



Oregon

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To: Oregon Energy Facility Siting Council

From: Maxwell Woods, Senior Policy Advisor/
Patrick Rowe, Senior Assistant Attorney General

Date: January 9, 2020

Subject: Agenda Item H (Possible Action Item)
Summit Ridge Wind Farm Site Certificate Amendment 4 – Requests for Reconsideration and Rehearing of Council’s Approval of Site Certificate Amendment 4 and Council’s Orders denying requests for contested case

Attachments: Requests for Reconsideration and Rehearing from:

1. Friends of the Columbia Gorge, Oregon Wild, Oregon Natural Desert Association, Central Oregon LandWatch and East Cascades Audubon Society
2. Fuji and Jim Kreider
3. Irene Gilbert, Friends of the Grande Ronde Valley

SUMMARY OF STAFF’S RECOMMENDATIONS

1. Deny the requests for reconsideration and rehearing in a written Order.
2. In the Order, set forth Council’s interpretation of its standard for assessing requests for a contested case in OAR 345-027-0371(9).

BACKGROUND

The Summit Ridge Wind Farm is an approved, but not yet constructed, wind energy facility located in Wasco County. The certificate holder, Pattern Development, requested an amendment to the site certificate (RFA 4) to extend the deadlines for beginning and completing construction.

Proposed Order and Requests for Contested Case

The Department issued its initial proposed order on April 2, 2019. Concurrent with the issuance of the April 2, 2019 proposed order, the Department also issued a public notice of the proposed order and a Notice of Opportunity to Request a Contested Case.

The following three individuals or groups requested a contested case to evaluate specific issues on the April 2, 2019 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 (collectively “Friends”); 2) Irene Gilbert, as an individual and also representing Friends of the Grande Ronde Valley (Gilbert); and 3) Fuji and Jim Kreider. (These requests for contested case on the proposed order were provided to Council as part of its May 2019 meeting packet).

The Council considered the contested case requests at its May 17, 2019 meeting, held in Condon, Oregon. At that meeting, the Council found that the issues raised in the contested case requests were properly raised, but that none of the issues justified a contested case. Council found that two issues raised in the requests for contested case could be settled in a manner satisfactory to the Council with amendments to the proposed order, including modifications to certain conditions largely related to habitat assessment and wildlife monitoring and mitigation. Council voted to deny the requests for contested case, and to order the Department to amend its proposed order. On July 3, 2019, Council chair Beyeler signed an Order denying the Requests for Contested Case on the original proposed order.

Amended Proposed Order and Requests for Contested Case

On July 3, 2019, the Department issued its amended proposed order on RFA4, including changes directed by Council at the May 17 meeting. Also, on July 3, the Department issued a 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. Friends and Gilbert requested a contested case on the amended proposed order by the August 5 deadline. (These contested case requests on the amended proposed order were provided to Council as part of its August 2019 meeting packet).

Final Order and Denial of Requests for Contested Case

At its August 22-23, 2019 meeting in Boardman, Oregon, Council denied the requests for contested case on the amended proposed order and approved Amendment 4, granting the certificate holder’s request to extend the time for beginning and ending construction of the facility. The Order denying the Requests for Contested Case on the original proposed order was served on September 30, 2019. The Order denying requests for contested case on the amended Proposed order was also issued and served on September 30, 2019. The Final Order approving Amendment 4 was issued on October 3, 2019.

REQUESTS FOR RECONSIDERATION AND REHEARING

Pursuant to OAR 345-001-0080 and ORS 183.484, within 60 days of the Council’s Orders denying the requests for contested case, there was an opportunity to request Council reconsideration of its decision to deny the requests for contested case. Within that 60 day timeframe the Department received requests for reconsideration from the Kreiders, Gilbert and Friends.

As noted above, Friends requested a contested case on both the original proposed order and the amended proposed order. They are requesting reconsideration of Council's denial of both requests. They have also requested reconsideration of the Council's final order approving amendment 4 of the site certificate. A copy of their Petition for Reconsideration is enclosed as Attachment 1. They argue (among other assertions) the Council lacked the authority to apply the site certificate amendment rules in its Orders, erroneously concluded that certain Wasco County ordinances are not applicable substantive criteria and failed to properly apply the correct standard for determining whether to conduct a contested case proceeding.

As noted above, Fuji and Jim Kreider requested a contested case on the original proposed order. They have requested Council reconsideration of the Order on Requests for Contested Case on the original proposed order, the Order on Requests for Contested Case on the amended proposed order and the Final Order on Request for Amendment 4. A copy of their request for reconsideration is enclosed as Attachment 2. They argue (among other assertions) that there is not a preponderance of evidence on the record that the facility complies with the Council's wildlife habitat, threatened and endangered species or protected areas standards in OAR 345-022-0060, 0070 and 0040, respectively.

As noted above, Gilbert requested a contested case on both the original Proposed order and the amended Proposed order and has requested reconsideration of Council's Orders denying these requests. The contested case request on the original proposed order was provided to Council as part of its May 2019 meeting packet. The contested case request on the amended proposed order was provided to Council as part of its August 2019 meeting packet. A copy of this request for reconsideration is enclosed as Attachment 3. Gilbert argues (among other assertions) that the Council and Department have failed to assess the combined impacts of the design, construction and operation of the facility, resulting in a determination that there would not be significant impacts to protected areas. Gilbert further argues that a contested case is merited to address the interpretation of OAR 345-024-0015 including the need to design components of the facility to minimize adverse visual features.

COUNCIL OPTIONS

The Council has 60 days from the date of receipt of the requests for reconsideration to take formal action. That action could be to reconsider the Council's prior decision and potentially reach a new, different decision (e.g., to grant a contested case on all or a portion of the issues raised), or to deny the requests for reconsideration. If Council does not take formal action within 60 days of the receipt of the requests, the requests for reconsideration are deemed denied. The request from Fuji and Jim Kreider was received on November 27, 2019. The requests from Friends and Gilbert were received on November 29, 2019. Thus, the Council has until January 28, 2020 to take any formal action on the requests from Gilbert and Friends, and until January 26, 2020 to take any formal action on the request from the Kreiders.

STAFF'S ANALYSIS

1. Council is under no obligation to consider the Petitions for Reconsideration of its Orders denying the requests for contested case.

Many state agencies, including EFSC, have promulgated their own rules regarding reconsideration of orders in other than a contested case (which includes orders denying requests for contested case). Unless otherwise specifically required by statute, however, an agency does not have to allow reconsideration of such an order. See ORS 183.480(1). OAR 345-001-0080 does not require Council to grant a petition for reconsideration under any particular circumstances, nor does it establish criteria for Council to apply when reviewing a petition for reconsideration. Indeed, per OAR 345-001-0080(4), Council could take no action on the petitions and the petitions would be deemed denied within 60 days.

While EFSC's rules do not establish criteria for when it will grant a petition for reconsideration, the following passage from the Oregon Administrative Law Manual is worth bearing in mind:

"A petition for reconsideration is appropriate when, for example, the order seems inconsistent with prior agency practice, but does not explain why; the order seems to misinterpret the law; or the order misstates the facts. In such cases, the agency may be well advised to grant a petition for reconsideration, reanalyze the record and the order, correct any errors, fill in omissions, clarify the findings and conclusions or clarify the rationale in the order."

OREGON ATTORNEY GENERAL'S ADMINISTRATIVE LAW MANUAL 178 (2019).

2. Council rules do not allow for reconsideration of the Order approving RFA4.

OAR 345-001-0080(1) states that a "person entitled to judicial review under ORS 183.484 of a final order in other than a contested case may file a petition for reconsideration or rehearing with the Council within 60 days after the date of the order." The Council's order denying the requests for contested case on the original proposed order, and its order denying the requests for contested case on the amended proposed order are considered final orders in other than a contested case, and judicial review of those orders is established under ORS 183.484. As such, it is allowable for petitions for reconsideration or rehearing of the orders denying the requests for contested case to be filed with Council. However, OAR 345-001-0080 only allows a person *entitled to judicial review under ORS 183.484* to file a petition for reconsideration or rehearing with Council. The final order approving the site certificate amendment is not subject to judicial review under ORS 183.484; rather, it is subject to judicial review under ORS 469.403(3) ("Jurisdiction for judicial review of the council's approval or rejection of an application for site certificate or amended site certificate is conferred upon the Supreme Court."). Therefore, OAR 345-001-0080 does not allow a person to seek Council reconsideration of the final order approving the site certificate amendment, as Friends and the Kreiders have done.¹

¹ Council previously provided information regarding the pathway for review of its decision on RFA 4. Council included a "Notice of Right to Appeal" in the Final Order on Request for Amendment 4, stating: "[t]he right to judicial review of this final order approving an amendment to the site certificate is governed by ORS 469.403 and

3. Council thoroughly evaluated RFA 4 and the requests for contested case

Staff and Council conducted a thorough evaluation of the Summit Ridge Wind Farm Request for Amendment 4 to extend the beginning and ending construction timelines. The review process included:

- Conducting a draft proposed order hearing in front of Council;
- Council’s review of the draft proposed order and public comments;
- Council’s review of three contested case requests on the proposed order and determination that none of the requests justified a contested case. However, Council remanded the proposed order to staff to respond to issues related to the Council’s Fish and Wildlife Habitat standard including amending condition language;
- Council’s review of two contested case requests on the amended proposed order and determination that none of the requests justified a contested case.

It would be appropriate for Council to reconsider its denial of a contested case on issues previously raised by Gilbert and Friends if it believes its prior evaluation resulted in findings that are inconsistent with prior practice, misinterprets the law, or misstates the facts. However, the Department contends that the amendment request was thoroughly evaluated and the Department further contends that Council acted appropriately and consistent with the facts on the record and in accordance with Council procedures, rules, and applicable statutes when it denied the petitions for contested case on the proposed order and the amended proposed order, and when it approved the fourth amended site certificate.

4. Interpretation of OAR 345-027-0371(9)

a. Friends’ interpretation

In their Petition for reconsideration Friends allege the Council failed to apply the correct standard for determining whether to conduct a contested case. They assert an interpretation of Council rule language in OAR 345-027-0371(9) related to when Council determines whether or not a contested case is justified for a site certificate amendment. This rule states:

“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 division 22, 23 and 24.”

OAR 345-027-0371(12). Pursuant to ORS 469.403(3), the Oregon Supreme Court has jurisdiction for review of the Council’s approval of an application for an amended site certificate. To appeal you must file a petition for judicial review with the Supreme Court within 60 days from the day this final order approving an amendment to the site certificate was served.”

OAR 345-027-0071(9) (2018); OAR 345-027-0371(9) (2019) (emphasis added). Friends offer their interpretation of this rule and, in particular, the meaning of the word “may” as used therein:

“Note the use of the word “may” in this standard, as italicized in the quotation above. Given this use of the word “may,” the rule does not require persons requesting a contested case to prove, at the time they request a contested case, that the issues they raise *will* in fact affect the Council’s determinations of compliance with applicable laws. In adopting this rule, the Council set a relatively low bar for raising issues to justify a contested case. In this context, the inclusion of the word “may,” versus the word “will,” is similar to the differences between notice pleading and fact pleading. A person requesting a contested case merely need give notice of a significant issue that *may* affect the Council’s evaluations as to compliance with the applicable law. At this early stage, such persons need not *prove*, via the introduction of evidence, detailed factual allegations, or legal arguments, that they are likely to prevail on each issue, nor even that the issues *will* affect the Council’s review. All of that must come later—as part of the contested case.”

Friends Petition for Reconsideration, p. 14 (emphasis in original).

Staff does not agree with this interpretation and recommends Council formally set forth its long-standing interpretation of the rule in an Order addressing the requests for reconsideration and rehearing.

b. Council Authority to Interpret its Own Rules

Oregon courts will defer to a state agency's interpretation of its own rule if the interpretation is plausible and is not inconsistent with the rule's text or context or with any other law. *See, e.g., Don't Waste Oregon Com. v. Energy Facility Siting Council*, 320 Or. 132, 142, 881 P.2d 119 (1994).

Staff believes Council has consistently interpreted OAR 345-027-0071(9) to require a person requesting a contested case to demonstrate that the issues the person is raising are likely to affect the Council’s determination whether the facility meets applicable laws and Council standards. Staff further believes this interpretation is plausible and consistent with the text and context of the rule.

c. Council’s interpreting “may” in OAR 345-027-0371(9) to mean “likely” is plausible.

Council rules do not define the word “may” as used in OAR 345-027-0071(9). In the absence of a definition, it is reasonable to consider the common or normal dictionary meaning of the word.

Webster's Third New International Dictionary 1396 (unabridged ed. 2002) defines “may,” in relevant part, as to “*be in some degree likely to.*” Given this definition, coupled with the context of this rule (discussed below), it is certainly plausible for Council to interpret OAR 345-027-0071(9) as meaning that in order for it to grant a request for a contested case, a person must demonstrate that it is likely the issues the person is raising may affect the Council’s determination whether the facility meets applicable laws and Council standards.

In their request, Friends essentially argue that the word “may” is synonymous with “possibility.” Friends’ interpretation conflicts with the context of OAR 345-027-0071, in particular Council’s current options in rule for evaluating requests for a contested case, and Council’s past and current practice of evaluating requests for contested case.

d. Overview of Council’s Rules Related to the consideration of amendments in a Contested Case

Type A Amendment Reviews: Council has discretion to determine whether or not a contested case is justified.

OAR 345-027-0371 Proposed Order, Requests for Contested Case and Council's Final Decision on Requests for Amendment Under Type A Review

- (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 [emphasis added]** 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 [emphasis added],** 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.*

Type B Amendment Reviews: There is no opportunity for a contested case.

- e. Neither authorizing statutes, OAR 345-027-0371(9) nor any other Council rule *require* Council to grant a contested case regarding a site certificate amendment; Council has discretion to determine whether a contested case is justified.

OAR 345-027-0371(9) establishes the minimum showing that must be made for Council to consider granting a contested case. But OAR 345-027-0371(9) does not require Council to grant a contested case. The Supreme Court recently observed the following with regard to the Council's processing of site certificate amendments:

"In contrast to the detailed statutory framework governing the site certificate application process, the statutory provision regarding the process for amending a site certificate provides:

'A site certificate may be amended with the approval of the Energy Facility Siting Council. The council may establish by rule the type of amendment that must be considered in a contested case proceeding. Judicial review of an amendment to a site certificate shall be as provided in ORS 469.403.'

ORS 469.405(1); *see also* ORS 469.405(2) (addressing land use approval of proposed amendments); ORS 469.405(3) (dispensing with the requirement of a site certificate amendment for certain pipelines).

By imposing virtually no statutory procedural requirements on the RFA process, the legislature has allowed the council to develop that process largely as it sees fit. . . .

And, whereas the statutes governing the certificate application process require a public hearing and an opportunity to request a contested case proceeding, the statutes governing the RFA process do not. The most those statutes say on those topics is that the council “*may* establish by rule the *type* of amendment” that will require a contested case proceeding. ORS 469.405(1) (emphasis added by Supreme Court). **At this point, the council has not adopted rules requiring any types of RFAS to be subject to contested case proceedings.** Ultimately, because the council is not required to provide a public hearing and opportunity to request contested case proceedings in the first place, petitioners cannot complain when the council makes steps available on limited terms . . .”

Friends of the Columbia Gorge v. Energy Facility Siting Council, 365 Or. 371, 393-394, 446 P.3d 53, 66 (2019) (emphasis added).

Similarly, because the legislature has not imposed any requirements on the Council’s handling of site certificate amendments and because (contrary to Friends’ assertions) neither OAR 345-027-0371(9) nor any other Council rule requires Council to hold a contested case proceeding on an amendment, it is appropriate for the Council to deny requests for contested case if it does not believe the issues raised by the person seeking the contested case are likely to affect its analysis of whether the facility meets applicable laws and Council standards.

- f. Council interpretation of the standard for its review of requests for contested cases is consistent with OAR 345-027-0371(10), whereas Friends’ interpretation is not.

OAR 345-027-0371(10)(b) states:

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).

Given this rule, even if Council were to determine that an issue raised in a request for a contested case is likely to affect its determination of whether the facility meets applicable laws and Council standards, Council would still have the discretion to deny the request if it believes modification to conditions would settle the issue for the Council.

Friends’ interpretation of OAR 345-027-0371(9) conflicts with Council’s discretion to modify an Order rather than go to a contested case, as allowed by OAR 345-027-0371(10)(b). Friends contend that Council must grant a contested case if a person requesting a contested case simply identifies an issue that theoretically might possibly affect Council’s determination of whether the facility meets applicable laws and Council standards. “A person requesting a contested case merely need give notice of a significant issue that *may* affect the Council’s evaluations as to compliance with applicable law.” *Friends, et al. Petition*, p. 14. However, if that were the standard for Council’s granting a contested case request on an amendment, there would be no ability for Council to deny the request if it believes modification to

conditions would settle the issue for the Council, as allowed for under OAR 345-027-0371(10)(b).

COUNCIL OPTIONS AND STAFF RECOMMENDATIONS

1. Options regarding the Requests for Reconsideration

- a. Take action in the form of an Order voted on by Council to deny all requests for reconsideration and rehearing.
- b. Take action in the form of an Order voted on by Council to fully or partially grant the requests for reconsideration, and conduct a contested case.
- c. Do not take action. The requests for reconsideration and rehearing will be deemed denied 60 days after the requests were received.

2. Staff Recommendation

Staff recommends Option 1.a. – deny all requests for reconsideration in a formal written Order, based on the findings presented here. The Orders denying the requests for contested case are consistent with prior agency practice, accurately interpret the law and do not misstate the facts.

Staff also recommends that in the Order, Council set forth its interpretation of “may” as that word is contained in OAR 345-027-0071(9), as described in this staff report, as consistent with Webster's Third New International Dictionary 1396 (unabridged ed. 2002) to “*be in some degree likely to.*”

ATTACHMENTS:

- Attachment 1: Request for Reconsideration and Rehearing by Friends of the Columbia Gorge, Oregon Wild, Oregon Natural Desert Association, Central Oregon LandWatch and East Cascades Audubon Society
- Attachment 2: Request for Reconsideration and Rehearing by Fuji and Jim Kreider
- Attachment 3: Request for Reconsideration and Rehearing Irene Gilbert, Friends of the Grande Ronde Valley

Attachment 1: Request for Reconsideration and Rehearing by Friends of the Columbia Gorge, Oregon Wild, Oregon Natural Desert Association, Central Oregon LandWatch and East Cascades Audubon Society

Attachment 2: Request for Reconsideration and Rehearing by Fuji and Jim Kreider

Please note, the Kreider request for Reconsideration and Rehearing included the statement “we incorporate by reference into this petition for rehearing or reconsideration our previously submitted concerns in this matter.” As a courtesy, the Department is providing the three documents to Council that the Kreiders have previously submitted on the record of Summit Ridge Wind Farm RFA4 that the Department has on file and that the Department believes represents the request from the Kreiders:

- 1. May 4, 2019 Request for Contested Case on RFA4*
- 2. February 21, 2019 Comment on the Record of the DPO*
- 3. February 22, 2019 Comment on the Record of the DPO*

Attachment 3: Request for Reconsideration and Rehearing Irene Gilbert, Friends of the Grande Ronde Valley