June 25-26, 2020 Energy Facility Siting Council Meeting
Agenda Item F: Rulemaking to Clarify Standard for Contested Case Requests for Type A Amendments
Attachment 2: Public Comments
Updated June 25, 2020 (FINAL)

Index of Public Comments

NOTE: THE COMMENT PERIOD FOR THIS RULEMAKING HAS BEEN EXTENDED TO 5:30 PM on JULY 16, 2020.

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June 24, 2020

Oregon Energy Facility Siting Council
c/o EFSC Rules Coordinator
Via email to EFSC.rulemaking@oregon.gov

Re: EFSC Rulemaking Hearing – Proposed Rules to Clarify Standard for Contested Case Requests for Type A Amendments

Dear Chair Jenkins and Council Members:

The following comments regarding the above-referenced proposed rulemaking are submitted on behalf of Friends of the Columbia Gorge, Northwest Environmental Defense Center, Oregon Natural Desert Association, Oregon Wild, Thrive Hood River, Columbia Riverkeeper, WildLands Defense, Greater Hells Canyon Council, Oregon Coast Alliance, Central Oregon LandWatch, Audubon Society of Portland, and East Cascades Audubon Society (collectively, "Commenters").

Commenters are nonprofit public interest organizations, with more than 65,000 collective members and supporters, with strong interests in responsible energy generation and the proper implementation of state law governing the approval, construction, and modification of large energy facilities in Oregon. Commenter Friends of the Columbia Gorge is a nonprofit organization with approximately 6,500 members dedicated to protecting and enhancing the resources of the Columbia River Gorge. Commenter Northwest Environmental Defense Center ("NEDC") is a nonprofit organization with approximately 500 members. NEDC's mission is to preserve and protect the environment and natural resources of the Pacific Northwest. Commenter Oregon Natural Desert Association ("ONDA") is a nonprofit, public interest organization dedicated to the conservation of eastern Oregon's public lands. ONDA's mission is to protect, defend, and restore Oregon's high desert. ONDA represents more than 10,000 members and supporters. Commenter Oregon Wild represents approximately 20,000 members and supporters who share Oregon Wild's mission to protect and restore Oregon's wildlands, wildlife, and waters as an enduring legacy. The mission of Commenter Thrive Hood River is to protect Hood River County's farms, forests, special wild places and the livability of our urban and rural communities. Thrive Hood River has approximately 325 members. Commenter Columbia Riverkeeper ("Riverkeeper") is dedicated to protecting and restoring the Columbia River and its tributaries. With over 10,000 members and supporters, Riverkeeper and its supporters have an interest in EFSC maintaining a fair and open process for evaluating site certificate amendments for large energy facilities. Commenter WildLands Defense works to inspire and empower the preservation of wild lands and wildlife in the West. WildLands Defense has more than 1,500 members, activists, and supporters. Founded in 1967, Commenter Greater Hells Canyon Council ("GHCC") is a grassroots conservation organization whose mission is to connect, protect, and restore the wild lands, waters, native species and habitats of the Greater Hells Canyon Region, ensuring a legacy of healthy ecosystems for future generations. GHCC has approximately 1,000 members. The mission of Commenter Oregon Coast Alliance ("ORCA") is to

protect the Oregon coast by working with coastal residents for sustainable communities; protection and restoration of coastal and marine natural resources; providing education and advocacy on land use development; and adaptation to climate change. ORCA has approximately 300 members and supporters. Commenter Central Oregon LandWatch ("LandWatch") is a conservation organization with more than 200 members that has advocated for the preservation of natural resources in Central Oregon for more than thirty years. LandWatch plays a vital role in achieving a responsible, balanced approach to planning for and conserving Central Oregon's land and water resources, while recognizing the needs of future generations. LandWatch works to protect and conserve the region's ecosystems and wildlife habitats; to foster thriving, sustainable communities; and to spread the costs and benefits of growth equitably across the community as a whole. Founded in 1902, Commenter Audubon Society of Portland ("Portland Audubon") is a nonprofit conservation organization with more than 15,000 members whose mission is to inspire all people to love and protect birds, wildlife, and the natural environment upon which life depends. Through conservation advocacy, environmental education, and wildlife rehabilitation, Portland Audubon promotes the understanding, enjoyment, and protection of native birds, other wildlife and their habitats. Commenter East Cascades Audubon Society ("ECAS") is a nonprofit organization with approximately 400 members. ECAS is involved in conservation projects throughout Central Oregon and promotes enjoyment of birds, birdwatching, and habitat improvement.

The proposed rule would modify the threshold standard at OAR 345-027-0371(9) for Council decisions on whether to conduct a contested case proceeding on site certificate amendments reviewed under the "Type A" process as follows:

> To determine that an issue justifies a contested case proceeding, the Council must find that the request raises a significant issue of fact or law that ~~**may**~~ **is reasonably likely to** affect the Council's determination that the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24.

Although the proposed rule would result in only a few words being changed, the effects would be significant. Commenters oppose the proposed rule language for several reasons. The proposed rule language would put the Council in the awkward position of having to prematurely weigh and adjudicate the merits of specific issues in deciding whether to hold a contested case—yet the merits and likelihood of success on specific issues are supposed to be the subject of the contested case. Second, the proposed rule language would impose new burdens on interested persons to justify a contested case by satisfying a new burden of proof, thus decreasing even further the likelihood that there would ever be a contested case on a proposed site certificate amendment. Finally, in many scenarios it could be impossible for interested persons to satisfy the proposed rule language—for example, situations where satisfying the new burden would depend on evidence that would be produced in the future, *via* a contested case. There is no need to change the Council's rules to impose new, difficult (and potentially insurmountable) burdens on interested persons requesting contested cases.

In addition, if the Council is not inclined to immediately reject the proposed rule language, then the Council should delay final action on the proposed rule until a later date. Commenters believe that both the Council and the public do not yet have sufficient information for meaningful review of

the proposed rule. In addition, the notice of proposed rulemaking and the meeting agenda for this rulemaking fail to accurately describe the proposed rule change, because they refer to the rule change as merely "clarifying" the Council's rules, when in fact the rule would *modify* the threshold standard for requesting—and determining whether to hold—a contested case. If the Council is not inclined to immediately reject the proposed rule language outright, then it should request more information from the ODOE Staff (as described below) and should authorize the distribution of a revised notice of proposed rulemaking to specify that the proposed rule would do more than merely "clarify" the Council's rules, but in fact would change the operative standards for the public to request and the Council to authorize a contested case. The public should also be given additional time to comment following this revised rulemaking notice. Finally, at the end of this letter below, Commenters formally request an extension of the rulemaking process by at least 21 days pursuant to ORS 183.335(4).

1. The Council should reject the proposed rule language.

The proposed rule language would substantially change the threshold standard for interested persons to request a contested case, and the standard for the Council to determine whether to hold a contested case. The Council should reject the proposed rule language.

Under the current rules at OAR 345-027-0371(9), if a request for a contested case is filed and if that "request raises a significant issue of fact or law that may affect the Council's determination that the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24," then the Council is empowered to authorize a contested case, which will be held before a hearings officer. This is an appropriate threshold standard to apply at the time a contested case is requested: if an issue is raised that "may affect" the ultimate determination of compliance with the applicable law, then a contested case should be held to vet and adjudicate that issue.

The proposed rule language, however, would turn the current process on its head. It would require the Council to evaluate the merits of each issue at the outset and determine whether it is "reasonably likely to affect" the ultimate determination of compliance with the applicable law. This would put the Council in the awkward position of having to prejudge the merits of each issue at an early stage, without the benefit of that issue having been vetted and adjudicated by a hearings officer in a contested case. While the Council is the ultimate decision-maker on applications for certificate amendments, the Council also utilizes the expertise and assistance of hearings officers to resolve complex evidentiary and legal issues via contested cases. Under current law, the Council waits until each contested case is concluded and then relies on the recommendations of the hearings officer to evaluate the merits of each issue. Again, the proposed rule change would turn that process on its head.

Compounding these problems, the evidence for each issue might not yet be available at the time a contested case is requested. Indeed, that is the very *purpose* of a contested case: for each party to litigate the issues in dispute by producing evidence, including the sworn testimony of expert witnesses. In addition, ODOE has recently taken the position that when a person requests a contested case, that person is prohibited from supplying new evidence to support the request if the evidence was not previously supplied with the person's initial comments on the amendment request. Commenters disagree with that position, but assuming ODOE is correct, then under the proposed rule change, a

person requesting a contested case in order to pursue evidentiary issues will find themselves in an unfair "Catch-22" predicament: they will be prohibited from submitting new evidence in support of a request for a contested case, and yet they will also be unlikely to convince the Council that a contested case should be held to produce that evidence in the future, because they will now be required to meet the high burden of demonstrating that the issue is "reasonably likely to affect" the Council's determination of compliance, based on evidence that does not yet exist. In essence, a person requesting a contested case would be required to prove her case, before the case even starts. This is unfair and inappropriate.

Moreover, there will be scenarios where persons requesting a contested case will not be capable of producing certain supporting evidence on their own, but rather will need to pursue that evidence from other parties, through discovery in a contested case. For example, a contested case may be necessary in order to pursue from site certificate holders, through discovery, evidence such as underlying data that was used to prepare application materials, or surveys or analyses that may have been conducted by the certificate holders but not furnished to the Department or the Council or otherwise made available to the public. Because most energy projects are proposed on private property (to which the general public does not have access), it can be critical for interested persons to obtain this type of evidence from energy certificate holders or their consultants via discovery. Similarly, persons requesting a contested case may need to use the discovery process to obtain evidence from the Department, such as legislative history of specific rules or communications with relevant persons. The discovery process is one of the fundamental reasons to hold a contested case: to pursue relevant evidence and furnish it to a hearings officer for adjudication and resolution of the disputed issues. The proposed rule language would circumvent that process by not allowing contested cases unless the supporting evidence already exists.

Ultimately, there is no need to change the standards for requesting and deciding whether to hold a contested case. The current rules are appropriate and fair. The proposed new rule language would upset the apple cart, substantially modifying the standards in ways that would put the Council in the awkward position of having to pre-judge issues, and that would unfairly hamstring persons requesting contested cases by requiring them to satisfy new burdens based on evidence that does not yet exist (and that, according to ODOE, could not be attached to the requests even if it did exist), and by requiring them to effectively prove their cases before the cases even begin. This substantial change in the rules would be unfair and inappropriate, and should be rejected.

Recommendation: Reject the proposed rule language.

2. If the Council is not inclined to immediately reject the proposed language, then the Council should delay final action on the proposed rule change until a later date, so that additional information can be supplied by ODOE Staff, so that a revised rulemaking notice can be distributed to the public, and so that the comment period on the proposed rule can be extended.

If the Council is not inclined to immediately reject the proposed rule language, then the Council should delay final action on the proposed rule until a later date and should authorize several actions to take place in the meantime.

First, Commenters believe that both the Council and the public do not yet have sufficient information for meaningful review of the proposed rule. The rulemaking notice states that the proposed rule change would be "consistent with the Council's current interpretation . . . of the rule." (Notice of Proposed Rulemaking at 2.) Yet nothing in the notice or in the ODOE Staff Report identifies any source(s) for this "current interpretation." The notice also states that the rule change would be "consistent with the Council's . . . past application of the rule." (*Id.*) Again, nothing in the ODOE Staff Report nor in the rulemaking notice identifies any relevant "past application[s]" of the rule. Without this information, it is difficult if not impossible to evaluate the statement that the proposed rule change would be consistent with the Council's past applications of and current interpretation of the rule. Similarly, the agency materials do not state when the "may affect" language in the rule was first adopted,[1] nor provide any legislative history behind the "may affect" language to show its intent, nor any discussion of the Council's interpretation and application of this language over time.[2] Finally, the notice states that one of the purposes of the rule is "to be consistent with other rules that convey a similar standard of proof." (*Id.*) But neither the notice nor the Staff Report identifies these other rules. The Council should request all of this information from ODOE Staff, so that the public and the Council can have a full picture of the history and intent behind the current rule, how it has been implemented and interpreted, whether the proposed rule change would indeed be consistent with that implementation and interpretation, and the relevance of any other unrelated rules that are being relied on by Staff.

In addition, the notice of proposed rulemaking and the meeting agenda for this rulemaking fail to accurately describe the proposed rule change, because they state that the purpose of the intended action is to "clarify" the Council's rules, when in fact the rule would *modify* the threshold standard for requesting—and determining whether to hold—a contested case. For example, the caption in the rulemaking notice is "*Clarification* of standard for issue to justify a Contested Case in Type A Amendment Review." (*Id.* at 1 (emphasis added).) The use of the word "clarification" is inaccurate and misleading, because the operative standard would in fact be modified, not merely clarified. Specifically, the standard would be changed from "may affect" to "reasonably likely to affect." These are two different standards.[3] The caption in the rulemaking notice fails to comply with ORS

[1] Commenters have begun to research this question, and have determined that the "may affect" language in question appears to have been first adopted on February 2, 2000, via a rulemaking order numbered EFSC 2-2000, and was first adopted at OAR 345-027-0070(6) (2000). ODOE Staff should provide the Council with the full rule language when it was first adopted, along with any prior and/or subsequent legislative history that might evidence the intent of this language. It is especially important for ODOE to do so, given the contentions in the rulemaking notice that the rule language is merely being "clarified," presumably to capture EFSC's intended interpretation.

[2] The ODOE Staff Report also fails to acknowledge that when the "may affect" language was first added to EFSC's rules (in February 2000), it was accompanied by the following sentence in the rules: "If the Council determines that even if the alleged facts are taken as true the outcome of the Council's determination would not change, but that conditions of performance might need revision, the Council may deny the request and may adopt appropriate conditions." OAR 345-027-0070(6) (2000). This sentence, which did require the Council to effectively weigh the merits of each issue in deciding whether to allow a contested case, was subsequently removed from EFSC's rules. The Council's subsequent choice to remove this sentence from its rules, while retaining the "may affect" language, helps demonstrate that the Council no longer intends for the merits of issues to be prematurely weighed in determining whether to hold a contested case.

[3] Indeed, in a prior Staff Report dated March 13, 2020 in this matter, ODOE Staff appears to

183.335(2)(a)(A) by misleadingly using the word "clarification." Second, the summary of the proposed rule in the rulemaking notice violates ORS 183.335(2)(a)(B), because it similarly states that "[t]he purpose of the rule amendment is to *clarify* the Council's standard." (Notice of Proposed Rulemaking at 2 (emphasis added).) The inaccurate and misleading use of the word "clarify," rather than a word such as "modify," fails to "inform a person that the person's interests may be affected," and thus violates ORS 183.335(2)(a)(B). The Council could and should rectify these procedural errors by authorizing the distribution of a revised notice.

If the Council is not inclined to reject the proposed rule language outright, then it should authorize the distribution of a revised notice of proposed rulemaking specifying that the proposed rule would do more than merely "clarify" the Council's rules, but in fact would modify or change the operative standard for the public to request and the Council to authorize a contested case. The public should also be given additional time to comment following this revised rulemaking notice.

Finally, pursuant to ORS 183.335(4), Commenters request that EFSC and ODOE postpone the process for this rulemaking by at least 21 days in order to allow Commenters and other interested persons a sufficient opportunity to submit data, views, or arguments concerning the proposed action.[4] Specifically, Commenters request that the Council postpone the June 25, 2020 deadline for written comments on this proposed rulemaking by at least 21 days, and also postpone the June 26, 2020 date (the scheduled date when the Council may take final action) by at least 21 days. This will allow the Department to supply more information to the Council regarding the proposed rule, will allow for a revised rulemaking notice to be distributed to the public specifying that the standards for requesting a contested case would be modified and not merely "clarified," and would allow interested persons to review this information, to continue researching and evaluating the proposed rule, and to respond appropriately.

Recommendation: If the Council is not inclined to immediately reject the proposed language, then the Council should request additional information from ODOE staff, should delay final action on the proposed rule change by at least 21 days, should extend the comment period on the proposed rule by at least 21 days, and should authorize the distribution of a revised rulemaking notice to the public.

3. Conclusion

For the reasons stated above, please retain the current language and reject the proposed rule, which would substantially change the threshold standards for requesting and determining whether to

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acknowledged that "may affect" and "reasonably likely to affect" are two different standards. The March Staff Report equates "may affect" with "in some degree likely to affect" and acknowledges that this standard could "include any non-zero probability." (Mar. 13, 2020 Staff Report at 2.) It also describes the proposed rule change to "reasonably likely to" as being "consistent with other rules which convey a *standard of proof*." (*Id.* (emphasis added).) If the "reasonably likely to affect" language indeed imposes a standard of proof similar to other rules, then this is a substantive change to the applicable standard in this rule.

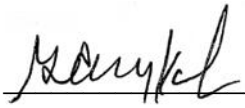
[4] This request is timely under ORS 183.335(4) because it is made before the earliest date that the rules could become effective pursuant to ORS 183.335(1). The notice of the proposed rulemaking was distributed to Commenters and others on May 6, 2020. The earliest date the proposed rules could become effective is June 25, 2020 (50 days after notice was given pursuant to ORS 183.335(1)(d)). The deadline to make requests under ORS 183.335(4) is thus June 24, 2020 (one day before the earliest date the rules could become effective).

hold a contested case. Otherwise, if the Council is not inclined to immediately reject the proposed language, then it should delay final action on the proposed rule, request additional information from ODOE staff, authorize the distribution of a revised rulemaking notice, and extend the time period for interested persons to comment on the proposed rule.

Thank you for your time and consideration.

Sincerely,

REEVES, KAHN, HENNESSY & ELKINS



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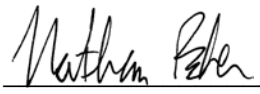
FRIENDS OF THE COLUMBIA GORGE



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