



ENERGY FACILITY SITING COUNCIL

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

Energy Facility Siting Council December 18, 2020 Meeting Minutes

**Friday, December 18, 2020 at 8:30 a.m.
Webex Teleconference Meeting**

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

Friday, December 18, 2020 – Webex Teleconference

Call to Order: The meeting was called to order at 8:30 a.m. on December 18, 2020 by Chair Jenkins.

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

Oregon Department of Energy representatives present were Assistant Director for Siting/Council Secretary, Todd Cornett, Senior Policy Advisor, Sarah Esterson, Rules Coordinator, Christopher Clark, Senior Siting Analyst, Chase McVeigh-Walker, Fiscal Analyst, Sisily Fleming, Assistant Director for Nuclear Safety, Maxwell Woods, Nuclear Waste Remediation Specialist, Jeff Burrigh, Operations & Policy Analyst, Wally Adams, and Division Assistant Michiko Mata were present. 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.

October 22-23, 2020 Meeting Minutes

Council Member Howe motioned Council approve the minutes of the October 22-23, 2020 meeting as presented.

Council Member Condon seconded the motion.

Motion carried.

Agenda Modification

No agenda modifications.

Secretary Report

Staffing/Council Updates

Siting Analyst Update

The Department is still in the recruitment process and hope to have the position filled in the coming weeks.

Council Member Condon re-appointment

Council member Condon was up for reappointment to EFSC this week during legislative days at the Capitol. However, the Senate Rules Committee cancelled their evaluation appointments and re-appointments to boards and commissions because they are unable to meet in person. This does not change Council member Condon's status as a Council member and she can continue to serve until reappointed.

Project Updates

West End Expedited Review

On December 11th we received a request for expedited review from Eurus Energy America Corporation for the West End Solar Energy Project.

The proposed project is a 45 MW Solar PV facility with substation, collector lines, roads and battery storage. The project would be located on 324 acres in Umatilla County, approximately two miles southeast of the City of Hermiston.

The reason it is EFSC jurisdictional is because it would be located on high value farmland because the project area is located within the Columbia Valley American Viticulture Area. Any project on high value farmland over 160 acres is EFSC jurisdictional.

Any proposed project that is less than 100 MW average electrical generating capacity is eligible to request expedited review.

The process requires the applicant to submit the request to staff who review it to determine if it is eligible, and then staff makes a determination.

The major difference between a regular review process and an expedited review process is that the expedited review eliminates the notice of intent stage.

We determined that the project meets the requirements of an expedited review yesterday. We are in the process of setting up a project webpage and will include a description of this project on the Monthly Siting Report.

Blue Marmot NOI Public Information Meeting

We held a virtual public information meeting on the new Blue Marmot Notice of Intent last Tuesday evening the 8th and had good participation.

The meeting lasted for about 3 ½ hours and there were around 30 attendees, including one County Commissioner.

Comments related to impacts to agriculture, concerns about the transfer of water rights, impacts to property values and many comments that the project should be put on hold until we could hold an information meeting in person. There were other comments but those were the ones we consistently heard.

Golden Hills Amendment #6

The Oregon Department of Energy received a Type B Review Amendment Determination Request, along with a preliminary Request for Amendment 6 of the Golden Hills Wind Project Site Certificate, on October 1, 2020.

The amendment request seeks Energy Facility Siting Council (Council) approval to:

- 1) Extend the construction completion deadline by 18-months from June 18, 2021 to December 31, 2022;
- 2) Amend the 6,820 acre micrositing corridor by adding approximately 534 acres, and removing 87 acres, totaling 7,267 acres, to allow for more direct and/or consolidated routes and reduce overall disturbance and impacts to existing agricultural practices; and
- 3) Amend preconstruction conditions to specify applicability based on phased construction; amend 9 conditions imposed under the Council's Historic, Cultural and Archeological standard (amend Conditions GEN-HC-01, PRE-HC-01, PRE-HC-02, PRE-HC-03, CON-HC-01, CON-HC-03, and CON-HC-04; and remove Conditions GEN-HC-02 and CON-HC-02); and amend 1 condition imposed under the Fish and Wildlife Habitat standard (GEN-FW-04).

Based upon review of RFA6, the Department concurs that Type B review is justified and made that determination on December 16th.

Summit Ridge – Wildlife Surveys

Condition 2.14 of the Summit Ridge Wind Facility Site Certificate requires that the Department provide an update during a Council meeting of results of plant and wildlife surveys conducted at the site. The condition requires that the update be provided at the “next” regularly scheduled Council meeting following receipt of survey results.

The Department received results of plant and wildlife surveys conducted at the site in July 2020, prior to facility construction commencement in August 2020.

The survey results are available on the project webpage for the facility, and were also provided to Council in their Council packets.

Ms. Irene Gilbert recently and correctly pointed out to staff that we failed to provide the results of those surveys to Council at the next Council meeting after receiving them. We appreciate her pointing this out to us and apologize if that created any confusion for Ms. Gilbert or anyone else.

To ensure we provide Council future survey results at the next meeting following receipt of surveys, and make those available to the public, we have placed a note to file to trigger a staff reminder. We are confident this will resolve this issue.

The surveys that were conducted at the site in July, prior to any construction, identified 3 active raptor nests (1 red-tailed hawk, 2 common raven), and 1 inactive nest, and did not identify any Threatened and Endangered (or candidate) plant species within the survey corridors (within 200-ft of construction area).

These survey results were used to inform the certificate holder of avoidance areas and work area restrictions and based on these surveys, construction activities were restricted from occurring within 500 feet of the active red-tailed hawk nest (work activities were approx. 720 feet from the edge of the nest buffer – 1,320 feet from nest)

Future Meetings

January 22 – They will definitely need a half day meeting, and based on Council preference it will be on Friday morning.

Vice-Chair Grail mentioned her availability for January has not been confirmed due to a possible conflict.

Council Member Condon asked about the expedited review of projects under 100 acres, and if it was an EFSC rule or standard because she thought the expedited review of 100 acres on a high value farmland was interesting. She asked where that policy came from.

Secretary Cornett replied that the jurisdictional threshold was 160 acres on high value farmland, and that it was in statute.

B. Radioactive Materials Enforcement Rulemaking - Council Consideration of Proposed Rules (Action Item)¹ – Christopher Clark, Rules Coordinator; Maxwell Woods, Assistant Director for Nuclear Safety; Jeff Burreight, Nuclear Waste Remediation Specialist. Council considered issuing a Notice of Proposed Rulemaking for proposed revisions to OAR chapter 345, division 029, related to enforcement of rules and laws governing the disposal of radioactive waste materials in Oregon and initiated formal rulemaking proceedings on the proposed rules. For more information visit the [Rulemaking](#) page.

Mr. Woods provided background on the rulemaking project and explained its relation to a Notice of Violation issued to Chemical Waste Management Northwest.

¹ Audio for Agenda Item B = 00:22:23 – December 18, 2020

Mr. Clark provided an overview of the existing process for enforcement of laws and rules under the Council's Jurisdiction.

Council member Condon asked what part of the process was public?

Mr. Clark replied that enforcement actions are typically contested cases, and are administrative proceedings between an agency and responsible party. He stated that there was not a public comment period built into this process, but that there was some public participation in determining what corrective actions were appropriate in response to the Notice of Violation issued to Chemical Waste Management.

Mr. Woods confirmed that there is no public comment period built into the process in the Division 29 Rules, and that the public comment period on the corrective action plan proposed for the Arlington Landfill has been voluntary.

Council Member Condon asked if a member of the public that reported a violation or a potential violation would be informed later of the outcome?

Mr. Woods stated by a strict reading of the rules they would not be informed of the outcome, and that it would be the choice of the Department to keep them involved.

Council Member Howe asked if the responsible party was the only one that could request a contested case or if a citizen who reported the violation could also request the contested case?

Mr. Woods replied they could not, as the proceeding is between the violator and the agency.

Mr. Clark added that under the administrative procedures act, contested cases in general are limited to the affected parties. He added that it is possible a member of the public could attempt to intervene in a contested case on a notice of violation, but that is unusual.

Chair Jenkins asked if you had a citizen report, the investigation and fact finding is up to the Department?

Mr. Woods confirmed that was correct.

Chair Jenkins replied that essentially the Department is responsible to verify the report was accurate or not.

Mr. Woods confirmed and it was the case with the chemical waste management, and that his colleague Mr. Burrigton could speak more to the details.

Chair Jenkins asked what happens if the party doesn't agree with the order, is there an appeal opportunity?

Mr. Clark replied that the contested case hearing is the first opportunity for administrative review, so if the responsible party disagrees with the Director's statement of facts resulting in the final order or result to be incorrect he could contest that through the contested case process. The hearing officer would draft a proposed order to change any findings of fact or law that the hearing officer felt were incorrect through the contested case process. If the responsible party still disagrees after the final order is produced there is an opportunity for judicial review.

Council Member Howe asked if there was the ability to issue a stop work order and require a person who is continuing a violation to cease and desist until the enforcement issue is resolved?

Mr. Clark replied that the rules do not address this, but that statute allows both the Director and the Council to both seek a court injunction, and the Director to order a halt to any transport or disposal of radioactive waste.

Council Member Condon stated she was a bit concerned about the change from the notice of violation to issuing a “pre-enforcement notice” in the proposed rules.

Mr. Woods noted that the pre-enforcement notice was a way to take the first steps towards understanding the facts of the matter, and to understand the issue at hand. It’s intended to be a procedural step that allows them to work with the responsible party, and to understand the issue and circumstances before taking enforcement action.

Secretary Cornett, referring to the table in the presentation, stated the first step for enforcement of energy facility siting requirements was the issuance of a Notice of Violation. However, in practicality they use what would be considered a pre-enforcement notice, even though it’s not in the established process now.

Mr. Woods added that the pre-enforcement notice process is a DEQ process that they borrowed to be more consistent within State Government.

Mr. Clark and Mr. Burrigh provided an overview of violations involving radioactive materials and wastes.

Chair Jenkins asked if aggravating and mitigating multipliers for penalty amounts can be combined.

Mr. Burrigh confirmed that they would stack the two, but that any penalty that the agency levies cannot exceed \$25,000 per day of violation. If you had a violation that had many stacked multipliers you’d have to stop once you reached \$25,000 per day.

Mr. Burrigh provided an example scenario of a violation involving a the transport of radioactive materials.

Chair Jenkins asked on transport in Northeast Oregon they will have snow storms and he assumed the interstate would be a transport route. If ODOT reroutes the traffic are these transports authorized to take reroutes identified by ODOT, or do they just have to wait?

Mr. Burrigh stated he actually has not directed a shipment yet. However, it was common for transports coming from the Hanford site to take highway 84, and his understanding was those shipments were tracked in real time by the Agency. So his expectation would be that the transporter would contact their management or to contact them directly to keep them notified of the change, so then the Agency could respond accordingly.

Mr. Woods added communication would be key.

Council Member Condon asked if transport on an authorized route involved the possibility of a traffic accident would it be considered as a major severity, not minor.

Mr. Burrigh stated if they were levying a penalty staff would know the facts of the accident, and that those facts could influence the severity, but it would be case by case.

Council Member Condon asked for confirmation that not every violation involving transport on an unauthorized route would be minor severity.

Mr. Burrigh confirmed.

Council Member Howe asked Mr. Burrigh to further explain the step to add an amount for Economic Benefit.

Mr. Burrigh stated that if the responsible party saved \$90,000 from not following the law appropriately, that would be the amount the State could add to the civil penalty.

Mr. Woods added that DEQ has that rule structure and uses it regularly. He noted that DEQ levied an amount for economic benefit against Chemical Waste Management and the transport company Oil Waste Logistics (OWL).

Mr. Clark added that they proposed to adopt some of the same implementing language DEQ uses that describes how they would make the needed assumptions to run the model.

Mr. Clark provided an overview of the Notice Proposed Rulemaking and the expected timeline for the rulemaking proceedings.

Vice-Chair Grail stated that she had concerns about issuing the rulemaking notice right before a holiday.

Mr. Clark stated they were statutorily required to give a 49-day notice to specific members of the Legislature, but the required timeframe to notify members of the public is only 28 days. He stated that if Council felt it would be more appropriate, staff could issue the notice to the Legislature then wait until after the holidays to issue it to the public. He stated this would still allow the Council to meet the timeline, and if Council wanted to allow more time for public comment that would be up to them as well.

Vice-Chair Grail asked for feedback on timing from the rest of the Council.

Council Member Howe agreed with Vice-Chair Grail, and liked the proposal to notice the Legislature and put the public notice off until January.

Chair Jenkins asked if they did the hearing in January, and they received requests from the public to extend it, they could extend it to February correct?

Mr. Clark replied that was correct and if they wanted to extend the written comment period the Council could do that. As far as establishing a new hearing for oral comments they would have to re-notice.

Mr. Woods added that if he remembered correctly they could hold a second hearing at the February meeting if they felt inclined.

Mr. Clark confirmed that was correct, they'd just need to provide a 21-day notice of a hearing.

Council Member Condon agreed with the other Council members.

Chair Jenkins asked for confirmation that his understanding was they would request notice to be given to the Legislature, and hold off on the general public notice until after the 1st of the year.

Council member Howe motioned that the Council approve the request for authorization to issue the Notice of Proposed Rulemaking as presented by staff. (Note, the Notice will be provided to Legislators on Monday the 21st and to the public after the holidays. Hearing will be held at the January Council meeting with the possibility of a continuation to February if requested by public.)

Vice-Chair Grail seconded the motion.

Secretary Cornett outlined the nature of the motion to ensure they all understood it correctly, and that it worked for Mr. Woods and Mr. Burright.

Consensus from Council and Mr. Woods.

Motion carried.

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

C. Annual Election of Officers (Chair and Vice Chair) (Action Item)² – Todd Cornett, Council Secretary.

Consistent with OAR 345-011-0010(1), Council completed its obligation to annually elect a Chair and a Vice Chair.

Chair Jenkins stated his term ends at the end of 2020, and his replacement has not been found yet. However, he told Secretary Cornett he would be willing continue to serve as Chair until a replacement was found, and assumed an election of officers would need to happen once he did leave.

Council member Condon thanked Chair Jenkins and felt he has done an amazing job. However, she felt with his term ending they should elect someone else. She stated Vice-Chair Grail would be a good fit, depending on her willingness to serve.

Vice-Chair Grail confirmed she was, she thanked Chair Jenkins, and hoped he'd be willing to mentor her as needed. She also asked Council member Howe if he'd be willing to step up to Vice-Chair.

Council member Howe confirmed he would.

Council member Truitt motioned that the Council elect Marcy Grail to serve as Chair and elect Kent Howe to serve as Vice-Chair starting at the first Council meeting in 2021.

Council member Condon seconded the motion.

Motion carried.

Secretary Cornett express his appreciation to all Council members.

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

D. Future Meeting Dates (Information Item)³ – Todd Cornett, Council Secretary. Council reviewed and confirmed the 2021 EFSC meeting schedule.

Council member Condon stated all the dates were good.

Council member Howe stated he was good with all the dates.

Secretary Cornett also added the future with COVID was unknown and their inability to meet in-person for now, at least next 3-4 meetings, will be via webinar. He also stated they had a Draft Proposed Order hearing coming up for the Madras facility, and they had an obligation to hold that hearing in-person and in vicinity of the project. They would be looking at holding that meeting sometime around February, which would be the only potential for an in-person meeting for the next few months.

Mr. Rowe requested Council to take note that based on the pre-hearing conference for the Obsidian Solar Center contested case yesterday that they were anticipating if there were any appeals for petitions for party status, Council would consider those at the February meeting.

² Audio for Agenda Item C = 01:29:55 – December 18, 2020

³ Audio for Agenda Item D = 01:37:49 – December 18, 2020

Council member Truitt stated he would not be available for the May 21-22, 2021 meeting.

Chair Jenkins stated he has a conflict for the September 2021 meeting dates.

Vice-Chair Grail reminded Secretary Cornett that her availability for January is unconfirmed, but she'd let staff know once she could confirm availability.

Chair Jenkins asked Secretary Cornett if there was still active discussion on Legislation to change the quorum to 4 instead of 5?

Secretary Cornett confirmed it is one of the Legislative Concepts that is moving forward in the 2021 Legislative session. He stated that every other board or commission has a straight majority, in our case it would be 4.

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

E. Public Comment Period (Information Item)⁴ – This time was reserved for the public to address the Council regarding any item within Council jurisdiction that is not otherwise closed for comment.

Irene Gilbert: Her first comment pertained to Blue Marmot, and why after three years it's being expedited? It's 3 miles from Hermiston and on high-value farmland, which she didn't understand how any project could be entirely on high-value farmland and be expedited. She felt ODOE did not provide adequate information to Council regarding that. Her second issue pertained to Golden Hills amendment being processed as a Type B, this was an 18 month extension from the start date, adds 534 acres, and if it was a change only to the siting corridor why are they adding 534 acres. If there are 9 site certificate changes including wildlife changes how can Council do this as a Type B amendment if these are significant changes, as the public would want the ability to provide feedback and possibly even request for contested cases. Third, she sent a letter to Council regarding the roughly 20 pre-construction conditions for Summit Ridge that were not met prior to the start of construction. Do you truly believe that resurfacing of a road or driveway considered a start of construction? While there was an effort to change the site certificate conditions, it's not allowed as it requires an amendment. All the conditions she listed in her letter needed to be completed prior to the start of construction, and Council was reaching to allow ODOE to claim construction had started on this development. She encouraged Council to look at that since they were the ones that end up being held liable. She stated there was a recent small money award of attorney fees to the Friends of the Columbia Gorge for decisions on the amendment rules in regards to procedures. While the amount was small, it's important to note there was a 14 page dissent by one of the Superior Court Judges. She has been saying word would get out that the Council was exceeding their authority, and that ODOE was making recommendations without enough information for Council to know what they should be doing. She then read the following quote: "The Council acted without a reasonable basis in fact or law in both issues in which the petitioners prevailed which required a money award", the second quote "The Council's disregard to the statutory requirements is no less stark than its disregard of the statute providing for the scope of judiciary review and other than contested cases of which was unreasonable." She stated Council is starting to get some kick back from the Supreme Court for their failure to abide by the statutes. Lastly, the Legislature had determined some rules regarding participation on Council. The statute 469.450(2) says "The term of office of each member is four years, but a member serves at the pleasure of the Governor. Before the expiration of the term of member, the Governor shall appoint a successor whose term begins on July 1 next following. A member is eligible for reappointment, but no member shall serve more than two full terms. If there is a vacancy for any cause, the Governor shall make an appointment to become immediately effective for the unexpired term." She stated this related to Chair Jenkins and that according to statute he was unable to perform any duties legally, and she objected to his participation on the Council. That the Governor needed to appoint someone immediately.

⁴ Audio for Agenda Item E = 01:46:55 – December 18, 2020

No further public comments.

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

F. Council Review of Request for Transfer/Decision on Request for Amendment 5 of Summit Ridge Wind Farm (Action Item)⁵ – Sarah Esterson, Senior Policy Advisor. Council received a presentation from staff on the transfer request, comments received on the record of the transfer request, and will take action to approve or deny the transfer request. If approved, Council will issue a fifth amended site certificate to reflect the new certificate holder owner. For more information visit the [Summit Ridge Wind Farm](#) project page.

Council member Howe asked if procedurally the Council should provide their position on each of the four as they go through them, or wait until the end?

Ms. Esterson stated it would probably be easier to talk about each one as they go through them, but there are only four so either works for her.

Issue #1: Date of Transaction

Chair Jenkins asked for consensus for the first issue.

Council member Condon asked about the requirement for notice of expected date, and was that intended to provide advanced notice in order to do some due diligence on the new owner since it is required in the conditions?

Ms. Esterson stated if the certificate holder is aware of a transfer the Department wants to know about it, because the transfer amendment will be required. She didn't think they would necessarily do due diligence before they received the transfer request, but there were mandatory requirements in their rules that say if you become aware of a transfer you have to let the Department know as soon as possible.

Mr. Rowe asked if Ms. Esterson could pull up the rule language, as he felt it would be helpful. The rule to look at was 345-027-400(2). He wanted to point out the rule says "if possible the certificate holder must notify the Department 60 days prior to the transfer." Thus, the rule doesn't require notification 60 days prior to the transfer, it says "if possible". In sub 4 of this rule it says the certificate holder should provide the date of the transaction "if known", it's not a hard requirement that they provide this. As Ms. Esterson indicated they did provide the transaction date in the cover letter and two items in attachment 3 show the effective date of August 3, 2020.

Council member Condon stated she struggled with this one because there was a requirement through notice of transfer date if possible. Clearly they could have given notice at any time prior to August 3rd, as they certainly knew this was happening before they did provide notice. So what was the point of the requirement? She understood this was more administrative and may not have any effect on what they were doing, but it didn't make sense to her that there was a requirement. As they go up to making the sale, they know they need a transfer, and they didn't get notice until August 21.

Mr. Rowe understood the certificate holder had verbally informed the Department prior to the written request, but he deferred to Ms. Esterson to confirm.

Council member Condon asked if that was sufficient, a verbal notice?

⁵ Audio for Agenda Item F = 01:54:45 – December 18, 2020

Mr. Rowe stated looking at the rule it doesn't say it requires written notice, it just says provide 60 day notice if possible. Ms. Esterson can speak more to the context of the conversations they had with the certificate holder.

Council member Condon stated that wasn't necessary, and thanked Mr. Rowe for the explanation.

Chair Jenkins asked Council for a consensus that staff has provided an adequate explanation for the date of transaction issue.

Consensus by Council.

Issue #2: Construction prior to approval of transfer

Vice-Chair Grail asked if it was safe to say that during this process because Pattern is the owner they are liable? Simply put, because until something is finalized they are ultimately responsible for the facility?

Ms. Esterson confirmed that was correct. It's really the site certificate holder, which is Summit Wind LLC, but the certificate owner by connection is Pattern.

Council member Howe stated he agreed with the conclusion that staff came up with that Pattern Renewables, LLC remains the certificate holder for these issues.

Council member Condon stated she understood that Pattern remained liable, but she wondered from the public perspective who sees Pattern as liable, but Aypa, the new company is now doing work. Does Aypa have any responsibility to the public? They aren't approved to be a site certificate holder.

Mr. Rowe stated that based on statements from their legal Counsel, Aypa isn't doing the work. It's the certificate holder Summit Ridge that is doing the work.

Council member Condon stated she understood that, but they are also saying Pattern remains liable because they are the certificate holder parent. However, now Aypa owns Summit Ridge, so are they liable for anything?

Mr. Rowe, stated that for purposes of the site certificate until Council approves the transfer that is pending Pattern would remain liable, as well as Summit Ridge. Summit Ridge will remain liable even after the transfer, and Aypa would be the parent.

Council member Condon stated she understood it from the Council perspective, but she was thinking of it more from the public perception of the process.

Ms. Esterson stated it is confusing when the transfer is of the certificate owner, where the owner comes in is the Council's evaluation of compliance with the organizational expertise and retirement financial assurance standard because they are normally the larger entity that has the experience. The executer of the site certificate is Summit Ridge, LLC. If it were a transfer of the certificate holder Ms. Condon's questions would fit better. It's just a bit disconnected when it's a transfer of a certificate holder owner.

Council member Condon stated her concern was they often rely on the expertise of the parent company. Now they are no longer involved, and now it's a new owner before the Council has even done their review. Which she felt was a very odd process.

Ms. Esterson stated the Department had received documentation showing the sale was fairly uncertain until the minute it happened.

Chair Jenkins asked Council for a consensus that staff has provided an adequate response for the second issue.

Council member Condon stated she wasn't completely satisfied, but understood.

Consensus by Council.

Issue #3: Royal Bank of Canada comfort letter

Vice-Chair Grail stated from the public standpoint she could see where the concern is about seeing something different when they were used to seeing the Department forms. Ms. Fleming has done her review and is comfortable, as a Council member she was comfortable. The issue in her perspective is the public doesn't see that they are able to go back and obtain additional information, and she felt that is what the problem was. She didn't feel it was something to deny the transfer for, but they should be mindful and perhaps try to be more forthright about the expectations of future applications.

Ms. Esterson agreed with Vice-Chair Grail's comment, and they could have identified through an evaluation of whether the application was complete. Although completeness wasn't technically one of the steps of the transfer, but the Department could have caught it. Council could consider if it was a significant enough issue to want for a better letter.

Council member Condon as she mentioned at the last meeting didn't find any comfort in the letter as it referred to Aypa Canada, which someone spoke to, but didn't feel it was adequate. Her understanding was regardless of the comfort letter there will always be a bond or letter of credit from either Pattern or Aypa, but her concern is what if there were a lapse or glitch that makes the letter go away. What happens then, is there assurance that there will always be a bond or letter of credit from someone?

Chair Jenkins replied that there is a mandatory requirement for one in the condition 14.1.

Council member Condon stated it's mandatory, but the project has already been started that now stops if the letter goes away? She didn't have a good enough understanding for the "if" or if it was even possible.

Ms. Esterson replied that they do have a letter of credit in place now. They did go over a process of getting that letter of credit since they wanted to make a few changes, but they do have one in place. They have a process annually when they are required to be updated for inflation. She didn't know how it would lapse.

Council member Condon stated maybe it never lapses, it's just odd they are dealing with one company for an unknown date until they have a letter of credit from Aypa, they are still dealing with Pattern who is no longer involved at all. To her that was a concern.

Mr. Rowe stated Council member Condon raised a good point, and suggested they look at the existing letter of credit from Citi Bank for Pattern Renewables, LLC to see if it would no longer be valid because of the transfer. If Council could no longer rely on it then Council could ask for an actual letter of credit issued in the name of the new owner instead of the comfort letter in place before the approval of the transfer.

Secretary Cornett stated the way bonds work is they don't expire until the Department releases them. Should Council approve the transfer Aypa will want to replace it because until the Department releases it, it is their security. It doesn't lapse because a transfer occurred, they still retain authority and have it in possession if needed to decommission the facility.

Council member Condon stated they don't know what the conversation with the lender was, but in issuing the letter of credit if the lender asked what their relationship with Summit Ridge was, and they stated they owned them. Well that is a very different relationship than what they have now, so does that impact the relationship with the financial institutions risk assessment for Pattern?

Secretary Cornett replied it wouldn't because that is the purpose of having a bond. Should the limited liability corporation evaporate and the parent company be unable to decommission the facility on their own, the Department has the financial instrument in hand. If it didn't operate in that way then it would provide no value to have these instruments in hand because at any point in the future any of these certificate holders, almost all of which are limited liability corporations, could evaporate. The Department would then be stuck in a situation where they no longer had the ability to decommission a facility. The nature of this system is based on the ability of these instruments to go beyond a certain amount of time or ownership of the facility. He was comfortable as they had the instrument in hand, covering them through the transition. His assumption is should the transfer go through the relationship between Pattern would want Aypa to submit their own bond or letter of credit, and only at that time would the Department release the original letter of credit.

Council member Condon stated she understood that, but the difference is if Summit Ridge, LLC would go away versus the parent company. At least she felt it was different, but she did understand they were completely covered.

Chair Jenkins asked Council for a consensus that staff has provided an adequate response for the second issue.

Consensus by Council

Issue #4: Limitations on changes to conditions through transfer process (Nov 16 staff report)

Ms. Esterson asked Council what method they preferred pulling up the table in the staff report or the draft final order.

Chair Jenkins stated he found table to helpful.

Council member Howe, Truitt, and Vice-Chair Grail agreed with Chair Jenkins.

Ms. Esterson brought up the Department's Evaluation of Previously Proposed Condition Language and Recommended Action table, then walked through each condition.

- Condition 2.10: No comments from Council.
- Condition 5.1: No comments from Council.
- Condition 5.2: No comments from Council.
- Condition 6.1: No comments from Council.
- Condition 6.31: No comments from Council.
- Condition 5.2: No comments from Council.
- Condition 5.4: No comments from Council.
- Condition 4.6: No comments from Council.
- Condition 10.4: No comments from Council.

Chair Jenkins asked if Ms. Esterson was seeking to determine if Council agreed with column three in the table, correct?

Ms. Esterson confirmed the Recommended Action column was correct.

Chair Jenkins stated so if any of the Council members felt they disagreed with the recommended action for any of the conditions they would need to go through the amendment process. He asked if there were any comments or questions from the rest of the Council.

Council member Condon felt this table was helpful and her concern was that staff appeared to have thought the amendments to the conditions were important enough to propose them, and in order to apply them they would

have to go through the amendment process. She was uncomfortable with disregarding them since staff felt they were important enough to be included.

Council member Howe thought they were considered as clarifications at the time, but staff had convinced him there is evidence the owner complies without making the changes to the language, so he is okay with eliminating the changes and approving the transfer.

Chair Jenkins stated from his perspective it was staff's desire to make sure all the bases were covered being as clear as possible to the new owners. However, he felt the issue was if the standard was met only through the new conditions or through the staff proposed finding. He felt that the standards are met for the organizational expertise and retirement through the findings, and that's the goal.

Council member Truitt stated he didn't have anything to add.

Vice-Chair Grail stated she was struggling because they got to a point where they recognized they were not entitled to make the changes, but it felt like they were short circuiting the process right now. She understood based on the language this would clarify, but she struggled with this one.

Council member Howe motioned that the Council approve the request to transfer certificate holder ownership of the Summit Ridge Wind Farm site certificate from Pattern Renewables 2 LP to Aypa Power LLC as presented by staff.

Council member Condon seconded the motion.

Vice-Chair Grail stated Ms. Esterson had done a good job clarifying the issues, and she hoped the members of the public sees the work done to ensure everyone was on the same page. That she was fine with moving forward.

Council member Condon referring to condition 5.1, in Oregon it seemed like a critical change. She wondered if Pattern had any engineering experience, but this change seemed to be necessary since staff included it. So by not adopting it, did experience in Oregon not matter?

Chair Jenkins replied that the standard didn't state the experience had to be in Oregon. The standard requires they have substantial experience.

Council member Condon stated she understood that, but she understood at the last meeting staff thought it was important they had Oregon experience. Would they have included it for Aypa and not Pattern?

Ms. Esterson stated that in their initial evaluation Council saw in November, they had rejected the idea they could rely significantly on the personnel of Aypa because their experience was before they were employed by Aypa. It wasn't that they previously disregarded it, they just didn't put a lot of weight into it. They are shifting to be fair in that they don't have to have EFSC experience to be a new owner. The individuals employed by Aypa have 15-30 years of experience as individuals in the industry. Steven Ostrowski, the site certificate contact for Summit Ridge has over 15 years of experience in Oregon, so as individuals, they do. Aypa and Blackstone as entities do not, which is where she tried to address that limitation here, not to say it was required. It's common that contractors may not have Oregon experience, and there is sometimes a lot of back and forth between them and the agency before a Geotech report is satisfactory. The idea of this would be to reduce that back and forth making the process more efficient, but it doesn't mean they are not certified geologists or qualified to do the work. It was an attempt to be more clear and efficient.

Motion carried.

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

G. Council Review of Department’s Request to Use Consultant in Review of EFSC Facility Compliance with Historic, Cultural and Archeological standard (Action Item)⁶ – Sarah Esterson, Senior Policy Advisor. Council considered appointing a consultant, pursuant to ORS 469.470(6), to support the Department and State Historic Preservation Office (SHPO) review of application, amendment and preconstruction compliance materials related to Council’s Historic, Cultural and Archeological Resources standard (OAR 345-022-0090) for specific projects under review (Blue Marmot Solar, Bonanza Energy Facility, Wagon Trail Solar, Wheatridge Renewable Energy Facility III, Golden Hills Wind Project and Montague Solar Facility) as needed.

Chair Jenkins stated there were some specific projects listed in the staff report, and asked if they were to specifically identify those projects in the motion?

Ms. Esterson confirmed they should or state for the facilities identified in the December 6, 2020 staff report.

Secretary Cornett stated they did this purposely, while they may not be specifically listed in the motion language it does refer to the staff report which does list the facilities. Should there be a need to go outside the scope of these projects we could easily bring it back to Council, but this is strictly limited to those listed in the staff report. He also stated if Council wanted staff to provide updates to indicate that is their desire in the motion, and staff would provide updates to Council as needed.

Vice-Chair Grail motioned that the Council appoint Hart Crowser to serve as a consultant to provide technical expertise and review of application, amendment and preconstruction compliance materials related to Council’s Historic, Cultural and Archeological Resources standard for the facilities identified in the December 6, 2020 staff report. (Friendly amendment to motion to update Council during Council Secretary report as to the status of any activities related to this approval)

Council member Howe seconded the motion with the addition to the amendment to update Council.

Council member Condon asked for clarification on what the “update” consisted of, was it an update on the relationship with Hart Crowser or the work Hart Crowser has done, what’s the update?

Secretary Cornett replied that anytime they execute an agreement on a specific project they would update Council in the Secretary Report, and any changes related to that as they moved along with a project. That it would become a regular part of his Secretary Report.

Council member Howe stated that was perfect, and Vice-Chair Grail agreed.

Motion carried.

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

Secretary Cornett stated at the last Council meeting Fuji Kreider experienced technical difficulties during the public comment period, and was unable to provide her public comment. She subsequently sent an email, which he provided to Council. He stated he did see her on the attendee list with her hand raised, so he asked Council if they wanted to extent the public comment timeframe to allow Ms. Kreider or anyone else that was interested to address the Council. He just wanted to be respectful as she wanted to provide comment before and was unable to due to the technical difficulties.

⁶ Audio for Agenda Item G = 00:00:00 – December 18, 2020

Chair Jenkins asked Council if they wanted to open it up to hear from Ms. Kreider, and anyone else that may want to address the Council.

Consensus from Council.

Additional Public Comment Period (Information Item)⁷

Fuji Kreider: Thanked Council for allowing her the opportunity, and staff for teaching her how to raise her hand. She wasn't sure of the process to get interim reports on what is happening with other cases, and they all have been absorbed in the Boardman to Hemmingway case appeal process. She still had a question in regards to the rule exemption that Council voted on in August, and it's on the rule exemptions for the contested case process. There is now a final order for the exemption from the Attorney General herself, and she's approving it except for summary determination clause. The Attorney General stated she would leave that one up to Council, ALJ, and the parties to resolve. Ms. Kreider asked if they had read that Attorney General, and if and when Council planned to address it.

Secretary Cornett stated he was referring this to Patrick Rowe, as it would be more appropriate for Legal Counsel to give direction to Council if they should respond or how the Council should handle this.

Chair Jenkins agreed, and stated that the public comment period wasn't for the purpose of a back and forth discussion, it was mean for the public to provide comments or feedback to the Council.

Mr. Rowe asked if Council was looking for him to interpretation of the AG's exemption or are they asking if they should respond to Ms. Kreider's comment?

Chair Jenkins stated they should probably address if Council should respond first.

Mr. Rowe stated this was just a public comment period and there was no obligation to respond. He also stated to avoid setting a precedent he didn't think they should respond otherwise the public may expect there will be a dialogue between them and the Council when the public makes its comments. Should Council want a better understanding of the AG's exemption he could provide his interpretation of that, which he had already provided to the participants in the B2H case.

Chair Jenkins asked if that was something Mr. Rowe had already provided?

Mr. Rowe confirmed he did, and that he sent an email to them setting forth the Department's position as to the significance of that exemption.

Chair Jenkins asked Mr. Rowe to summarize it for Council.

Mr. Rowe provided some context to remind Council how this transpired. Council contested cases have always proceeded under the model contested case rules and Council's own rules. Recently the Council decided that they would start using the Office of Administrative Hearings ALJ's to act as Hearing Officers. OAH have their own contested case rules, so because Council is using an OAH Administrative Law Judge including in the Boardman to Hemingway contested case and the Obsidian contested case, Council needed to ask the Attorney General to provide an exemption because normally the OAH would apply their own rules. As Mr. Woods presented at the August meeting, they would like to continue using the model rules and EFSC's own rules that they've always applied in their contested cases. However, they would also like to continue using an OAH Administrative Law Judge. In order for them to do that, they had to request an exemption from having to use the OAH rules from the Attorney General. That is what Council authorized the Department to request, which the Department did. Originally the Attorney General approved that request just for the Boardman to Hemingway case, which caused concerned with the participants and why the exemption was

⁷ Audio for Additional Public Comment Period = 03:17:15 – December 18, 2020

only being applied to their contested case when the request Council had made was a blanket exemption. The Attorney General re-visited that issue, and granted a blanket exemption for all contested cases through next June once the agreement between the Department and OAH expires. He did expect this agreement to be renewed, and upon renewal he expected the Attorney General to extend the blanket exemption through the term of the new agreement. In the second exemption when making it a blanket exemption the Attorney General included a statement that said Council can continue to apply the model rules and its own contested case rules, and she also stated "I note that such rules do not contain a specific rule regarding motions for summary determination, an issue which I leave to the Council, presiding ALJ, and the parties to resolve". The way the Department has interpreted that is if you are in a contested case, and someone (a party) wants to bring a motion for summary determination they should argue to the ALJ they should be allowed under the model contested case rules and the EFSC contested case rules governing the case. That was his understanding and what has happened in a recent contested case. There wasn't a rule that explicitly allowed motions for summary determination, so the parties argued whether or not such motions should be allowed under the model rules and the Council rules. The interpretation of the AG's statement is that the Department should do what you did in the last contested case and sort it out between the presiding ALJ and the parties, it also states to leave it to Council to resolve. He stated that to him this means if Council wanted to adopt a rule that explicitly said that in their contested cases they can do motions for summary determinations or vice versa Council could adopt such a rule, or Council could proceed with the existing rule in place that discusses motions in contested cases in general.

Chair Jenkins thanked Mr. Rowe, and he felt that his summary answered Ms. Kreider's question. He agreed with Mr. Rowe's recommendation that they didn't go beyond that as far a discussion.

Secretary Cornett also wanted to confirm it is a general exemption and not specific to any particular project. The questions that are being raised are fine, but they can't get too far into the details related to any particular project. He also reiterated that this was not the forum to debate the merits or the details associated with the Attorney General's exemption. Mr. Rowe provided an appropriate explanation, but this is not the appropriate forum to debate the meaning or how it will play out in a particular project or contested case.

Irene Gilbert: Ms. Gilbert stated the AG rules says what it says, and it says the Council would be involved in any decision to include summary determination in any case. Historically, the Council guaranteed the participants in the Boardman to Hemmingway contested case would not be impacted by any changes in use of the model rules. Originally it was just the Boardman to Hemmingway case, and she reminded Council of ODOE's guarantee, then Mr. Rowe asked for the exemption for just the Boardman to Hemmingway contested case, and he also represented the Attorney General in responding and approving it. So she had major questions in that decision. The follow up decision, which was a fraudulent one, again included the Boardman to Hemmingway contested case. Which was against what the Council assured the public of, and the procedural change that was requested to benefit ODOE and Idaho Power. When summary judgement was used in the past, it was with her and the public has no understanding of the manipulation of the legal procedure. They had promised no changes in the rules, the process so far in the Boardman to Hemmingway has been prejudicial against the public. She encouraged Council to follow the AG rules, and have a Council meeting that includes the ALJ and the public, and the Council. Then have a decision that is made through that process regarding that strange interpretation that the ODOE has chosen to use in order to insert a process that was clearly prejudicial against the public.

No further public comment.

Meeting adjourned at 12:22 p.m.

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