submit a written preliminary request for amendment to the Department of Energy that includes the following:¶
(a) The name of the facility, the name and mailing address of the certificate holder, and the name, mailing address, email address and phone number of the individual responsible for submitting the request.¶
(b) A detailed description of the proposed change, including:¶
(A) a description of how the proposed change affects the facility,¶
(B) a description of how the proposed change affects those resources or interests protected by applicable laws and Council standards, and¶
(C) the specific location of the proposed change, and any updated maps and/or geospatial data layers relevant to the proposed change.¶
(c) References to any specific Division 21 information that may be required for the Department to make its findings.¶
(d) The specific language of the site certificate, including conditions, that the certificate holder proposes to change, add or delete through the amendment.¶
(e) A list of the Council standards and all other laws - including statutes, rules and ordinances - applicable to the proposed change, and an analysis of whether the facility, with the proposed change, would comply with those applicable laws and Council standards. For the purpose of this rule, a law or Council standard is "applicable" if the Council would apply or consider the law or Council standard under OAR 345-027-0375(2).¶
(f) An updated list of the owners of property located within or adjacent to the site of the facility, as described in OAR 345-021-0010(1)(f).¶
(2) After receiving a preliminary request for amendment, the Department shall post an announcement on its website to notify the public that a preliminary request for amendment has been received. The announcement shall include a copy of the preliminary request for amendment.¶
(3) For any Council standard that requires evaluation of impacts within an analysis area, the analysis area shall be the larger of either the study area(s) as defined in OAR 345-001-0000(59) or the analysis area(s) described in the project order for the application for site certificate, unless otherwise approved in writing by the Department following a pre-amendment conference.¶
(4) The certificate holder may incorporate, by specific reference, evidence previously submitted to the Department in the application for site certificate or previous request for amendment, or evidence that is otherwise included in the Department's record on the facility.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.405

ADOPT: 345-027-0363

RULE SUMMARY: States that the Department must first determine a request for amendment is complete (and how that completeness is determined) before it proceeds to writing and issuing a Draft Proposed Order. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-027-0363
Determination of Completeness for a Request for Amendment
(1) Until the Department of Energy determines the request for amendment to the site certificate is complete, it is a preliminary request for amendment. After receiving a preliminary request for amendment, the Department may seek comments from reviewing agencies to determine whether that request is complete.¶
(2) Unless the certificate holder agrees to additional time, within 60 days after receipt of a preliminary request for amendment under type A review, and within 21 days after receipt of a preliminary request for amendment under type B review, the Department shall notify the certificate holder whether the request for amendment is complete. In the notification, the Department shall:¶
(a) State that the request for amendment is complete; or¶
(b) State that the request for amendment is incomplete and:¶
(A) Describe any additional information needed to complete the request for amendment to the extent known to the Department at the time of the notification, including identification of applicable laws and Council standards not addressed in the preliminary request for amendment,¶
(B) Ask the certificate holder to submit the additional information by the due dates described in section (4), and¶
(C) Estimate the additional time the Department will need to make a determination of completeness following the submittal of the additional information by the certificate holder.¶
(3) If the Department does not notify the certificate holder as described in section (2), the request for amendment under type A review is deemed complete 60 days after receipt of a preliminary request for amendment, and the request for amendment under type B review is deemed complete 21 days after receipt of a preliminary request for amendment. Otherwise, the request for amendment is complete as determined under section (5).¶
(4) The Department may specify a date by which the certificate holder must submit additional information needed to complete the request for amendment. If follow-up requests for additional information are needed, the Department may specify dates by which the certificate holder must submit the information. At the request of the certificate holder, the Department may allow additional time for submission of the information. If the certificate holder does not submit the information by the deadline specified by the Department, including any allowed extension, the Council may reject the preliminary request for amendment. The rejection of a preliminary request for amendment is subject to appeal under ORS 469.403(3).¶
(5) A request for amendment is complete when the Department finds that the certificate holder has submitted information adequate for the Council to make findings or impose conditions on all applicable laws and Council standards. The Department shall notify the certificate holder when the Department finds that the request for amendment is complete.¶
(6) After receiving notification from the Department that the preliminary request for amendment is complete, the Department may require the certificate holder to prepare a consolidated request for amendment that includes all revisions to the preliminary request for amendment and all additional information requested by the Department before the determination of completeness. Upon a request by the Department, the certificate holder shall submit paper and non-copy-protected electronic copies of the consolidated request for amendment to the Department as specified by the Department.¶
(7) If, after a determination that a request for amendment is complete, the Department identifies a need for additional information during its review of the request for amendment, the Department may request additional information from the certificate holder.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.405

ADOPT: 345-027-0365

RULE SUMMARY: States the process by which the Department issues a Draft Proposed Order. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-027-0365
Draft Proposed Order for a Request for Amendment
(1) Within 7 days after a request for amendment to the site certificate described in OAR 345-027-0350(3) and(4), or a request for amendment to apply later-adopted laws described in OAR 345-027-0390, is determined to be complete, the Department of Energy shall:¶
(a) Send notice to the certificate holder specifying a date for issuance of a draft proposed order. The date of issuance of a draft proposed order for a type A request for amendment shall be no later than 120 days after the date of the notice. The date of issuance of a draft proposed order for a type B request for amendment shall be no later than 60 days after the date of the notice.¶
(b) Post an announcement on the Department's website to notify the public that a complete request for amendment has been received. The announcement shall include:¶
(A) A copy of the complete request for amendment;¶
(B) The date the draft proposed order will be issued, as specified in the notice required by subsection (1)(a); and¶
(C) A statement that the public comment period begins upon issuance of the draft proposed order.¶
(2) No later than the date specified in the notice required by subsection (1)(a), the Department shall issue a draft proposed order recommending approval, modification, or denial of the requested amendment. The Department may issue the draft proposed order at a later date, but the Department shall, no later than the date the Department has specified in the notice required by subsection (1)(a), notify the certificate holder in writing of the reasons for the delay. The draft proposed order may include, but is not limited to draft proposed findings of fact, conclusions of law, and conditions concerning the facility's compliance with applicable laws and Council Standards.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.405

ADOPT: 345-027-0367

RULE SUMMARY: States the process by which Public Notice and Comment occurs on Draft Proposed Orders for Request for Amendment under Type A Review. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-027-0367
Public Comment and Hearing on the Draft Proposed Order for Requests for Amendment Under Type A Review
(1) After issuance of the draft proposed order as described in OAR 345-027-0365, the Council shall conduct a public hearing on the request for amendment to the site certificate in the vicinity of the facility. The public hearing must be held at least 20 days after the draft proposed order is issued. The public hearing is not a contested case hearing.¶
(2) Concurrent with the issuance of the draft proposed order as described in OAR 345-027-0365, the Department of Energy shall:¶
(a) Send the notice described in section (3) of this rule by mail or email to:¶
(A) Persons on the Council's general mailing list as defined in OAR 345-011-0020;¶
(B) Persons on any special mailing list established for the facility;¶
(C) The reviewing agencies as defined in OAR 345-001-0010(52); and¶
(D) The updated property owner list as described in OAR 345-021-0010(1)(f) Exhibit F,¶
(b) Post the complete request for amendment, draft proposed order, and the notice of the draft proposed order and public hearing on the Department website, and Make physical copies of the draft proposed order available to the public for inspection.¶
(3) Notice of the complete request for amendment, draft proposed order and public hearing shall include:¶
(a) A description of the facility and the facility's general location.¶
(b) The date, time and location of the public hearing described in this rule.¶
(c) The name, address, email address and telephone number of the Department representative to contact for additional information.¶
(d) Addresses of the physical location(s) and the website where the public may review copies of the complete request for amendment and draft proposed order.¶
(e) The deadline for the public to submit written comments to be included in the record of the public hearing and how such comments should be submitted.¶
(f) A statement that:¶
(A) A complete request for amendment has been received and reviewed by the Department.¶
(B) The Department has issued a draft proposed order.¶
(C) To raise an issue on the record of the public hearing, a person must raise the issue in person at the public hearing or in a written comment submitted after the date of the notice of the public hearing and received by the Department before the close of the record of the public hearing.¶
(D) A person's failure to raise an issue in person or in writing on the record of the public hearing precludes the Council's consideration of whether to grant that person's subsequent contested case request. Failure to raise an issue with sufficient specificity to afford the Council, the Department, and the certificate holder an opportunity to respond to the issue precludes the Council from considering whether that issue justifies a contested case proceeding.¶
(F) To raise an issue with sufficient specificity, a person must present facts, on the record of the public hearing, that support the person's position on the issue.¶
(G) The Council will not accept or consider any further public comment on the request for amendment or on the draft proposed order after the close of the record of the public hearing.¶
(4) During the public hearing, the Department shall explain the amendment process, including the means and opportunities for the general public to participate in the process. The Department may provide this explanation by a written handout.¶
(5) At the commencement of the public hearing, the presiding officer shall read aloud the following:¶

(a) A person who intends to request a contested case on the proposed order for a site certificate amendment must comment in person or in writing on the record of the public hearing.¶
(b) A person who intends to raise an issue that may be the basis for granting a contested case proceeding must raise that issue on the record of the public hearing with sufficient specificity to afford the Council, the department and the certificate holder an adequate opportunity to respond to the issue. To raise an issue with sufficient specificity, a person must present facts, on the record of the public hearing, that support the person's position on the issue.¶
(6) At the public hearing, any person may present information regarding the pending request for amendment without administration of an oath. The presiding officer shall record all presentations made during the public hearing. The presentations are part of the decision record for the request for amendment.¶
(7) Following the close of the record of the public hearing on the draft proposed order, the Council shall review the draft proposed order, shall consider all comments received on the record of the hearing, and may provide comments to the Department regarding the draft proposed order. When the Council meets to review a draft proposed order, the Council does not permit the certificate holder, reviewing agencies or the public to comment on any issue that may be the basis for a contested case request.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.405

ADOPT: 345-027-0368

RULE SUMMARY: States the process by which Public Notice and Comment occurs on Draft Proposed Orders for Request for Amendment under Type B Review. Adopts provisions included in Administrative Order EFSC 5-2017. Provides that judicial review of the Council's final order either granting or denying an amended site certificate shall be as provided in ORS 469.403.

CHANGES TO RULE:

345-027-0368
States the process by which Public Notice and Comment occurs on Draft Proposed Orders for Request for Amendment under Type B Review.
(1) After issuance of the draft proposed order as described in OAR 345-027-0365, the Council shall solicit and receive written public comments on the draft proposed order. The Department of Energy shall specify a written comment deadline at least 20 days after the draft proposed order is issued.¶
(2) Concurrent with the issuance of the draft proposed order as described in OAR 345-027-0365, the Department shall:¶
(a) Send the notice described in section (3) of this rule by mail or email to:¶
(A) Persons on the Council's general mailing list as defined in OAR 345-011-0020;¶
(B) Persons on any special mailing list established for the facility;¶
(C) The reviewing agencies as defined in OAR 345-001-0010(52); and¶
(D) The updated property owner list as described in OAR 345-021-0010(1)(f) Exhibit F.¶
(b) Post the complete request for amendment, draft proposed order, and the notice of the draft proposed order and written comment deadline on the Department website, and¶
(c) Make physical copies of the draft proposed order available to the public for inspection.¶
(3) Notice of the complete request for amendment, draft proposed order and written comment deadline shall include:¶
(a) A description of the facility and the facility's general location.¶
(b) The name, address, email address and telephone number of the Department representative to contact for additional information.¶
(c) Addresses of the physical location(s) and the website where the public may review copies of the complete request for amendment and draft proposed order.¶
(d) The deadline for the public to submit written comments to be included in the record of the draft proposed order and how such comments should be submitted.¶
(e) A statement that:¶
(A) A complete request for amendment has been received and reviewed by the Department.¶
(B) The Department has issued a draft proposed order.¶
(C) To raise an issue on the record of the draft proposed order, a person must raise the issue in a written comment submitted after the date of the notice of the draft proposed order and written comment deadline, and received by the Department before the written comment deadline.¶
(D) The Council will not accept or consider any further public comment on the request for amendment or on the draft proposed order after the written comment deadline that closes the record on the draft proposed order.¶
(E) Judicial review of the Council's final order either granting or denying an amended site certificate shall be as provided in ORS 469.403.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.405

ADOPT: 345-027-0371

RULE SUMMARY: States the process by which the Proposed Order is issued, the process for requesting and granting a Contested Case, and the process for how the Council makes its Final Decision on Requests for Amendment Under Type A Review. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-027-0371
Proposed Order, Requests for Contested Case and Council's Final Decision on Requests for Amendment Under Type A Review
(1) No later than 30 days after the Council has reviewed the draft proposed order and considered all comments received on the record of the public hearing under 345-027-0367, the Department of Energy shall issue a proposed order recommending approval, modification or denial of the request(s) for amendment to the site certificate. The Department must consider any oral comments made at the public hearing, written comments received before the close of the record of the public hearing, agency consultation, and any Council comments. The Department may issue the proposed order at a later date, but the Department shall, no later than 30 days after the Council has reviewed the draft proposed order and considered all comments received on the record of the public hearing, notify the certificate holder in writing of the reasons for the delay.¶
(2) Concurrent with issuing the proposed order, the Department shall issue public notice of the proposed order by posting public notice as an announcement on its website and by sending public notice by mail or email to:¶
(a) Persons on the Council's general mailing list as defined in OAR 345-011-0020,¶
(b) Persons on any special list established for the facility,¶
(c) The reviewing agencies as defined in OAR 345-001-0010(52), and¶
(d) The updated property owner list as described in OAR 345-021-0010(1)(f) Exhibit F.¶
(3) Notice of the proposed order shall include:¶
(a) A description of the facility and the facility's general location.¶
(b) A description of the process for requesting a contested case.¶
(c) The physical and website addresses of where the public may review copies of the proposed order.¶
(d) The name, address, email address and telephone number of the Department representative to contact for more information.¶
(4) On the same date the notice of proposed order as described in section (2) is issued, the Department shall send a notice of the opportunity to request a contested case to the certificate holder and to all persons who commented in person or in writing on the record of the public hearing as described in OAR 345-027-0367. The notice shall include the deadline for requesting a contested case and restatements of sections (5), (6), (7), (8) and (9).¶
(5) Only those persons, including the site certificate holder, who commented in person or in writing on the record of the public hearing described in OAR 345-027-0367 may request a contested case proceeding on the proposed order for an amendment to the site certificate. To properly raise an issue in a request for a contested case proceeding on the proposed order for an amendment, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing, unless the Department of Energy did not follow the requirements of OAR 345-027-0367, or unless the action recommended in the proposed order differs materially from the draft proposed order, including any recommended conditions of approval, in which case the person may raise only new issues within the jurisdiction of the Council that are related to such differences. If a person has not raised an issue at the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, the Council shall not grant a contested case proceeding for that issue. To have raised an issue with sufficient specificity, the person must have presented facts at the public hearing that support that person's position on the issue.¶
(6) Contested case requests must be submitted in writing and must be received by the Department by a specified deadline that is at least 30 days from the date of notice in section (4). Contested case requests must include:¶
(a) The person's name, mailing address and email address and any organization the person represents;¶
(b) A short and plain statement of the issue or issues the person desires to raise in a contested case proceeding;¶

(c) A statement that describes why the Council should find that the requester properly raised each issue, as described in section (7), including a specific reference to the person's prior comments to demonstrate that the person raised the specific issue or issues on the record of the public hearing, if applicable;¶
(d) A statement that describes why the Council should determine that each identified issue justifies a contested case, under the evaluation described in section (9);¶
(e) A detailed description of the person's interest in the proceeding and how that interest may be affected by the outcome of the proceeding;¶
(f) Name and address of the person's attorney, if any;¶
(g) A statement of whether the person's request to participate in a contested case is as a party or a limited party, and if as a limited party, the precise area or areas in which participation is sought;¶
(h) If the person seeks to protect a personal interest in the outcome of the proceeding, a detailed statement of the person's interest, economic or otherwise, and how such interest may be affected by the results of the proceeding;¶
(i) If the person seeks to represent a public interest in the results of the proceeding, a detailed statement of such public interest, the manner in which such public interest will be affected by the results of the proceeding, and the person's qualifications to represent such public interest; and¶
(j) A statement of the reasons why others who commented on the record of the public hearing cannot adequately represent the interest identified in subsections (h) or (i).¶
(7) Before considering whether an issue justifies a contested case proceeding under section (9), the Council must determine that the person requesting a contested case commented in person or in writing on the record of the public hearing and properly raised each issue included in the request. To determine that a person properly raised each issue included in the request, the Council must find that:¶
(a) The person making the contested case request raised the issue on the record of the public hearing described in OAR 345-027-0367 with sufficient specificity to afford the Council, the Department and the certificate holder an adequate opportunity to respond to the issue;¶
(b) The Department did not follow the requirements of OAR 345-027-0367; or¶
(c) If the action recommended in the proposed order, including any recommended conditions of approval, differs materially from the action recommended in the draft proposed order, the contested case request identified new issues that are related to such material differences.¶
(8) If the Council finds that the person requesting a contested case failed to comment in person or in writing on the record of the public hearing or failed to properly raise any issue, as described in section (7), the Council must deny that person's contested case request. If the Council finds that the person requesting a contested case commented in person or in writing on the record of the public hearing and properly raised one or more issues, the Council's determination of whether an issue justifies a contested case, as described in section (9), shall be limited to those issues the Council finds were properly raised.¶
(9) After identifying the issues properly raised the Council shall determine whether any properly raised issue justifies a contested case proceeding on that issue. To determine that an issue justifies a contested case proceeding, 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 the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24. If the Council does not have jurisdiction over the issue raised in the request, the Council must deny the request.¶
(10) The Council must take one of the following actions when determining if a request identifying one or more properly raised issues justifies a contested case proceeding:¶
(a) If the Council finds that the request identifies one or more properly raised issues that justify a contested case proceeding, the Council shall conduct a contested case proceeding according to the applicable provisions of OAR 345-015-0012 to -0014 and 345-015-0018 to -0085. The Council shall identify the contested case parties and shall identify the issues each contested case party may participate on. The parties to a contested case proceeding shall be limited to those persons who commented on the record of the public hearing and who properly raised issues in their contested case request that the Council found sufficient to justify a contested case, except that the

certificate holder is an automatic party to a contested case. The issues a party to a contested case proceeding may participate on shall be limited to those issues that party properly raised in its contested case request that the Council found sufficient to justify a contested case, except that the certificate holder may participate on any issue the Council found sufficient to justify a contested case proceeding.¶
(b) If the Council finds that the request identifies one or more properly raised issues that an amendment to the proposed order, including modification to conditions, 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 and send a notice of the amended proposed order to the persons described in section (4). Only the certificate holder and those persons who commented on the record of the hearing may, in a writing received by the Department within 30 days after the Department issues the notice of the amended proposed order, request a contested case proceeding limited to issues related to the amendment to the proposed order. As described in section (9), the Council shall determine whether any issue identified in the request for a contested case proceeding justifies a contested case proceeding. A person's contested case request under this subsection shall include:¶
(A) The person's name, mailing address and email address;¶
(B) A statement of the contested issues related to the amendment to the proposed order, including facts believed to be at issue; and¶
(C) A statement that describes why the Council should find an issue justifies a contested case, as described in section (8).¶
(c) If the Council finds that the request does not identify a properly raised issue that justifies a contested case proceeding, the Council shall deny the request. In a written order denying the request, the Council shall state the basis for the denial. The Council shall then adopt, modify or reject the proposed order based on the considerations described in OAR-345-027-0375. In a written order the Council shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council shall issue an amended site certificate, which is effective upon execution by the Council Chair and by the certificate holder.¶
(11) If there is no request for a contested case proceeding as described in section (6) or subsection (10)(b), the Council, may adopt, modify or reject the proposed order based on the considerations described in OAR 345-027-0375. In a written order, the Council shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council shall issue an amended site certificate, which is effective upon execution by the Council Chair and by the certificate holder.¶
(12) Judicial review of the Council's final order either granting or denying an amended site certificate shall be as provided in ORS 469.403.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.405

ADOPT: 345-027-0372

RULE SUMMARY: States the process by which the Proposed Order is issued, the process for requesting and granting a Contested Case, and the process for how the Council makes its Final Decision on Requests for Amendment Under Type B Review. Adopts provisions included in Administrative Order EFSC 5-2017. Provides that judicial review of the Council's final order either granting or denying an amended site certificate shall be as provided in ORS 469.403.

CHANGES TO RULE:

345-027-0372
Proposed Order and Councils Final Decision on Requests for Amendment Under Type B Review
(1) No later than 21 days after the written comment deadline that closes the record on the draft proposed order, the Department of Energy shall issue a proposed order recommending approval, modification or denial of the request(s) for amendment to the site certificate. The Department must consider any written comments received before the close of the record on the draft proposed order and any agency consultation. The Department may issue the proposed order at a later date, but the Department shall, no later than 21 days after the close of the record on the draft proposed order, notify the certificate holder in writing of the reasons for the delay.¶
(2) Concurrent with issuing the proposed order, the Department shall issue public notice of the proposed order by posting public notice as an announcement on its website and by sending public notice by mail or email to:¶
(a) Persons on the Council's general mailing list as defined in OAR 345-011-0020,¶
(b) Persons on any special list established for the facility,¶
(c) The reviewing agencies as defined in OAR 345-001-0010(52), and¶
(d) The updated property owner list as described in OAR 345-021-0010(1)(f) Exhibit F.¶
(3) Notice of the proposed order shall include:¶
(a) A description of the facility and the facility's general location.¶
(b) The physical and website addresses of where the public may review copies of the proposed order.¶
(c) The name, address, email address and telephone number of the Department representative to contact for more information.¶
(d) A statement that judicial review of the Council's final order either granting or denying an amended site certificate shall be as provided in ORS 469.403.¶
(4) The Council, may adopt, modify or reject the proposed order based on the considerations described in OAR 345-027-0375. In a written order, the Council shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council shall issue an amended site certificate, which is effective upon execution by the Council Chair and by the certificate holder.¶
(5) Judicial review of the Council's final order either granting or denying an amended site certificate shall be as provided in ORS 469.403.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.405

ADOPT: 345-027-0375

RULE SUMMARY: States the scope of Council's review and what standards and laws apply to the Council's review of various types of changes proposed in a request for amendment. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-027-0375
Scope of Council's Review
(1) In making a decision to grant or deny issuance of an amended site certificate, the Council shall apply the applicable laws and Council standards required under section (2) and in effect on the dates described in section (3).¶
(2) To issue an amended site certificate, the Council shall determine that the preponderance of evidence on the record supports the following conclusions:¶
(a) For a request for amendment proposing to add new area to the site boundary, the portion of the facility within the area added to the site by the amendment complies with all laws and Council standards applicable to an original site certificate application.¶
(b) For a request for amendment to extend the deadlines for beginning or completing construction, after considering any changes in facts or law since the date the current site certificate was executed, the facility complies with all laws and Council standards applicable to an original site certificate application. However, for requests to extend completion deadlines, the Council need not find compliance with an applicable law or Council standard if the Council finds that:¶
(A) The certificate holder has spent more than 50 percent of the budgeted costs on construction of the facility;¶
(B) The inability of the certificate holder to complete the construction of the facility by the deadline in effect before the amendment is the result of unforeseen circumstances that are outside the control of the certificate holder;¶
(C) The standard, if applied, would result in an unreasonable financial burden on the certificate holder; and¶
(D) The Council does not need to apply the standard to avoid a significant threat to the public health, safety or the environment;¶
(c) For any other requests for amendment not described above, the facility, with the proposed change, complies with the applicable laws or Council standards that protect a resource or interest that could be affected by the proposed change.¶
(d) For all requests for amendment, the amount of the bond or letter of credit required under OAR 345-022-0050 is adequate.¶
(3) In making the findings required to grant an amendment under section (2), the Council shall apply the applicable law and Council standards in effect on the following dates:¶
(a) For the applicable substantive criteria under the Council's land use standard, as described in OAR 345-022-0030, the date the certificate holder submitted the request for amendment, and¶
(b) For all other applicable laws and Council standards, the date the Council issues the amended site certificate.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.405

ADOPT: 345-027-0380

RULE SUMMARY: States when and how the Type C review process could be approved, and the procedural steps of the Type C review process. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-027-0380
Type C Review Process for Pre-Operational Requests for Amendment
(1) A certificate holder may only request the type C review for a request for amendment when the change proposed in the request for amendment relates to the facility, or portion/phase of the facility, not yet in operation, but approved for construction in the site certificate or amended site certificate. A certificate holder cannot request type C review of a request for amendment proposing to extend construction deadlines.¶
(2) Requests under section (1) must be submitted in writing to the Department of Energy and must include:¶
(a) A complete request for amendment, including the information described in 345-027-0360(1);¶
(b) The reasons why the certificate holder needs type C review of its request for amendment;¶
(c) An explanation of why the proposed change could not have been reasonably foreseen by the certificate holder;¶
(d) An explanation of why the proposed change is unavoidable; and¶
(e) Reasons why the type C review is adequate to prevent significant adverse impacts to the resources and interests protected by Council standards.¶
(3) Upon receiving a request under sections (1) and (2), the Department shall post the request and the request for amendment on the Department's website.¶
(4) Within 3 business days after receiving a request under sections (1) and (2), the Department shall issue a written determination either granting or denying type C review. Upon issuance, the Department shall post the written determination on its website.¶
(5) If the Department denies type C review, the certificate holder may request the Department's determination to be referred to the Council. If requested, the Department must refer its determination to the Council for concurrence, modification or rejection. Upon a Department determination being referred to the Council, the Council chair shall convene a Council meeting as promptly as possible as described in OAR 345-011-0015.¶
(6) To grant a request under section (1), the Department or the Council must find:¶
(a) Construction of the certificated energy facility, or portion of the certificated energy facility, has not been deemed complete;¶
(b) The request for amendment is complete;¶
(c) Type C review is necessary;¶
(d) The proposed change could not have been reasonably foreseen by the certificate holder;¶
(e) The proposed change is unavoidable; and¶
(f) Type C review is adequate to prevent significant adverse impacts to the resources and interests protected by the Council's standards.¶
(7) Within 7 days after a request under section (1) is granted, the Department shall:¶
(a) Issue a draft temporary order approving or denying the request for amendment, including a recommendation to the Council on whether Council review should be completed through the type A or type B review process; and¶
(b) Post the draft temporary order on the Department's website.¶
(8) The Council shall, at its first meeting following the Department's issuance of a draft temporary order, consider the draft temporary order and consider whether review should be completed though the type A or type B review process. Upon issuance of a draft temporary order, the Council chair may call a special Council meeting, as described in OAR 345-011-0015, to be held as promptly as possible.¶
(9) After considering the draft temporary order and the Department's recommendation on whether review should be completed through the type A or type B review process, the Council shall adopt, modify, or reject the draft temporary order based on the considerations described in OAR 345-027-0375, and the Council shall decide whether review should be completed through the type A or type B review process. In a written temporary order,

the Council shall either temporarily grant issuance of an amended site certificate, or deny issuance of an amended site certificate.¶
(10) Before implementing any change approved by the Council's temporary order, the certificate holder must submit an authorized acknowledgement that the certificate holder accepts all terms and conditions of the temporary order.¶
(11) If review is to be completed through the type A review process, review proceeds as described in 345-027-0367, -0371, and -0375, where the temporary order replaces all references to the draft proposed order.¶
(12) If review is to be completed through the type B review process, review proceeds as described in 345-027-0368, -0372, and -0375, where the temporary order replaces all references to the draft proposed order.¶
(13) Action taken by the certificate holder under the authority of the temporary order that is inconsistent with the language and conditions of the final order is not a violation so long as the inconsistency is remedied by the certificate holder as specified by the Council in the final order.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.405

ADOPT: 345-027-0385

RULE SUMMARY: States the process by which certificate holders can make a request for amendment to extend construction deadlines. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-027-0385
Request for Amendment to Extend Construction Deadlines
(1) The certificate holder may request an amendment to the site certificate to extend the deadlines for beginning or completing construction of the facility, or portion/phase of the facility, that the Council has approved in a site certificate or an amended site certificate by submitting a preliminary request for amendment in accordance with 345-027-0360. The preliminary request for amendment must include an explanation of the need for an extension and must be submitted to the Department of Energy before the applicable construction deadline, but no earlier than the date twelve months before the applicable construction deadline.¶
(2) A preliminary request for amendment received by the Department within the time allowed under section (1) to extend the deadlines for beginning and completing construction suspends expiration of the site certificate or amended site certificate until the Council acts on the request for amendment. If the Council denies the extension request after the applicable construction deadline, the site certificate is deemed expired as of the applicable construction deadline specified in the site certificate or amended site certificate.¶
(3) If the Council grants an amendment under this rule, the Council shall specify new deadlines for beginning or completing construction that are the later of:¶
(a) Three years from the deadlines in effect before the Council grants the amendment, or¶
(b) Following a contested case proceeding conducted pursuant to OAR 345-027-0371, two years from the date the Council grants the amendment.¶
(4) For requests for amendment to the site certificate received under this rule to extend construction deadlines for facilities or portions of the facility the Council shall not grant more than two amendments to extend the deadline for beginning construction of a facility or a phase of a facility.¶
(5) For requests for an amendment to the site certificate to extend construction deadlines for facilities, or portions/phases of facilities, not yet in construction, but already approved for construction in the site certificate or amended site certificate prior to October 24, 2017:¶
(a) Sections (1) and (2) of this rule apply;¶
(b) Sections (3) and (4) of this rule do not apply;¶
(c) When considering whether to grant a request for amendment for a deadline extension made under this section, the Council shall consider how many extensions it has previously granted; and¶
(d) If a request for amendment for a deadline extension made under this section is granted, the Council shall specify new deadlines for beginning or completing construction that are not more than two years from the deadlines in effect before the Council grants the amendment.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.370, 469.405, 469.503

ADOPT: 345-027-0390

RULE SUMMARY: States the process by which a person may request that subsequent laws or rules (laws that became effective after an approved site certificate or amended site certificate was issued) be made applicable to a facility and a site certificate holder. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-027-0390
Request by Any Person for Amendment to Apply Later-Adopted Laws
(1) Any person may request an amendment of a site certificate to apply a law(s), including local government ordinances, statutes, rules or Council standards, adopted after the date the site certificate was executed, if the person contends failure to apply the law(s) results in a significant threat to the public health or safety or to the environment. The Department of Energy itself may initiate such a request.¶
(2) To request an amendment to apply later-adopted law(s) under this rule, the person shall submit a preliminary request for amendment to the Department with the information described in 345-027-0360(1)(a),(c),(d) and the following:¶
(a) Identification of the law(s) that the person seeks to apply to the facility; and¶
(b) The particular facts that the person believes clearly show a significant threat to the public health, safety or the environment that requires application of the later adopted law(s).¶
(3) If the Department receives a preliminary request for amendment to apply later-adopted law(s) as described in this rule from any person other than the certificate holder, the Department shall send a copy of the request to the certificate holder. The transmittal shall include a deadline by which the certificate holder must submit a response to the Department. In its response, the certificate holder shall state whether it agrees that there is a clear showing of a significant threat to the public health, safety or the environment that requires application of the later-adopted law(s).¶
(a) If the certificate holder concludes the later-adopted law(s) should be applied to the facility, the Council shall review the request to apply later-adopted law(s) as a complete request for amendment in accordance with section (5).¶
(b) If the certificate holder concludes that the law(s) should not be applied to the facility, or if the certificate holder does not respond with its conclusion before the specified deadline, the Department shall ask the Council to determine whether the request clearly shows a significant threat to the public health, safety or the environment that requires application of the later-adopted law(s).¶
(A) If the Council determines there is not a clear showing of a significant threat to the public health, safety or the environment that requires application of the later adopted law(s), the Council shall deny the request to apply later-adopted law(s).¶
(B) If the Council determines there is a clear showing of a significant threat to the public health, safety or the environment that requires application of the later adopted law(s), the Council shall review the request to apply later-adopted law(s) as a complete request for amendment in accordance with section (5).¶
(4) A preliminary request for amendment to apply later-adopted law(s) under this rule is considered a complete request for amendment for purposes of OAR 345-027-0363 on:¶
(a) If the request to apply later-adopted law(s) is made by the certificate holder, the date the request is received by the Department.¶
(b) If the request to apply later-adopted law(s) is made by a person other than the certificate holder, and if the certificate holder responds as described in subsection (3)(a), the date the response described in subsection (3)(a) is received by the Department.¶
(c) If the request to apply later-adopted law(s) is made by a person other than the certificate holder, and if the certificate holder responds as described in subsection (3)(b) or does not respond before the specified deadline under section (3), the date of the Council's determination under paragraph (3)(b)(B).¶
(5) After receiving a complete request for amendment under section (4) of this rule, the Council shall review the request for amendment as described in OAR 345-027-0365, 345-027-0367, 345-027-0371 and 345-027-0375,

except that:¶
(a) If the Department recommends approval or modified approval of the requested amendment, the Department shall include in the proposed order described in OAR 345-027-0371 any new or modified site certificate conditions necessary to assure compliance with the law(s) applied to the facility under the proposed order;¶
(b) If the Department in its proposed order recommends approval or modified approval of the requested amendment, the certificate holder may, by written request submitted to and received by the Department within 30 days after the Department issues the proposed order, ask the Council to hold a contested case proceeding on the proposed order. In the request, the certificate holder shall provide a description of the issues to be contested and a statement of the facts believed to be at issue. If the certificate holder requests a contested case proceeding, the Council shall conduct a contested case proceeding according to the applicable provisions of OAR 345-015-0012 to -0014, and 345-015-0018 to 345-015-0085 limited to the issues stated by the certificate holder; and¶
(c) The Council shall include new conditions in a site certificate amended under this rule only if the Council finds that the conditions are necessary based upon a clear showing of a significant threat to the public health, safety or the environment.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.401, 469.405

ADOPT: 345-027-0400

RULE SUMMARY: States the circumstances that require a request for amendment to transfer the site certificate and the process by which that review is completed. Adopts provisions included in Administrative Order EFSC 5-2017.

CHANGES TO RULE:

345-027-0400
Request for Amendment to Transfer Ownership, Possession or Control of the Facility or the Certificate Holder ¶

(1) For the purpose of this rule:¶
(a) A request for amendment to a site certificate to transfer the site certificate is required for a transaction that results in a change in the ownership, possession or control of the facility or the certificate holder.¶
(b) "New owner" means the person or entity that will gain ownership, possession or control of the facility or the certificate holder.¶
(2) When the certificate holder has knowledge that a transaction that requires a transfer of the site certificate as described in section (1)(a) is or may be pending, the certificate holder shall notify the Department of Energy. In the notice, the certificate holder shall include the name and contact information of the new owner, and the date of the transfer of ownership. If possible, the certificate holder shall notify the Department at least 60 days before the date of the transfer of ownership.¶
(3) A transaction that would require a transfer of the site certificate as described in subsection (1)(a) does not terminate the transferor's duties and obligations under the site certificate until the Council approves a request for amendment to transfer the site certificate and issues an amended site certificate. The new owner is not allowed to construct or operate the facility until an amended site certificate as described in section (10) or a temporary amended site certificate as described in section (11) becomes effective.¶
(4) To request an amendment to transfer the site certificate, the new owner shall submit a written request to the Department that includes the information described in OAR 345-021-0010(1)(a), (d), (f) and (m), a certification that the new owner agrees to abide by all terms and conditions of the site certificate currently in effect and, if known, the expected date of the transaction. If applicable, the new owner shall include in the request the information described in OAR 345-021-0010(1)(y)(O)(iv).¶
(5) The Department may require the new owner to submit a written statement from the current certificate holder, or a certified copy of an order or judgment of a court of competent jurisdiction, verifying the new owner's right, subject to the provisions of ORS Chapter 469 and the rules of this chapter, to possession or control of the site or the facility.¶
(6) Within 15 days after receiving a request for amendment to transfer the site certificate, the Department shall send a notice of the request by mail or email to the reviewing agencies as defined in OAR 345-001-0010, to all persons on the Council's general mailing list as defined in OAR 345-011-0020, to any special list established for the facility and to the updated property owner list submitted by the new owner under section (4). In the notice, the Department shall describe the request for amendment to transfer the site certificate, specify a date by which comments are due and state that the date of the Council's transfer hearing will be announced on the Department's website.¶
(7) Before acting on the request for amendment to transfer the site certificate, the Council shall hold a transfer hearing. The Council shall hold the transfer hearing during a Council meeting and shall provide notice of the hearing on its meeting agenda, which will be sent by mail or email to the Council's general mailing list in advance of the meeting. The transfer hearing is not a contested case hearing. During the hearing the Council will accept comments from the public, reviewing agencies and new owner regarding the new owner's compliance with the Council standards described in subsection (8)(a).¶
(8) At the conclusion of the transfer hearing or at a later meeting, the Council may issue an order approving the request for amendment to transfer the site certificate if the Council finds that:¶
(a) The new owner complies with the Council standards described in OAR 345-022-0010, 345-022-0050 and, if applicable, OAR 345-024-0710(1); and¶

(b) The new owner is or will be lawfully entitled to possession or control of the site or the facility described in the site certificate.¶
(9) Except as described in OAR 345-027-0351(5), the Council shall not otherwise change the terms and conditions of the site certificate in an order approving the request for amendment to transfer the site certificate.¶
(10) Upon issuing the order described in section (8), the Council shall issue an amended site certificate that names the new owner as the new certificate holder or as the new owner of the certificate holder. The amended site certificate is effective upon execution by the Council chair and the new owner. The Council shall issue the amended site certificate in duplicate counterpart originals and each counterpart, upon signing, will have the same effect.¶
(11) If the Council chair determines that special circumstances justify emergency action, the Council chair may, upon a written request from the new owner that includes a showing that the new owner can meet the requirements of section (8), issue a temporary amended site certificate that names the new owner as the new certificate holder or as the new owner of the certificate holder. The temporary amended site certificate is effective upon execution by the Council chair and the new owner. The temporary amended site certificate expires when an amended site certificate as described in section (10) becomes effective or as the Council otherwise orders.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.401, 469.405

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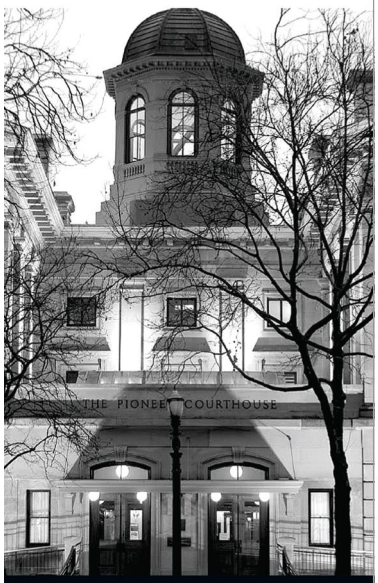

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ENERGY FACILITY SITING COUNCIL MEETING

AGENDA ITEM C: SITE CERTIFICATE AMENDMEN PROCESS

RULEMAKING

HELD ON
THURSDAY, AUGUST 22, 2019

PORT OF MORROW - RIVERFRONT ROOM
2 MARINE DRIVE
BOARDMAN, OREGON

1 **APPEARANCES**

2

3 Maxwell Woods, ODOE Senior Policy Advisor, Acting
4 Council Secretary
5 Christopher Clark, ODOE Energy Policy Analyst
6 Patrick Rowe, ODOJ Assistant Attorney General
7 Barry Beyeler, EFSC Chair
8 Hanley Jenkins, EFSC Vice Chair
9 Marcy Grail, Council Member
10 Ann Gravatt, Council Member (telephonically)
11 Kent Howe, Council Member
12 Mary Winters, Council Member
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1 **FINAL**

2 **ENERGY FACILITY SITING COUNCIL MEETING**

3 **AGENDA ITEM C: SITE CERTIFICATE AMENDMEN PROCESS**

4 **RULEMAKING**

5 **HELD ON**

6 **THURSDAY, AUGUST 22, 2019**

7

8 **MR. BEYELER:** Okay. It's 5:00. We'll get
9 back to work. And the next item on the agenda is
10 Item C, Site Certificate Amendment Process
11 rulemaking. Patrick?
12 **MR. WOODS:** Sure. Chair Beyeler and,
13 Patric, before we start, I just want to confirm that
14 Council Member Ann Gravatt's on the line and can
15 hear us okay?
16 **MS. GRAVATT:** Yeah, I'm here.
17 **MR. WOODS:** Great. Thank you. Mr. Chair,
18 you have a quorum, and we may proceed.
19 **MR. CLARK:** All right. For the record,
20 this is Christopher Clark, the rules coordinator for
21 the Council and analyst for the Department. We're
22 going to talk today about the site certificate
23 amendment process rulemaking, make a recommendation
24 for temporary rules. Before we get to that, I'd
25 like to provide a brief background on the amendment

1 rulemaking and what brings us here today.
2 So the amendment rules date back to late
3 2011 when the Council requested department staff
4 provide a briefing on the amendment process and
5 potential improvements to rules. Following that
6 briefing and several other meetings, the Council
7 formally initiated a rulemaking process in late
8 2012. As part of that process, in early 2013, the
9 staff facilitated two public workshops, and then
10 after receiving the feedback from those workshops,
11 appointed a RAC to provide additional input. Over
12 the next two years, the RAC met three times and
13 staff began the lengthy process of drafting proposed
14 rules, which were presented to and approved by
15 Council in November of 2016.
16 Staff issued a notice of proposed
17 rulemaking in January 2017, initiating the formal
18 rulemaking process as summarized in the Supreme
19 Court's decision in Friends vs. EFSC -- that is,
20 Friends of the Columbia Gorge vs. the Energy
21 Facility Siting Council that was released August 1st
22 of this year. The Council issued six public notices
23 about the rulemaking process, extended the comment
24 period four times, held three public hearings,
25 circulated three draft versions of proposed rules

1 and considered more than 150 written comments
2 between January and October 2017.
3 The final rules were then adopted by the
4 Council on October 19th, 2017, and filed on October
5 24th, 2017, through administrative orders EFSC 4-
6 2017 and 5-2017.
7 **MR. ROWE:** For the record, Patrick Rowe,
8 Department of Justice. I'm going to walk Council
9 through the decision that the Supreme Court issued
10 on August 1st. As Chris mentioned, Friends of the
11 Gorge, in December 2017, petitioned the Supreme
12 Court for review of the rules that were adopted.
13 I'll refer to those as the October 2017 rules. You
14 know them potentially as the Type A or Type B
15 amendment rules.
16 In their petition, the petitioners alleged
17 that there were three procedural and two substantive
18 errors. On August 1st, the Supreme Court released
19 its decision, and it held that there had been one
20 procedural error and one substantive error. And
21 I'll slow down a bit and describe each of those.
22 The procedural error, as noted in this
23 slide, said that the rules approved through the
24 orders issued in October 2017 were invalid because
25 the Council had failed to substantially comply with

1 ORS 183.335(3)(d). So what does that state? This
2 may ring a bell for those of you on the Council that
3 were members of the Council back when these rules
4 were adopted. That statute requires that, upon
5 request, an agency proposing a rule must "provide a
6 statement that identifies the objective of the rule
7 and a statement of how the agency will subsequently
8 determine whether the rule is, in fact,
9 accomplishing that objective."
10 So the issue that was presented by the
11 petitioners was whether the Council had provided the
12 latter statement, how it would determine if the rule
13 is satisfying its objective. The statute does not
14 say to whom the statement must be provided. It
15 doesn't say when it must be provided or whether --
16 or the manner in which it must be provided, whether
17 the statement can be oral or it must be written.
18 Petitioner has alleged that they needed to receive a
19 written statement from the Council laying out how
20 the Council would monitor the success of the rules.
21 At meetings discussing the rules, before
22 the rules were adopted, Council and staff discussed
23 how the success of the rules might be traced.
24 However, the Supreme Court held that those
25 discussions were not sufficient to meet the

1 statutory requirement for a statement. The court
2 found that the Council did not reach a final
3 decision as to how it would track the success of the
4 rules, and that the statement must be in writing,
5 specifically -- the Supreme Court's words -- "in
6 some written form that can be stored and retrieved."
7 So it was due to that lack of a written statement
8 indicating how the success of the rules would be
9 monitored. On that basis, that procedural error,
10 the court held that the rules adopted pursuant to
11 those two orders were invalid. That was the
12 procedural error.
13 The substantive error, the Court held that
14 there was one substantive error in all of the rules
15 that were adopted. That error appeared in three
16 rules. And that was a statement regarding judicial
17 review of Council decisions on amendments subject to
18 Type B review.
19 So as you'll recall, as you're probably
20 familiar with by now, Type B review, under the
21 October 2017 rules, is a more expedited review.
22 Under that review, Council considers written
23 comments on a proposed amendment, but Council does
24 not hold a public hearing, nor is there an
25 opportunity to request a contested case for

1 amendments that are subject to that Type B review.
2 Again, the idea is that would be a more expedited
3 review.
4 Three of the amendment rules stated that
5 the right to seek judicial review regarding an
6 amendment to proceeding under Type B review was
7 limited to those persons who had provided written
8 comments by the written comment deadline, and that
9 judicial review would be limited to issues raised in
10 that person's comments. So why did Council adopt
11 that rule? Council adopted that rule because that
12 rule is already in statute, addressing judicial
13 review of Council decisions on applications for site
14 certificates and site certificate amendments -- but
15 here's the catch -- that have gone through a
16 contested case proceeding.
17 So again, there is a statute. It's ORS
18 469.403. It says if you've gone through a contested
19 case proceeding, you can seek judicial review, only
20 if you previously commented on the record about that
21 amendment or that site certificate. That statute
22 does not have a provision regarding judicial review
23 of requests for amendment that do not go through a
24 contested case proceeding.
25 So because Type B review does not allow

1 for contested cases, the Court held that a different
2 statute governs judicial review of Type B amendment
3 decisions. That statute is ORS 183.482. That
4 statute does not include any requirements that a
5 person must have commented on the record in order to
6 be able to obtain judicial review. Rather, it
7 allows a petition for review to be filed by, among
8 others, "a person adversely affected or aggrieved by
9 the agency order." So in other words, the court
10 held that the Council exceeded its authority when it
11 adopted those three rules that stated only persons
12 who have commented on the record could seek judicial
13 review of a Type B amendment decision.
14 Now, significantly, those are the only
15 provisions in the October 2017 amendment rules that
16 the court held the Council did not have the
17 authority to adopt. As Chris will discuss, the
18 Department is recommending a temporary rule. He will
19 talk about when temporary rules may be adopted and
20 the mechanics of doing so. I'll discuss why the
21 Department is recommending temporary rules.
22 **MR. CLARK:** Thank you, Patrick. Yeah so
23 as Patrick mentioned, I'll just walk through the
24 statutory requirements for adoption of temporary
25 rulemaking. Under ORS 183.335(5), "Temporary rules

1 may be adopted without prior notice or hearing, or
2 upon any abbreviated notice or hearing that Council
3 finds practical, if it finds that its failure to act
4 promptly will result in serious prejudice to the
5 public interest or the interests of the parties
6 concerned."
7 Regarding notice, while it is not
8 required, we do want you to know that we did send
9 notice to our rulemaking email list that this would
10 be considered at today's meeting. We sent out notice
11 of the agenda when it was issued early last week,
12 and then notice to the email list again two days
13 ago.
14 One of the sort of procedural
15 considerations to make when adopting temporary rules
16 is that they may only be in effect for 180 days.
17 That means if you were to adopt rules today, they
18 could only be in effect until February. At that
19 time, they would automatically expire and revert to
20 what is in effect right now. And then the rules may
21 be effective upon filing with the Secretary of
22 State. So if you were to take action today, it
23 would be effective as soon as I am able to submit
24 whatever your decision is to the Secretary of State.
25 I think -- yeah, that is all, unless there

1 are additional questions about what the sort of
2 requirements are for temporary rules.
3 **MR. ROWE:** As you've seen from the packet,
4 the Department is recommending temporary rules, but
5 then also opening up new permanent -- discussions of
6 new permanent rules that would take place of the
7 temporary rules.
8 So one of the key things that Chris just
9 mentioned on the prior slide that justify temporary
10 rules is there being substantial prejudice to the
11 public or to interested parties if temporary rules
12 are not adopted.
13 I need to make sure that you understand
14 what's our status today. So our status today is the
15 Supreme Court issued its decision on August 1st.
16 Again, that decision held that all of the rules
17 adopted under the two orders that Council issued in
18 October 2017, that those rules are invalid. But
19 that decision does not actually take effect until
20 the court issues what's called an appellate
21 judgment.
22 The Court, as of today, has not issued an
23 appellate judgment, and it will not issue an
24 appellate judgment until the attorney fee issue is
25 resolved. And what I mean by that is both sides, at

1 this point in time, have had, up until today was the
2 the deadline to submit to the court a petition for
3 attorney's fees. So if you're a prevailing party,
4 you can say, Court, I won on issues X, Y and Z; I am
5 entitled to attorney's fees.
6 So we're waiting to see. We anticipate
7 that the petitioners will be submitting -- they may
8 have already done it by now while we've been here
9 today -- a petition for fees. The court won't issue
10 its appellate judgment until any dispute over
11 attorney's fees are resolved. Then it will issue an
12 appellate judgment that includes a final order, and
13 the final order will say, Okay, this is what our
14 decision was, and this is how we find with regard to
15 the petition for attorney's fees.
16 So what does that mean? It means as of
17 today, we're still operating under the October 2017
18 Type A, Type B, Type C amendment rules until that
19 appellate judgment is issued. Nevertheless, it's
20 State policy that when the court comes out with a
21 decision, that we'll honor that decision, even prior
22 to the appellate judgment being entered.
23 So the temporary rules -- once that
24 appellate judgment is issued, then the question
25 becomes what are we left with once that judgment is

1 actually issued. Petitioners assert that all of the
2 pre-October 2017 rules will revert to those rules
3 and requests for amendment -- here's the key part --
4 that are already in process. Because right now, as
5 you're aware, we have half a dozen requests for
6 amendment that have been submitted under the October
7 2017 rules. Petitioners assert that those requests
8 for amendment would have to be resubmitted under the
9 rules that were in place prior to October 2017. So
10 in other words, go back to go and start that process
11 again, but start that process under the rules that
12 were in place prior to October 2017.
13 The State is not certain and is
14 uncomfortable with assuming that the October -- the
15 rules that were in place prior to October 2017 will
16 automatically be in place. The reason for our
17 discomfort over that issue is because the manner
18 which the court issued its decision, the court
19 concluded, as I've mentioned, that the rules adopted
20 in October 2017 are invalid. But in October 2017,
21 when the Council adopted the Type A, Type B
22 amendment rules, it also repealed the rules that
23 were place prior to then.
24 Councilman Winters?
25 **MS. WINTERS:** There was no savings clause.

1 There was nothing. They were just repealed, which
2 sometimes happens.
3 **MR. ROWE:** Yeah, the rules were appealed
4 and the new rules adopted.
5 **MS. WINTERS:** Yeah.
6 **MR. ROWE:** And so there is a possibility
7 that once the appellate judgment issues, we would be
8 left with no rules whatsoever. That possibility
9 exists. Or as petitioners assert, we could revert
10 to the pre-October 2017 rules. Even if the rules
11 that were in place prior to October 2017 apply, the
12 Department believes that requiring resubmission of
13 requests for amendment under those rules would cause
14 serious prejudice to to those certificate holders.
15 And I will discuss that more in a moment.
16 The temporary rules, as Chris will walk
17 through, also, in a few minutes, they would avoid
18 prejudicing those certificate holders with pending
19 requests by allowing those requests to be processed
20 without having to resubmit their request and without
21 having to repeat procedural steps already taken.
22 The temporary rules, the Department believes, would
23 provide regulatory certainty and continuity in the
24 processing, also, of new requests for amendments
25 that may come in until permanent rules are adopted.

1 So discussing the potential for serious
2 prejudice to existing certificate holders with
3 pending requests for amendment. As I've mentioned,
4 currently, there are six pending requests for
5 amendment that are in various stages of being
6 reviewed by the Department and the Council.
7 Significantly, all of those are requests that have
8 been reviewed under the Type A process. The focus
9 of the challenge in the Supreme Court was on the
10 Type B review process. That was what petitioners
11 really had an issue with.
12 Most of the certificate holders whose
13 requests are pending are anticipating a decision on
14 those requests in the next few months. Two are
15 anticipating a decision at this meeting, the August
16 meeting. Requiring those certificate holders to
17 submit a new amendment application under the old
18 rules, the pre-October 2017 rules, would set them
19 back by at least several months, or potentially a
20 year or more, depending on how far they were into
21 the process. It would cause them to lose
22 significant time, financial resources already
23 expended in this process. For some, it would result
24 in project delays, potentially, lost contracts that
25 were based on expected timing of a decision from the

1 Council. It could result in them not meeting
2 contractual or other obligations dependent on a
3 timely decision from the Council.
4 So I can talk a bit -- in your materials
5 are letters from five of the certificate holders.
6 Max Woods sent those to you this Tuesday afternoon.
7 They are letters from five of the certificate
8 holders that describe what it would mean to them if
9 Council required them to resubmit a new request for
10 amendment.
11 First is Summit Ridge Wind Farm. That is
12 -- again, you have, in the materials Max emailed to
13 you on Tuesday afternoon, it's called a draft
14 Statement of Need. There's a Statement of Need for
15 the temporary rules. Attachment 1 to that document
16 is a letter from counsel for Summit Ridge regarding
17 why they would be prejudiced if they had to resubmit
18 their request for amendment.
19 The certificate holder advises that if it
20 were forced to start the site certificate amendment
21 process anew, it would result in serious prejudice
22 to its interests because it will have lost a year of
23 time and significant financial expenditures made on
24 the amendment to date. It would cause delay in
25 approving -- or a delay in approving the amendment

1 would likely impact the certificate holder's ability
2 to retain construction contractors, to procure
3 equipment, and market the power to be produced.
4 I will also note that petitioners in the
5 lawsuit have taken the position that, as a result of
6 the Supreme Court's decision, the permission to
7 construct the Summit Ridge Wind Farm has expired,
8 and the certificate holder -- if the certificate
9 holder still desires to pursue the project, it must
10 file an application for a new site certificate, not
11 for an amendment, and the words of the petitioner's
12 "effectively starting the permitting process over
13 from scratch." That was in petitioner's press
14 release about the Supreme Court's decision. Under
15 such circumstances, the entire facility may then be
16 in jeopardy, which obviously would cause serious
17 prejudice to the certificate holder.
18 Also attached to your materials is a
19 letter from Perennial Wind Chaser. If it were
20 forced to start the site certificate amendment
21 process anew, it would result in serious prejudice
22 to its interests because, again, it will have lost a
23 year of time and financial resources. In its
24 letter, Perennial contends that it would be harmed
25 and seriously prejudiced by the delay. That is

1 Attachment 3 to the draft Statement of Need in your
2 materials.
3 As with Summit Ridge, petitioners in the
4 lawsuit have taken the position that as a result of
5 the Supreme Court's decision, the permission to
6 construct the Perennial Wind Chaser facility has
7 also expired, and they would need to pursue an
8 application for a brand new site certificate.
9 Wheatridge Wind Energy Facility, that is a
10 letter from Council for the certificate holder, is
11 attachment 4 to the draft Statement of Need.
12 Counsel for the certificate holder advises that if
13 required to start the amendment process again, the
14 certificate holder would lose significant time and
15 financial resources already expended. They would be
16 in jeopardy of not meeting contractual obligations
17 to begin construction of certain components of the
18 facility.
19 Port Westward Generating Project, this is
20 a letter -- attachment 5 -- to the draft Statement
21 of Need. This is a Portland General Electric
22 project. The certificate holder has informed the
23 Department that any delay would have serious
24 implications for its ability to comply with a
25 statutory requirement that electric companies,

1 including the certificate holder, including PGE --
2 there's a statutory requirement that electric
3 companies invest in energy storage projects and have
4 a contract to procure 5 megawatts of energy storage
5 executed by January 1 of 2020. Again, that's
6 attachment 5, an August 13, 2019 letter from PGE.
7 I'm doing my best to, essentially,
8 summarize what's in these letters. I recommend, if
9 you haven't already done so, to take a careful look
10 at the letters directly from the certificate holders
11 or their counsel. Adoption of these temporary rules
12 would allow for continued processing of the current
13 request for amendment and would likely serve to
14 avoid this prejudice to PGE.
15 Montague Wind Power Facility, the
16 certificate holder -- the developer for Montague
17 sent a general letter in support of the temporary
18 rules. That's attachment 6. They didn't call out
19 Montague specifically, but it's from Avangrid
20 Renewables, and Avangrid is the developer for
21 Montague. In their letter, the certificate holder
22 points out that regulatory uncertainty regarding the
23 current status of the amendment rules can pose
24 increased risk for project financing, for contract
25 obligations, and investor relations.

1 So those are the reasons why the
2 Department recommends adoption of temporary rules to
3 avoid serious prejudice to each one of these
4 certificate holders that has amendments in process.
5 I want to make sure that you're understanding that
6 what the Department is proposing is that these
7 temporary rules also apply, as I mentioned earlier,
8 to new requests for amendment that may come in until
9 permanent rules are adopted.
10 Again, if a certificate holder were to
11 apply for an amendment to a site certificate, once
12 that appellate judgment is issued, it's not clear
13 what, if any, rules would govern the Department and
14 Council's review of that request. Adopting the
15 temporary rules would provide certainty that it's
16 the temporary rules that govern the amendment
17 process until the Council can adopt new permanent
18 rules. It would also provide -- temporary rules
19 would also provide continuity in processing for the
20 Department and for certificate holders who have been
21 operating under the October 2017 rules, obviously,
22 for nearly two years and now understand that process
23 and are accustomed to it.
24 So those are the reasons why the
25 Department believes there's substantial prejudice to

1 the certificate holders, why it's essential that
2 temporary rules be adopted also for new -- to
3 process new amendment requests that come in.
4 **MR. CLARK:** So once again, this is Chris
5 Clark, the rules coordinator. To meet the
6 objectives that Patrick just laid out for you all,
7 we are proposing a number of rulemaking actions.
8 Essentially, these would readopt the rules adopted
9 in 2017 in substantially the same form that they
10 were then. To do that, we would amend the effective
11 rules in Division 15 and 25 to readopt the changes
12 made in October 2017. We would then propose
13 suspending all the Division 27 rules that were
14 adopted or amended by that rulemaking. That
15 includes, I think, all of the Division 27 rules,
16 except for 120 and 140. There's maybe two rules
17 that were unaffected.
18 You cannot repeal rules through temporary
19 rulemaking. You can only suspend. So that would
20 put those rules out of effect for 180 days. We
21 would then adopt new rules to a replace those
22 invalidated rules with the -- and they would be
23 substantially similar to the rules that were
24 suspended, except for we would amend the
25 applicability rule to clarify the -- as Patrick

1 explained that the rules would apply to any pending
2 applications that were received on or before the
3 effective date of these rules, received and in
4 process. They would also -- we would make an
5 explicit statement that -- a statement that we would
6 continue processing any requests that were currently
7 in process. And I'll show you that language on the
8 next slide.
9 We'd also be amending the three specific
10 provisions that were identified as exceeding
11 statutory authority by the court. And I'll show you
12 that language as well. And then to just clarify
13 that these are new rules, the new Division 27 rules
14 would be adopted under new numbers. We're proposing
15 to start with the 300 series, so they would start
16 with rule 345-027-0311 and then continue from there
17 with the same last two digits, as the existing rules
18 have.
19 **MS. WINTERS:** Can I ask a question of
20 counsel?
21 **MR. CLARK:** Yeah.
22 **MS. WINTERS:** Just in the event that the
23 authority to adopt temporary rules is challenged, I
24 was -- the criteria in the statute, the (5)(a) that
25 you were just going over, seems fairly fact specific

1 -- and I've read the findings and the letters -- on
2 meeting that test of public interest or interests of
3 the parties concerned. But what I was wondering is
4 is there any case law out there interpreting for
5 another agency when there was a procedural or
6 substantive challenge where a rule was invalidated?
7 **MR. ROWE:** Yes, there is case law
8 interpreting that. And, you know, there's probably
9 about four different cases, and one, in particular -
10 - I'm paraphrasing it -- but it essentially said
11 that the court will not analyze the -- the court is
12 not going to put itself in the agency's position.
13 If the agency perceives there to be a substantial
14 prejudice or a need for the temporary rules and
15 identifies what that prejudice or that need is, then
16 the court will uphold the temporary rules. And I
17 could share that cite with you.
18 **MR. CLARK:** So as I mentioned, this would
19 be the amendment to the applicability rule. As you
20 can see, new text is underlined; removed text is in
21 strike through. We'd be adding some substantial
22 language there to clarify that the Department and
23 Council will continue to process all requests for
24 amendment and amendment determination requests
25 submitted on or after October 24, 2017, for which

1 Council has not made a final decision prior to the
2 effective date of these rules, without requiring the
3 certificate holder to resubmit the request or to
4 repeat any steps taken as part of the request, prior
5 to the effective date of these rules. We believe --
6 well, yeah, we had been advised that that is
7 sufficient to cover anything that is currently in
8 process. Yeah, we believe it's a good idea to make
9 that explicit statement as well, just to give
10 ourselves (inaudible).
11 The changes to the subsection -- or
12 Section 2, just remove the applicability statement
13 for the October 2017 rules, which are no longer
14 relevant. I will say that I did also delete the
15 phrase, "including the Trojan Energy Facility,"
16 because that facility is covered under ORS 469.410,
17 and now only consists of ISFISI.
18 To remedy the judicial review sections,
19 we're just proposing removing any language limiting
20 judicial review and reliance solely upon the
21 reference to ORS 469.403. We believe that these
22 rules should be well within mere statutory authority
23 because they mostly -- because they rely just on
24 statute.
25 So as we discussed earlier -- oh, I'm very

1 sorry.

2 **MR. HOWE:** Chair Beyeler, quick question.

3 On --

4 **MR. CLARK:** Would you like me to go back?

5 **MR. HOWE:** No. No, I just found it.

6 Yeah, the prior slide, it was referencing number 2

7 there that said notwithstanding Section 1 in the

8 rule, the rules don't apply to a facility described

9 in 469.410. What are those facilities?

10 **MR. CLARK:** Those are dates -- those are

11 facilities that were in operation before 19 --

12 **MR. WOODS:** Old facilities. They're

13 facilities that existed prior to EFSC existing.

14 **MR. HOWE:** Okay. Thanks.

15 **MR. CLARK:** There are a number of them,

16 but not too many left anymore. So as I mentioned

17 earlier, the temporary rules could only be in effect

18 for 180 days. So permanent rulemaking, whether or

19 not you adopt temporary rules, permanent rulemaking

20 will be required to replace the invalid rules. You

21 have several options for how you want to proceed

22 with the permanent rule making process. One of

23 those is the way that you would solicit public input

24 early in the process before initiating the formal

25 rulemaking process by filing notice of proposed

1 rulemaking action.
2 Essentially, you've used three options in
3 the past, that is, one, you could go ahead and issue
4 a notice now and just start a formal comment period,
5 respond to those comments as they come in; you could
6 solicit written input on proposed rules to give
7 stakeholders a chance to say what they think should
8 be included or amended in proposed rules; or you
9 could convene a rules advisory committee meeting.
10 Considering the time constraints, the 180-
11 day time constraints, and the significant amount of
12 public input that was gathered in the initial 2017
13 rulemaking, we are recommending that you seek
14 written input only and provide 30 days for
15 stakeholders to provide that advice to the
16 Department. Then we would bring back --
17 **MR. ROWE:** Could somebody on the phone
18 please mute your phone, please? Thank you.
19 **MR. CLARK:** Yeah. So we recommend
20 soliciting written input and providing a period of
21 time for stakeholders to provide that advice to you.
22 As I mentioned, the permanent rulemaking
23 process must be completed in 180 days, but because
24 rules may be effective no earlier than dates
25 provided in ORS 183.335(1), we would need to file

1 that notice of proposed rulemaking at least 49 days
2 before they could become effective. That is the
3 longest time.
4 **MR. WOODS:** And I will note that if
5 chosen, that middle option that Chris just
6 described, there is still a hearing on the proposed
7 rules. And Chris has a slide -- I think the next
8 slide is a schedule, and we would anticipate that
9 occurring in November.
10 **MR. CLARK:** Yeah. So this timeline
11 represents how the permanent rulemaking process
12 could play out under the recommendation that we just
13 proposed. So if you were to approve temporary rules
14 today and initiate a permanent rulemaking process
15 today, the last day temporary rules could be
16 effective is February 17, 2020. So if we were to go
17 out next week and solicit written advice from
18 stakeholders and provide them 30 days, we would
19 anticipate that we could bring proposed rule
20 language to you for your October meeting. Some of
21 these earlier dates are representing the normal
22 production cycle, so we would try to get that to you
23 with plenty of time to review.
24 We'd also be preparing all of the filing
25 forms associated with those in that time so that we

1 could issue the notice of proposed rulemaking by the
2 end of October. There would be a formal public
3 comment period after that, with the option to
4 provide an oral hearing that is not required unless
5 requested under certain conditions, but it is
6 general practice just to have one and schedule one
7 in advance. We would recommend that you schedule
8 that for November so that you have an additional
9 month to consider any comments and oral testimony
10 received. And we would kind of bring some revised
11 proposed rules back to you in December and have you
12 consider them for adoption at your December meeting.
13 If all that went through as planned,
14 permanent rules could be effective, I guess, as
15 early as December 23rd, which is the Monday after
16 your meeting, which would give us about a month of
17 buffer time before the temporary rules were to be
18 suspended. So there's a little bit of extra time
19 built into this, but not a whole lot.
20 So to summarize what we've just gone over,
21 our recommendation to you is to adopt temporary
22 rules that are substantially similar to rules
23 adopted on October 24th, 2017, with the changes that
24 we described before to the applicability rule and
25 correcting the substantive errors identified by the

1 Supreme Court. We're also asking you to initiate
2 permanent rulemaking to adopt permanent rules for
3 the review of site certificate amendments.
4 We would like you to also provide your
5 input on how you would like us -- how you would like
6 to solicit input, with our recommendation that you
7 direct us to solicit written input only and provide
8 30 days.
9 And then the third recommendation is not
10 something that you need to act on today, but as
11 Patrick explained, the procedural error we made was
12 that we did not provide a written statement that
13 explained how we would evaluate the previously
14 adopted amendment rules. So we would like you to,
15 at some point in time, provide guidance on what you
16 think that evaluation should be and when it should
17 be conducted. We will bring our recommendation to
18 you with proposed rules. But if you have any input
19 in the meantime, we are definitely welcome to it and
20 look forward to hearing it.
21 I believe that concludes our statements,
22 unless you have any further questions.
23 **MS. GRAIL:** For the record, this is Marcy
24 Grail, and yes, I have questions or comments or
25 something. So obviously, a fairly aggressive

1 timeline. And I like to be optimistic, but as I'm
2 looking at the sunshine right now, I know that's not
3 going to happen. So we start thinking about our
4 meetings later in the year and weather, and then I'm
5 looking at holidays. So I don't know what that
6 means. I'll just saying I'm logically thinking
7 about that.
8 And then I would request that you're
9 asking us about guidance. I would hope that that
10 would be clear in whatever you're soliciting from
11 the public, because if we are not -- if we've got a
12 big gap between what our perception is of what that
13 should be and what the public thinks, then we're
14 going to be, I suspect, right back to having more
15 problems.
16 **MR. CLARK:** That's specifically on the
17 third item.
18 **MR. WOODS:** I definitely agree. The back
19 of the calendar slide -- we built in a buffer the
20 best we could. Right? Timing is tough, 180 days
21 total temporary rule length. And so December -- in
22 years past, we have had -- I think it was two years
23 ago, we had December meeting that was snowed out.
24 That was in Salem. The buffer is about a month.
25 Now we haven't released or even discussed 2020

1 meeting dates yet, but presumably, we would keep the
2 third week of the month schedule, something like
3 that. So if we missed a meeting -- say there was
4 weather in December, as an example -- you could come
5 back in January and, weather permitting, consider
6 and adopt permanent rulemaking and still be within
7 that 180-day window. But that's the best we can do
8 with the schedule.
9 **MR. WOODS:** Questions? Comments?
10 Deliberation?
11 **MR. BEYELER:** What happens if you don't
12 make the 180 days?
13 **MR. CLARK:** So the Council would be
14 prohibited from adopting identical temporary rules.
15 There is precedent for adopting temporary rules that
16 are -- have some substantial changes made to them.
17 That would be one thing. If no action was taken at
18 the end of that 180 days, we would essentially be in
19 the position that we're in today where there's not a
20 lot of clarity about what rules are in effect.
21 **MR. BEYELER:** Well, it's only the
22 temporary rules that are putting back in the
23 previous language that we had before we passed the
24 2017 rules. So would that -- what you're changing
25 in language to revert it back to that, basically,

1 would that go away at the end of 180 days?
2 **MR. ROWE:** Basically, you'd be in a
3 position similar to where we are now. As Chris
4 said, you would either have no rules or the rules
5 that were in place prior to October 2017.
6 **MR. BEYELER:** Any other questions?
7 **MS. GRAVATT:** Yeah, Barry, it's Ann. And
8 I will fully admit, I can't hear well. What I'm not
9 clear about -- I understand the temporary rulemaking
10 recommendations. I'm really not clear on the timing
11 and the -- of the permanent rulemaking. And I
12 honestly would also like like to hear from
13 stakeholders on what they would want on the
14 permanent rulemaking.
15 **MR. CLARK:** Yeah, we don't know if you can
16 see the proposal. We would recommend soliciting
17 input before proposed rules, but in any case, there
18 would be a public comment period for people to
19 provide additional comment.
20 **MR. WOODS:** Yeah, Council Member Gravatt,
21 can you hear us okay? Absolutely, on the permanent
22 rulemaking, it would actually have a written -- if
23 Council takes up what we've proposed -- a written
24 comment period from, basically, next week, when
25 Chris can get this request for information out,

1 soliciting written comments and what the form of the
2 permanent rulemaking should look like. We would
3 then have staff prepare a draft of those rules,
4 bring it back to Council. That opens opens up a
5 permanent rulemaking, the official process -- I
6 don't know exactly what it's called -- on those
7 recommended permanent rules would include another
8 written comment period on the proposed rules, as
9 well as I would recommend -- we recommend the
10 Council adopt a requirement for a hearing on those
11 permanent rules, likely at the November Council
12 meeting. So there would be a lot of opportunity for
13 public input on the permanent rulemaking to fully
14 agree. Does that answer your question?
15 **MS. GRAVATT:** Sort of. I really can't
16 hear you, Max.
17 **MR. WOODS:** Okay. I apologize. I'll try
18 and yell. And your second request was around
19 listening to stakeholder input. That was on the
20 permanent rule making, correct?
21 **MS. GRAVATT:** Yes.
22 **MR. WOODS:** Okay. Absolutely, we will
23 have multiple opportunities, both written and, I
24 would recommend, oral added testimony, opportunity
25 for public input, stakeholder input, on the

1 permanent rulemaking.

2 **MS. WINTERS:** So I understand it, so

3 that's at the November hearing. But then staff

4 would potentially revise the rules, and Council

5 would consider them. But there wouldn't be another

6 chance for the public to comment to Council on the

7 revised rules? If they're minor revisions, it maybe

8 wouldn't matter. But if they weren't that, that was

9 an issue --

10 **MR. WOODS:** That's a good question,

11 Councilwoman Winters. I looked at Chris. I guess

12 it's possible that Council could open up another

13 comment period on revised rules.

14 **MR. CLARK:** It is possible. So generally

15 speaking, once you make your proposal, we would only

16 be making changes in response to comments already

17 received, at which point that would be -- there

18 would be another chance for you to deliberate. Once

19 the comment period is closed, though, you would not

20 consider any further comments, unless you extended

21 the public comment period.

22 So yeah, we could renotice. That would

23 create some significant delays, and would not be

24 wise. We would only be revising proposed rules in

25 response to comments. You would have a chance to

1 deliberate, advise any other changes that you want
2 to see in response to issues raised by by
3 stakeholders.
4 **MR. WOODS:** Any further questions?
5 Comments? Deliberation?
6 Okay. Council, you have in front of you
7 Option for Motion Language. We request two motions,
8 one on the temporary rules and a second motion on
9 the initiation of permanent rulemaking.
10 **MS. GRAIL:** Chair Beyeler?
11 **MR. BEYELER:** Go ahead.
12 **MS. GRAIL:** Are we ready, folks? Okay.
13 Mr. Chair, I move to adopt temporary rules as
14 recommended by staff and direct staff to file the
15 rules with the Oregon Secretary of State
16 immediately.
17 We're doing them one at a time, right?
18 **MR. WOODS:** You have a move. Do we have
19 second?
20 **MR. HOWE:** Yeah, I'll second.
21 **MR. BEYELER:** We have a motion and a
22 second. Any further discussion?
23 **MR. HOWE:** Yeah, I would just simply say,
24 in support of that, that because of the serious
25 prejudice that we received comment from the Summit

1 Ridge and Perennial Wind Chaser, Wheatridge Wind,
2 Port Westward, and the Montague Wind, those are
3 serious considerations, and they've identified the
4 prejudice that they would experience if we didn't do
5 something here. And the Supreme Court has kind of
6 set this up so that we do need to do something. And
7 so I'm in support of the motion. It will provide
8 continuity, and it gives an opportunity for people
9 to have input in making whatever permanent rules as
10 we move on down the road. But I'm kind of moving
11 out of this motion, so I'll stop with that.
12 **MR. BEYELER:** Anything else? Mr.
13 Secretary, please call for the role.
14 **MR. WOODS:** Barry Beyeler?
15 **MR. BEYELER:** Aye.
16 **MR. WOODS:** Marcy Grail?
17 **MS. GRAIL:** Yes.
18 **MR. WOODS:** Kent Howe?
19 **MR. HOWE:** Yes.
20 **MR. WOODS:** Mary Winters?
21 **MS. WINTERS:** Yes.
22 **MR. WOODS:** Ann Gravatt?
23 **MS. GRAVATT:** Yes.
24 **MR. WOODS:** The motion passes.
25 **MS. GRAIL:** Okay. Moving on. Mr. Chair,

1 I move to initiate permanent rulemaking and direct
2 staff to solicit written input from stakeholders on
3 potential improvements on the temporary rules and
4 present proposed permanent rules to Council at the
5 October 2019 meeting.
6 **MR. BEYELER:** Do I hear a second?
7 **MS. WINTERS:** Second.
8 **MR. BEYELER:** Any discussion? Mr.
9 Secretary, please call the role.
10 **MR. WOODS:** Barry Beyeler?
11 **MR. BEYELER:** Aye.
12 **MR. WOODS:** Marcy Grail?
13 **MS. GRAIL:** Yes.
14 **MR. WOODS:** Kent Howe?
15 **MR. HOWE:** Yes.
16 **MR. WOODS:** Mary Winters?
17 **MS. WINTERS:** Yes.
18 **MR. WOODS:** Ann Gravatt?
19 **MS. GRAVATT:** Yes.
20 **MR. WOODS:** The motion passes.
21 Okay. That concludes Agenda Item C.
22 **MR. BEYELER:** Thank you, gentlemen.
23 **(Whereupon, Agenda Item C was concluded.)**
24
25

1 CERTIFICATE
2
3 I, Robyn Fiedler, do hereby certify that I
4 reported all proceedings adduced in the foregoing matter
5 and that the foregoing transcript pages constitutes a
6 full, true and accurate record of said proceedings to the
7 best of my ability.
8
9 I further certify that I am neither related
10 to counsel for any party to the proceedings nor have any
11 interest in the outcome of the proceedings.
12
13 IN WITNESS HEREOF, I have hereunto set my
14 hand this 11th day of September, 2019.
15
16 Robyn Alison Fiedler
17
18
19 Robyn Fiedler
20
21
22
23
24
25

Oregon

Kate Brown, Governor

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To: Oregon Energy Facility Siting Council

From: Christopher M. Clark, Rules Coordinator

Date: August 20, 2019

Subject: Agenda Item C Supplement: Summary of proposed temporary rules for Site Certificate Amendment Rulemaking for the August 22-23, 2019 EFSC Meeting.

Staff recommends Council adopt temporary rules in place of the October 2017 site certificate amendment rules. Specifically, temporary rules would allow Council to: (1) replace the amendment rules adopted on October 24, 2017; (2) clarify the process the Council will use to review requests for amendments and other review processes submitted on or after October 24, 2017 for which Council has not yet made a final decision; and (3) amend provisions which exceeded the Council's statutory authority under the Type B review process, as identified by the Supreme Court. Additionally, Council must provide a statement of need and justification for temporary rulemaking. Staff and Oregon Department of Justice are providing Council with recommended draft statement of need and justification as a separate document, for Council's consideration.

Staff proposes the following rulemaking actions:

1. Amend OAR 345-015-0014, 345-015-0016, 345-015-0080, 345-015-0083, 345-025-0006, 345-025-0010, and 345-025-0016 to reflect changes to rules made under Administrative Orders EFSC 4-2017 and EFSC 5-2017.

2. Suspend OAR 345-027-0011, 345-027-0013, 345-027-0050, 345-027-0051, 345-027-0053, 345-027-0055, 345-027-0057, 345-027-0059, 345-027-0060, 345-027-0063, 345-027-0065, 345-027-0067, 345-027-0068, 345-027-0071, 345-027-0072, 345-027-0075, 345-027-0080, 345-027-0085, 345-027-0090, and 345-027-0100.

3. Adopt OAR 345-027-0311, 345-027-0313, 345-027-0350, 345-027-0351, 345-027-0353, 345-027-0355, 345-027-0357, 345-027-0359, 345-027-0360, 345-027-0363, 345-027-0365, 345-027-0367, 345-027-0368, 345-027-0371, 345-027-0372, 345-027-0375, 345-027-0380, 345-027-0385, 345-027-0390, 345-027-0400.

Adopted rules will reflect rules adopted by Administrative Order EFSC 5-2017, except for the following changes (deleted language is in ~~strikethrough~~; new language is <u>underlined</u>):

OAR 345-027-0~~0~~311:

(1) The rules in this division apply to all requests for amendment to a site certificate and amendment determination requests for facilities under the Council's jurisdiction that are submitted to, or were already under review by, the Council on or after the effective date of the rules. The Department and Council will continue to process all requests for amendment and amendment determination requests submitted on or after October 24, 2017 for which Council has not made a final decision prior to the effective date of these rules, without requiring the certificate holder to resubmit the request or to repeat any steps taken as part of the request prior to the effective date of these rules.

(2) Notwithstanding section (1) of this rule, these rules do not apply to ~~except those~~ facilities described in ORS 469.410(1)~~, including the Trojan energy facility, and except that rules OAR 345-027-0050 through 345-027-0100 that were in effect prior to October 24, 2017 apply to requests for amendments to site certificates and change requests that have been received by the Department prior to October 24, 2017~~.

OAR 345-027-0~~0~~368(3)(e)(E):

"(3) Notice of the complete request for amendment, draft proposed order and written comment deadline shall include: * * *

(e) A statement that:

* * *

"(E) ~~Only those persons, including the site certificate holder, who provided written comment by the written comment deadline may seek j~~ Judicial review shall be as provided in ORS 469.403~~ and issues eligible for judicial review are limited to the issues raised in that person's written comments~~.

OAR 345-027-0~~0~~372(3)(d):

"(3) Notice of the proposed order shall include:

* * *(d) A statement that ~~only those persons, including the site certificate holder, who provided written comment by the written comment deadline may seek~~ judicial review shall be as provided in ORS 469.403~~ and issues eligible for judicial review are limited to the issues raised in that person's written comments~~."

OAR 345-027-0~~0~~372(5):

"(5) Judicial review of the Council's final order either granting or denying an amended site certificate shall be as provided in ORS 469.403~~, provided that only those persons, including the site certificate holder, who provided written comment by the written comment deadline may seek judicial review as provided in ORS 469.403 and issues eligible for judicial review are limited to the issues raised in that person's written comments~~."

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 4, 2019, I filed the foregoing **PETITIONERS' OPENING BRIEF** with the Appellate Court Administrator by using the appellate courts' electronic filing (eFiling) system.

I further certify that service of a true copy of the foregoing **PETITIONERS' OPENING BRIEF** will be accomplished on Denise G. Fjordbeck, Attorney for Respondents, who is a registered user of the appellate courts' eFiling system, by the appellate courts' eFiling system at her email address as recorded on October 4, 2019 in the appellate eFiling system.

FRIENDS OF THE COLUMBIA GORGE

/s/ Nathan J. Baker
Nathan J. Baker, OSB No. 001980
Attorney for Friends of the Columbia Gorge

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Exhibit C

Requesters' Comments on Perennial WindChaser, LLC's
Proposed DEQ Air Quality Permit Modification,
October 10, 2019

October 10, 2019

Nancy Swofford, Air Permit Coordinator
DEQ Eastern Region - Bend Office
475 NE Bellevue Dr., Suite 110
Bend, OR 97701

Submitted via email to: swofford.nancy@deq.state.or.us

Re: Perennial-WindChaser LLC's Proposed Air Quality Permit Modification

Dear Ms. Swofford:

Please accept these comments from Columbia Riverkeeper, 350PDX, Friends of the Columbia Gorge, Center for Sustainable Economy, Human Access Project, Neighbors for Clean Air, Northwest Environmental Defense Center, Oregon Conservancy Foundation, Physicians for Social Responsibility, and Sierra Club. On behalf of our tens of thousands of members and supporters, we urge the Oregon Department of Environmental Quality (DEQ) to reject Perennial-WindChaser LLC's request for a modification to its Standard Air Contaminant Discharge Permit (ACDP). In the six years since Perennial submitted its initial permit application, the environmental impacts of fracked gas have become increasingly apparent. To combat climate change, we need to rapidly phase out all fossil fuel infrastructure, not construct new gas-fired power plants like Perennial.

Perennial's initial ACDP was approved on January 26, 2016; in it Perennial was given 18 months, until July 26, 2017, to begin construction.[1] Since that time, Perennial has requested two extensions to its construction commencement deadline. The first request was submitted on April 5, 2017 and approved by DEQ on May 17, 2017.[2] The May 2017 permit modification gave Perennial until January 26, 2019, to begin construction. Perennial now requests a second 18-month extension. For the reasons set forth below, DEQ should deny Perennial's request.

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[1] *See* Permit No. 30-0039-ST-01 at 3 (Jan. 26, 2016).
[2] *See* Simple Technical Permit Modification, Permit No. 30-0039-ST-01 (May 17, 2017).

1) Perennial's Construction Approval Has Already Terminated and is Invalid.

Perennial's construction deadline has already expired; if the project proponents want to continue to pursue this project they need to submit a new application for an ACDP. The regulations are clear that "[c]onstruction approval terminates and is invalid if construction is not commenced within 18 months after DEQ issues such approval, or by the deadline approved by DEQ in an extension . . . ."[3] In response to Perennial's first extension request, DEQ approved a new construction commencement deadline of January 26, 2019.[4] Perennial submitted its most recent request for an extension on January 25, 2019, just one day before its existing construction deadline expired. The regulations are clear that, to be timely, an "owner or operator must submit an application to modify the permit at least 30 days . . . prior to the end of the current construction approval period."[5] Failure to submit a timely application is grounds for automatic termination of the permit.[6] Since Perennial had not started construction by its permitted deadline of January 26, 2019, and had not yet received a DEQ-approved extension of that deadline, its construction approval has terminated and is invalid. If Perennial wants to keep this zombie project alive, it must submit a new application for an ACDP.[7]

2) Perennial's Explanation of the Need for Another Extension is Inadequate

Even if DEQ finds Perennial's request to be timely, the request must be denied because Perennial has not provided DEQ with a detailed enough explanation of why it needs a second extension to its construction commencement deadline. According to DEQ, at the time Perennial submitted its first extension request in April 2017, Perennial indicated that it needed the extension because

> it could not obtain an energy contract for the project due to significant changes in the electrical generation industry. Uncertainty of EPA regulations has resulted in a disruption in long-term planning for the industry. Once these uncertainties are resolved the permittee believes an energy contract will be obtained.[8]

To receive a second extension of the construction commencement deadlines, the regulations require permittees to submit an application that includes a "detailed explanation of why the source could not commence construction within the second 18-month period."[9] In its January 25,

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[3] OAR 340-224-0030(4) (*emphasis added*).
[4] *See* Simple Technical Permit Modification, Permit No. 30-0039-ST-01, at 2 ("[c]onstruction must commence within 36 months of initial permit issuance"). The original permit was issued on January 26, 2016. *See* Permit No. 30-0039-ST-01 (Jan. 26, 2016).
[5] OAR 340-224-0030(5)(e) (emphasis added).
[6] *See* OAR 340-216-0082(2)(c).
[7] *See* OAR 340-216-0082(3) ("[a] permit automatically terminated under any of subsections (2)(b) through (2)(d) may only be reinstated by the permittee by applying for a new permit").
[8] *See* Standard Air Contaminant Discharge Permit Review Report, Permit No. 30-0039-ST-01, at 2 (April 24, 2017).
[9] OAR 340-224-0030(5)(b)(A).

2019, request for a second extension, Perennial's explanation for why it needs the extension is virtually identical to the explanation it provided in its first extension request two years ago. Specifically, in this most recent request Perennial explained that

> it could not obtain an energy contract for the project due to significant changes in the electrical generation industry. Uncertainty of the EPA Clean Power Plan regulations under the current administration has resulted in a disruption in long-term planning for the industry. Once these uncertainties are resolved the permittee believes an energy contract could be obtained.[10]

This explanation, ostensibly copied and pasted with minimal editing from Perennial's prior request for an extension, is hardly detailed enough to meet the requirements of OAR 340-224-0030(5)(b)(A). Perennial provided no explanation for what specific actions it has taken towards securing an energy contract. Nor has it explained its source of optimism that the "uncertainties" regarding the federal regulations will be resolved in the next 18 months, given that they were not resolved in the prior 18 months.

In the six years since Perennial submitted its initial ACDP application (in September of 2013), little if any progress has been made toward actually constructing the project. At this point, Perennial owes both DEQ and the public an explanation of why it believes this project is still worth pursuing, especially considering the substantial taxpayer-funded effort DEQ is required to undertake each time Perennial submits another extension request.

3) The VOC Limits in the Current Permit Underestimate Startup and Shutdown Emissions

Additionally, as written, Perennial's current ACDP fails to impose any emissions limits for startup and shutdown events. When considering a request for a second extension of the construction commencement deadline, DEQ must conduct a review of the permit's air quality analysis.[11] Recent experience with the Carty Generating Station has shown that gas-fired power plants have the potential to emit far greater levels of volatile organic compounds (VOCs) than energy companies such as Perennial have led permitting authorities and the public to believe. Perennial estimates 500 startups and shutdowns per year, each and every year.[12] Pollution levels are much higher during startup and shutdown events, because carbon monoxide and volatile organic compounds increase during partial load operations, and because pollution control devices like selective catalytic reduction controls cannot operate until the temperature reaches a certain threshold.[13] Perennial's current ACDP allows it to emit pollution beyond normal levels during

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[10] Standard Air Contaminant Discharge Permit Review Report, Permit No. 30-0039-ST-01 at 4 (Sept. 9, 2019).
[11] OAR 340-224-0030(5)(b)(C).
[12] Standard Air Contaminant Discharge Permit, Permit No. 30-0039-ST-01, Section 3.9 (Jan. 26, 2016).
[13] *See* Permit No.: 30-0039-ST-01, Application No.: 27470, Page 13 of 62; *see also* Joseph J. Macak III, *Evaluation of Gas Turbine Startup and Shutdown Emissions for New Source Permitting*, *available at*

startup and shutdown events, and fails to impose any limits on the amount of emissions during these events.[14] If DEQ decides to grant Perennial's request for an extension of its construction commencement deadline, despite the fact that it was not submitted in a timely manner, it should modify the permit to include emissions limits for startup and shutdown events.

4) The BACT Limit for VOC Emissions in the Permit Is Too High

The BACT limit for VOC emissions in Perennial's current permit is too high. Pursuant to the regulations, in reviewing an extension request DEQ is required to evaluate "the original LAER or BACT analysis for potentially lower limits and a review of any new control technologies that may have become commercially available since the original LAER or BACT analysis."[15] As part of that analysis, DEQ admits that it considered lowering the BACT limit for VOC emissions to 2.0 ppmvd @ 15% O2, but ultimately decided not to alter the VOC BACT determination because "the VOC emissions are dependent on the make and manufacture of the turbine and the permittee has committed to a GE LMS-100 turbine. GE guarantees VOC emissions of 5 ppm, uncontrolled. With catalytic oxidation 3 ppm would still be BACT."[16] There is no evidence in the public record to explain in what way Perennial "has committed" to using a GE LMS-100 turbine. If Perennial is contractually bound in some manner that would prevent the facility from utilizing better available technology, DEQ should include that information in the explanation of its decision not to lower the BACT determination. If such evidence does not in fact exist, DEQ should reconsider its decision not to lower the VOC BACT limit.

5) DEQ Should Deny the Extension Request Because Oregon is Moving Away from Fossil Fuel Infrastructure

Approving Perennial's request for an extension of its construction commencement deadline would contradict Oregon's goals to reduce greenhouse gas emissions. Oregon is one of twenty-four states that have signed the U.S. Climate Alliance, pledging to reduce greenhouse gas emissions consistent with the goals of the Paris Agreement. By joining the Alliance, Governor Brown committed to "implement policies that advance the goals of the Paris Agreement, aiming to reduce greenhouse gas emissions by at least 26–28 percent below 2005 levels by 2025" and to "accelerate new and existing policies to reduce carbon pollution and promote clean energy deployment at the state and federal level."[17] We must move rapidly away from fossil fuel infrastructure and toward renewable energy alternatives. Approving Perennial's request would be a step backwards.

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https://d3pcsg2wjq9izr.cloudfront.net/files/6709/articles/5647/evaluationofpermitting.pdf

[14] *See* Permit No. 30-0039-ST-01 at 3.3, 3.4, 3.5, 3.6 (excluding startup and shutdown periods from nitrogen oxide, carbon monoxide, and volatile organic compound limits); *see also* Permit No. 30-0039-ST-01 at 3.9 (limiting the time and frequency of startup and shutdown periods but not the emissions levels).

[15] OAR 340-224-0030(5)(b)(B).

[16] Standard Air Contaminant Discharge Permit Review Report, Permit No. 30-0039-ST-01, at 5.

[17] *See* https://www.usclimatealliance.org/alliance-principles

At the time Perennial received its initial ACDP, so called "natural gas" was still considered a "bridge fuel" between coal and cleaner energy alternatives. In the intervening years, it has become abundantly clear that switching from coal to fracked gas[18] is almost a wash from a climate perspective; the health of our planet demands investment in cleaner alternatives now.[19] The construction of a new fracked gas-fired power plant would lock the state into decades of dependence on fossil fuel that would impede the development of cleaner, safer alternatives. We no longer have the luxury of a "bridge"; the time to move away from fracked gas is now.[20]

Perennial's attempted explanation of the need for construction extensions, in addition to being legally insufficient, admits a lack of market demand for energy from this project. Perennial made no effort to explain the source of its optimism that the market will somehow swing in its favor, particularly when state energy policy is clearly moving in the opposite direction, away from fossil fuel infrastructure. There is simply no room in Oregon for a new fracked gas-fired power plant; DEQ should not continue to allow this zombie project to linger any longer, given the absolute lack of need for the project.

As discussed above, Perennial's request for an extension of its construction commencement deadlines suffers from a number of deficiencies and should be denied. If DEQ nevertheless decides to approve Perennial's extension request despite these deficiencies, it should strengthen the permit by adding emissions limits for startup and shutdown events and by lowering the VOC BACT limit. Thank you for considering this comment.

Sincerely,

Erin Saylor
Staff Attorney
Columbia Riverkeeper

On behalf of:
Columbia Riverkeeper, 350 PDX, Center for Sustainable Economy, Friends of the Columbia Gorge, Human Access Project, Neighbors for Clean Air, Northwest Environmental Defense Center, Oregon Conservancy Foundation, Physicians for Social Responsibility, and Sierra Club

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[18] Approximately 69% of all natural gas produced in the U.S. is obtained through fracking. *See* https://www.eia.gov/tools/faqs/faq.php?id=907&t=8

[19] *See* https://www.ucsusa.org/clean-energy/coal-and-other-fossil-fuels/infographic-climate-change-risks-natural-gas. Emerging science is showing us that gas infrastructure emits more methane along every step of its extraction, transportation, and storage than we used to think; pound-for-pound, methane is as big a contributor to climate change as coal-fired power plants. *See* https://www.ucsusa.org/clean-energy/coal-and-other-fossil-fuels/infographic-natural-gas-fugitive-methane-emissions

[20] *See* The Guardian, *World has no capacity to absorb new fossil fuel plants, warns IEA* (November 12, 2018).