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# ENERGY FACILITY SITING COUNCIL

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

**Energy Facility Siting Council  
March 13, 2020  
Meeting Minutes**

**Friday, March 13, 2020 at 8:30 a.m.  
Columbia Gorge Discovery Center - Classroom  
5000 Discovery Drive  
The Dalles, 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>

## Friday, March 13, 2020 – The Dalles, OR

**Call to Order:** The meeting was called to order at 8:30 a.m. on March 13, 2020 by Chair Jenkins.

**Roll Call:** Council Chair Hanley Jenkins, Vice Chair Marcy Grail, and Council Members Kent Howe were present, and Jordan Truitt by telephone. Council Member Winters joined by telephone at 8:36 am.

Oregon Department of Energy representatives present were Assistant Director for Siting/Council Secretary, Todd Cornett, Senior Policy Advisor Maxwell Woods, Senior Siting Analyst Sarah Esterson, Operations Analyst Sean Mole, Division Assistant Michiko Mata. EFSC Counsel Patrick Rowe of the Department of Justice was also present. Rules Coordinator Christopher Clark joined by telephone.

### Opening Remarks

Secretary Cornett indicated the Department had one agenda item modification. Item H is related to site certificate conditions of the Wheatridge Wind Energy Facility. In the staff report sent to Council, this agenda item included two items: 1) an exception request to avoidance requirements for Laurent's Milkvetch; and 2) a request to amend the Habitat Mitigation Plan. The noticed Agenda mistakenly omitted the request to amend the habitat mitigation plan, so he requested agenda Item H be modified, as reflected in the staff report.

**A. Consent Calendar (Action Item)**<sup>1</sup> – Todd Cornett, Council Secretary, Approval of minutes, Council Secretary Report, and other routine Council business.

Secretary Cornett welcomed the newest Council Member Cynthia Condon who was appointed on February 14, 2020. He mentioned that Ms. Condon is eligible to serve two full 4-year terms since she is completing less than half of former Council Member Ann Gravatt's term.

Secretary Cornett announced that Cliff Voliva would be retiring at the end of the month. Cliff has provided the primary communications support to the Council since he has been at the agency in late 2010.

Unfortunately Mr. Voliva was not able to attend the meeting, but Secretary Cornett said he wanted to state that Mr. Voliva had been a key part of the Siting Council meeting road show over the last 9 + years and he expressed his appreciation for all his help to the Siting Division and the Council in that time. Secretary Cornett then recited a quote from Mr. Voliva expressing his appreciation to Siting Staff and Council. Chair Jenkins stated that in addition to working with Cliff on EFSC, he had also worked with Cliff when he was a Land Conservation and Development Commissioner and Cliff performed a similar function for that Commission. He expressed appreciation for the job that Cliff had done.

### Project Updates:

#### Obsidian Solar Project

Secretary Cornett explained that staff intended to issue the draft proposed order for Obsidian Solar Project last month, and hold the in person public hearing at the March Council meeting. However, the draft proposed order wasn't issued until March 12, 2020, and the public hearing would now occur at the April Council Meeting. [Note: the in person public hearing has been delayed due to the COVID-19 pandemic; the April Council meeting will occur via phone and webinar.

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<sup>1</sup> Audio for Agenda Item A = 00:00:01 – March 13, 2020

### Carty Amendment Request and ADR

On February 28<sup>th</sup> the Department received a request from Portland General Electric for amendment 2 to the Carty Generating Station. The existing facility is an operating 450 MW natural gas fueled combined cycle unit and an approved but not yet constructed 50 MW solar PV facility on approximately 1,581 acres in Morrow County.

The amendment proposes to modify the site boundary, construct new infrastructure and incorporate existing infrastructure from the Boardman Coal site certificate into the Carty site certificate since the Boardman Coal plant will cease burning coal at the end of this year.

Examples include:

- adding the existing 500 kV Grassland to Slatt substation transmission line
- adding existing 230 kV BCP to Dalreed transmission line
- adding the Carty reservoir and portions of the water discharge channel
- Removing land currently in the Carty site boundary but not utilized by the facility
- constructing a new security guard station, new office and new warehouse space

The request for amendment is on the ODOE project website and includes all of the specific details related to the amendment request. This will be the first amendment that the department will provide notice for at the point we have received the amendment request based on the recent amendment rulemaking. While we received the amendment request on February 28<sup>th</sup>, we did not receive all of the information necessary to validate the correct property owner notification until March 11<sup>th</sup>. However, Mr. Cornett did anticipate the notice going out today.

Portland General Electric has also requested that this amendment be reviewed under the Type B amendment review process. We are still reviewing that request, have posted that request on our website, and provided a courtesy email notice. We did provide a courtesy email announcement of the receipt of the Amendment Determination Request on March 3<sup>rd</sup>.

Chase McVeigh-Walker is the project lead.

### Nolin Hills Preliminary Application for Site Certificate

On February 28, 2020, the Department received the preliminary application request for the Nolin Hills Wind project. This a 350 MW wind project proposed on 48,077 acres in Western Umatilla County, South of Interstate 84. The project applicant is Nolin Hills Wind, LLC which is a subsidiary of Capitol Power. Department staff was currently reviewing the application for completeness.

Katie Clifford is the project lead.

### Wheatridge Wind Energy Facility Amendment #5 Split

On March 6, 2020, the Department received the preliminary amendment request for amendment #5 to the Wheatridge Wind Energy Facility.

This is an approved wind and solar energy generation facility. The facility is approved for construction and operation of up to 292 turbines with a peak generating capacity of up to 500 megawatts (MW); up to 150 MW of photovoltaic solar energy equipment and battery storage, to be located within a site boundary containing approximately 14,624 acres. Currently, the certificate holder is constructing 120 wind turbines (300 MW).

The amendment request is to split the facility into two site certificates. One site certificate would be for 100 MW of wind, named Wheatridge Renewable Energy Facility I; the remaining wind and solar facility components would be covered under a separate site certificate, named Wheatridge Renewable Energy Facility II. The split is related to winning the bid to provide renewable energy to Portland General Electric. The Department would send a public notice of receipt of the preliminary amendment request, consistent with the new rules shortly.

The certificate holder submitted a Type B Review Amendment Determination Request (Type B Review ADR) for the amendment request [note, the Department determined that Type B review process is justified]. The Department will send a courtesy announcement about their receipt of the Type B Review ADR shortly.

Secretary Cornett stated they have not yet determined who the project lead is. [note, the lead analyst is Sarah Esterson]

#### Solar PV Rulemaking Update

On Monday March 9<sup>th</sup> they held the 5<sup>th</sup> Rulemaking Advisory Committee Meeting in Salem. Chair Jenkins was on the phone. Secretary Cornett stated staff would be presenting Council with recommended rules, comments, and recommendations from individual Rulemaking Advisory Committee members that differ from staff recommendations at the April Council meeting asking Council to give staff direction to file notice of rulemaking with the Secretary of State's Office.

#### Carbon Rulemaking Update

SB 1530, the cap and trade legislation proposed during the 2020 session did not pass. Since it did not pass the Council's carbon standard is in full force and effect. The Council has the ability to update the monetary offset rate associated with the carbon standard every two years by no more than 50%. The last time the Council did this was just over two years ago. Staff will therefore be proposing the Council direct staff to initiate a rulemaking to increase the monetary offset rate at the April Council meeting.

#### Chemical Waste Management and Statutory/Rulemaking Update

Mr. Cornett referred to an email he sent to Council members on February 14<sup>th</sup> related to a violation of the Council rules in Division 50 related to the disposal of radioactive material. These rules are normally implemented by the Nuclear Safety and Emergency Preparedness Division based on their knowledge and expertise in the area.

The specific violation was that between 2016 and 2019, Chemical Waste Management who operates a chemical waste landfill near Arlington (Gilliam County) accepted an estimated 1,284.66 tons of Technologically Enhanced Naturally Occurring Radioactive Materials (known as "TENORM"), the vast majority of which was subject to the disposal prohibition in ORS 469.525 and OAR 345-050-0006. All of the waste came from out of state and the majority of the waste were filter socks used in the oil and gas fracking process. Oilfield Waste Logistics was the company that transported the material from out of state to Chemical Waste Management.

The violation was issued as Class I violation based on the information available at the time. The Department was still evaluating whether the violation would remain Class I or need to be increased. As part of the violation, Chemical Waste Management is now required to submit a corrective action plan.

Last week, Ken Niles and Jeff Burrigh from the Nuclear Safety and Emergency Preparedness Division attended a meeting with the Gilliam County Commissioners in Condon, and then a public meeting in Arlington.

During the short legislative session, there was a bill related to land use that was amended to include direction to EFSC to amend its rules related to radioactive waste, but the session ended without a vote on that bill. Secretary Cornett stated that Maxwell Woods will be providing more details about this in his legislative presentation.

#### Email Notifications

Secretary Cornett reminded Council that the department has used GovDelivery as their email notification system for several years. That the agency has stopped using Gov Delivery and moved to a company called ClickDimensions, which provides the same service. Everyone who had previously signed up to receive email notice had been transferred over and should not notice any difference.

### Future Council Meetings

Secretary Cornett stated that all Council members were available in person or by phone for the April Council meeting, which means they would have a quorum. He then reviewed a slide in the presentation outlining the future Council meetings for the remainder of the year. Secretary Cornett stated that with the addition of Council Member Condon he wanted to review these dates with all Council members for availability. All confirmed availability.

### January meeting minutes

Vice Chair Grail moved that the Council approve the minutes of the January 23-24, 2020 meeting as presented with no modifications.

Council Member Howe seconded the motion.

Motion carried.

**B. [8:59 a.m.] Bakeoven Solar Project, Council Review of Draft Proposed Order and Public Comments (Information Item)**<sup>2</sup> – Sarah Esterson, Senior Siting Analyst presented the Draft Proposed Order (DPO) for the Bakeoven Solar Project and comments received during the DPO comment period, which extended from January 17 through February 25, 2020 for members of the public and through February 28, 2020 for the applicant, Bakeoven Solar, LLC (subsidiary of Avangrid Renewables, LLC) to respond for their review and comment. The proposed facility includes up to 303 megawatts of solar photovoltaic power generation equipment and its related or supporting facilities, occupying up to 2,717 acres in eastern Wasco County, near Maupin, Oregon. For project details visit [Department's Bakeoven Solar Project webpage](#).

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

Ms. Esterson made note for the record that representatives from Avangrid and their legal representative were present in person and by phone.

Ms. Esterson outlined some definitions for newly appointed Council Member Condon, and that instead of detailed PowerPoint slides they would be referring to specific pages on the Draft Proposed Order.

### General Standard of Review (page 13 of the DPO)

Chair Jenkins requested clarification on the construction schedule; the applicant requested that the construction commencement and completion deadline be 5 and 6 years from the date of site certificate approval, respectively, but had not represented that the facility, if constructed in one phase, could be constructed in 1 year. Chair Jenkins requested confirmation of these facts to support the Department's recommended commencement deadline of 3 and 5 years for the first and last phase, and 6 years for completion of all phases.

Ms. Esterson confirmed.

### Organizational Expertise OAR 345-022-0010 (page 19 of the DPO)

Ms. Esterson described applicant comments on recommended Organizational Expertise Condition 1, which require that the certificate holder notify the Department within 7-days of any changes to the corporate structure of its parent company which could impact the certificate holder's access to financial or technical expertise. The applicant requested that the condition be removed because it would not result in reporting of information which would impact the applicant's ability to meet the standard. Ms. Esterson sought input from Council on recommended types of information that could be included in the condition, for clarification, as to the types of

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<sup>2</sup> Audio for Agenda Item B = 00:12:05 – March 13, 2020

financial or technical changes viewed as important for the Department and Council to be aware of, particularly when certificate holders are a limited liability company acting as a shell company.

Vice Chair Grail recommended staff consider changes to the board of directors or executive levels of the company.

Council Member Condon asked if there were requirements for the parent company to disclose debt structure.

Mr. Woods replied no, not to the Department.

Council Member Condon added that it surprised her considering the financial condition and the risk some of these companies bring.

Structural Standard OAR 345-022-0020 (page 24 of the DPO)

No questions or comments

Soil Protection OAR 345-022-0022 (page 30 of the DPO)

Chair Jenkins requested clarification on farmland classification used in ASC Exhibit I (prime, non-prime, farmland of statewide importance) compared to ASC Exhibit K (high value, arable and non-arable soils).

Ms. Esterson confirmed that arable soil refers to farmland of statewide importance; non-arable soil refers to non-prime soils.

LAND USE OAR 345-022-0030 (page 36 of the DPO)

Secretary Cornett stated that under the Council's Land Use standard, staff and Council evaluate the County's land use regulations and, if the County hasn't incorporated all the most recent rules and statutes from the Land Conservation and Development Commission (LCDC), the applicable LCDC administrative rules apply directly. The one difference is the goal exception process.

Chair Jenkins expressed that a reason based solely on lease payments to underlying landowners shouldn't be the only reason for an exception because it would apply to all solar facilities.

Mr. Woods replied that he appreciated Chair Jenkins comment. The thresholds regarding goal exceptions are set by the LCDC solar rules for protection of farmland, covered by LCDC "Goal 3,". An acreage threshold for the exception depends on the type of farmland that would be impacted by the solar project. A goal exception is required when the solar project would remove up to 12 acres of high value farm land, up to 20 acres of arable land, and up to 320 acres of any other type of land such as non-arable land. Beyond those the Governing Body (Council or County) has to review a goal exception. The goal exception is essentially a higher review threshold, and there are multiple criteria that have to be met to justify a goal exception. In addition to the applicants' local economic benefit reason, the applicant described that a strategic investment program agreement may be entered into with the County. These are programs established by a state agency called Business Oregon and offers tax deferral for these types of investments. These programs help with reduced property taxes, among other things.

Chair Jenkins asked Ms. Esterson to explore the issue of whether or not the County must update their comprehensive plan to include a goal exception approved by the Council with LCDC staff as Council's process is not that same that is required by counties following the LCDC goal exception process.

Ms. Esterson confirmed ongoing coordination with DLCD staff, to confirm the differences between state and local goal exception process and the need for, if any, counties to reflect a goal exception taken by Council in their comprehensive plan.

Ms. Esterson informed Council Member Condon that Counties have come to EFSC asking them to think about these questions.

Estimated Cost of Site Restoration OAR 345-022-0050 (page 129 of the DPO)

Legal Counsel Patrick Rowe outlined the OAR 345-022-0050 rule and the applicant's proposal to utilize a phased decommissioning approach inclusive of a full decommissioning bond or letter of credit prior to and during construction, reduced to \$1 for the term of an executed Power Purchase Agreement (PPA); and, apply the salvage scrap value to the decommissioning amount. Mr. Rowe stated that Council has the authority to approve the proposal, and explained possible implications for the State should Council do so.

Vice Chair Grail requested whether any other facilities, other than the Boardman to Hemingway Transmission Line Project, have proposed similar approaches to satisfying the standard?

Ms. Esterson confirmed that there had not been proposals requesting reliance on a PPA to support a reduced bond or letter of credit amount.

Council Member Winters raised concerns about precedent and whether the State would be protected from risk if Council were to accept the current proposal.

Council Member Truitt expressed concern with allowing a reduced decommissioning amount based on salvage scrap value, based on his experience and knowledge of scrap market volatility.

Council Member Winters thanked Council Member Truitt. She stated she didn't have any experience with scrap, but had some in bankruptcy, and that it's not an easy or in-expensive process. She asked Counsel Rowe if DOJ had any experience with going through a bankruptcy process either successfully or not?

Mr. Rowe replied that he didn't have personal experience, but he knows the state has had some.

Chair Jenkins confirmed concern with accepting the applicant's proposal without going through an administrative rule process with stakeholders to allow comprehensive evaluation of risk and issues.

Council Member Winters concurred with Chair Jenkins.

Vice Chair Grail noted the applicant's identified costs, incurred during facility operation from maintaining a bond or letter of credit, is then passed on to the consumer. However, based on Mr. Rowe's presentation, she was uncomfortable supporting a proposal with less financial assurances.

Council Member Howe agreed with Chair Jenkins. He was more conservative, and wanted to make sure the State stays protected. He stated that in today's world 20 years was a long time to take the bond down to \$1, and that he just couldn't support the \$1 bond without some sort of better vetting or rulemaking.

Council Member Condon questioned why the State would be willing to take on risk and that the decrease to \$1 was troubling because it added a level of complexity to the management of finances.

Ms. Esterson asked if there was any input on the contingency discussion.

Council Member Condon asked if the Department had any experience with decommissioning and if 10% was the right number in terms to what actually works?

Mr. Woods confirmed that the Department has not exercised a bond or letter of credit, which are considered the last resort because it is the certificate holder's first responsibility to decommission the facility to a useful non-hazardous state once it ceases operation.

Mr. Woods addressed the Council and asked if they wanted to pursue this in rulemaking.

Chair Jenkins said he would want to consider it for future rulemaking.

Council Member Winters agreed with Chair Jenkins.

Fish and Wildlife Habitat OAR 345-022-0060 (page 134 of the DPO)

No questions or comments

Threatened and Endangered Species OAR 345-022-0070 ( page 147 of the DPO)

No questions or comments

Historic, Cultural, and Archaeological Resources OAR 345-022-0090 (page 159 of the DPO)

No questions or comments

Public Services OAR 345-022-0110 (page 175 of the DPO)

No questions or comments

Waste Minimization OAR 345-022-0120 (page 183 of the DPO)

No questions or comments

Noise Control Regulation OAR 340-035-0035 (Page 188 of the DPO)

No questions or comments.

Removal-Fill ORS 196.796 through 196.990 and OAR 141-085-0500 through 141-085-0785 (page 195 of the DPO)

No questions or comments.

Water Rights (page 196 of the DPO)

No questions or comments.

Chair Jenkins commented on the applicant's proposed maximum construction-related water use at 77 million gallons per year. He assumed the water would be coming from wells, and he recalled seeing a letter dated January 10th from the Mayor of Maupin that the city confirmed it could meet project water demand. However, he thought it seemed like a lot of water for this area.

Ms. Esterson confirmed ongoing coordination with Oregon Water Resources Department on City of Maupin's permitted water withdrawal limit and the ability of the city to meet maximum potential construction-related water use demand, to be incorporated into the proposed order.

**C. [11:13 am] Legislative Updates (Information Item)**<sup>3</sup> – Maxwell Woods, Senior Policy Advisor provided an update on the short legislative session and bills related to ODOE, EFSC, and state-level energy policy.

Mr. Woods reviewed the current updates from the 2020 Legislative Session which concluded without any bills related to EFSC passing.

In relation to the Cap and Trade bill, HB 1530 not passing, Secretary Cornett stated that he received an email from the department's Rules Coordinator, Christopher Clark to clarify if Council wanted to increase the off-set rate, which is currently at \$1.90, they could increase it by as much as \$2.85 per ton of CO2.

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<sup>3</sup> Audio for Agenda Item C = 02:26:20 – March 13, 2020



**D. [11:26 a.m.] Council Review of Boardman Coal Monitoring Program (Action Item)**<sup>4</sup> – Maxwell Woods, Senior Policy Advisor. Council will consider a change requested by Portland General Electric (PGE) to the terrestrial ecological monitoring program at the Boardman Coal facility. PGE requests to discontinue the annual aerial photography monitoring program. For project details visit [Department's Boardman Coal Plant webpage](#).

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

Chair Jenkins asked if during the 2004 review of the same request by PGE, the aerial photography monitoring item was segmented out of the other monitoring request?

Mr. Woods confirmed it was, and that there was a separate monitoring for water quality, ground water, and surface water near the reservoir. DEQ was working on adjustments to the water monitoring, which Council approved.

Chair Jenkins asked if there was any indication to why the Council denied PGE's request?

Mr. Woods stated we were limited to the meeting minutes from 16 years ago, but as he interpreted what he read, there were some public concerns. That people weren't comfortable with not having any monitoring at the site in general. Mr. Woods stated that he didn't believe there is any reason for concern as the results have shown no impacts, and at the time it was probably more of a broad impact concern.

Vice Chair Grail stated this would end in 2020 anyway when the coal plant ceases operation so after that there won't be any aerial photography.

Mr. Woods confirmed that was correct.

Chair Jenkins stated an interesting fact that the entire earth's surface is aerially photographed once a day every day.

Council Member Truitt asked if they could transition the aircraft photography to using a drone to save on cost? Not that it's an issue, just out of curiosity.

Mr. Woods replied that there was no information on record, but he believed there was a "manned aerial" clause.

Council Member Howe motioned that the Council approve the request by Portland General Electric to change the terrestrial ecological monitoring program at the Boardman Coal Plant in order to discontinue aerial photography monitoring, as presented by staff.

Vice Chair Grail seconded the motion.

Motion carried.

**E. [11:38 am] Public Comment Period**<sup>5</sup> – This time was reserved for the public to address the Council regarding any item within Council jurisdiction that was not otherwise closed for comment. Note that the public comment timeframe related to the Bakeoven Solar Project Draft Proposed Order was closed.

#### **Irene Gilbert**

Ms. Gilbert stated she realized the comment period was closed, but wanted to compliment the developer and staff, that there has been transparency and great information on the Bakeoven project. She also complimented

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<sup>4</sup> Audio for Agenda Item D = 02:39:20 – March 13, 2020

<sup>5</sup> Audio for Agenda Item E = 02:52:00 – March 13, 2020

Ms. Esterson on her presentation of the information. Ms. Gilbert also expressed her appreciation of Brian Walsh for spending about an hour on the phone with her answering questions. All in all she was satisfied.

Ms. Gilbert stated that in October 2009 Horizon Wind proposed a wind development in Union County, by January 2010 she was a member of Friends of Grande Ronde Valley as a Legal Research Analyst. Ms. Gilbert started attending EFSC meetings at that time or listening to the recordings, and that she had been involved with the Siting Division longer than anyone in the room. Ms. Gilbert outlined a few of ODOE staff's tenure, then stated she has gone through three agency directors, and she had lots of agency historical knowledge with decisions that have come through the Siting Council. Ms. Gilbert stated that when they receive a proposal and they aren't considering a rule change regarding the use of the word "may" and determining if an amendment should have a contested case attached to it. Over time that term has been interpreted to mean to be some degree "likely", and that she could say it has never been interpreted that way at least in the last decade. "May" meaning it could happen or there is a possibility, not that it is "likely" that it will occur. As she read through the proposal for changing the wording, the Council recommended some statements, and that the proposed wording was stricter than what the Council recommended. Ms. Gilbert stated she has chased the amended contested case requirement for ten years, and as she did that the "goal posts" have changed, the rules have changed, the interpretation has changed, and it seemed Council has always been one step ahead of the public in terms of allowing them access to contested cases. If you look at the State's history of the Oregon Department of Energy, they have never allowed a contested case for an amended site certificate for either a solar or wind development. The question that raises is do the members of the Council believe that they never make mistakes on site certificates and are they 100% sure the public isn't right? The way the amendment rules are being interpreted Council is saying they are always right, and never make a mistake. Ms. Gilbert stated it devalues their credibility when they don't allow review of the decisions Council makes, and the public questions if they are afraid to have independent analysis of the decisions they make. She didn't feel that was in the best interest of the Council or the public, and what will end up happening is the public will have to rely on the Courts. This will increase the number of appeals, in return ODOE is billing the developer the cost of the appeal, and the developers are passing the cost on to the recipients of the energy. Increasing the cost to the public, the issues aren't getting resolved or coming up over and over without any resolution. Ms. Gilbert felt Council needed to consider if anyone ever benefits from not allowing contested cases other than the Oregon Department of Energy because their budget increases the more these issues come up, and they charge the developers. So ODOE benefits financially. Ms. Gilbert closed her comment asking Council to seriously consider contested cases.

#### **Brian Walsh (via telephone)**

Mr. Walsh stated his comment was in support of an expedited process in regards to the rulemaking process of decommissioning and retirement of a facility. Mr. Walsh stated that his comment was not specific to the Bakeoven project even though he is the project developer through Avangrid Renewables. He did support what Chair Jenkins stated earlier, and this was bigger than the Bakeoven project. Mr. Walsh stated that the expedited process was important so developers and other projects could benefit from the alternate decommissioning. Mr. Walsh mentioned that he felt there was additional evidence that could be presented in a rulemaking hearing that would provide further understanding of the low probability and risk to the State. Mr. Walsh stated a current real life example was the SunEdison bankruptcy, who's assets were never abandoned and continued operating throughout the bankruptcy. That example should provide some assurance that facilities wouldn't be abandoned in bankruptcy, and that there is a lot more evidence that could be provided showing the risk is very low. Mr. Walsh stated that the evidence was well presented earlier, but they have much more they could add to the record regarding PPA's, and the credit levels of those PPA's. Mr. Walsh closed by asking Council to consider proposing an expedited rulemaking regarding decommissioning.

F. [11:50 a.m.] **Annual Work Plan (Information Item)**<sup>6</sup> – Sean Mole, Operations Analyst presented the Energy Siting Division’s annual work plan that focused on current process improvement activities. The work plan provided a record recording of completed tasks and a list of identified future tasks.

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

Mr. Mole outlined the Siting Division’s annual work plan for Council.

Chair Jenkins asked if the current year list was prioritized.

Mr. Mole confirmed it was (top to bottom), but if Council wanted to amend the prioritization he was open to it.

Secretary Cornett added that these are things that are identified as important or high value to Stakeholders, Council, Staff, Public, Applicants, and Reviewing Agencies. However, if Council wanted to add something that they haven’t identified, they could certainly amend the list.

Vice Chair Grail asked how close the department was in replacing the retired communications representative, Cliff Voliva?

Secretary Cornett replied that Mr. Voliva is retiring at the end of the month, and he works in the Communications Division, which has 4 members. In the last year or so he has split that position with Erica Euen. Secretary Cornett reminded Council that Ms. Euen stepped in as the Division Assistant position part-time once their previous Division Assistant, Esther left the agency. She will more than likely be the one taking over Mr. Voliva’s role.

Council Member Condon asked in regards to the Performance Metric Task what is the existing single metric?

Secretary Cornett stated the agency has a completeness timeframe for applications that within 60 days they have to determine if the application is complete or in-complete. That is the metric, the 60 day timeline.

Council Member Condon asked in regards to the standing performance metrics task, how do they anticipate measuring public input?

Mr. Mole thanked Ms. Condon for her question. He then stated that they measured public input using survey’s that are sent out to the public or individuals that participate in the agency’s online delivery service GovDelivery, which is now ClickDimensions. The survey is your typical scale of good or very good type of assessment. As for how they would do it if the Council wanted to see that as a metric, he’s not certain at this point, but he’s open to ideas.

Council Member Howe in regards to the last topic (Local and Federal Project Boundaries), is that going to be a way to start capturing the projects and what Counties will need to work with EFSC?

Mr. Mole confirmed it was, and that there is a lot of information available in regards to pinning a project to a map, but in regards to project boundaries those are defined differently, and not available. Going forward they would like to see not only historical local boundaries, but current local boundaries as well.

Secretary Cornett said going forward the department would like to include projects allowed under HB2329 as well as all other future and past local jurisdictional energy projects. If anyone looks at our mapping tool they may think that’s all of the energy projects.

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<sup>6</sup> Audio for Agenda Item F = 03:04:03 – March 13, 2020

Council Member Condon asked if the green house emission gasses would fall under performance tasks for meeting the requirements?

Mr. Mole stated that metric wouldn't fall to the Siting Division, it would fall under the agency division of Energy Planning & Innovation. They would likely set up a 10% annual progressive type of metric.

Secretary Cornett stated that the short answer is they didn't know at that point. There are very explicit things articulated in the executive order, along with very clear directives. However, there are some implicit things as well that we are still evaluating. At some point we will be coming back to Council with an agency action, division action, or recommendation in regards to what is within Council's authority. The department is still trying to evaluate and interpret the executive order at this point.

**G. (Working Lunch) Contested Case Process Overview (Information Item)** <sup>7</sup> – Patrick Rowe, Legal Counsel presented an overview of the contested case process.

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

**Please Note:** This agenda item included 15 minutes for questions by members of the public at the end of the presentation.

Mr. Rowe presented the contest case process to Council.

In relation to an interlocutory appeal, Council Member Howe hypothesized if there were 3 issues brought up by someone seeking party status in a contested case and the hearing officer said they were denying 2, and concurred on the one, is that appealable to Council?

Mr. Rowe replied that was not appealable to Council because the person would be granted party status on the one issue. They can only bring the interlocutory appeal to Council if all of the person's issues have been denied and therefore they are denied party status.

Secretary Cornett stated this goes back to what Mr. Mole said earlier in his presentation. The department has a very robust records management system, they document everything associated with the decision record of each project. All the information including all the emails that come in are all part of the decision record. At the point when they are entering into a contested case they would establish that entire record since they had been working on it up until that point in time. While discovery may be needed, in terms of their record they would attempt to provide everything to all contested case party members. Secretary Cornett asked Mr. Mole if he had a more articulate way to explain the process.

Mr. Mole confirmed it was a fair assessment of the process.

Chair Jenkins asked if Mr. Rowe could draw some distinctions between the issues that have been raised and the new evidence that can be submitted?

Mr. Rowe replied that an "issue" in a contested case is an assertion that an application does not meet a standard. The evidence is what documentation or testimony that you provide in support of their position that the applicant has or hasn't met that standard.

Chair Jenkins stated that you would have had to raise the issue with enough specificity in order to qualify for the contested case. So presumably you would already have enough evidence entered into the record for that issue. Now you would have the opportunity to supplement that as a part of the hearing officer's process?

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<sup>7</sup> Audio for Agenda Item G = 03:41:52 – March 13, 2020

Mr. Rowe confirmed that was correct. The record is closed at the conclusion of the Draft Proposed Order comment timeframe but new evidence can be raised in a contested case that is related to an issue that is part of that contested case.

Vice Chair Grail asked if Council recently talked about the witness qualifications or statements, she still had a hard time understanding how the member of the public qualifies other than being a citizen.

Mr. Rowe stated it sounded like you're asking about the standing or whether they have an interest in the requests?

Vice Chair Grail replied that she was trying to understand the witness qualification and where that piece came in, like having expertise or just a member of the public.

Secretary Cornett referred to the recent amendment rulemaking where there was talk about when someone had to submit information in a notice for a contested case to state why they wanted to participate in a contested case. During the pre-hearing conference they had to re-state that again, so there was an elimination of duplication under that rulemaking. While the bar to establish standing is low in relation to the person's qualifications, the information provided in the record must be sufficiently specific to document why they believe the standard was not met. This is what allows staff, the applicant, and Council to have a good understanding of the issue and the ability to respond to the comment in the proposed order.

Chair Jenkins added that if someone had identified an issue, and provided evidence, in order to rebut that issue you had to be a party to that issue or presumably the applicant. For anyone else they would have had to have participated on that issue in order to provide rebuttal testimony?

Mr. Rowe replied that the applicant could rebut but it would be at the hearing officer's discretion as to who else could rebut.

Council Member Condon stated she wanted to understand the evidence piece; if I was granted party status for an issue that received more information on, that was not presented in the record, would I have a right to present that in my written testimony? However, in the rebuttal no new evidence would be allowed?

Mr. Rowe stated the scope of rebuttal is limited to the testimony of what is being rebutted. If in the rebuttal or direct there were additional evidence that had not been on the record for the DPO, certainly in the rebuttal you can address it.

Chair Jenkins asked how Cross Examination is different than the rebuttal? You're asking for verification of evidence?

Mr. Rowe stated the difference in this context is it means you now have the opportunity to *orally* examine a witness in front of the hearing officer to attempt to draw weaknesses in that person's position.

Council Member Howe asked if that's the only oral part of the hearing?

Mr. Rowe confirmed that was correct. This cannot happen if no one requests cross examination, but if they did that is the only part that is in person.

Chair Jenkins asked so after people have presented the new evidence and even after rebuttal?

Mr. Rowe responded that sequentially that is likely how it would happen.

Council Member Howe asked if this is for a proposed order?

Mr. Rowe confirmed it was for a proposed order, the terminology overlaps and can be confusing, but this is the Proposed Contest Case Order, which is distinct from the department's proposed order.

Council Member Howe understood the difference, but he was surprised that the hearing officer wasn't issuing more of a final decision, that this was just a proposed order.

Mr. Rowe responded that it is essentially the hearing officer's final decision on the issues they reviewed, but Council has the ultimate final decision.

Secretary Cornett stated this process feels a lot like a built in appeal, it's in the language, it's in the steps, but it's not. It's setting the record up so if there is an appeal to the Supreme Court it's limited to the issues in the contested case and that there is a record, making sure the contested case record had all the evidence for the Supreme Court. In a typical appeal you have the decision, and then the appeal pathway, then the record is built all the way to the Supreme Court. This is establishing a very clear record with whatever issue may end up getting appealed in the Supreme Court. That's why it feels like an appeal, but it's not.

Council Member Howe thanked Secretary Cornett and stated that explanation was helpful. He thought that it was the appeals process, so the contested case process is to build the record for if there is an appeal to the Supreme Court.

Council Member Howe stated that is the final order (referring to the Council Adoption of Final Order)?

Mr. Rowe confirmed that was correct.

Secretary Cornett stated we didn't really cover the written exception process. Can we walk through the Council's role during this process.

Mr. Rowe stated that other than what was on the presentation slide he didn't have much more to add, other than the hearing officer would have made their recommendations to Council. Parties may file objections to those recommendations, and parties could file responses to those exceptions. Then the Council can take in the information and decide if they agree with the hearing officer or they agree with the party who filed the objection.

Chair Jenkins stated the exceptions follows the hearing officer's proposed contested case order.

Mr. Rowe confirmed that was correct. The Hearing Officer is now out of the process, as their order is the Final Proposed Contested Case Order, which then goes back to Council. It's the final opportunity for people to object in the contested case process.

Chair Jenkins asked would they deal with the exceptions first before the hearing officer's order?

Mr. Rowe replied that essentially they would address both as part of the same process, but they would be looking at the order. You would look at the order and figure out why the hearing officer came to the decision they did, and then look at the exception.

Chair Jenkins asked when they make the decision on the hearing officer's contested case proposed order they are making a decision on the exception at the same time?

Mr. Rowe confirmed.

Chair Jenkins asked whether they make a decision on the hearing officers proposed contested case order or on the final order?

Mr. Rowe replied that they coincide because ultimately the Council is responsible for comparing the department's proposed order to the hearing officer's contested case proposed order. Then they would issue a final order taking both those orders in consideration.

Council Member Howe asked if this included any exceptions.

Mr. Rowe confirmed.

Secretary Cornett stated they typically don't have full blown contested cases in the application process, but when they had them, during Council's review of those exceptions, those would happen during a Council meeting and they could allow the parties of the contested case to testify in front of Council. There is nothing in rule that describes that, so it's at Council's discretion on how to approach that. Presumably it would take a fair amount of time to go through that process. He didn't see Council reviewing the exceptions and coming to a conclusion on the hearing officer's proposed contested case order and doing the final evaluation of the staff's proposed order marrying them into one order during one council meeting. That would take at least two or more Council meetings depending on the complexity. It does happen in a certain way, but in reality it would probably be drawn out a bit with the need to deal with the information in reasonable sizes.

Chair Jenkins stated his recollection was they did the exceptions, then the hearing officer's contested case proposed order, and then went to the final order.

Secretary Cornett replied that based on that and the Council's decision on the hearing officer's contested case proposed order the staff would draft of the final order pulling all those things together. As Mr. Rowe said earlier you're not obligated to go with that, you can make changes. The step is required, and the opportunity for comment as well.

Chair Jenkins stated he remembered it was confusing when they did this before, so this helps.

Mr. Rowe stated they even may want to do this presentation again in 18 months.

Council Member Howe stated this has been helpful as it separated where he had been confused with the difference between appeals and contested case.

Mr. Rowe stated that the Council's order is the only order appealable with the Supreme Court, and the only people who can request the appeal are the ones that participated in the contested case process.

Secretary Cornett stated there is a lot of information here and staff doesn't typically go through the contested process in this detail. So having staff walk through the process and creating the slides has been helpful for them. They are open to doing this presentation again prior to a project if needed they are happy to do so.

Vice Chair Grail stated that is exactly what she was thinking, that you can sit here and hear the language, but until you are ready to apply it, it's a lot. Vice Chair Grail thanked Mr. Rowe, and she hoped the public also had a better understanding of what their responsibilities were.

Council Member Howe asked how many contested cases had gone through in the last decade?

Secretary Cornett stated he thought there has only been one that has gone all the way through the process. A couple others have been through some variation of the process, he thought about 5 or so.

Council Member Condon referring back to the Order on Petitions for party status. She outlined her understanding of the process, then asked if one basis for Supreme Court review would be to review a Council ruling on an interlocutory appeal, in which Council allowed party status?

Mr. Rowe replied that what he could tell her in certain, is what he's already said – the substantive issues addressed in the contested case would be considered; whether that procedural issue would be considered by the Supreme Court, he believed it would, but he's not certain.

## **Public Questions:**

### Irene Gilbert

Ms. Gilbert commented she had a statement not a question. Ms. Gilbert stated when people ask for party status, they ask for either limited or full party status. If they request full party status they do have the opportunity to respond to all issues in terms of the contested case, not just the issues they brought forward. Limited party status only allows response to the issues they brought up. She was speaking from experience and statute.

Mr. Rowe stated that if the hearing officer were to grant full party status, then that is correct.

Chair Jenkins stated so the answer is if you are granted full party status you have the right to participate in all issues approved by the hearing officer.

Mr. Rowe reminded Council you can only request party status on issues you raise in your comments on the record. So if you didn't raise a comment on the record for every issue they would not be granted full party status.

Chair Jenkins stated he understood what Mr. Rowe was saying, but thinks it's different than what Ms. Gilbert is saying.

Mr. Rowe they could certainly look into that issue more, but that is how he interpreted it.

Ms. Gilbert stated that is not how it's been applied, ever. It's always been applied how she said.

Chair Jenkins stated the question is what is the difference between full party status, and limited party status and how it affects your ability to participate on the issues. There is a difference in between what Mr. Rowe and Ms. Gilbert are saying.

### Jim Kreider (via telephone)

Mr. Kreider asked when discussing discovery, can staff be deposed, and can email exchanges between staff and other individuals be deposed, or requested?

Mr. Rowe responded that you can request at the pre-hearing conference to depose staff. The hearing officer would take that into consideration, and make his/her decision. Emails exchanges between staff would potentially be subject to discovery and public records law. If there are exemptions under public records law that would prevent production of those, then they wouldn't be produced. If they could be produced under public records law, then they would be produced.

**H. [1:23 p.m.] Wheatridge Wind Energy Facility, Council Review of Site Certificate Condition Exception Request for Laurent's Milkvetch and Habitat Mitigation Plan Amendment (Action Items)**<sup>8</sup> – Sarah Esterson, Senior Siting Analyst presented a site certificate condition exception request, which includes the certificate holder's (Wheatridge Wind LLC – NextEra Energy Resources) impact assessment and proposed mitigation plan, as reviewed by the Department in consultation with Oregon Department of Agriculture, for potential construction-related impacts to a state-listed threatened plant species – Laurent's milkvetch (*Astragalus collinus var. laurentii.*). Council had the ability to approve, modify or reject the certificate holder's exception request. Ms. Esterson also presented the certificate holder's request to modify the approach for mitigation of temporary impacts to grassland habitat, which would allow mitigation based on revegetation rather than revegetation and compensatory mitigation site. For project details visit [Department's Wheatridge Wind Energy Facility webpage](#).

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<sup>8</sup> Audio for Agenda Item H = 04:37:45 – March 13, 2020



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

Council Member Condon questioned whether the certificate holder's consultant was able to evaluate potential impacts to the plant without bias.

Ms. Esterson confirmed that the certificate holder's consultant was Tetra Tech, who had qualified biologists/botanists prepare the impact assessment. While the certificate holder/Tetra Tech identified the potential impact as less than significant, the Department and ODA considered facility-related impacts potentially significant, requiring the level of mitigation under review.

Chair Jenkins sought clarification of research funds if distributed to ODA?

Ms. Esterson confirmed that research could include seed collection, germination trials and plant re-establishment, to directly offset facility-related impacts, while gaining information through report or document such as a conservation assessment, to provide the public and state additional information about the plant.

During the Council's review of the certificate holder's request to amend the Habitat Mitigation Plan, Steve Cherry from Oregon Department Fish & Wildlife (ODFW) joined the meeting via telephone..

Mr. Cherry from ODFW introduced himself, and stated his position. Mr. Cherry described ODFW's mitigation policy and confirmed concurrence with the certificate holder's request to amend the Habitat Mitigation Plan. Mr. Cherry confirmed that it is not ODFW's policy to require compensatory mitigation for temporary impacts to grassland habitats because these habitat types have a shorter (3-5 years) recovery period, which would be mitigated via revegetation/monitoring efforts, and that additional mitigation (through acreage within a conservation easement) is not required to meet ODFW's Habitat Mitigation Policy.

Mr. Woods stated Secretary Cornett had to step out and he would be filing the role to call role for the vote.

Council discussed that they had the option to combine the two motions which they all approved.

Council Member Howe motioned (combining two motions) that the Council approve the request by the Wheatridge Wind Energy Facility for an exception from its Site Certificate Condition PRE-TE-03 due to unavoidable impacts on the listed species, as presented by staff.

AND

That the Council approve the Habitat Mitigation Plan amendment for the Wheatridge Wind Energy Facility, as presented by staff.

Vice Chair Grail seconded the motion.

Motion carried.

- I. **[1:45 p.m.] Rulemaking Initiation to Clarify Standard for Contested Case Requests for Type A Amendments (Action Item)**<sup>9</sup> – Maxwell Woods, Senior Policy Advisor. Council considered whether or not to conduct rulemaking to clarify the standard that must be met for an issue to justify a contested case proceeding in the Type A amendment review process under OAR 345-027-0371(9). For more information about Rulemaking visit the [Agency's Rulemaking Page](#).

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<sup>9</sup> Audio for Agenda Item I = 04:57:43 – March 13, 2020

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

Mr. Woods pointed out that Christopher Clark, Rules Coordinator was on the phone. Mr. Woods then presented this agenda item.

Chair Jenkins stated he just got used to “in some degree likely to” so why are we changing it to “reasonably likely”?

Mr. Woods referring to page 2 of the staff report, first paragraph explains the reasons behind the change. Mr. Woods stated that it’s ultimately to be more consistent with other rules, and the “in some degree likely” implies a probability waiting assessment making it not as clear or consistent. “Reasonably likely” is more consistent and also what they voted on in January.

Mr. Clark confirmed what Mr. Woods stated. When they looked at the issue and the intent is to clarify the Council’s standard and the term “may” was ambiguous, they thought that the term “in some degree likely to” was also relatively ambiguous. They thought it was more precise and consistent with other language used in other places in the rules.

Vice Chair Grail asked Mr. Rowe if he was satisfied with this.

Mr. Rowe confirmed he was.

Vice Chair Grail motioned that the Council approve the proposed rule change as presented and direct staff to issue the notice of proposed rulemaking.

Council Member Howe seconded.

Chair Jenkins asked if “approved” was the right motion language?

Mr. Woods confirmed it was an approval to start the rulemaking process. This is not the final decision on the rules, it’s to approve the initiation of the rulemaking process.

Council Member Condon: we are not motioning for an actual change?

Mr. Clark clarified they are motioning on a proposed rule change. They are proposing the rule change and approving the notice of proposed rulemaking. Mr. Clark stated it was a bit confusing, but the motion language provided was accurate.

Council Howe so this language is a proposal for rulemaking?

Secretary Cornett stated Council Member Howe was correct, which meant it will go in a notice to the Secretary of State, then go out for public comment, then there will be a hearing in front of Council, and Council would weigh all the information presented by staff and public comments. Council would then decide if they agree with staff, not agree, use different language, or not make a change at all.

Motion carried.

**Meeting adjourned at 1:59 p.m.**

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