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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 June 25-26, 2020 Meeting Minutes**

**Thursday, June 25, 2020 at 4:30 p.m.  
Friday, June 26, 2020 at 8:30 a.m.  
Virtual Webex Teleconference Meeting**

### Table of Contents

- A. Consent Calendar – Approval of minutes; Council Secretary Report; and other routine Council business.
- B. Rulemaking Hearing on Proposed Carbon Monetary Offset Rate Increase (Hearing) – Christopher Clark, Rules Coordinator
- C. Rulemaking Hearing on Proposed Rules to Clarify Standard for Contested Case Requests for Type A Amendments (Hearing) – Christopher Clark, Rules Coordinator
- D. Rulemaking Hearing on Proposed Solar Photovoltaic Facility Rules (Hearing) – Christopher Clark, Rules Coordinator
- E. Carbon Monetary Offset Rate Update, Council Review of Comments & Possible Final Decision (Possible Action Item) – Christopher Clark, Rules Coordinator
- F. Rulemaking to Clarify Standard for Contested Case Requests for Type A Amendments, Council Review of Comments & Possible Final Decision (Possible Action Item) – Christopher Clark, Rules Coordinator
- G. Public Comment Period
- H. Council Consideration of Need for Power for the Proposed Swan Lake North Pumped Storage Hydroelectric Project, in accordance with ORS 543.017(1)(e) (Action Item) – Maxwell Woods, Senior Policy Advisor
- I. Solar PV Rulemaking, Council Review of Comments & Possible Final Decision Solar PV Rulemaking (Possible Action Item) – Christopher Clark, Rules Coordinator

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

## Thursday, June 25, 2020 – Virtual Webex Teleconference

**Call to Order:** The meeting was called to order at 4:32 p.m. on June 25, 2020 by Chair Jenkins.

**Roll Call:** Council Chair Hanley Jenkins, Vice Chair Marcy Grail, Council Members Kent Howe, Jordan Truitt and Cynthia Condon were present by teleconference. Council Member Winters joined by teleconference at 4:56 pm.

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

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

No agenda modifications.

### **May Meeting Minutes**

Vice Chair Grail motioned that the Council approve the minutes of the May 21-22, 2020 meeting minutes as presented.

Council Member Truitt seconded the motion.

Motion carried.

### **Council Secretary Report**

#### Staffing/Council Updates

Operations and Policy Analyst 2 interviews: The Department held first round interviews for Sean Mole's replacement last week. Second round interviews are scheduled for next week hoping to wrap up the recruitment and have someone on board prior to the July Council meeting.

#### Project Updates

- Obsidian DPO Hearing – The Department has rescheduled the Obsidian Draft Proposed Order public hearing. The public hearing is now scheduled for July 20<sup>th</sup> starting at 5:30 PM. The hearing will occur in person, via webinar and on the phone. The in-person location will be at the Christmas Valley Community Hall. Vice Chair Grail, Council Member Howe and Council Member Condon all indicated they would be attending in person. Chair Jenkins, Council member Winters and Council member Truitt, and Joe Allen, the Council appointed hearing officer will be attending via webinar.

Staff will also be attending in person. However, other than Secretary Cornett, they have not yet determined who will be attending. For anyone attending in person they will make sure to adhere to all current social distancing requirements.

- Archway Solar Energy Project – On Tuesday the Department received a Notice of Intent from Invenergy, who is the site certificate holder for the Boardman Solar Project, for a new project named the Archway Solar Energy Project. The project is currently proposed at 400 MW with a site boundary of approximately 4,300 acres on private land. The project would be located southeast of Christmas Valley. For context, the Obsidian Solar Center is proposed northwest of Christmas Valley. These two projects appear to be a little over 20 miles away from each other.

The project would include: Solar panels on single axis trackers; battery storage system; collector substation; point of interconnect substation; new 500 kV transmission line; and an O & M building.

A perimeter fence will encompass an area of 3,650 acres that will house the solar facility and most of the related and supporting facilities.

Since ODOE just received the Notice of Intent the project information is not yet on our website and we have not yet sent out a notice soliciting public and reviewing agency comments.

#### COVID-19 Updates

- State Agencies – State Agencies are in a status quo mode until August 31<sup>st</sup> and then there will be a reassessment. That means ODOE doors remain closed to the public but we can schedule a time for anyone to come in who wants to review applications or draft proposed orders and proposed order in person. Siting Division staff are also mostly teleworking but some do get into the office frequently.
- Re-opening Phases – Most Counties have entered into Phase 2 where there are increased opportunities for traveling and gathering. For example now there is the ability to have up to 50 people in an indoor space as long as 6 feet physical distancing is maintained. Under Phase 1 the limitation was 25 people.
- Council Activities – For Council meetings and public hearings they are doing their best to meet the needs of all stakeholders. For applicants and site certificate holders that meant getting projects reviewed and before Council in a timely fashion. For the public that meant ensuing there are meaningful opportunities for their input. And for everyone that means conducting business in a safe way. ODOE will continue to rely upon webinars and phones for anyone who does not feel safe participating in-person and they can be in-person when needed or required, but would adhere to all current social distancing requirements.

Today is the first day since the Pandemic that their Compliance Officer, Duane Kilsdonk is conducting in-person site visits. Mr. Kilsdonk is doing annual site visits for the Shepherds Flat North, Central and South Wind Farms. However, before being able to do that ODOE had to establish specific protocols for his safety and the people he is meeting with.

#### Special Legislative Session

The Governor convened a special legislative session earlier this week. The Legislature took up a limited number of bills that fell into three categories: Police Accountability; COVID Emergency Issues; and Holdover Issues. There were no bills that had direct or indirect impact on state jurisdictional energy facilities.

#### **Council Member Howe addressed the Council to respond to a statement made during the May 21-22, 2020 Council meeting.**

Council Member Howe stated the following:

Ms. Irene Gilbert followed up her verbal comments at our May meeting with a memo dated May 22<sup>nd</sup> to Director Benner and the Council. I feel there were some (in my opinion) fairly strong and inaccurate statements in her follow-up comments. These comments I'm making are in response.

Ms. Gilbert specifically refers to the Council's deliberations during our December meeting and our discussion of the Shepard's Flat North application to make changes to the length of the turbine blades after Gilliam County updated its land use ordinance set back requirements for wind facilities that are different than what was in place at the original approval. Our deliberations centered around the

requirements for an amendment to a Conditional Use Permit when a non-conforming structure is expanded.

Ms. Gilbert stated that our extended deliberations were spent trying to find a way to justify approval. I felt our deliberations were making sure the Council correctly identified the applicable County Code provisions to make sure that our decision was lawful and could withstand a legal challenge.

Ms. Gilbert stated that QUOTE *“the Council is placed in the unenviable position of having to accept recommendations from the Oregon Dept. of Energy as complete and factual when often they are neither.”* END QUOTE

Ms. Gilbert is entitled to her opinion. But, for the record I wanted to say that I felt the staff did an excellent job providing the Council with the complete facts of the applicable Gilliam County Code provisions that helped the Council reach its decision in the Shepard’s Flat North request for Amendment 2.

**B. [5:00 p.m.] Rulemaking Hearing on Proposed Carbon Monetary Offset Rate Increase (Hearing)<sup>1</sup> –**

Christopher Clark, Rules Coordinator. The Council received public comments on the proposed increase to the Carbon Monetary Offset Rate under OAR 345-024-0580. The deadline to provide the Council with oral or written comments on the proposed rule is the close of the hearing. For more information visit the [Rulemaking page](#).

Mr. Clark notified the Council members that one of the public comments received on the Rulemaking to Clarify the Standard for Contested Case Requests for Type A Amendments contained a timely request to extend the deadline for public comments under ORS 183.335(4).

Chair Jenkins asked Mr. Clark which agenda item they are extending the comment period?

Mr. Clark stated it was for Agenda Item C – Rulemaking Hearing on Proposed Rules to Clarify Standard for Contested Case Requests for Type A Amendments.

Secretary Cornett clarified the 21 days from today would conclude the public comment timeframe, which is prior to the July EFSC meeting, and Council’s review of the draft rules and comments will be put on the agenda for July meeting.

Chair Jenkins asked when the Department received the request to extend the comment period?

Mr. Clark replied that they received from Friends of the Columbia Gorge, and other organizations as combined comments on June 24<sup>th</sup>, 2020, which was also sent to Council the same day.

Council Member Howe asked if there is a requirement to extend the public comment period.

Mr. Clark confirmed it was because the request for an extension was received before the earliest date the rules could be effective, which was on June 24. The agency is compelled to grant the extension for a minimum of 21 days and no more than 90 days.

Hearing no objections from the Council, Mr. Clark clarified for the record that the deadline for written comments for Agenda Item C – Rulemaking Hearing on Proposed Rules to Clarify Standard for Contested Case Requests for Type A Amendments on OAR 345-027-0371 is July 16<sup>th</sup>, at 5:30 pm. The written comment period for the other two rulemaking hearings they were presenting tonight will conclude today at 5:30 pm or at the close of the hearing. Mr. Clark provided additional comments on the conduct of the hearings under Agenda Items B through D.

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<sup>1</sup> Audio for Agenda Item B = 00:02:15 – June 25, 2020

Public Comments on Proposed Carbon Monetary Offset Rate Increase:

Mr. Clark informed the Council that it had received 10 written comments from Glenn Sonne, Jynx Houston, Allyson Dugan, Linda Reedjik, Veronica Poklemba, Noelle Smith, Columbia Riverkeeper and other organizations, Cascade Policy Institute, a group of 380 Columbia Riverkeeper members, and the Multnomah County Office of Sustainability. Mr. Clark confirmed that the comments had been provided to the Council members.

Mr. Clark opened the hearing for oral testimony on the proposed rule change. The following people provided testimony during the public hearing:

Dan Serres, Conservation Director for Columbia Riverkeeper

Thanked EFSC staff for the opportunity to participate in the Rules Advisory Committee, and commended staff for the outline of the update to the rule in the staff report. Mr. Serres stated they supported the change to the offset rate for the following reasons:

- Staff has demonstrated the current rate is dramatically underpriced, and even with the increase to \$2.85 per ton the offset rate would still be underpriced.
- This rulemaking is consistent with the Governor's Executive Order 20-04 which states that the agency should exercise all authority and discretion invested in them in law to help facilitate Oregon's achievement of the emissions of greenhouse gases set forth in the order.
- The rule is fiscally achievable and reasonable without causing undue burden, and that ODOE staff had made a clear case that the cost increases associated with rule change would be modest.. Mr. Serres further explained that Columbia Riverkeeper supports the use of the Social Cost of Carbon in the fiscal impact analysis to demonstrate that there are social benefits associated with carbon reductions. Executive Order 20-04 also provides additional support in achieving the climate change pollution reduction goals of the Paris Climate Accord, and that the proposed rule change would help meet these goals by reducing additional excess carbon emissions.

Vice Chair Grail asked if Council was still able to make comments or ask questions if Mr. Clark recessed the hearing.

Mr. Clark clarified that Council could ask clarifying questions of commenters or provide their own testimony during the hearing, but their opportunity to discuss comments and deliberate on the draft rules will occur during Friday's Agenda Item E.

Council Member Condon asked if questions regarding the written comments should be brought up at Friday's meeting.

Mr. Clark stated that written commenters may not be in attendance, and that Council would be able to ask additional questions of staff during deliberation.

There were no further comments and Mr. Clark recessed the Hearing.

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

**C. [ p.m.] Rulemaking Hearing on Proposed Rules to Clarify Standard for Contested Case Requests for Type A Amendments (Hearing)<sup>2</sup>** – Christopher Clark, Rules Coordinator. The Council received public comments on the proposed change to OAR 345-027-0371(9) that is intended to clarify the standard for an issue to justify a contested case proceeding under the Type A amendment review process. The deadline to provide the Council

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<sup>2</sup> Audio for Agenda Item C = 00:29:19 – June 25, 2020

with oral or written comments on the proposed rule is the close of the hearing. For more information visit the [Rulemaking page](#).

Mr. Clark stated that the Council had received one written comment from Friends of the Columbia Gorge and other organizations opposing the propose rule change and requesting an extension of the public comment period. Mr. Clark clarified that the public comment period had been extended during Agenda Item B.

Mr. Clark opened the hearing for oral testimony on the proposed rule change. The following people provided testimony during the public hearing:

Gary Khan, Attorney on behalf of 11 environmental Organizations.

Mr. Kahn stated he was commenting on behalf of 11 environmental organizations, Northwest Environmental Defense Center, Oregon Natural Desert Association, Oregon Wild, Thrive Hood River, Columbia River Keeper, Wild Lands Defense, Greater Hells Canyon Preservation Council, Oregon Coast Alliance, Central Oregon Land Watch, Audubon Society of Portland, East Cascades Audubon Society. Together those groups comprise of almost 60,000 supporters that are interested in this process. They submitted a joint comment with Friends of the Columbia Gorge on June 24th. Mr. Kahn stated that the commenters are vigorously opposed to the proposed rule change. He stated the proposal would significantly increase the threshold that a person must meet to establish a contested case hearing for a type A site certificate amendment application.

Mr. Kahn explained that the current standard is that an issue must raise a significant issue of fact or law that “may” affect the Council’s determination that the facility, as amended would meet all applicable laws. The proposed rule would significantly change that to require the proponent to show that an issue is “reasonably likely” to affect the Council’s determination. He stated this change is much more significant than a clarification to the rule as represented by ODOE staff. Mr. Kahn explained that the change would require a requester to present their entire case factual and legal at the beginning of the case, making the request much harder. He explained that often, the evidence isn’t available to the public until a contested case is evoked allowing discovery to obtain documents and information from the applicant or any third party that may have information. Mr. Kahn stated that many of the projects are on private land making the information unavailable to the public until a contested case is requested. The process of the contested case grants the members of the public the right to request the information from the applicant, and with the proposed rule change would take this right away from the public.

Mr. Kahn argued that the current standard is appropriate from a policy and practical perspective., He cited Governor Brown’s support for government transparency, which he believes is counter to the proposed rule change. because it would make it almost impossible for a member of the public to obtain the information to satisfy the higher standard.

Mr. Kahn stated that from a practical perspective, he believes the current standard is working, and that to his knowledge, no one has abused this process. Mr. Kahn added that he believes the issue has been exacerbated by the Department’s position that a person requesting a contested case is prohibited from providing evidence beyond what was originally contained in comments on the rulemaking procedure [sic].

Mr. Kahn urged the Council to reject the proposed rule.

Nathan Baker, Senior Staff Attorney for Friends of the Columbia River Gorge

Mr. Baker supported Mr. Kahn’s case to reject the proposed rule and urged Council to reject it as well. He commented regarding the procedure for this rulemaking going forward. He stated that at the start of the hearing the Council did grant their request to extend the comment period to July 16<sup>th</sup> at 5:30 pm, and it would postpone its final deliberation until the July Council meeting. Mr. Baker stated that the Council should still discuss this agenda item, but the action to be postponed until July. Mr. Baker argued that a new notice should go out to the public notifying them of the extension, and requested a change to the content of the notice. They felt the notice was insufficient because the notice states that the proposed rule change is a clarification, and that it

should indicate that this is a change to the standard. Mr. Baker also requested staff explain the history of the “may affect” language adopted in February 2000, what the operative standard before February 2000 was, and how did it change after February 2000. He cited specific language that was in the rules in February 2000 is no longer in the rules, and the intent of its removal should be looked into as well.

Council Member Condon asked Mr. Baker and Mr. Kahn if, when requesting a contested case, is it not being requested because there is belief that they are presenting material that may affect the Council’s determination, and that the “reasonable likely” standard would have the same meaning in that regard.

Mr. Baker stated it would depend on the specific facts related to the case, but there could be situations the evidence is not in the hands of the person making the request. If raw data or survey’s submitted by the applicant, it’s only available through discovery. While the person making the request believes their issue is valid, only discovery and information gathering process will bring that documentation forward.

Mr. Kahn compared the contested case process to a civil case and stated it’s like requiring them to explain in their opening argument of why they would win the case, and requiring the jury to make that determination without them hearing any evidence. That is the difference. The current process allows them to request a contested case, discover the information, then present the information to try and convince the Council of their argument.

Council Member Condon thanked the commenters for the clarification.

#### Irene Gilbert

Ms. Gilbert stated that she was present at the contested case hearing for the Helix Wind Farm expansion process that happened 8 or 10 years ago when the Council asked for changes to the amendment rules. She explained that at that time the Council felt they were compelled by rule to deny all contested case requests on the request for amendment. She stated the Council was concerned about the lack of availability for the public to have a contested case for amended site certificates. Ms. Gilbert explained that Between then and now the rules have moved in the opposite direction of allowing the public to request a contested case, and all contested case requests for amendments to wind, solar, or transmission lines have all been denied, and the rules were becoming more stringent and subjective and at the Council’s discretion. Ms. Gilbert recommended that if the Council wanted the public to respect the process it would be loosening the rules so members of the public could challenge its decisions. Ms. Gilbert asserted that moving forward with this change only adds to the negative perception of the process by the public.

Ms. Gilbert also requested the Council consider that the Council denied multiple requests for changes to the proposed rules when they were adopted, and that changes requested by the public were deferred to rulemaking scheduled for 2022. She stated that it was not clear why the Council would move forward with this change.

Ms. Gilbert stated that she plans to respond the comment made by Council Member Howe, and may provide additional written comments.

Vice Chair Grail stated that what she heard Ms. Gilbert say is that none of the public comments during the rulemaking process were included. Vice Chair Grail asked Mr. Clark if that was something he could address?

Mr. Clark replied he could clarify it tomorrow, but asked Ms. Gilbert to clarify her statement and if she is saying her written comments from 2017 were not included for the rulemaking in 2019.

Ms. Gilbert confirmed, but that her comment was that public comments made during the adoption of the new amendment rules were put off until 2022. She wasn’t just referring to her comments, she was referring to all the comments that were made that were not included yet ODOE’s were.

Mr. Clark thanked Ms. Gilbert and stated they would respond when they provide their evaluation tomorrow.

No further comments and Mr. Clark recessed the Hearing.

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

**D. Rulemaking Hearing on Proposed Solar Photovoltaic Facility Rules (Hearing)**<sup>3</sup> – Christopher Clark, Rules Coordinator. The Council received public comments on proposed rules intended to clarify the application and interpretation of jurisdictional thresholds for solar photovoltaic power generation facilities. The deadline to provide the Council with oral or written comments on the proposed rules is the close of the hearing. For more information visit the [Rulemaking page](#).

Mr. Clark stated the Council had received written comments from Renewable Northwest and OSIEA, and from Obsidian Renewables, which have been provided to Council members.

No comments were provided, and Mr. Clark recessed the hearing.

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

Mr. Clark provided an additional opportunity to provide testimony on any of the three rulemaking hearings.

#### Eric Jansen

Commenting regarding agenda item D, Mr. Jansen asked Council to clarify the next steps in the decision making process for the proposed rules to modify the definition of a facility. He understood that this may not be the final ruling, but asked what the next steps were.

Mr. Clark stated that during tomorrow's meeting Council will consider any written or oral comments including ones from today, deliberate, and potentially make their final decision. They also could postpone that decision if needed.

Mr. Jansen asked Mr. Clark what the best way for him to keep connected with the outcome of this issue?

Mr. Clark recommended Mr. Jansen attend the meeting tomorrow, and the website for the permanent order once a decision is made.

Secretary Cornett asked Mr. Clark to remind everyone how to sign up for public notices via email through Click Dimensions.

Mr. Clark demonstrated how to access the link to sign up for email updated on the ODOE website, and if anyone on the phone needed more information they could email him.

Mr. Clark closed all three Hearings. The comment periods for the Rulemaking Hearing on Proposed Carbon Monetary Offset Rate Increase and the Rulemaking Hearing on Proposed Solar Photovoltaic Facility Rules are now closed. The comment period for the Rulemaking Hearing on Proposed Rules to Clarify Standard for Contested Case Requests for Type A Amendments will close on July 16<sup>th</sup> at 5:30 pm.

**ADJOURN** at 6:05 pm

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<sup>3</sup> Audio for Agenda Item D = 00:56:54 – June 25, 2020



## Friday, June 26, 2020 – Webex Zoom Teleconference

**Call to Order:** The meeting was called to order at 8:30 a.m. on June 26, 2020 by Chair Jenkins.

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

Oregon Department of Energy representatives present by teleconference were Assistant Director for Siting/Council Secretary, Todd Cornett, Senior Policy Advisor Maxwell Woods, Senior Siting Analysts Chase McVeigh-Walker, Rules Coordinator Christopher Clark, and Division Assistant Michiko Mata. EFSC Counsel Patrick Rowe of the Department of Justice was also present by teleconference.

**E. Carbon Monetary Offset Rate Update, Council Review of Comments & Possible Final Decision (Possible Action Item)**<sup>4</sup> – Christopher Clark, Rules Coordinator. Council reviewed public comments received on the proposed increase to the Carbon Monetary Offset Rate under OAR 345-024-0580 and considered the adoption of permanent rules. For more information visit the [Rulemaking page](#).

Mr. Clark provided an overview of the proposed rule change and public comments received on the record. Mr. Clark explained that the proposed rule would increase the Carbon Monetary Offset Rate from \$1.90 to \$2.85 per ton of carbon dioxide emissions in excess of the Council’s Carbon Standard, and recommended the proposed rate increase be effective July 1, 2020.

Vice Chair Grail asked if the rules had to be effective July 1st, or if Council could specify a later date.

Mr. Clark replied that Council can specify any date on or after the date of filing.

Mr. Clark explained that the Council had received 10 written comments on the proposed rules, 8 of which were generally supportive.

He stated that one additional comment was received that objected to the use of variable pricing for carbon offsets that could be used to generate revenue for government. Mr. Clark clarified for the record that staff believes the carbon monetary offset rate is a fixed price and that the funds were provided to and managed by a third-party, not the agency.

Mr. Clark stated that the final comment from the Cascade Policy Institute recommended Council reject the proposed rule change based on concerns over potential impacts to ratepayers. Mr. Clark explained that staff addressed the comments in its issues document and that any impact on ratepayers would be very small and outweighed by the net social benefit described in the fiscal impact statement.

Council Member Condon asked for confirmation that when Mr. Clark did his analysis the average price per kilowatt hours was 9.05 cents and the difference or increase was .00017 percent, rather than cents?

Mr. Clark confirmed that was correct.

Council Member Condon asked if members from Investor Owned Utilities were on the RAC?

Mr. Clark confirmed that was correct.

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<sup>4</sup> Audio for Agenda Item E = 00:02:58 – June 26, 2020

Council Member Condon asked if there was discussion at the RAC on whether the rate increase would be passed on to rate payers.

Mr. Clark stated that there was no direct discussion of how the increase would be passed on to rate payers, but there were no objections to the way that fiscal impacts were characterized or other impacts to the public that were identified other than what was already represented in the fiscal impact statement.

Mr. Clark explained that a number of the comments in support of the proposed rule change contained detailed comments on particular aspects of the Department's analysis and Council's findings. He pointed out that Columbia Riverkeeper also recommended Council consider Oregon's commitment to meeting the goals of the Paris Climate Accord as an objective of this rulemaking.

Mr. Clark concluded his presentation and invited the Council's deliberation.

Vice Chair Grail stated she read all the comments, she felt the rate proposed was fair and reasonable. She read the comments from the Cascade Policy Institute and stated that like everyone else utilities have been affected by the COVID-19 pandemic. She felt the Council should increase the rate, but felt they should give more time than July 1st given the current state of affairs. She stated that most if not all utility companies were not allowed to cut power off for non-payment.

Secretary Cornett clarified that the rate increase would only apply to new projects, not existing facilities.

Chair Jenkins stated that it's important to know that none of the utilities have requested extensions of the effective date of the rule beyond July 1.

Vice Chair Grail stated that with that information she was no longer concerned about a July 1<sup>st</sup> effective date.

Council Member Winters stated that she was supportive of implementing policy underlying the Governor's Executive Order 20-04 and the Paris Agreement. She asked if this is something they need to state as a finding or part of the record?

Mr. Clark replied that either way was possible.

Council Member Winters asked Council if anyone else had any thoughts on this topic? She stated that the topic of limitations on the Council's authority to consider climate goals had come up before, and that she would like to express support for the climate goals, consistent with direction from the governor's office, the legislature, and the Council's stakeholders, as critical to our state.

Chair Jenkins stated he wasn't sure it was necessary for findings because the criteria for adopting this rule was that it be based on empirical evidence and economic achievability, and that maybe a statement from Council is more appropriate.

Council Member Winters agreed.

Council Member Howe stated his agreement to include support of the climate goals in the language of the motion, and that he was prepared to make a motion.

Council Member Howe motioned to adopt the permanent rule to increase the Carbon Monetary Offset Rate under OAR 345-024-0580 as presented by staff, addressing the Paris climate accord, consistent with environmental and public safety goals of the State.

Council Member Winters second.

Council Member Winters stated for the record that when they first discussed if there was empirical data, and she went back and reviewed it. Ms. Winters wanted it to be clear they did review it as there were comments regarding this.

Council Member Condon stated that it seemed to her the current rate was significantly under the market rate due to years of not updating the rules to raise the rate, and they aren't really achieving the goal of the offset.

Secretary Cornett confirmed, and stated that even if Council approves this increased rate they would still be under the current market rate. Mr. Clark did a good job at providing the information for the record, and unless the standard is eliminated based under cap and trade legislation this standard will continue. Annually they bring the rule making prioritization to Council, and this item will be on that list even though they can't impose another increase for 2 years showing intent. It will be at Council's direction if they want staff to begin the rulemaking at 2 years or begin prior so the effective date would be at the 2 year allowable timeframe.

Council Member Condon stated she strongly supported the change, and asked it would be more appropriate to change the statute to say the rate change couldn't be more than the current market place preventing them from getting behind the ball. She asked if there were something stronger the Council could do?

Secretary Cornett replied that Statutes certainly could be changed. While it can be done, he suspected there is a desire to continue and propose a larger carbon program than just this one component. He stated he wasn't sure if there would be any future gas plants proposed in the State to which this offset rate would be applicable. There are currently no investor owned utility integrated resource plans that have natural gas plants or carbon based energy facilities. This could be applicable to some independent power producers, but they don't know. He suspected more effort would go into a larger cap and trade program than updating the carbon statute. However, if Council wanted to propose a change, staff could raise it to the Governor's office to find out their interest.

Secretary Cornett asked Mr. Clark to confirm the motion by Council Member Howe incorporated the date of July 1, 2020 that the rule would become effective.

Mr. Clark confirmed, and he intended to file the rule change with the effective date of July 1, 2020.

Secretary Cornett asked Council if anyone had objection to the July 1, 2020 date before calling roll.

No objections from Council.

Motion carried.

More information is located on the Council Meetings website for additional details pertaining to this presentation.

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

**F. [9:08 a.m.] Rulemaking to Clarify Standard for Contested Case Requests for Type A Amendments, Council Review of Comments & Possible Final Decision (Possible Action Item)<sup>5</sup>** – Christopher Clark, Rules Coordinator. The Council reviewed public comments received on the proposed change to OAR 345-027-0371(9) and considered the adoption of permanent rules. . For more information visit the [Rulemaking page](#).

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<sup>5</sup> Audio for Agenda Item F = 00:37:26 – June 26, 2020

Mr. Clark reminded Council that there was a request to extend the comment period an additional 21 days and no final decisions would be made until then but that Council could begin their discussion and review. Mr. Clark provided an overview of the proposed rule change and the history of the rulemaking process. Mr. Clark explained that the Council had received one written comment on the proposed rules as well as oral testimony from three commenters. All comments were opposed to the proposed rule change.

Council Member Winters stated that that in its Order interpreting the rule, Council found that “may” meant “in some degree likely” which was consistent with previous practice and the normal dictionary meaning, but in the proposed rule it’s now “reasonably likely”. She asked Mr. Clark to explain how the that change came about.

Mr. Clark replied that staff recommended using the term “reasonably likely” because that is evidentiary standard for applicants in other parts of the application process. He offered to present the citations of previous discussions for the July meeting if Council wanted to discuss it further. He commented that staff also felt the term “in some degree likely” is ambiguous and subject to various interpretations.

Council Member Winters stated that Council’s intent was to clarify the meaning of “may” not to change the meaning of “may”. She stated that she felt some environmental organizations go too far in saying Council has created a situation they have to weigh evidence or pre-judge, but that she is concerned that the average person may think the words “may” and “reasonably likely” mean the same thing. She felt that those terms could have different legal definitions, but didn’t feel the Council was trying to change the standard. She asked for clarification that the intent was not to have Council litigate the evidence.

Mr. Clark confirmed the staff’s intent when drafting the proposed rules was not to require a person requesting a contested case to present their full body of evidence at the time of the request, or for Council to adjudicate the merit of the issue at that time. It’s to establish if there is a reasonable chance Council’s decision would be affected. Mr. Clark proposed that if Council felt other language would be more consistent with what the standard means, it would be appropriate for Council to modify the language in the proposed rule based on the comments when they make their decision.

Council Member Winters stated that the commenters didn’t provide any direction on actual language other than they liked the word “may”, which is vague. She asked staff and legal counsel if there was a more clear standard with language pertaining to case law pertaining to agency rules? She didn’t like the idea of arguing with the community who is most likely the one requesting a contested case or creating fear of our use of language. That was not their intent, they aren’t trying to change the standard. She stated they needed to be careful with their words to avoid creating any unfounded concerns.

Legal Counsel Patrick Rowe agreed that the intent of the proposed rules is to clarify how the Council has interpreted the rule. He stated this was discussed at the January meeting and possibly one other subsequent meeting, and he would look to see if there was any case law and how other agencies might address a “may” type standard. He would report his findings to the Council at the July meeting.

Chair Jenkins supported that, and stated that he didn’t feel Council should deliberate much further as they will still be receiving comments.

Vice Chair Grail stated that the presumption that the Council is trying to limit the public’s participation bothered her. She stated that in casual conversation asking what the “may” means versus “reasonably likely,” most people don’t know that there is a difference. She felt it’s important for their language to be clear, and for any person that is not experienced with Rules and Statutes to be able to understand them. She wanted to provide some clarity in the standard without creating the perception that the public’s opportunity to challenge a Council decision could be limited based on a “technicality.” She is very interested in what Mr. Rowe has to say in July.

Council Member Howe stated he agreed, and the Council is trying to clarify the word “may”. He felt that “reasonably likely” does clarify it so it’s not as broad as “may”. He stated that he didn’t think the Council was trying to be more restrictive, but was trying to give Council better guidance on what to use for a decision. He felt “reasonably likely” is less vague than “may”. He stated that he was concerned that the comments made it seem Council was trying to make it more difficult at the front end in submitting arguments during the contested case process. He looked at “reasonably likely” in regards to how Council would make their decision, but shouldn’t affect the way a person prepared the request.

Council Member Condon asked if a public member wanted a contested case, isn’t that presentation an expectation that what they have to present “may” or “may reasonably likely” change Council’s decision? She felt the response provided during the hearing was compelling and she didn’t like the change from “may” to “reasonably likely” because she felt “reasonably” was ambiguous. She stated that “may” defined in the dictionary is possibility or probability, and most people know and understand that word and definition.

Chair Jenkins asked what the timing was for the notice for close of the written testimony, when did they have to give notice by? Chair Jenkins stated he wanted to make sure there was enough time to do the evaluation.

Mr. Clark replied that the Statute was vague regarding what notices require when an Agency extends a comment deadline and response to a petition under 183.385(4). He did refer to his Administrative Law Manual to research what the answer was, and all it required was to provide written notice to anyone previously noticed. However, there was no precise timeframe given, but it should be reasonably after and allowing sufficient notice to provide comments before the deadline. He planned to provide a written notice of the extended comment deadline by Monday, June 29, 2020.

Chair Jenkins asked if 14 days would be reasonable, July 6<sup>th</sup>?

Legal Counsel Patrick Rowe replied that the 6<sup>th</sup> could be tight considering the work load they have at the moment. However, if that is the direction Council provides they will get it done.

Mr. Clark clarified there were two separate issues. To extend the comment deadline there are no requirements for the Department to file a new notice with the Secretary of State. They just need to provide notice in writing to people previously noticed about the extension of the deadline. The second is if Chair Jenkins is suggesting that the Department needs to file a new proposed rulemaking with the Secretary of State, he felt there would be additional time constraints pushing out the comment period further. If notice was published July 6<sup>th</sup>, it wouldn’t appear in the Secretary of State Bulletin until August 1. If we needed to provide a revised proposed rulemaking notice it would push out Council’s deliberation until August.

Chair Jenkins stated they had two options, one is just re-noticing of the extended timeline for written comments. The second is if Mr. Rowe felt there was better language to use for the replacement of the word “may” they would have to issue a revised notice with the Secretary of State’s office. If the second option is the direction they end up going everyone needs to understand this be pushed out until August.

Mr. Clark confirmed Chair Jenkins was correct. That if they gave notice of the extended deadline while receiving additional comments Mr. Rowe will have the opportunity to review the language, and it’s something they could bring to Council’s review at the July meeting to make a formal decision if they wish.

Chair Jenkins replied that all the Department needed today was consensus to re-notice the extended written comment period.

Mr. Clark confirmed that was correct.

Legal Counsel Patrick Rowe stated that reading the Statute under which the organizations requested the postponement of Council taking action, it states the agency shall postpone the date of its intended action no less than 21 and no more than 90 days to allow the requesting person an opportunity to submit data and arguments concerning the proposed action. Reading that strictly the only parties under the Statute that would be given the additional 21 days would be the requesting parties, not the public in general. In his quick look of case law he didn't see any case law interpretation of it. Their discussion has been to extend the 21 day comment period for all the public, which he felt Council had the authority to do. Pointing out this could be going beyond what the Statute requires.

Chair Jenkins stated he supported extending it to all the public.

Council Member Winters stated she understood the Statute, but agreed they should apply it to all the public.

Council Member Condon asked for clarification on the closing date.

Mr. Clark stated the comment period would close on July 16, at 5:30 pm. Deliberation is extended until the July meeting.

Council Member Condon stated she thought the public would have 14 days to comment, and that was the reason for the notice that they had 14 days to comment.

Mr. Clark replied that the comment period extension is actually 21 days, that July 16 is 21 days from last night. The noticing period is where the confusion was.

Council Member Condon stated she thought there should be plenty of time for the public to comment once the notice was received.

Council Member Winters stated she was confused, as she thought the new notice was only required if Council determined it was needed which they haven't determined yet. That would be up to Mr. Rowe to review with staff, correct?

Chair Jenkins replied that this was just additional time to comment on the existing language presented.

Council Member Condon asked if there was not an additional notice given that time was extended?

Chair Jenkins replied that is what this notice is.

Mr. Clark stated that in the rulemaking process there is requirement that the Department must file notice of proposed rulemaking with the Secretary of State, and also provide a notice to stakeholders that the notice has been filed with the Secretary of State. In this case they would not be filing a new notice of proposed rulemaking with the Secretary of State. In this case they would just be providing written confirmation that the comment deadline has been extended from what was previously published before to anyone that previously received the notice.

Chair Jenkins asked for consensus from Council. There were no objections and informed Mr. Clark they had had their direction.

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

**G. Public Comment Period**<sup>6</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.

**Irene Gilbert**

Ms. Gilbert responded to Council Member Howe’s comments in regards to an email she sent to Council regarding the Council’s deliberation of the Shepherds Flat North Request for Amendment 2. Ms. Gilbert made the following points:

- Council must adhere to statutes because they take precedent over rule. Specifically, ORS 469.503 which states that Council decisions must be in compliance with statewide planning goals, exceptions & local comprehensive plans and local land use regulations in effect on the date the request is made.
- Nine turbines associated with the Shepherds Flat North were already infringing on the required setback of the Bonneville Power Administration’s transmission line right of way.
- Council failed to follow the statutory requirements or their own rules when they allowed the nine turbines in proximity to the Bonneville Power Administration’s transmission line right of way to increase their turbine blade lengths which is a public safety and health issue
- Because this was a Type B amendment the public did not have the opportunity to challenge Council’s decision

**H. [9:50 a.m.] Council Consideration of Need for Power for the Proposed Swan Lake North Pumped Storage Hydroelectric Project, in accordance with ORS 543.017(1)(e) (Action Item)**<sup>7</sup> – Maxwell Woods, Senior Policy Advisor. Per ORS 543.017(1)(e), ORS 469.470(5), and OAR 690-051-0280, the Energy Facility Siting Council shall consult with and make recommendations to the Oregon Water Resources Commission regarding the need for power associated with hydroelectric projects with a nominal generating capacity of 25 MW or more. A proposal has been submitted to the Water Resources Commission and Oregon Water Resources Department for a pumped-storage hydroelectric power project in Klamath County, called the Swan Lake North Pumped Storage Hydroelectric Project.

Secretary Cornett informed Council that Mary Grainey, Hydroelectric Program Director from Oregon Water Resources Commission was in attendance, and available for any questions that Council may have.

Secretary Cornett gave Mary Grainey the opportunity to address the Council.

Ms. Grainey thanked Council for the opportunity and coordination with the consideration this type of project, as it seems to only come up once every 30 years.

Vice Chair Grail motioned that the Council make “no recommendation” as to the need for power from the Swan Lake North Pumped Hydropower Facility, consistent with the staff presentation.

Council Member Howe seconded.

Council Member Condon asked Mary Grainey that without a recommendation from Council given the Water Resource Commission has the same access to records as Council, do they look at the need for power as they interpret the documents?

Ms. Grainey replied that most of the info in the record leans towards a general need for power and general need for storage to manage the renewables connected to the grid. The information they have from the National Council and Oregon Department of Energy is all favorable. Unless something unfavorable is introduced to the record later, it’s not something they had to develop the standard for.

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<sup>6</sup> Audio for Agenda Item G = 01:13:06 – June 26, 2020

<sup>7</sup> Audio for Agenda Item H = 01:19:58 – June 26, 2020

Motion carried.

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

- I. **[10:21 a.m.] Solar PV Rulemaking, Council Review of Comments & Possible Final Decision Solar PV Rulemaking (Possible Action Item)**<sup>8</sup> – Christopher Clark, Rules Coordinator. The Council reviewed public comments received on the proposed rules intended to clarify the application and interpretation of jurisdictional thresholds for solar photovoltaic power generation facilities and considered the adoption of permanent rules. For more information visit the [Rulemaking page](#).

Mr. Clark provided an overview of the proposed rules and the rulemaking process. Mr. Clark explained that there were two written comments on the proposed rules, and that comments contained several requests for Council to clarify the terms and provisions of the proposed rules. Mr. Clark stated that staff had included its recommended responses in the evaluation provided to Council. Mr. Clark suggested Council approve or modify staff's recommendations in the evaluation and formally recognize staff's clarifications provided. He didn't believe it was required if they chose not to.

Secretary Cornett stated they could go through the items being requested for clarification one by one, with Council giving a consensus or acknowledgement as they go through them. If they were consistent this can be incorporated into the motion if adopting the rules.

Chair Jenkins agreed and stated the Council would give consensus as they moved through each item.

**Issue: Clarification of "other components" in proposed definition**

**Issue Summary:** The proposed definition of "solar photovoltaic power generation facility" provides that a solar photovoltaic power generation facility includes "photovoltaic modules, mounting and tracking equipment, posts, electrical cabling, inverters, transformers, collection systems, fencing, and other components." Commenters requested that Council confirm that the term "other components" as used in the proposed rule would be limited to energy facility components that is intended to be a catch-all in case technology or construction techniques change over time" and "is not meant to capture what would otherwise be considered 'related or supporting facilities."

**Staff Recommendation:** Consistent with the commenters reading of the proposed rules, the term "or other components" is intended to allow flexibility to account for differences in energy facility design and changes in technology, but would only apply to components of a similar nature to those included in the list. Staff confirms that "other components" is not intended to apply to structures or equipment that would otherwise be considered to be related or supporting facilities.

Council had consensus with the staff recommendation.

**Issue: Clarification of treatment of related or supporting facilities**

**Issue Summary:** The proposed definition provides that "[r]elated or supporting facilities" are included in acreage calculations for determining EFSC jurisdiction but "are not otherwise considered to be components of the solar photovoltaic power generation facility." Commenters request clarification if the proposed rule is intended to

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<sup>8</sup> Audio for Agenda Item I = 01:50:26 – June 26, 2020



exclude “related or supporting facilities” such as gen-tie lines, access roads, O&M buildings, and battery storage systems from the one-mile calculation presented in the proposed OAR 345-001-0010(56)(b)(A).

**Staff Recommendation:** The proposed rule language is intended to specify that related or supporting facilities located outside of the energy facility site boundary will only be considered in determining the total acreage used by the solar facility, but will not be considered in evaluating the proximity criteria for triggering a jurisdictional review. The rule is intended to allow Council to consider all land used by a solar facility when calculating acreage under ORS 469.300(11)(a)(D) without discouraging co-location of transmission infrastructure or other related or supporting facilities.

Council Member Howe asked how the rule would apply to shared battery storage .

Mr. Clark replied if the battery storage were proposed to be related or common facility, which is most common. Mr. Clark stated that the battery storage is often within the site boundary, and in that case it would be a moot question. He stated that if there was a big battery storage location between two distinct facilities this rule would not be used to determine the proximity criteria, but if it had a large footprint they may look at the area it uses to see if it surpasses the 1,920 acre threshold.

Council had consensus.

**Issue: Recommendation to reduce distance for “proximity” trigger**

**Issue Summary:** The proposed rule language provides that projects proposed within one mile of an existing solar photovoltaic power generation facility “may be determined to be an expansion” of the existing facility. Commenters recommend Council reduce the one-mile radius to a quarter-mile to align with DLCDC’s solar siting rule.

**Staff Recommendation:** Staff recommended that Council preserve the one-mile radius for the “proximity” review trigger. The one-mile radius is consistent with the one-mile study area for impacts to agricultural practices found in the LCDC rule under OAR 660-033-0130(38)(h)(G) and (i)(D), and accounts for differences in the way distance is measured in the Council process vs the LCDC process. Under the LCDC rules, distance is measured from the edge of the tract upon which the facility is sited, whereas under the proposed Council rules distance would be measured from the energy facility site boundary.

Mr. Woods stated he would like to clarify the word “site boundary” and what it referred to in EFSC Statutes. It included the EFSC facility as well the related and supporting facilities. That is distinct compared to what they were discussing in the proposed rules today. Which is the measurement point, the distance is from the facility or project as they defined those in terms. The related or supported facility in an EFSC review is brought into the site boundary, which is a defined term in the Statute.

Mr. Clark confirmed when they are talking about the 1-mile distance it’s referring to the distance between the energy facility site boundary, not the facility site boundary. It can be confusing, but they are referring to just those components of the photovoltaic power generation facility or project.

Council Member Condon stated this is related to the first issue, a facility surrounded by a fence. The measurement would be from the fence?

Mr. Clark confirmed that was correct.

Council Member Howe stated he was in agreement in leaving it at the 1-mile distance consistent with the impact analysis.

Vice Chair Grail and Council Member Winters both agreed.

Council Member Truitt asked if the radius took in account for natural barriers?

Mr. Clark replied that question came up in RAC meetings and if it the distance could be topographical, but the intent was for the shortest distance between the two points looking at a map.

Council had consensus to retain the 1-mile distance.

**Issue: Clarification of “common ownership” (Exhibit 1)**

**Issue Summary:** The proposed rule provides that projects under common ownership with an existing solar photovoltaic power generation facility may be determined to be an expansion of the existing facility and that “[p]rojects connected to the same parent company or individuals will be considered to be in common ownership, regardless of the operating business structure.” Commenters requested Council clarify if the phrase “connected to the same parent company or individuals” refers to projects connected by a common majority owner or owners, regardless of the structure or structures that insulate that owner from liability related to the project, or if it is also intended to capture debt lenders, tax equity investors, minority partners, and other entities involved in financing the project.

**Staff Recommendation:** The phrase “connected to the same parent company or individuals” is intended to be primarily to the relationship between project specific entities that are affiliated under a common ownership structure and share the same ultimate parent company or companies, regardless of whether ownership by the parent company is direct or through one or more intermediate subsidiaries. While the rule is not intended to capture debt lenders, tax equity investors or other entities involved solely in the financing of a project, under certain circumstances projects could potentially be connected through one or more minority owners.

Council Member Condon asked Mr. Clark to provide an example of where the common ownership would work? As she read the information she wondered if the commenters may were suggesting that there is a different parent company but common minority investors, and that’s what they were afraid of.

Mr. Clark replied he felt the commenters were concerned about the rule being expanded to apply to anyone that has a financial stake in a project being considered an owner or any financial connection to a project implying common ownership. He gave an example that a tax equity investor would have some financial stake, but not typically thought of an equity owner in the project. The intent is to look at an LLC that is specific to a solar project, and referenced Wheatridge project that is now three separate projects under it’s own subsidiary LLC. Those LLC’s are ultimately owned by the same parent company, which would looked at under the same parent company. This is to prevent or avoid using shell companies to avoid regulation.

Council had consensus.

**Issue: Clarification of “other proceeding” in proposed procedural rule (Exhibit 1,2)**

**Issue Summary:** The proposed OAR 345-001-0250(1) provides that to find that a project is an expansion of an existing facility, “the Council must find that the preponderance of the evidence on the record of a declaratory ruling issued under this rule, or other proceeding before the council, supports such a conclusion.” Commenters request that Council clarify what “other proceedings” could be used to make a determination.

**Staff Recommendation:** As commenters point out, the declaratory ruling process is intended to provide an expeditious process for determining legal issues, not for resolving factual disputes. If the parties necessary to the resolution of the declaratory ruling process are unwilling or unable to participate or agree to the facts in the matter, the Council would not be able to issue a declaratory ruling. If the Council felt that a petitioner’s claim that a facility was being constructed or expanded in violation of ORS 469.320 had merit, the Council would likely have

the authority to pursue the fact finding through its own investigation to develop the evidentiary record needed to make a determination through an Order in other than a contested case.

Chair Jenkins asked Mr. Rowe if this needs to be further clarified or is it adequate with using “other”?

Legal Counsel Rowe stated that if they clarify in this proceeding people could go back to this record to understand Council’s intent, which is outside of the declaratory ruling if the parties can’t agree on the facts the Council would still review the jurisdictional issue under the enforcement authority. Stating that on today’s record should be sufficient, but Council could also provide direction to staff to communicate that clearly in the minutes.

Chair Jenkins stated he felt it was adequate to have it in the record.

Secretary Cornett stated that the minutes will have sufficient detail on the record to clarify what the Council’s intent was.

Council Member Condon preferred clarity in the rule itself, that it should be clear to the public what the intent was without doing significant research about a hearing that occurred 3 years ago. She was not familiar with the process and if that would mean it needed to go through the rulemaking process again, but is there a specific communication with the commenter answering those questions that is distinct separate from this record?

Mr. Clark replied that the stakeholders asked clarifying questions and the staff provided intent, but it is not part of the rulemaking record as it was an informal conversation.

Council Member Condon realized it would be in this record, but in addition to this is there a letter in response to the comments clarifying so they have it in their files for reference?

Mr. Clark stated they did not provide a written response, just an informal conversation. They did request that any formal request for clarification must be submitted to the Council in formal written comments.

Secretary Cornett stated they could provide a record of the information of what was occurring today to the stakeholders, and based on Council’s direction staff could generate a specific letter based on their comments with what the Council did. Staff could also share the final adopted meeting minutes with them which would have the same information they could add to their record. Either option was acceptable as long as Council agreed clarifying language within the rules themselves was not needed.

Council Member Condon would be more comfortable with written communication.

Mr. Clark stated they would be more than happy to provide written communication should Council direct him to do so.

Chair Jenkins stated all the commenters asked is that Council address their concerns, and be clear what their intent was. He stated they felt Council had done that by going through and accepting staff’s recommendations for each of the issues. He did agree that a letter would be appropriate.

Mr. Clark reminded Council this is a new rule and subject to the 5-year review requirements in the Administrative Procedures Act. Within 5-years they will need to conduct a review of the rule, and if they determine any additional clarification is needed or Council wanted to change the scope of tools they can use there is an opportunity to do that at that time.

Secretary Cornett stated the 5-year rule is the minimum requirement, and that should Council decide at 2-years or 3-years they find clarification is needed there is nothing that says Council can't do that review earlier than the 5-years.

Council had consensus.

**Issue: Recommendation that petition by person other than Applicant or ODOE be dismissed**

**Issue Summary:** A commenter recommended that a petition from a person other than the applicant or Department should be dismissed, and if not, asked if the applicant would be required to intervene.

**Staff recommendation:** Any person has the right to petition for a declaratory ruling under ORS 183.410, and that the Council would decide the merits of the petition and decide whether or not it will issue a ruling on a case by case basis. Staff notes that this is true under current law, and that the proposed rule does not create any right that does not otherwise exist.

Council had consensus.

**Issue: Clarification of Council's Authority to Reject a Petition for Declaratory Ruling**

**Issue Summary:** Commenters request clarification of whether the Council has authority under the declaratory-order process to reject a petition if Council staff determine that relevant parties do not agree regarding the underlying facts.

**Staff Recommendation:** An agency has complete discretion to issue a declaratory ruling or not in response to a petition under ORS 183.410. As noted above, the Council would not be able to issue a ruling if the persons needed to resolve the declaratory ruling were unable or unwilling to agree to the underlying facts.

Chair Jenkins asked Mr. Clark to explain the difference between a solar project and a solar facility in the proposed OAR 345-010-0250(3).

Mr. Clark stated they have created a distinction between the two terms, which are also used interchangeably within the LCDC rules between project and facility. Mr. Clark explained that a "solar power generation facility" can be either a local jurisdictional facility or an EFSC jurisdictional facility. He explained that under the local process, anything issued a CUP would be considered to be a separate facility even if under the new standard it would be considered to be a components of a larger "energy facility" Staff have defined the term "proposed solar photovoltaic power generation project" to mean either the proposed development of an independent solar photovoltaic power generation project facility or the proposed modification or expansion of an existing solar photovoltaic power generation project facility

Council had consensus.

**Issue: Clarification of "safe harbor provisions"**

**Issue Summary:** Commenters request Council's clarification that under the "safe harbor" provisions of the proposed OAR 345-001-0250(3), the rule would not apply to existing facilities but only to new projects proposed within the distance specified under the proposed OAR 345-001-0010(56)(b)(A) of the existing facility and the proposed project is under common ownership with the existing or approved facility, in which case the new project may be reviewed under OAR 345-001-0250. Commenters further request clarification that this safe harbor applies to solar photovoltaic power generation facilities which are not "energy facilities" under ORS 469.300.

**Staff Recommendation:** The proposed rules would not apply to any existing solar photovoltaic power generation facility, regardless of whether or not the solar photovoltaic power generation facility is subject to Council jurisdiction, that has a land use permit issued by a local government on or before the date the rules become effective, unless new solar photovoltaic development which could be considered to be an expansion of that facility under the proposed rule is proposed. In that case, the rule would apply to the existing facility because the jurisdictional review would be needed to ensure that the facility is not being expanded in violation of ORS 469.320.

**Issue: Expansion of “safe harbor” provisions**

**Issue Summary:** Commenters recommend that the proposed OAR 345-001-0250(3) be amended to expand the safe harbor provisions to specify that the rules are not applicable to safe harbor projects. The commenters propose the following amendments to the proposed language:

(3) ~~OAR 345-001-0250 shall not apply to~~ ~~The Council will not make a ruling on the applicability of ORS 469.300(1)(a)(D) or section (1) of this rule to~~ any solar photovoltaic power generation facility with a land use permit approved by a local government on or before the effective date of this rule, ~~unless a solar photovoltaic power generation project is proposed on lands within one mile of the solar photovoltaic power generation facility.~~

**Staff Recommendation:** Staff recommended Council reject the recommended amendment to the proposed rule language because it could suggest that a local jurisdictional facility could be expanded in violation of ORS 469.320 if it were permitted before the effective date of the rule.

Mr. Clark concluded his review of the public comments.

Vice Chair Grail motioned to adopt the permanent rules related to jurisdictional thresholds for solar photovoltaic power generation facilities as presented by staff.

Council Member Howe seconded.

Secretary Cornett recommended they add to the motion language their consensus clarifications to be reflected in the June meeting minutes.

Vice Chair Grail restated the motion to adopt the permanent rules related to jurisdictional thresholds for solar photovoltaic power generation facilities as presented by staff with the consensus clarifications reflected in the June meeting minutes.

Council Member Howe seconded.

Motion carried.

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

**Meeting adjourned at 11:30 am**

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