



# Oregon

Kate Brown, Governor



550 Capitol St. NE  
Salem, OR 97301  
Phone: 503-378-4040  
Toll Free: 1-800-221-8035  
FAX: 503-373-7806  
[www.oregon.gov/energy](http://www.oregon.gov/energy)

**To:** Oregon Energy Facility Siting Council

**From:** Katie Clifford, Senior Siting Analyst

**Date:** November 7, 2019

**Subject:** Agenda Item K – Perennial Wind Chaser Station, Council Decision on Request for Contested Case; and the Review of the Proposed Order on Request for Amendment 1 of the Site Certificate (Action Items) for the November 21-22, 2019 EFSC Meeting

**Attachments:** Attachment 1: Request for Contested Case: Columbia Riverkeeper, Friends of the Columbia Gorge, and Oregon Wild  
Attachment 2: Proposed Order on Request for Amendment 1 of the Perennial Wind Chaser Station Site Certificate

---

*Agenda Item K includes two potential Council decisions: first, whether to grant or deny a contested case proceeding on the Proposed Order; second, if a contested case proceeding is not granted, whether to approve, amend, or deny the staff's Proposed Order, and issue an amended site certificate.*

## STAFF RECOMMENDATION

As presented in this staff report, the Department recommends that the Council conclude that the issues raised in the request for contested case from Columbia Riverkeeper, Friends of the Columbia Gorge, and Oregon Wild received on the Proposed Order on Request for Amendment 1 of the Perennial Wind Chaser Station Site Certificate were properly raised, but that none of the issues raise a significant issue of fact or law that may affect the Council's determination that the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24. As such, the Council should deny the request.

In addition, the Department recommends that, based upon compliance with the recommended amended site certificate, the Council find that the facility, with proposed changes, would comply with all applicable Council standards and other applicable rules and statutes, and that

the Council approve the Proposed Order as the final order and issue the first amended site certificate.

## **BACKGROUND**

The Perennial Wind Chaser Station (facility) is an approved, but not yet constructed, natural gas power generation facility comprised of up to four natural gas-fired combustion turbine generators which would produce up to approximately 415 megawatts. In addition, the facility would include the following related and supporting facilities: lateral natural gas pipeline, reconducted transmission line, step-up substation, interconnecting water pipelines, utility lines, temporary construction facilities, and operations and maintenance facilities.

The Council issued a *Final Order on the Application for Site Certificate* on September 18, 2015. The site certificate was fully executed soon thereafter (on September 23, 2015). In its Request for Amendment 1 of the Site Certificate, the certificate holder (Perennial-WindChaser LLC)<sup>1</sup> seeks approval to extend the construction deadlines by two years. The certificate holder requests to extend the construction initiation date from September 23, 2018 to September 23, 2020, and to extend the construction completion date from September 23, 2021 to September 23, 2023.

## **PROCEDURAL HISTORY OF THE RFA**

The certificate holder submitted the preliminary Request for Amendment (RFA) to the Department on August 2, 2018, and the Department determined on June 21, 2019 that the RFA was complete. On July 8, 2019, the Department issued its Draft Proposed Order and public notice of a public comment period beginning on that same day and ending at the conclusion of the public hearing on August 22, 2019, for a total of 45 days. On August 22, 2019, the Department presented to Council a summary of the RFA and the Draft Proposed Order. That evening the Council conducted a public hearing on the Draft Proposed Order during which members of the public addressed Council directly regarding issues and concerns with the RFA and the Draft Proposed Order. The record of the Draft Proposed Order closed at the conclusion of the public hearing.

On August 23, 2019, the Council reviewed the Draft Proposed Order and some of the public comments received on the record of the public hearing; however, Council carried over its full review of public comments and the Draft Proposed Order to its September meeting. At the Council meeting on Friday, September 27, 2019, Council reviewed the Draft Proposed Order, considered all comments received on the record, and had the opportunity to provide comment to the Department regarding the Draft Proposed Order. The Department issued its Proposed Order, in a red-line version, on October 2, 2019, which took into consideration Council

---

<sup>1</sup> Perennial-WindChaser LLC is a wholly-owned subsidiary of Perennial Power Holdings, Inc., which is a wholly-owned subsidiary of Sumitomo Corporation and Sumitomo Corporation of America.

comments and 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 issuance of the notice of the public hearing and prior to the close of the record).

Concurrent with issuance of the Proposed Order, the Department issued a Public Notice of the Proposed Order as well as a Notice of the Opportunity to Request a Contested Case (Notice of Contested Case). The Notice of Opportunity to Request a Contested Case was sent via certified mail to all persons who commented on the record of the public hearing as only those persons who commented in person or in writing on the record of the public hearing could request to participate as a party or limited party in the contested case proceeding. Pursuant to the Notice of Opportunity to Request a Contested Case, the deadline to request a contested case was 5:00 pm on November 1, 2019.

## **REQUEST FOR CONTESTED CASE**

The Friends of the Columbia Gorge, Columbia Riverkeeper, and Oregon Wild (collectively, “Requesters”) jointly filed a timely request for contested case proceeding on the Proposed Order by the November 1, 2019 deadline. Requesters attached a copy of their written comments on the Draft Proposed Order as Exhibit A to their request.

### **Council Scope of Review on Request to Amend a Site Certificate to Extend Construction Deadlines**

Perennial Wind Chaser Station is seeking to amend its site certificate to extend the construction deadlines. When considering a request for a contested case, the Council should bear in mind the scope of its review when an existing certificate holder seeks an amendment solely to extend construction deadlines:

*To issue an amended site certificate, the Council shall determine that the preponderance of evidence on the record supports the following conclusions: . . . (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.<sup>2</sup>*

The Council has historically interpreted “changes in facts or law” to mean proposed changes in facility design or changes to the environment (e.g., changes within the applicable analysis areas related to land uses, habitat categorization, noise receptors, recreation areas, or other applicable issues under Council jurisdiction), and regulatory changes, which could include a

---

<sup>2</sup> OAR 345-027-0375(2).

change to the statutes governing the Council, a change in Council rules, or in other applicable rules and statutes.

### **Council Scope of Review on Requests for a Contested Case Proceeding RE: a Site Certificate Amendment**

Following are the criteria governing the Council's consideration of a request for a contested case regarding a proposed site certificate amendment.

#### *Whether Request meets Informational Requirements – OAR 345-027-0371(6)*

The request must be submitted in writing, received by the specified deadline and include all information set forth in rule.<sup>3</sup>

#### *Whether the Issue was Properly Raised*

The requesting party must have properly raised the issue(s) on the record of the Draft Proposed Order public hearing with sufficient specificity to afford the decision maker an opportunity to respond.<sup>4</sup>

Under OAR 345-027-0371(7), 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;

---

<sup>3</sup> OAR 345-027-0371(6)(a) – (j). 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).

<sup>4</sup> OAR 345-027-0371(5) and (7).

- 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.

For an issue to have been raised with sufficient specificity, the individual must have presented facts on the record of the Draft Proposed Order public hearing that support the individual's position on the issue.

*Whether Request Raises Significant Issues of Fact or Law*

OAR 345-027-0371(9) contains the standard of review for contested case requests for site certificate amendments. It states:

*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.*

Therefore, simply raising a significant issue of law or fact is not sufficient to justify a contested case. The significant issue of law or fact must have some connection to the Council's determination whether the Perennial Wind Chaser Station, with proposed changes, meets the applicable laws and Council standards Council standards included in chapter 345 divisions 22, 23 and 24.

### **Council Options**

OAR 345-027-0371(10) gives the Council three options for action on a contested case request:

**Option 1:** If the Council finds that an issue justifies a contested case under the criteria quoted above, the Council can decide to conduct a contested case proceeding. The contested case proceeding would be limited to the issues that the Council finds sufficient to justify the proceeding.

**Option 2:** 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).

**Option 3:** If the Council finds that an issue does not justify a contested case under the criteria quoted above, the Council can deny the contested case request. The Council would issue a written order specifying the basis for the decision. The Council would then have the further option to adopt, modify or reject the Proposed Order on the amendment request.

The following evaluation presents the Department’s recommendations to Council on whether the submitted requests satisfy the requirements for granting a contested case proceeding.

### **Department Evaluation of Request for Contested Case**

Based on review of the request, the Department concludes, and recommends Council find, that the request satisfies the contested case request submittal requirements of OAR 345-027-0371(6).<sup>5</sup>

The Department will now evaluate whether each issue raised by the Requesters was properly raised and justifies a contested case.

#### Issue A: “The Council Cannot Approve Perennial’s Application Under Invalid Rules”

Requesters contend that, based on the Supreme Court’s August 1, 2019 decision<sup>6</sup> related to the site certificate amendment rules adopted by Council in October 2017, the amendment request was submitted pursuant to invalid rules and, because the construction commencement deadline has passed, the site certificate for the facility has expired.

To properly raise an issue in a request for a contested case proceeding, the issue must be within the jurisdiction of the Council, and the person must have raised the issue on the record of the Draft Proposed Order public hearing. Requesters commented on this issue on the record of the Draft Proposed Order with sufficient specificity. To the extent that the Council has jurisdiction over its site certificate amendment rules in division 27, the issue was properly raised; however, as explained below, the issues raised under Issue A can only be settled by the Oregon Supreme Court and not through a contested case proceeding.

The Department addressed these comments in the Proposed Order in Section II.D., *Applicable Division 27 Rule Requirements*. As discussed therein, the Council adopted temporary rules on August 22, 2019 governing the process for amending site certificates. The temporary rules are in effect until February 17, 2020. Amongst other changes, the temporary rules replaced the amendment processing rules contained in OAR 345, division 27. As stated in OAR 345-027-0311(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

---

<sup>5</sup> Individuals eligible to participate in a contested case proceeding must submit to the Department a request, by a specified deadline, that contains responses to the information requirements of OAR 345-027-0371(6)(a) – (j).

<sup>6</sup> As of the date of this staff report, the Oregon Supreme Court had not yet entered its judgement.

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.” Under this rule, the temporary rules apply to the ongoing review and processing of the Perennial Wind Chaser Station Request for Amendment 1.

Requesters also contend that the temporary rules are invalid, and therefore contend that these rules cannot be used to review, process, or approve the RFA. On August 30, 2019, Friends of the Columbia Gorge and other organizations (Friends, et al.), submitted a petition for judicial review of the temporary rules to the Oregon Supreme Court. However, despite the fact that this matter is currently under the Court’s review, Requesters state in their request for contested case that 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.”

Requesters assert that a contested case is warranted because these issues raise “significant questions of law.” The Department notes that the Supreme Court of Oregon has jurisdiction to determine the validity of rules adopted by the Council and that the validity of the temporary amendment rules is a matter of ongoing litigation before the Supreme Court. Pursuant to ORS 469.490, “[t]he validity of any rule adopted by the council may be determined only upon a petition by any person to the Supreme Court.” Accordingly, these issues can only be settled by the Oregon Supreme Court and not through a contested case proceeding. OAR 345-027-0371(9) requires the Council to deny a request for contested case if the Council does not have jurisdiction over the issue raised in the request; therefore, the Department recommends that the Council find Requesters’ Issue A does not justify a contested case, and that the Council deny the contested case request on this issue.

In their request for contested case, Requesters state that “at a minimum, 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.” On September 13, 2019, Friends et al. filed a motion requesting the Oregon Supreme Court issue a preliminary injunction prohibiting the Council and Department from implementing the temporary rules while the Oregon Supreme Court reviews the validity of those rules. On October 24, 2019, the Court issued an order denying the motion for preliminary injunction. The Department maintains its position that its division 27 temporary rules are valid, and given that the Court denied the motion for preliminary injunction, the Department recommends the Council continue its review of the RFA.

Issue B: “Perennial’s Application is Incomplete Because it Failed to Include Accurate Information About the Status of its DEQ Air Permit”

Requesters contend that the Department should “never have accepted the RFA as complete” because “Perennial failed to submit accurate information regarding the status of its DEQ permit” that the Requesters assert was required by the division 21 rules. Requesters commented on this issue on the record of the Draft Proposed Order with sufficient specificity and the Council’s division 21 rules are within Council’s jurisdiction; therefore, the Department recommends the Council find that the issue was properly raised.

The Department addressed these comments in the Proposed Order in Section III.F., *Protected Areas* (pages 52-55). Portions of that analysis are incorporated as appropriate into the Department’s analysis in this staff report of Issue B.

Pursuant to OAR 345-027-0371(9), 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. Requesters assert that a contested case is justified because Issue B “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...” Besides referring to the standard of review for contested case requests for site certificate amendments at OAR 345-027-0371(9), the only “applicable laws and rules” cited by the Requesters under Issue B are division 21 rules pertaining to application completeness requirements and federally-delegated permits:

- General requirements at OAR 345-021-0000(7) and (10); and
- Requirements for the contents of Exhibit E of an application at OAR 345-021-0010(1)(e)(D).

As Issue B requests a contested case based on Division 21 requirements and does not raise “a significant issue of law or fact that may affect the Council’s determination that the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24” as required by OAR 345-027-0371(9), the Department recommends that the Council find Requesters’ Issue B does not justify a contested case, and that the Council deny the contested case request on this issue.

*Additional Discussion*

As interpreted by the Department, the purpose of OAR 345-021-0000(7) and OAR 345-021-0010(1)(e)(D) is to provide some limited connectivity between the Energy Facility Siting Council review process and the state’s applicable federally-delegated programs, which fall outside the Council’s jurisdiction. At the time the Department determined that the RFA was complete, the



Department had reviewed documentation associated with the original Air Contaminant Discharge Permit (ACDP) application as well as the first ACDP permit modification (to extend the construction deadline). Although the Council does not have jurisdiction over federally-delegated permits, the Council may rely on the determinations of compliance and the conditions in federally-delegated permits in evaluating an application for compliance with relevant Council standards. The Council did so in the *Final Order on the Application for Site Certificate* (Section IV.F.) in its evaluation of facility compliance with the Protected Areas standard.

At the time the Council made its findings under the Protected Areas standard in the *Final Order on the Application for Site Certificate*, DEQ had not yet issued the original ACDP for the facility. In other words, the Council's findings were based in part on the fact that Perennial had not yet obtained, but that it would need to obtain and maintain, a valid ACDP prior to commencing construction. This remains true – even if the Council amends the site certificate to extend the construction commencement date to September 23, 2020, Perennial would not be able to commence facility construction without a valid DEQ permit. This requirement is independent of the EFSC process.

In the Proposed Order on this RFA, in response to comments received on the record of the Draft Proposed Order public hearing and as informed by communications with the Oregon Department of Environmental Quality (DEQ), the Department added further discussion under the Protected Areas standard (pages 52-55) on the status of the facility's ACDP as well as additional discussion about potential impacts from air emissions on two protected areas (a Class I area and the Columbia River Gorge National Scenic Area). As discussed in Section III.F. of the Proposed Order, DEQ's review report for the original ACDP concluded, "Based on the air quality analysis, DEQ has determined that the Perennial-WindChaser will not have an adverse impact on air quality in any Class I and Class II areas nor on the Columbia River Gorge National Scenic Area." DEQ informed the Department that DEQ does not anticipate that the facts underlying its previous conclusion would change any time before September 23, 2020 (the requested construction commencement deadline in the RFA).

Requesters state that the Council and Department "did not receive the required information [from DEQ] until after the close of the public comment period." Based upon comments on the record of the Draft Proposed Order public hearing, the Department contacted DEQ to discuss the comments applicable to DEQ's ACDP program, as was appropriate pursuant to OAR 345-027-0371(1).<sup>7</sup>

The Requesters fail to explain how adding further information at this point to the record about the status of the facility's ACDP has the potential to affect the Council's determination that the facility, with the change proposed by the amendment, meets the applicable laws and Council

---

<sup>7</sup> "...the Department of Energy shall issue a proposed order..." which "must consider...agency consultation..."

standards included in chapter 345 divisions 22, 23 and 24, as required by OAR 345-027-0371(9). Therefore, the Department recommends that the Council find Requesters' Issue B does not justify a contested case, and that the Council deny the contested case request on this issue.

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

Requesters contend that the Department further erred in determining that the RFA was complete "because Perennial's purported explanation for why it needs an extension of the construction deadlines for the Project is legally inadequate." Requesters commented on this issue on the record of the Draft Proposed Order with sufficient specificity and the Council's division 27 rules are within Council's jurisdiction; therefore, the Department recommends the Council find that the issue was properly raised.

The Department addressed these comments in the Proposed Order in Section III., *Review of the Requested Amendment* and Section III.A., *General Standard of Review*. As discussed therein, pursuant to OAR 345-027-0085(1), the preliminary RFA must include an explanation of the need for an extension and must be submitted to the Department before the applicable construction deadline. In its RFA, the certificate holder stated:

*The reason for this request is that Perennial has been unable to obtain a power purchase agreement and it is unlikely that one will be obtained before the required construction start date. There 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 market place.*

Requesters argue that Perennial's explanation is insufficient because the certificate holder did not include additional details (such the steps it has taken to try to obtain a power purchase agreement) or explain why each construction deadline must be extended by a full two years.

The certificate holder provided its explanation of the need for an extension to address the requirements of OAR 345-027-0085(1), which requires the certificate holder to explain its "need" for the requested deadline extension. However, Council rules include no substantive review criteria for why the extension is needed and requested. Council is not required to find, and rules do not guide a finding, as to what constitutes an "acceptable" need for a timeline extension. If the Department were to determine that the certificate holder failed to meet the OAR 345 division 27 information requirement to include an explanation of the need for the extension, then it would determine the amendment request to be incomplete and request further information during its completeness review. This was not the case with the RFA.

Because the information required under OAR 345-027-0085(1) was provided by the certificate holder, in the Proposed Order the Department recommends the Council consider the merits of

the amendment request and the certificate holder's ability to satisfy the requirements of Council standards and other applicable statutes, rules and ordinances. The stated need for more time to obtain a power purchase agreement does not bear a relationship to the ability of the facility to comply with all applicable laws and Council standards.

Requesters point to the Department's statement in the Proposed Order (at page 21) that "Council rules include no substantive review criteria for why the extension is needed and requested." Requesters argue that:

*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.*

As noted by staff during the August 23, 2019 Council meeting, the Council may pursue rulemaking should the Council wish to develop substantive review criteria for the explanation required by OAR 345-027-0085(1). However, the Council's rulemaking process is outside of the Council's scope of review on a request for a contested case proceeding on a site certificate amendment.

As Issue C requests a contested case based on division 27 requirements and not based on "applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24" as required by OAR 345-027-0371(9), the Department recommends that the Council find Requesters' Issue C does not justify a contested case, and that the Council deny the contested case request on this issue.

#### Issue D: The Council Must Consider Methane Emissions from the Proposed Facility

Requesters contend that the Proposed Order fails to consider potential methane emissions from operation of the Perennial Wind Chaser Station, and assert that the "Council's Carbon Standard specifically requires that methane be considered as part of the carbon emissions analysis. See OAR 345-024-0590(2)." Requesters commented on this issue on the record of the Draft Proposed Order with sufficient specificity and the Council's division 24 rules are within Council's jurisdiction; therefore, the Department recommends the Council find that the issue was properly raised.

The Department noted in Section III.P.2. of the Proposed Order (on page 97) that the one Council standard directly related to climate change is the Carbon Standard. Contrary to the Requesters' assertions, the Council's Carbon Standard does not require the Council to determine the methane emissions (or any other greenhouse gases besides carbon dioxide) that may result from facility operation. Instead, the Council "shall 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).

Requesters state that:

*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.*

Because the previous citation was to OAR 345-024-0590(1), the Department assumes by “*Id.*” the Requesters are referring to the same rule; however, that definition does not appear in (1), which contains the requirement for Council to determine facility gross carbon dioxide emissions. In (2) – which is specific to emissions reductions projects that could be implemented to meet the Carbon Standard – the rules define the “amount of greenhouse gas emissions” as “the pounds of carbon dioxide and the carbon dioxide equivalent of other greenhouse gases.” In other words, this definition is for the “amount of greenhouse gas emissions,” rather than for “carbon dioxide emissions,” and appears only in the context of emissions reductions projects, rather than in the rules pertaining to measuring stack emissions.

The Council’s division 1 rules define the terms “carbon dioxide equivalent” and “greenhouse gas” by referring to ORS 469.503(2)(e). The statute not only defines these two terms, but also separately defines “gross carbon dioxide emissions,” thereby differentiating this term from the other two:

*“Gross carbon dioxide emissions” means the predicted carbon dioxide emissions of the proposed energy facility measured on a new and clean basis [ORS 469.503(2)(e)(H)]*

To issue a site certificate for a non-base load power plant, the Council must find that the net carbon dioxide emissions rate of the proposed facility does not exceed 0.614 pounds of carbon dioxide per kilowatt-hour of net electric power output, with carbon dioxide emissions and net electric power output measured on a new and clean basis. OAR 345-024-0590. Pursuant to ORS 469.503(2)(c):

*The council shall determine whether the applicable carbon dioxide emissions standard is met by first determining the gross carbon dioxide emissions that are reasonably likely to result from the operation of the proposed energy facility...The council shall adopt site certificate conditions to ensure that the **predicted carbon dioxide emissions** [emphasis added] are not exceeded on a new and clean basis.*

ORS 469.503(2)(c) then proceeds to provide how an applicant can use offsets to provide “any remaining emissions reduction necessary” in order to demonstrate that the “resulting net carbon dioxide emissions meet the applicable carbon dioxide emissions standard.”

“Net carbon dioxide emissions” is defined in ORS 469.503(2)(e)(I) as the “gross carbon dioxide emissions of the proposed energy facility, less carbon dioxide or other greenhouse gas emissions avoided, displaced or sequestered by any combination of cogeneration or offsets.” Therefore, ORS 469.503(2)(c) is fairly unambiguous that Council findings on compliance with the Carbon Standard are based on the facility carbon dioxide emissions – alone, and not in combination with other greenhouse gases – minus the “carbon dioxide or other greenhouse gas emissions avoided, displaced or sequestered by any combination of cogeneration or offsets.” It is therefore in the context of offset projects that other greenhouse gases may be considered, while emissions from the facility itself are limited to carbon dioxide emissions for the purposes of the Carbon Standard.

Methane emissions from facility operation are therefore not required to be quantified for the purposes of calculating a proposed energy facility’s carbon dioxide emissions under the Council’s Carbon Standard and the relevant statute at ORS 469.503. OAR 345-027-0371(9) requires the Council to deny a request for contested case if the Council does not have jurisdiction over the issue raised in the request; therefore, the Department recommends that the Council find Requesters’ Issue D does not justify a contested case, and that the Council deny the contested case request on this issue.

Issue 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

Requesters contend that the additional information that has become available about the impact of “fracked gas” (hydraulic fracturing) on the climate, as well as the effects of climate change itself, since the Council issued the original site certificate is information that the Council should consider in its review of the RFA. Requesters point to the requirement that the Council consider “any changes in facts or law since the date the current site certificate was executed” in its evaluation of a request to extend the construction commencement or completion deadlines.<sup>8</sup> The Requesters argue that changes in fact or law that the Council must consider include Oregon’s evolving policies with respect to climate change as well as scientific literature published since the site certificate was executed that “demonstrate the cradle-to-grave climate change impacts of fracked gas.”

Requesters commented on this issue on the record of the Draft Proposed Order with sufficient specificity and the Council’s division 27 rules are within Council’s jurisdiction; therefore, the Department recommends the Council find that the issue was properly raised.

---

<sup>8</sup> OAR 345-027-0375(2)(b)

As required by OAR 345-027-0375(2)(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.*

Based upon the rule language, changes in fact or law must be considered in the context of the facility's compliance with laws and standards applicable to the Council's review. In the Proposed Order (at page 5), the Department noted:

*The proposed facility does not include drilling for natural gas; furthermore, a natural gas drilling project would not fall within the definition of an "energy facility" under ORS 469.300(11). Therefore, comments regarding the environmental impacts of hydraulic fracturing are outside the scope of the Council's review.*

Requesters contend that this 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."

While the Department does not dispute the very real effects of climate change, the Council standards at divisions 22, 23, and 24 – including the Carbon Standard in division 24 – do not require a lifecycle analysis of greenhouse gas emissions. The Council therefore lacks the authority to consider these impacts in its review of the RFA.

OAR 345-027-0371(9) requires the Council to deny a request for contested case if the Council does not have jurisdiction over the issue raised in the request; therefore, the Department recommends that the Council find Requesters' Issue E does not justify a contested case, and that the Council deny the contested case request on this issue.

## **ADMINISTRATIVE AND MATERIAL CHANGES FROM DRAFT PROPOSED ORDER TO PROPOSED ORDER**

The Proposed Order (Attachment 2 to this staff report) includes revised discussion or analysis in response to comments received on the Draft Proposed Order, as shown in the Draft Proposed Order Comment Index (Attachment C to the Proposed Order). In addition, the Proposed Order contains material changes from the Draft Proposed Order, including recommended new findings in Section III.B *Organizational Expertise*, recommended new findings in Section III.F. *Protected Areas*, and recommended new findings and a condition in Section III.K. *Historic, Cultural and Archaeological Resources*. All revisions are presented in the Proposed Order in red underlined text with supporting analysis.

Administrative changes are presented in Sections I. *Introduction* and II. *Amendment Process* of the Proposed Order and include updates to the Council review process, updates to the

applicable division 27 rule requirements, and changing references from “draft proposed order” to “proposed order.”

**Attachment 1: Request for Contested Case: Columbia Riverkeeper, Friends of the Columbia Gorge, and Oregon Wild**



**Attachment 2: Proposed Order on Request for Amendment 1 of the Perennial Wind Chaser  
Station Site Certificate**