

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 3: Staff Summary and Evaluation of Public Comments
Updated July 31, 2020

This document summarizes the significant data, views, and arguments contained in the hearing record and create a record of the Department’s recommendations to address the major issues raised therein. Exact copies of the written testimony are included in **Attachment 2**.

Request for Extension of Public Comment Period **Ex. 1**

Issue Summary: 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 for final deliberation by at least 21 days as provided in ORS 183.335(4).

Staff Recommendation: ORS 183.335(4) requires an agency to postpone the date of a proposed rulemaking action by at least 21 days, and no more than 90 days, “upon request of an interested person received before the earliest date that the rule could become effective after the giving of notice” under ORS 183.335(1). The earliest date that these proposed rules could be effective is the 50th day after staff gave notice to the legislators described under ORS 183.335(1)(d). Staff provided notice to the legislators on May 6, 2020, making the earliest date that the proposed rules could be effective June 25, 2020. Because this request was received before the earliest date that the rule could become effective, Staff recommends Council grant the extension and extend the deadline for written comments to 5:30 PM on Thursday, July 16, 2020.

Council Decision: At its June 25th, 2020 hearing, the Council granted the extension as recommended.

Objection to Rulemaking Caption & Summary **Ex. 1-3,6,8-10**

Issue Summary: The Notice of Proposed Rulemaking states that the purpose of the proposed rule amendment is to clarify the Council’s standard for determining whether an issue raised in a Type A Amendment Review justifies a Contested Case proceeding. Commenters object the use of the word “clarify” because, they argue, the rule would “modify” the threshold standard for requesting—and determining whether to hold—a contested case.

Staff Recommendation: Staff believes the rulemaking caption and summary included in the Notice of proposed document are accurate, and reasonably identify the subject matter of the Council’s intended action in a manner that is sufficient to inform a person that their interests may be affected. For this reason, staff believes the Notice of Proposed rulemaking substantially complies with the requirement of ORS 183.335(2)(a)(A) to include a caption “that reasonably identifies the subject matter of the agency’s intended action.” Further, while staff acknowledges the disagreement over the effect of the proposed rulemaking, we note that a rule is not subject to judicial review or other challenge for failing to comply with ORS 183.335(2)(a)(A). See ORS 183.335(11)(c).

Commenters request additional rulemaking history

Ex. 1,2, 4

Issue Summary: In comments submitted on June 24, 2020, Friends of the Columbia Gorge et al. contended the Council and the public did not have sufficient information for meaningful review of the proposed rule, and requested additional information on past applications of the rule, legislative history demonstrating the intent of the “may affect” language, and discussion of the Council’s interpretation and Application of the proposed rule.

In a previous evaluation, staff noted that the proposed rules relied upon analysis provided in the staff report for Agenda Item I for the March 13, 2020 Council meeting and that it believed the Council and the Public had sufficient information for meaningful review of the proposed rule, and that staff was not aware of any requirement for a rulemaking notice to contain a detailed analysis or legislative history supporting the rulemaking action.

In clarifying comments submitted on July 16, 2020, the commenters agreed that the Council is not under a legal obligation to review and analyze the legislative history of a rule before amending it, but suggested that the Council should understand what rule language it has used in the past, and how that language as changed over time. The commenters also offered rulemaking history on the proposed language, which is summarized by staff with additional notes below:

The “may affect” language was first adopted through Administrative Order EFSC 1-2000. OAR 345-027-0070(6) effective February 2, 2000. Prior to 2000, the rule provided as follows:

“(4) The Council shall determine whether any issue identified in a request for a contested case proceeding is significant as defined in OAR 345-001-0010 or otherwise justifies a contested case proceeding.

(a) If the Council finds that the request identifies an issue that is significant or that otherwise justifies a contested case proceeding, the Council shall conduct a contested case proceeding according to the applicable provisions of OAR 345-015-0002 to OAR 345-015-0085 limited to the issues that the Council found significant or sufficient to justify the proceeding” OAR 345-027-0070(4) effective November 30, 1994. See Administrative Order EFSC 2-1994.

Staff notes that the definition of “significant” used under this rule was identical to the definition in place today:

“‘Significant’ means having an important consequence, either alone or in combination with other factors, based upon the magnitude and likelihood of the impact on the affected human population or natural resources, or on the importance of the natural resource affected, considering the context of the action or impact, its intensity and the degree to which possible impacts are caused by the proposed action. Nothing in this definition is intended to require a statistical analysis of the magnitude or likelihood of a particular impact.” OAR 345-001-0010(48) effective February 2, 2000.

In the 2000 rulemaking, the Council adopted “new language [that] gives the Council guidance in determining whether to grant a request for a contested case.” Administrative Order 1-2000.

“(6) To determine that an issue justifies a contested case proceeding under section (7), the Council must find that the request raises a significant issue of fact or law that may affect the Council’s determination that the facility, with the change proposed by the amendment, meets an applicable standard. 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. If the Council does not have jurisdiction over the issue raised in the request, the Council shall deny the request.” OAR 345-027-0070(6), effective February 2, 2000.

Staff notes that in testimony provided on the proposed OAR 345-027-0070(6) dated January 7, 2000, staff explained that the revised rule was “modeled after language in the final order on the South Mist Feeder amendment.” The Final Order on South Mist Feeder Amendment No. 2, dated April 9, 1999, describes the standards for determining whether to grant a contested case as follows:

“The Council will grant a contested case when it finds that significant issue of fact or a significant issue of fact or law has been raised in the context of compliance with a Council standard, and when the person requesting the hearing has made a showing that there is additional evidence that may affect the Council’s determination that a particular standard is met. 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 will deny the contested case, and will adopt appropriate conditions. The Council will not grant a contested case if the Council does not have jurisdiction over the matter, such as in issues of value in condemnation.” (p. 71)

This language remained in place, with slight modifications until October 2017 when the Council proposed to revise its rules governing site certificate amendments, including a proposal to modify the language in this rule as follows:

“* * *To determine that an issue justifies a contested case proceeding under section (8), the Council must find that the request raises a significant issue of fact or law that may affect the Council’s determination that the facility, with the change proposed by the amendment, meets ~~an~~ **the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24.** ~~If the Council finds that the request would not affect the Council’s determination if the alleged facts were found to be true but that those facts could affect a site certificate condition, the Council may deny the request and may adopt appropriate conditions.~~ If the Council does not have jurisdiction over the issue

raised in the request, the Council must deny the request. OAR 345-027-0071(9), Administrative Order EFSC 5-2017.

As the commenters point out, the revised amendment rules were held invalid by the Oregon Supreme Court in *Friends of the Columbia Gorge v. EFSC*, 365 Or 371, 446 P3d 53 (2019). Following the Court's decision, the Council adopted a new permanent rule containing the language through Administrative Order EFSC 1-2020:

“***. To determine that an issue justifies a contested case proceeding, the Council must find that the request raises a significant issue of fact or law that may affect the Council's determination that the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24. If the Council does not have jurisdiction over the issue raised in the request, the Council must deny the request.” OAR 345-027-0371(9) effective January 28, 2020.

The Commenters claim the text deleted by Administrative Order EFSC 5-2017, and later EFSC 1-2020, directed “the Council to take “as true” the factual allegations of the person requesting the contested case” and that the intent of its removal is unclear. Staff would like to clarify that the intention was merely to remove language which contains provisions that allow Council to adopt conditions addressing a contested case issue in lieu of granting a contested case proceeding, which were separately provided in the previous OAR 345-070-0070(8)(b), which are now found in OAR 345-027-0371(10)(b).

Based on the history provided above, commenters suggested the following interpretation of the proposed rule:

Under the Council's current rules, the Council must answer two key questions in determining whether to hold a contested case to resolve properly raised issues. First, the Council must determine whether any of the issues are “significant.” Second, if any of the issues are deemed significant, the Council must then determine whether the allegations asserted under each of these issues, if ultimately proven true via a contested case, “may affect” the Council's ultimate determination of whether the energy facility will comply with the applicable laws and Council standards. If the answer to both of these questions is “yes,” then a contested case will be held to allow the identified issues to be fully vetted through the adversarial setting afforded by a contested case proceeding. In such instances, the Council will abstain from making its ultimate determinations on any disputed significant issues of fact or law until after it receives recommendations from a hearings officer on how to resolve these issues. This is exactly how the Council's rules are designed and were intended to work. The “may affect” language is integral to this procedural framework, and should be retained in the rules.”

Staff Recommendation: Staff presents the rulemaking history above for Council's consideration. Staff recommends that, in clarifying the intent of the rule, Council should consider the Council's finding on the standard for a contested case provided in the Final Order

on South Mist Feeder Amendment No. 2, as referenced in staff’s testimony supporting the rule language adopted under Administrative Order EFSC 1-2000, as the primary expression of intent underlying the current rule’s language:

“The Council will grant a contested case when it finds that [a] significant issue of fact or a significant issue of fact or law has been raised in the context of compliance with a Council standard, and when the person requesting the hearing has made a showing that there is additional evidence that may affect the Council’s determination that a particular standard is met.” (p. 71)

As described throughout that Order, staff recommends that the rule intends for the Council to employ a two-part analysis when determining whether a person raised an issue that justifies a contested case proceeding on an amendment:

- (1) Did the request raise a significant issue of fact or law regarding compliance with a Council standard;
- (2) Did the request adequately explain how additional fact-finding or argument would help the Council resolve the issue;

In evaluating the second part of the analysis, Council must effectively determine whether the explanation provided has convinced the Council that the additional facts or arguments identified by the requestor as relevant to their significant issue are reasonably likely to affect the Council’s findings of compliance with an applicable law or standard.

Objection to Rulemaking Caption & Summary **Ex. 1-3,6,8-10**

Issue Summary: Commenters object to the Council’s reliance on the reasoning in the Final Order Regarding Application of OAR 345-027-0371(9) in the preparation of the proposed rules. Specifically, they object to relying on that order because it is currently under litigation, initiated by the commenters. In addition, commenters object to the Order itself because they claim the Order fails to cite evidence or supporting examples to support the statement that “[w]hen considering requests for contested case regarding a proposed order on a site certificate amendment subject to Type A review, Council’s practice is to consider whether the request is reasonably likely to affect the Council’s determination as to whether the facility complies with applicable laws and Council standards.” (Final Order Regarding Application of OAR 345-027-0371(9), p. 3.)

Recommendation: Staff notes that the Order was appropriately identified as a document relied upon in the development of proposed rules, but we recommend that addressing any alleged deficiencies of the Order is beyond the scope of this review.

Objection to adjudication of merits of argument prior to Contested Case

Ex. 1-4,6,8-10

Issue Summary: Numerous commenters object to the proposed rules because they believe the proposed rule would require the Council to evaluate the ultimate merits of the issues before a contested case is held to adjudicate those issues.

Commenters believe that it could be impossible for interested persons to raise a significant issue of fact or law that “is reasonably likely to affect” the Council’s determination that an amended facility would comply with applicable laws and Council standards in situations where demonstrating the merits of the issues would depend on evidence that would be produced through discovery in the contested case.

Other commenters assert that requiring the Council to determine if an issue is reasonably likely to affect the Council’s decision could affect the ultimate outcome on such a proceeding, or could affect subsequent requests for judicial review by enhancing judicial deference to the Council’s ultimate decisions on the merits, even when issues were not considered in a contested case proceeding.

Commenters note that under the current rules, the Council may conduct a contested case if a contested case 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.” Commenters assert that this is an appropriate threshold standard to apply at the time a contested case is requested.

Staff Recommendation: Staff believes the commenters have misinterpreted the standard intended by the proposed rule. As discussed above, to justify a contested case proceeding the current rule requires a requestor to explain how the contested case process, either through additional fact finding or development of new legal argument, could influence a determination of compliance made by the Council.

The current rule does not require the requestor to demonstrate that the requestors position will prevail on their issue, but it does permit the Council to deny such a request when there is not some degree of likelihood that the contested case process would affect its determination. This would not change under the proposed rule, which would clarify that the explanation provided by the requestor must demonstrate how the contested case proceedings, through additional fact-finding or legal argument, is reasonably likely to affect the Council’s determination. Staff provides the following review of the amendment process to provide additional context for the threshold and the purpose of the contested case process in a Type A amendment review.

In submitting a preliminary request for amendment, the certificate provides all of the evidence they believe may be required for the Council to determine if the facility, as amended, will continue to comply with those laws and standards.

The Department and other reviewing agencies then review the preliminary application to determine if any additional information is needed to be able to evaluate request. See OAR 345-027-0360.

Once the request is determined to be complete, the Department reviews the request and supporting information to draft proposed findings of facts, conclusions of law, and conditions of approval, to support a recommendation that the Council approve, modification, or denial of the requested amendment. These draft proposed findings, conclusions, and conditions are included in a draft proposed order. See OAR 345-027-0363 and 345-027-0365.

After the Department issues its draft proposed order, the Council must accept public comments and conduct a public hearing on the request for amendment. Notice is provided to all persons on the Council's general mailing list, any special list established for the facility, the reviewing agencies for the facility, and neighboring property owners. Any person who wishes to request a contested case on the request for amendment must raise their issue in their comments with sufficient specificity to afford the Council, the Department, and the certificate holder an adequate opportunity to respond to the issue at this point in the process. See OAR 345-027-0367.

After considering any issues raised in public comments as well as any additional information provided by the certificate holder in response, the Department will make changes to the findings, conclusions, and conditions in the draft proposed order and issue a proposed order recommending approval, modification, or denial of the request.

Under ORS 469.405(1) The council may establish by rule the type of amendment that must be considered in a contested case proceeding. In the Type A review process, any person who commented on the record of the draft proposed order may request a contested case proceeding on the proposed order. With some exceptions, to be granted a contested case, the person must have initially raised their issue in their comments on the draft proposed order, and the Council must find that the request raised an issue that justifies a contested case proceeding, the threshold for which is the subject of this rulemaking. If the Council finds that a properly raised issue justifies a contested case, the Council will either conduct a contested case or, if the Council determines that the issues could be resolved by amending the proposed order, the Council may remand the order to Staff to make the necessary changes. If the Council determines that no issues raised in a request justify a contested case, the Council must deny the request. See OAR 345-027-0371.

Staff recognizes that there is some disagreement about what threshold for a contested case is intended by the current rule (including previous versions); however, we believe the intent is to require the person requesting a contested case to demonstrate to the council why it is necessary to go through the contested case process. Staff believes that threshold of raising "a significant issue of fact or law that may affect the Council's determination..." is intended to require a person making a request to demonstrate that there is a reasonable likelihood that further development of the facts or legal arguments through the contested case process will

affect the Council's determination whether the facility meets applicable laws and Council standards, not just a mere possibility.

This is consistent with Council's past application of the threshold. In the Final Order on South Mist Feeder Amendment No. 2 which, as described elsewhere in this document, provided the model for the current threshold, the Council explained that:

"The Council will grant a contested case when it finds that [a] significant issue of fact or a significant issue of fact or law has been raised in the context of compliance with a Council standard, and when the person requesting the hearing has made a showing that there is additional evidence that may affect the Council's determination that a particular standard is met" (p. 71.)

In the Final Order Denying A Contested Case Proceeding and Approving Amendment #2 to the Helix Wind Power Facility dated August 24, 2012, the Council denied several contested case requests because they merely asked the Council to reconsider determinations which the Council found "should stand unless there are new facts or circumstances relevant to EFSC's consideration...that would affect EFSC's previous determination that HWPF complies with an applicable standard" (Attachment C, page 12.) This denial was upheld by the Oregon Supreme Court in *Blue Mountain Alliance v. Energy Facility Siting Council*, 353 Or. 465, 300 P.3d 1203 (2013).

More recently, in the Final Order on Requests for Contested Case on the Proposed Order on Request for Amendment 1 to the Perennial Wind Chaser Station Site Certificate issued on November 22, 2019, the Council found an issue related to a DEQ issued Air Quality Permit did not justify a contested case because:

"The Requesters fail to explain how adding further information at this point to the record about the status of the facility's ACDP has the potential to affect the Council's determination that the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24, as required by OAR 345-027-0371(9)." (p. 9)

Staff further disagrees with the assertion that providing that an issue must be *reasonably likely* to affect the Council determination of compliance with a standard or applicable law would significantly change the way the Council applies the threshold.

The Model Rules of Procedure for Contested Cases in OAR 137-003-0005 require a person requesting to participate as a party or limited party in a contested case to file a written request that includes either, a detailed description of the persons personal interest in the outcome of the proceeding and "how such interest may be affected by the results of the proceeding", or a detailed description of the public interest the person seeks to represent and "how such public interest will be affected by the results of the proceeding." OAR 137-003-0005(3)(d) and (e). In ruling on such a petition, the agency must consider "whether the petitioner has demonstrated

a personal or public interest *that could reasonably be affected* by the outcome of the proceeding” OAR 137-003-0005(7)(a), emphasis added. In other words, the outcome of the proceeding must be reasonably likely to affect the persons interest. This standard applies in the Council’s review of requests for contested case on an application, and it seems reasonable that the Council would apply a similar threshold for requests for a contested case proceeding in the Type A amendment.

In addition, several commenters assert that the standard would be unfair because in some cases, they claim, the information needed to satisfy the new threshold would only be available through the discovery process afforded by a contested case. Here we note, the proposed rule is also consistent with the Model Rules of Procedure for Contested Cases. Under OAR 137-003-0025(4), any discovery request in a contested case must itself be “reasonably likely to produce information that is generally relevant to the case.” Under the rule, if relevance of the requested discovery is not apparent, party requesting discovery may be required to explain how the request is likely to produce relevant information. Commenters may be correct that, after the relatively involved process of developing the evidentiary record needed for the Council to make a determination of compliance, if there are any new relevant facts previously unconsidered by the Council, they would likely only be obtained through discovery but that is primarily because the Type A Review process has been designed to provide multiple opportunities for information to be introduced into the record prior to the issuance of a proposed order.

While, as discussed above, the phrase “reasonably likely” is consistent with the standard for discovery used in OAR 137-003-0025, we realize some stakeholders are concerned its use could result in a standard that is overly restrictive. One alternative may be to replace the term “may affect” with “could reasonably affect”, mirroring the construction used in OAR 137-003-0005(7)(a). If Council believes a reasonableness standard is not appropriate, the Council could also replace “may” with “is in some degree likely to” or other similar language.

Recommendation to replace “that with “whether”

Ex. 4

Issue Summary: Commenters recommend Council replace the word “that” in the current rule with the word “whether”:

To determine that an issue justifies a contested case proceeding, the Council must find that the request raises a significant issue of fact or law that may affect the Council’s determination ~~that whether~~ 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.

Commenters assert that the word “that” could be read as presupposing that the Council will, in fact, make an affirmative “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” (emphasis added). The Commenters correctly note that if the Council determines that the facility, with the change proposed by the amendment, does not meet the applicable laws and Council standards, the Council must deny the request for amendment.

Staff Recommendation: Staff does not believe the proposed language presupposes an affirmative determination from the Council, however, we agree that the language suggested by commenters does more clearly articulate that either a determination that the facility does or does not comply with the applicable laws or Council standard may be subject to a contested case proceeding. Staff recommends Council replace the word “that” with “whether” as suggested.

Recommendation that Council allow more access to Contested Cases **Ex. 2**

Issue Summary: In oral testimony, a commenter suggested that the Council move toward loosening the standard for contested cases so that the public has greater access to challenging council decisions.

Staff Recommendation: Staff includes this issue for Council’s consideration without recommendation.

Recommendation that Council restore previous version of rules **Ex. 2**

Issue Summary: In oral testimony, a commenter suggested that the Council restore the version of the rule in place prior to the 2017 Amendment Rulemaking. Staff provides the corresponding section OAR 345-027-0070 rule adopted on by Administrative Order EFSC 1-2000, effective February 2, 2000 for reference:

“(6) To determine that an issue justifies a contested case proceeding under section (7), the Council must find that the request raises a significant issue of fact or law that may affect the Council’s determination that the facility, with the change proposed by the amendment, meets an applicable standard. *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.* If the Council does not have jurisdiction over the issue raised in the request, the Council shall deny the request.” (emphasis added.)

Staff Recommendation: As noted in the issue describing the rulemaking history of this language, the language recommended to be restored (emphasized above) was removed because it is separately implemented by OAR 345-027-0371(10)(b):

“If the Council finds that the request identifies one or more properly raised issues that an amendment to the proposed order, including modification to conditions, would settle in a manner satisfactory to the Council, the Council may deny the request as to those issues and direct the Department to amend the proposed order and send a notice of the amended proposed order to the persons described in section (4) of this rule. Only the certificate holder and those persons who commented on the record of the hearing may, in a writing received by the Department within 30 days after the Department issues the notice of the amended proposed order, request a contested case proceeding limited to issues related to the amendment to the proposed order.”

Staff notes that in addition to allowing the Council to adopt conditions addressing an issue raised in a request for contested case, the rule, as adopted in 2020 requires the Department to issue an amended proposed order containing the new conditions and allow opportunity for additional requests for a contested case proceeding specifically on the amended language. Because staff believes the current rules provide opportunities for public participation beyond the rule in place prior to 2017, we do not recommend Council reinstate the prior rule language as recommended.

Recommendation that Council pend issue until 2022 rulemaking **Ex. 2**

Issue Summary: Some Commenters recommend that Council delay consideration of this issue under the rulemaking scheduled to begin in 2022.

One commenter noted that they were not sure why Council was addressing this issue now, since consideration of other issues related to Division 027 raised in public comments during the 2019 Amendment Rulemaking project were deferred to the rulemaking scheduled for 2021.

Numerous other commenters suggest that it is unclear why the Council would want to devote time and resources to this rulemaking when the Council is scheduled to review OAR 345-027 in 2022. Commenters do not believe there are any immediate or urgent reasons to review or revise the threshold standard for contested cases now.

Staff Recommendation: Staff includes this issue for Council’s consideration without recommendation.

Objection to higher threshold for judicial review **Ex. 8**

Issue Summary: Commenters assert that the proposed rules “would also impose a higher threshold for review than those established by the Oregon legislature.” They elaborate:

“Under Oregon’s Administrative Procedures Act, “any person adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order.”² The Oregon Supreme Court has noted that the legislature made a deliberate decision to allow “any person” to seek judicial review of a government action. Additionally, the court has clarified that “the legislature envisioned broad public participation in the energy facility siting process itself.” By imposing a higher threshold for review than the standard established through Oregon’s Administrative Procedures Act, the Council’s proposed amendment would restrict opportunities for public participation in energy facility siting processes.”

Staff Recommendation: It is not clear if the commenters meant to suggest that the proposed rules would impose a standard for a contested case proceeding that is higher than the standard for judicial review under ORS 183.480, or if the commenters suggest that the proposed rules would change the standard for judicial review itself. In either case, staff notes that the proposed rules have no effect on the standard for judicial review, which is provided under ORS

469.403. Staff notes that under ORS 469.405(1), the Council may establish by rule the type of amendment that must be considered in a contested case proceeding, and when there is no contested case proceeding on a request for amendment, a person adversely affected or aggrieved by the agency order may request judicial review from the Supreme Court as provided under ORS 183.482(2). See *Friends of the Columbia Gorge v. EFSC*, 365 Or 371 (2019).

Objection to potential conflict with EO 20-04

Ex. 8

Issue Summary: Commenters object to the proposed rule because it potentially conflicts with Executive Order 20-04, on greenhouse gas (GHG) emissions and climate change. Commenters assert that, the order obligates the Council to exercise its siting authority and discretion to help reduce power sector emissions, and that restricting access to contested case proceedings could prevent concerned members of the public from challenging proposed amendments to site certificates for natural gas-fired power plants.

Staff Recommendation: Staff notes that while it may be appropriate for the Council to consider Executive Order 20-04 in making policy decisions related to greenhouse gas emissions from energy facilities, nothing in the executive order, or the proposed rules, suggests that a person proposing to construct or operate a natural gas-fired power plant or other carbon dioxide emitting facility should be subject to different procedural requirements than a person proposing to construct a non-emitting facility.