



# ENERGY FACILITY SITING COUNCIL

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

## **Energy Facility Siting Council**

**April 22-23, 2021**

**Meeting Minutes**

**Thursday April 22, 2021 at 5:15 p.m.**

**Inn at Cross Keys Station -- 66 NW Cedar St. -- Madras, OR 97741**

**In-Person/WebEx Teleconference/Webinar**

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**Friday April 23, 2021 at 8:30 a.m.**

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## Thursday April 22, 2021 – In-Person/WebEx Teleconference/Webinar

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

**Call to Order:** The meeting was called to order at 5:24 p.m. on April 22, 2021 by Chair Grail.

**Roll Call:** Council Members Mary Winters\*, Vice-Chair Kent Howe\*, Hanley Jenkins\*, Jordan Truitt, Cynthia Condon\*, Perry Chocktoot and Chair Marcia Grail\* were present.

Oregon Department of Energy representatives present were Assistant Director for Siting/Council Secretary, Todd Cornett, Senior Policy Advisor, Sarah Esterson\*, Senior Siting Analyst, Chase McVeigh-Walker\*, Siting Policy Analyst and Rules Coordinator, Christopher Clark, and Operations Analyst, Wally Adams. EFSC Counsel Patrick Rowe of the Department of Justice, and Joe Allen, Hearing Officer were also present.

*(\*denotes in person attendance)*

Chair Grail confirmed that agenda modifications were not proposed.

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

Consideration of Minutes  
February 26, 2021 Meeting Minutes

**Council Member Jenkins motioned Council to approve the minutes of the February 26, 2021 meeting as presented.**

**Vice-Chair Howe seconded the motion.**

*Council Member Condon noted a scrivener correction on page 14, to which the Council concurred, and it was noted by Secretary Cornett for inclusion in the final approved minutes.*

**Chair Grail called on the Secretary to call the roll.**

**Motion carried.**

### Secretary Report

Secretary Cornett offered the following comments during his report to the Council.

### Staffing/Council Updates

- Perry Chocktoot, Cultural and Heritage Director for the Klamath Tribes was welcomed as the newest Council Member, appointed on March 15, 2021.  
*Mr. Chocktoot expressed his appreciation of the appointment and enthusiasm for working with the Council.*
- Council Member Condon was reappointed on March 15, upon completing her first term.
- Council Member Jenkins and Council Member Winters have completed their terms and will not be reappointed during this legislative session; both have agreed to continue to serve until their replacements are appointed.

- Kate Sloan has been hired for Utility and Energy Analyst position bringing significant experience in environmental reviews. Ms. Sloan joined the Department April 5, 2021
- Dawnita Bruce has been hired to fill the Administrative Assistant and will start on May 3, 2021.

#### Project / Contested Case Updates

- Boardman to Hemingway Transmission Line – Contested Case – Discovery Phase  
Hearing Officer Alison Green Webster, in accordance with OAR 345-015-0023(4), provided a status update of the contested case proceeding on April 15.
- Obsidian Solar Center – Contested Case – Discovery Phase  
On March 10, Hearing Officer Joe Allen issued the Contested Case Management Order and Schedule. Motions for Discovery Orders were filed by the applicant and representatives from limited parties prior to the April 19, 2021 deadline. Hearing Officer Allen expects to issue rulings on motions compelling discovery on May 24, 2021.
- Jordan Cove Energy Project  
Pembina has announced their intent to pause all permitting activities related to the Jordan Cove Energy and Pacific Connector pipeline projects, with the exception of the completion of the Section 7 consultation with the US Fish and Wildlife Service and the National Marine Fishery Service for the “Blue Ridge” variation. In response to their request to DC Circuit Court, Oregon Department of Justice has notified Pembina that the Appellate State Agency (consisting of various State natural resource agencies) will oppose their request to place the appeal in abeyance.

#### Future Meetings

- May 20-21 are the next scheduled meetings dates and will be confirmed in the next week. Vice-Chair Howe and Council Member Truitt stated they will not be available for the May meeting; all other Council members confirmed their availability.

#### **B. [5:30 p.m.] Madras Solar Energy Facility, Draft Proposed Order Public Hearing (Hearing)<sup>1</sup>:**

1. Proposed Facility Overview: Chase McVeigh-Walker, Senior Siting Analyst, provided an overview of the proposed facility and the procedural history of the Application for Site Certificate (ASC).
2. Hearing Officer Process Overview: Joe Allen, Senior Administrative Law Judge, Oregon Office of Administrative Hearings, provided an overview of the scope of the hearing.
3. Public Hearing: Interested individuals were provided an opportunity to provide oral testimony on the ASC and Draft Proposed Order. Written comments were also accepted by the Department through the close of the public hearing.

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

The following testimony/comments were provided during the hearing:

#### Scott Piscitello, Exoplexus,

Mr. Piscitello, project lead for the developer, Exoplexus, extended his appreciation to Council and staff for their efforts on this project. He stated that he believes the project will bring many benefits to the community.

#### Phil Stenbeck, Jefferson County Public Works Director

Mr. Stenbeck thanked the Council for bringing the hearing to the community and stated that staff has done a thorough job conducting outreach in the community and evaluating their comments.

<sup>1</sup> Audio for Agenda Item B = 00:19:32 2021-04-22-23-EFSC-Meeting-Audio-Day-1

Irene Gilbert, Citizen

Ms. Gilbert stated that her comments were not related to the Madras Solar Facility and did not wish to comment on the development.

No further comments were received, and the public hearing was closed at 6:15 pm and the meeting adjourned for the day.

**Friday April 23, 2021 – In-Person/WebEx Teleconference/Webinar**

**Call to Order:** The meeting was called to order at 8:34 a.m. on April 23, 2021 by Chair Grail.

**Roll Call:** Chair Marcia Grail\*, Vice-Chair Kent Howe\*, Council Members Mary Winters\*, Hanley Jenkins\*, Jordan Truitt, Cynthia Condon\*, Perry Chocktoot and were present.

Oregon Department of Energy representatives present were Assistant Director for Siting/Council Secretary, Todd Cornett, Senior Policy Advisor, Sarah Esterson\*, Senior Siting Analyst, Chase McVeigh-Walker\*, Siting Policy Analyst and Rules Coordinator, Christopher Clark, and Operations Analyst, Wally Adams. EFSC Counsel Patrick Rowe of the Department of Justice, was also present.

*(\*denotes in person attendance)*

- C. Montague Wind Power Facility, Request to Amend Wildlife Monitoring and Mitigation Plan (Action Item)<sup>2</sup> – Sarah Esterson, Senior Policy Advisor,** presented a request by Montague Wind Power Facility, LLC to amend the post-construction fatality monitoring study (survey methods and statistical analysis tool) of the Wildlife Monitoring and Mitigation Plan. More information is located on the [Council Meetings website](#) for additional details pertaining to this [presentation](#).

*During the presentation the following discussion occurred:*

*Council Member Chocktoot inquired about data availability for birds and/or species and shared an incident about a wind facility in California with significant avian fatalities. He also asked whether the tribes are consulted on the fatalities or plans for moving forward. He described the sacredness of winged animals to western tribes and the importance of tribal consultation.*

*Ms. Esterson stated that the Montague Wind facility site certificate includes a condition that requires the implementation of the Wildlife Monitoring and Mitigation Plan (WMMP) which has been previously approved by Council. The WMMP is imposed under the Fish and Wildlife standard to specifically address impacts to habitat. The review requested at this time is for Council to confirm that the goals and outcomes have been achieved under the currently approved plan. That aside, she went on to state that the post construction fatality monitoring report does require data collection and reporting for 2 years. Ms. Esterson acknowledged that Council Member Chocktoot's concerns were broader in scope than just the request currently before Council and noted that she would explore options with the team to include tribal consultation into future impact evaluations.*

*Council Member Winters questioned the difference between the data in year one and year five, and questioned the science and analysis, and whether it informed on the data that should be collected. Council Member Jenkins also inquired as to when the data collection starts.*

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<sup>2</sup> Audio for Agenda Item C = 00:04:47 – 2021-04-22-23-EFSC-Meeting-Audio-Day-2

*Mr. Esterson responded that the data collection starts the first year after operation and typically provides the best data to reflect impact, as the birds are not accustomed to the turbines being there. In consultation with Steve Cherry at ODFW, concerns were not raised over changing from years 1 and 5 to years 1 and 2, provided that two years of data are collected as soon as possible after operation.*

*Council Member Jenkins asked how much time has already elapsed, and Ms. Esterson stated that the project is in year 2.*

*Council Member Truitt asked whether year five data will be collected, or whether it would be just the first 2 years.*

*Ms. Esterson confirmed that it would be for just the first two years, adding that if the threshold is exceeded additional mitigation may be required.*

*Council Member Winters followed up by asked whether this is consistent with data collected in other states, expressing concern over whether data may be substituted that is needed later.*

*Ms. Esterson stated that an exceedance of the threshold is expected after year one and added that all EFSC wind facilities include monitoring conditions, however, data collection requirements vary from years 1 and 2 and years 1 and 5 by site certificate.*

*Council Member Winters asked whether additional studies and monitoring are required when thresholds are exceeded.*

*Ms. Esterson responded that in the event that one of the thresholds of concern is exceeded mitigation is triggered, requiring the Department, in consultation with ODFW, to determine what additional mitigation is appropriate based on a list of parameters.*

*Council Member Jenkins noted that a benefit of this proposal is that the mitigation will occur sooner, rather than waiting until the conclusion of year 5.*

*Council Member Condon questioned whether there is any scientific data suggesting that the first two years are a better approach than the current 5-year plan.*

*Ms. Esterson stated that the data shows that when facilities have an impact to the species it doesn't vary significantly in the years of collection.*

*Council Member Condon questioned whether monitoring is currently underway in anticipation of the approval of this request.*

*Ms. Esterson affirmed and stated that the statistical analysis does not occur until the end, so in the event this request is not approved they will still be consistent with the existing plan.*

*Chair Grail mentioned that a comment was received from a member of the public and wanted acknowledge it for the record.*

*Ms. Esterson provided a comment received from Irene Gilbert expressing concern over changing from year 1 to year 5, as well as her broader concern over the impact to bird and bat fatality and requested Council consider a more long-term approach. She noted the concerns echo many of the comments made by Council Member Chocktoot and were outside of the scope of this review.*

*Council Member Chocktoot stated that all data should be used for the life of the project and Council's responsibility for what happens at the facilities. He offered suggestions of mitigation measures that could be taken to reduce or prevent avian deaths stressing the importance of protecting species from extinction.*

*Council Member Grail appreciated Council Member Chocktoot's comments and reminded Council that the focus is on this current request for amendment before them. She explained that Council has the opportunity to approve, deny or makes changes to the recommendation when a motion is posed, and asked for concurrence from Secretary Cornett and EFSC Counsel, Patrick Rowe.*

*Secretary Cornett confirmed her understanding and went on to provide that if Council desired significant changes, they could also hold the item over for action at a future meeting.*

*Council Member Condon, referring to Ms. Gilbert's comment, questioned the data suggesting that there are more bird and bat deaths due to wind developments. She also asked whether there was a process for Council to require additional monitoring in the future, if they were to approve the request as provided.*

*Ms. Esterson stated that while she did not personally review the data, ODFW and the developer's consultant reviewed the data and were in concurrence that the data supported the change. She added that legislation is currently being considered evaluating mitigation requirements. She stated that Council has authority to evaluate additional monitoring if proposed by the certificate holder as mitigation, if the first two-years of monitoring identify an issue (i.e. exceedance of a threshold of concern).*

*Mr. Rowe encouraged Council to evaluate WMMP's for future developments thoroughly in the application phase to ensure their concerns are covered. He reminded the Council that final approval of WMPP's has been delegated to the department and that delegation of approval could be rescinded.*

*Council Member Jenkins commented that additional monitoring is allowed under this plan if thresholds are exceeded allowing a more immediate response.*

**Council Member Jenkins motioned for Council to approve the request by Montague Wind Power Facility LLC to amend the Wildlife Monitoring and Mitigation Plan recommended by staff.**

**Council Member Winters seconded the motion.**

*Council Member Winters echoed Mr. Rowe's comments and stated the importance of reviewing future applications to allow for mitigation and monitoring in all projects.*

*Council Member Jenkins encouraged a presentation from ODFW on this topic. Council Member Winters, Howe, and Truitt agreed that a presentation on the science and the impacts of turbines would be appreciated.*

*Ms. Esterson added that anytime a threshold of concern is exceeded Council review and concurrence would be sought.*

**Chair Grail called on the Secretary to call the roll.**

*Council Member Truitt added that a presentation from ODFW would be appreciated and should include information about mitigation as well as prevention.*

*Secretary Cornett acknowledged Council's request and committed to making the topic a future agenda item.*

**Motion carried.**

**D. Golden Hills Wind Project, Request to Amend Wildlife Monitoring and Mitigation Plan (Action Item)<sup>3</sup> – Sarah Esterson, Senior Policy Advisor**, presented a request by Golden Hills Wind Farm LLC to amend the post-construction fatality monitoring study (survey methods and statistical analysis tool) of the Wildlife Monitoring and Mitigation Plan. More information is located on the [Council Meetings website](#) for additional details pertaining to this [presentation](#).

*During the presentation the following discussion occurred:*

*Council Member Condon, in reference to the search frequency change from 16 to 24, questioned whether searches would occur during migratory times.*

*Ms. Esterson replied that the monitoring frequency is based on seasons and will occur every two weeks for one year.*

*Council Member Condon reiterated that searches conducted at times when there isn't migration could impact the results and averages.*

*Ms. Esterson highlighted the monitoring schedule for the project and explained that various types of searches and related schedules are based on seasons that have been thoroughly vetted. She went on to share that monitoring schedules seem to be consistent in the plans for wind facilities.*

*Council Member Condon expressed ongoing concern that completing monitoring during some of these seasons, when migration isn't occurring, will impact the findings.*

*Ms. Esterson provided that the statistical and analytical tool used includes corrective factors to unitize the data, such as assumptions that a fatality could have occurred and removed by other wildlife between searches.*

*Vice-Chair Howe suggesting that this be a topic for ODFW to include in their presentation at a future Council meeting.*

*Council Member Winters questioned the strike out changes page D-9 of the monitoring plan, which removed "Migratory Bird Treaty Act".*

*Council Member Jenkins suggested that it may be redundant, and therefore removed.*

*Ms. Esterson stated that it was a redline proposed by the applicant that she believed was intended to be consistent with removal of handling all together but she would need to investigate it further to confirm.*

*Council Member Winters requested confirmation that it was not applicable before removal.*

*Council Member Jenkins questioned the necessity of removing it, understanding it to be a coordination function.*

*Council Member Chocktoot described the Klamath Tribe as traditional practitioners; hunting, fishing and gathering. From this experience, he offered that surveys only occurring every 15 days were too infrequent and would skew the data from the onset. He perceived the proposer's request to include the purposeful removal of this*

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<sup>3</sup> Audio for Agenda Item D = 00:46:17 – 2021-04-22-23-EFSC-Meeting-Audio-Day-2

and other protection mechanisms. He reiterated that studies completed every 15 days will not yield meaningful results.

*Ms. Esterson repeated that this proposal increases the monitoring frequency from 16 to 24 times a year.*

*Referencing the earlier comments regarding the removal of the “Migratory Bird Treaty Act” Ms. Esterson stated that this Treaty Act covers all birds, and the certificate holder is no longer handling birds, which is in alignment with this change.*

*Council Member Jenkins, regarding the survey limitations on wheat fields, confirmed that this limitation is only in place during the growing season, and suggested the use of drones to complete surveys.*

*Council Member Condon questioned the significance of the removal of raptor handling and its original intent.*

*Ms. Esterson responded that raptor handling requires a permit that the current site certificate holder does not possess. She provided that Council did not originally impose raptor handling in the WMMP, it was approved as proposed by the applicant, and reminded Council that the site certificate holder has recently changed.*

*Council Member Condon expressed concern over removing the requirement simply because an applicant is unwilling to obtain a permit to meet a requirement.*

*Council Member Jenkins stated the applicant’s obligation is to meet the standard which does not require dealing with mortality and it would be a bit of a stretch to impose requirements on mortality beyond what the applicant imposed. He went on to suggest that the standard itself may need review.*

*Council Member Condon stated that because the requirement was proposed by the applicant, and approved by the Council, removing it now doesn’t reconcile well.*

*Council Member Winters acknowledged the difficulty in approving an amendment to a plan that seems to remove requirements without fully understanding the impacts of doing so. She recognized the challenge that Council may be presenting for Ms. Esterson, an energy expert, when many of their questions would be better directed to a fish and wildlife expert.*

*Chair Grail asked whether it would be appropriate for this item to be held over to allow an opportunity for additional information to be collected.*

*Secretary Cornett confirmed that was an option Council could consider, or they could act on the request with changes.*

**Council Member Jenkins motioned for Council to hold over the request from Golden Hills to a future meeting to gather more information regarding the changes.**

**Council Member Chocktoot seconded the motion.**

**Chair Grail confirmed unanimous consent from all Council Members to postpone action on this item.**



**E. Public Comment Period<sup>4</sup>** – The following individuals took the opportunity to address the Council regarding any item within Council jurisdiction that is not otherwise closed for comment, which includes Madras Solar Energy Facility; and Boardman to Hemingway Transmission Line Proposed Order and the Obsidian Solar Center Proposed Order, which are in the contested case process.

- Angela Crowley Cook, Executive Director Oregon Solar Storage Industries Association  
In reference to rulemaking, Ms. Crowley Cook shared that comments have been submitted expressing concern over the changes to the Councils Protected Areas Scenic Resources, and Recreation Standards. Ms. Crowley stated that the changes do not align with Climate Executive Order 20-04, which requests the simplification of procedures and an evaluation of standards and application requirements. She believes that the proposed rules increase costs and timelines and not align with the order. She requested that Council consider holding multiple workshops to work through the technical changes.
- Amy Bird, Sunstone Energy, on behalf of Renewable Northwest  
Regarding the Protected Areas Rulemaking, Ms. Bird expressed concern that the proposed rule revisions will add delays and cost increases in development. She encouraged Council to hold at least three workshops for the rulemaking due to the breadth of the scope and to ensure maximum stakeholder participation. She requested that Council not initiate formal rulemaking proceedings based on the draft language provided by staff in the meeting materials, stating that these changes require significant stakeholder review. Ms. Bird expressed Renewable Northwest’s desire to participate in in-person workshops and requested Council direct staff to defer any rulemaking proceedings until workshops could be again held in person, to allow for greater participation. She highlighted Climate Executive Order 20-04 and described EFSC has a processes that should be followed under this Order.
- Charlie Gillis, Attorney, La Grande, Oregon  
Mr. Gillis stated that he was aware that comments on some projects may not be offered during this comment period and questioned whether he could provide comment on the Boardman to Hemingway Transmission Line.  
Chair Grail informed Mr. Gillis that comments could not be accepted for Boardman to Hemingway during this time.
- Elaine Albrich, Land Use and Permitting Attorney  
Ms. Albrich thanked staff for their work to date on the proposed (protected area) rulemaking and acknowledged the significant evaluation of the issues and careful consideration of the comments received. She concurred with Staff’s recommendation to hold workshops and encouraged they be held in-person before any further recommendations are reviewed or considered. She identified that the proposed rules seem to apply to projects currently under review and that the scope seems to have expanded beyond the original intent. There is concern that these changes open an applicant to increased risk and costs due to the uncertainty in the process, rather than providing clarity. She further reiterated the importance of the workshops and the benefits they can offer to the process and applicants.
- Irene Gilbert, La Grande, Oregon  
Ms. Gilbert welcomed Council Member Chocktoot and encouraged him to read the “negative” newspaper comments made about recent decisions of the Council and to consider the information that is provided, in addition to information that is not provided.  
Ms. Gilbert shared frustration in response to Idaho Power’s letter to “push their issues forward” after their opportunity to provide comment, prior to the development draft rules. She argued that the letter submitted does not carry merit; was submitted after the opportunity to comment had expired; and includes issues already connected to the contested case of which she claimed it would not impact

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<sup>4</sup> Audio for Agenda Item E = 01:18:35 – 2021-04-22-23-EFSC-Meeting-Audio-Day-2

regardless of the outcome. She described a landowner committed to documenting damages created. She shared that she has concerns about the draft rules and that ORS 183.333 provide opportunity for the public to weigh in. She claimed that the opportunity to comment on these rules was only extended to large corporations and non-profits and that rules are often finalized prior to allowing the public at large to share their concerns. She stated that Council has received a draft based on input to date and provides adequate information to move forward with the rulemaking. She described her experience participating in previous workshops and stated that the public is poorly represented. She encouraged Council to move forward with the rulemaking and offer the opportunity for public input.

- **Jocelyn Pease, McDowell Henson. On behalf of Idaho Power**

**Ms. Pease** emphasized Idaho Power's concerns for the direction of the Protected Area rulemaking and requested Council decline to move forward with staff's proposed rulemaking without having a plan in place to mitigate impacts to projects currently under review. She also urged Council to provide additional opportunities for stakeholder comment and echoed previous suggestions of at least three workshops. She expressed concern over the removal of the cutoff date in the protected areas standard because it would allow for new protected resource to potentially be added at any time before issuance of the site certificate. She stated that this is not a hypothetical issue and that is a genuine concern in the case of B2H. She stated that staff has not proposed a solution to the issue in their draft beyond punting the issue to Council for ad-hoc consideration. Recognizing the rule does need updates, she urged Council to craft a solution to also create balance with developers need for certainty. She suggested an application milestone be used to determine a cut off date as a possible solution. She stated that the proposed rules could be significantly disruptive to the B2H contested case and are detailed in their comment letter. She requested council consider a provision to exempt projects currently under review from these proposed changes. She believes that the rulemaking scope is broader than simple housekeeping, and that a rulemaking of this magnitude requires additional stakeholder input, including a process for stakeholders to respond to each other's comments. She supported staff's recommendation for additional workshops to include a scope of the applicability of the rule for existing projects, and opposed staff alternative recommendation to move forward with the current draft rules. She reiterated the importance of evaluating how the rules impact projects already in the process and requested Council take the time to complete this review prior to moving forward.

- **Michelle Slater, Project Manager, Obsidian Renewables**

Ms. Slater thanked staff for their thoughtful, thorough efforts in the(protected area rule) staff report and appreciated the time taken to explore alternatives. She agreed with staff's recommendation to hold additional workshops and entertain additional public comment. She described her experience in previous workshops as an effective inclusive way to bring multiple perspectives together to enhance understanding. She commented that because the scope has expanded substantially additional workshops are needed. She was unclear as to what the problems are that the proposed rules are intending to solve and requested further exploration to be sure that the issues are actually addressed by the rules. She further reiterated the complexity of the rulemaking and the need for additional in-person workshops.

- **Matt Hutchinson, Avangrid Renewables**

Mr. Hutchinson reminded Council that Avangrid Renewables is responsible for the Montague and Golden Hills and committed to working with staff and ODFW to answer Council's questions regarding the WMMP's considered earlier on the agenda. He went on to reiterate earlier comments, agreeing with the need to update the Protected Areas standard, but believes the proposed changes have more impacts than people are aware off. He suggested that additional workshops can help to eliminate unintended consequences for new projects or those requesting amendments in the future.

There were no further public comments.

**F. Protected Areas Rulemaking (Potential Action Item)<sup>5</sup> - Christopher Clark, Siting Policy Analyst and Rules Coordinator** reviewed stakeholder advice received on the Council's Protected Areas, Scenic Resources, and Recreation Standards and presented staff's recommendations for the conduct of rulemaking proceedings and draft proposed rule revisions. Council will determine whether additional opportunities for public participation in the development of proposed rules are needed prior to the consideration of proposed rules.

*During this presentation the following discussion occurred:*

*Council Member Winters, referring to the slide on potential impacts to developers, noted that the second bullet indicated that changes would only apply to future applications and that it appeared to be contrary to the public comments received claiming that projects currently under review and future amendment requests would be impacted. She asked whether staff disagreed with that assessment.*

*Mr. Clark provided that the Project Order determines the applicable laws and standards that Council is required to make findings on. The intent would be that project orders would not be amended as a result and would only be amended at Council's direction. He went on to explain the rules in Division 1 and Division 15 regarding applicability are not clear and have not been tested.*

*Council Member Winters inquired as to whether the proposed rule could expressly state the applicability differently than what is proposed.*

*Mr. Clark offered that applicability definitions could be established with each standard adopted, that the Council could adopt a rule of general applicability or could amend rules around project orders to further describe the relation of project orders and applicability.*

*Council Members confirmed with Mr. Clark that while that would be a substantive change it is something that could be modified later if needed.*

*Council Member Jenkins following up on Council Member Winters' question, asked whether the issue was a scoping issue that could be addressed by the Council today and request staff include this issue as a part of the process.*

*Mr. Clark responded that the scope is subject to Council's direction, and that Council may direct staff to include it if they wish. He went on to share that the issue of applicability associated with rule changes and existing projects under review is not unique to the situation, but Council could choose to add it to this current scope.*

*Council Member Winters stated that while she was unsure of whether it should or should not be addressed in this rulemaking, ambiguity that could lead to litigation is not preferred and should be addressed to provide clarity.*

*Chair Grail noted that all Council members were expressing non-verbal concurrence with Council Member Winter's direction to staff.*

*Council Member Jenkins stated that he agreed it should be added to the rulemaking scope.*

*Council Member Condon, referring to the slide describing the scope and objectives, noted that the first bullet of "Ensure that the language of the Standards clearly identifies important resources and values the standards are intended to protect" seems to indicate authority for a broad scope, while the public testimony seemed to be*

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<sup>5</sup> Audio for Agenda Item F = 01:51:28 – 2021-04-22-23-EFSC-Meeting-Audio-Day-2

*focused on narrowing the scope to the second and third bullets, and asked Mr. Clark whether that was a correct assessment.*

*Mr. Clark did not speak to the intent of the previous commenters, but agreed that most of the comments received emphasized support for improving the efficiency and effectiveness of the Council's review process and noted that in the Department's implementation plan for Executive Order 20-04 details the application review process rulemaking and there seems to be a desire by some stakeholders to re-prioritize that rulemaking ahead of this one. He added that the application review process rulemaking will be a three phase, requiring lengthy evaluation and the hope was to address some of these substantive issues prior to undertaking that bigger process.*

*Council Member Condon clarified that she was questioning whether the first bullet has always been included as part of the scope of this rulemaking.*

*Mr. Clark confirmed that the objectives are the same as those that were presented to Council in October and built into the project since its inception.*

*Council Member Jenkins asked whether there was opportunity to host workshops in a hybrid manner as the current meeting was being conducted.*

*Secretary Cornett informed Council that the opportunity to host workshops in a hybrid manner would not be allowed under current health and safety restrictions and further explained the exception to hold the current Council meeting in a hybrid manner was only authorized due to the statutory requirement that Draft Proposed Order Hearings must be held in person in the vicinity of the proposed project.*

*Council Member Condon inquired about the opportunity to hold meetings in a hybrid manner after the health and safety restrictions are lifted. She noted the expenses involved for a member of the public to travel to in person workshops may limit participation and the opportunity to attend virtually could encourage additional participation.*

*Secretary Cornett responded that once the restrictions are lifted hybrid meeting opportunities will be offered.*

*After this presentation Chair Grail opened the floor for Council discussion:*

*Council Member Jenkins agreed that rulemaking workshops are more inclusive and open to everyone versus a rule advisory committee and supported the idea of not limiting the number of workshops in the beginning and let the issues dictate the need for frequency.*

*Chair Grail proposed that Council focus on the issue of recommended workshops before moving on to other topics, to which all Council Members concurred that workshops were preferred.*

*Council Member Condon asked how people are invited to attend workshops.*

*Mr. Clark explained that an announcement would be made to the Council's rulemaking list in addition to any persons that have commented or expressed interest in this rulemaking, and would work to identify other interested stakeholders such as public interest groups, and other state and federal agencies that manage protected areas or recreation. He added that while it takes some time, staff would make every effort to identify people and entities that may be interested in participating.*

Council Member Jenkins moved on the next issue, regarding expanding the scope to include addressing the applicability issue.

Council Member Condon questioned whether the applicability question was as to “when” it would be applicable, or to which projects it would apply.

Council Member Jenkins stated that it would be for when it would become applicable for projects, whether it was new, existing or in process. And clarified that this is just to establish the scope for staff to address as part of the rulemaking.

Council Member Condon stated her understanding that once the rule was finished the rule becomes applicable and what’s really at issue is what projects.

Mr. Clark explained that once a rule is filed with the Secretary of State it becomes effective, unless a later date is designated by Council, however, that does not necessarily mean it is applicable to every project. Providing this clarity would be the intent of Council Member Jenkins request to add this element to the scope.

Council Member Howe asked whether it was appropriate to have the discussion on when the rule is applicable and make that decision now.

Council Member Jenkins explained his intent in adding it to the scope was to allow for this issue to be considered as part of the proceedings.

Council Member Winters stated that there are several different applicability criteria for different circumstances and because she was unclear on all the standards that are proposed for change, she was uncomfortable deciding that nothing could apply in the future. She agreed that clarity is needed to know whether the changes apply to a pending application or project.

Secretary Cornett explained that the Goal Post rules are only applicable to the Land Use standard and theoretically any changes could be applied until the site certificate is executed. He recognized it is a very complicated issue and agreed that adding it to the scope is important.

Mr. Rowe stated that the concerns heard today are due to the fact that applicability is currently tied to the project order and because the project order could be amended at any time, and this rule is adopted as written, one could challenge that the site certificate must comply with all standards and laws in effect on the date of site certificate execution and new protected areas could have been designated during that period. He explained that Council could then amend the project order, which creates uncertainty for developers. He stated that Council needs to address whether Council agrees with the concern, and if so, decide how to direct staff to address it.

Council Member Winters asked whether there was a legal mechanism for Council to apply the proposed rules to pending projects.

Mr. Rowe clarified that Council Member Winter’s question presents a scenario opposite of the concerns of the commenters and went on to confirm that agencies have the ability to apply rules retroactively, it just needs to be addressed in the rules.

Secretary Cornett stated the importance of outlining what the proposed language would mean for projects at different stages of the process to flesh out and fully understand and evaluate the impacts.

*Council Member Howe appreciated the clarifications offered by Secretary Cornett and Counsel Rowe.*

*Counsel Rowe provided statutory reference to statutes involving applicability that need to be better understood to ensure any changes made to rule are still consistent with statute.*

*Council Member Jenkins recommended that the workshops begin virtually as soon as possible, followed by virtual and in person opportunities as soon as restrictions allow.*

*Council Member Winters advocated for virtual meetings, noting that hybrid meeting technology is still a work in progress to have effective meaningful participation.*

*Chair Grail, Vice Chair Howe, and Council Members Truitt and Chocktoot concurred.*

*Mr. Clark noted that initial workshops will be needed due to the technical nature of the applicability issue and suggested that those workshops begin first before the other issues are addressed at which time the opportunity for hybrid workshops could be reassessed.*

*Chair Grail noted unanimous concurrence from the Council.*

*Secretary Cornett offered to read draft motion language for Council action, and Council Member Jenkins asked Todd to read the motion on his behalf.*

**On behalf of Council Member Jenkins, Secretary Cornett moved that Council approve staff's request to hold public workshops to refine the draft proposed rules and further discuss issues related to protected areas, scenic resources, and recreation standards, subject to the following: hold the number of public workshops that are necessary, add applicability of the rule to the scope, start workshops virtually, initially working on the applicability question and then move on to hybrid workshops when available and alter locations when in person is available as well.**

**Vice-Chair Howe Seconded the motion.**

*Council Member Condon stated that the hybrid and in person meetings would be required before moving forward, however if virtual meetings work, we should be able to progress through, however, this motion seems to require in person meetings and may hold up the finalization.*

*Council Member Jenkins agreed that the motion could be clarified, and the motion was modified to the following:*

**Council approve staff's request to hold public workshops to refine the draft proposed rules and further discuss issues related to protected areas, scenic resources, and recreation standards, subject to the following: hold the number of public workshops that are necessary; add applicability of the rule to the scope; start workshops virtually, initially working on the applicability question and then move on to hybrid workshops when and if available and alter location when in person is available as well.**

**Chair Grail called on the Secretary to call the roll.**

**Motion carried by unanimous consent.**

**G. Legislative Update (Information Item)<sup>6</sup> – Sarah Esterson, Senior Policy Advisor**, provided an update to Council on the legislative session and bills related to ODOE, EFSC and state-level energy policy. More information is located on the [Council Meetings website](#) for additional details pertaining to this [presentation](#).

*During this presentation the following discussion occurred:*

*Council Member Jenkins asked whether HB 2520 was still moving through the process.*

*Ms. Esterson tentatively affirmed and asked Secretary Cornett to confirm.*

*Secretary Cornett informed that HB 2520 was moving through the process.*

*Counsel Rowe updated Council on HB 2521, explaining the bill is aimed to reduce greenhouse gas in the electricity sector. Section 28 of this bill would prohibit EFSC from issuing a site certificate for a generating facility using fossil fuels and prohibit Council from amending a site certificate that would increase gross carbon dioxide emissions.*

*Upon inquiry from Council Member Jenkins, Counsel Rowe informed that three public hearings have been held on HB 2521, and it has currently been referred to the Revenue Committee.*

*Chair Grail explained the bill has become the vehicle to achieve many renewable energy goals, to include many of the originally proposed renewable portfolio standard bills and labor standards.*

**H. Council Appointment of Consultant for Exhibit S (Historic, Cultural and Archeological Resources)<sup>7</sup> – Review of Request to Ratify an Emergency Order (Action Item) – Sarah Esterson, Senior Policy Advisor**, presented a request to ratify an emergency order, approved by Chair Marcia L. Grail, to approve the Department’s use of consultants for review of ASC Exhibit S for the Nolin Hills Wind Project. More information is located on the [Council Meetings website](#) for additional details pertaining to this [presentation](#).

*There were no questions or comments during this presentation.*

Chair Grail opened the floor to Council discussion or possible motion.

**Vice-Chair Howe motioned for the Council to ratify the Order approved on March 5, 2021 to approve the Departments use of consultants for review of ASC Exhibit S for the Nolin Hills Wind Project.**

**Council Member Jenkins seconded the motion.**

**Chair Grail called on the Secretary to call the roll.**

**Motion carried unanimously.**

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<sup>6</sup> Audio for Agenda Item G = 02:54:06 – 2021-04-22-23-EFSC-Meeting-Audio-Day-2

<sup>7</sup> Audio for Agenda Item H = 03:08:07 – 2021-04-22-23-EFSC-Meeting-Audio-Day-2

- I. **Madras Solar Energy Facility, Council Review of Draft Proposed Order (Information Item)<sup>8</sup> – Chase McVeigh-Walker, Senior Siting Analyst and Sarah Esterson, Senior Policy Advisor**, presented the Draft Proposed Order (DPO) and issues raised in comments received on the record (DPO) for the Madras Solar Energy Facility.

*During the presentation the following additional comments were provided:*

*Council Member Truitt confirmed that the force major provisions would only apply to acts of nature or acts of God.*

*Ms. Esterson confirmed that is correct, it is intended to include something beyond ones control, such as a volcano eruption.*

*Council Member Jenkins, related to the soil protection standard, questioned the timing related to the de-vegetation and revegetation after the development is in place and whether it should be addressed in this Order, realizing that a separate revegetation plan will be developed. He expressed concern over de-vegetating a site during construction, and the ability of the vegetation to thrive after construction due to panel maintenance. He also pointed out a scrivener error for correction on page 40 of the DPO.*

*Ms. Esterson clarified that the revegetation plan will cover the approximately seven acres of temporary disturbance, such as as the lay down area, and explained that due to the weed instability concern emphasis has been placed on not scraping and grading sites unless absolutely necessary. She stated that while she would confirm, she did not believe the site would be de-vegetated during construction.*

*Secretary Cornett clarified that this draft proposed order is staff's initial recommendation based on all comments from reviewing agencies, tribal governments, etc. He reminded Council that this is their opportunity to bring issues forward that they desire staff to evaluate further and possibly make changes to findings or conditions based on their comments.*

*Chair Grail, regarding Condition 5, questioned the difference between a written report or a notification of an issue, and described the timelines associated with report development which could be longer than a notification.*

*Ms. Esterson explained that Condition 5 is a mandatory condition and must be imposed exactly as the rule language is written, and explained timelines are associated with both the notification and report requirements when clarified by other conditions.*

*In response to Council Member Jenkins earlier questions, Ms. Esterson, informed that Exhibit C of the application materials includes facility maps and includes roads.*

*Council Member Jenkins, noting that the Draft Proposed Order describes soils with moderate to high wind erosion potential, and further explained his concern is that if road surfaces are de-vegetated as a result of being used as a road a potential risk of erosion due to wind occurs.*

*Council Member Jenkins also shared, related to the washing of solar panels twice a year which requires a Department of Environmental Quality permit that has classified the one million gallons of wastewater as de minimis, that he and Council Member Howe completed the calculations and determined the amount to be reasonable once distributed over the 277 acres.*

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<sup>8</sup> Audio for Agenda Item I = 03:08:29 – 2021-04-22-23-EFSC-Meeting-Audio-Day-2



*Ms. Esterson shared that DEQ no longer issues permits for this di minimis use and the recommended condition has been crafted to include the provisions that the permit would have covered.*

*Council Member Jenkins, related the reasons supporting a Statewide Planning Goal 3 exemption, agreed that several of the applicants arguments for a reasons exception are insufficient to meet this exception. He emphasized the importance of the reasons exception is it's intent to identify unique characteristics at a site as the reasons for locating there, and while he agreed that the applicants statements were factual, he did not consider them to be unique to this specific site. He stated concern in justifying a reasons exception based on proximity to a transmission line, and suggested more work be done to strengthen the findings.*

*Council Member Jenkins, referencing the list provided by the county to identify the applicable regulations, expressed concern over the omission of the temporary concrete batch plant. He stated that this type of use would typically require a conditional use permit and it has not been listed by Jefferson County or identified in the Draft Proposed Order.*

*Secretary Cornett explained the permit as a third-party permit and Ms. Esterson added that it is the more traditional approach that has been taken. She explained that this evaluation is reviewed under the commercial utility category to determine whether the batch plant is an accessory use to that category or needed to be evaluated on its own. She went on to provide that all related facilities considered under the land use standard fall under the umbrella of the CUP, except for transmission lines.*

*Council Member Jenkins noted that the DPO mentions that a third party will be responsible for the permit but reference to a county CUP is not mentioned.*

*Ms. Esterson clarified that there is a requirement for the facility, as a whole, to obtain a CUP and that this batch plant would fall under that CUP, under the Commercial utility category.*

*Council Member Jenkins stated that it would need to be classified as an accessory use to do so, and Ms. Esterson confirmed that she intends to investigate it further to determine that this is allowable in the EFU zone.*

*Council Member Jenkins, referencing the golden eagle nest sites identified in the application materials, questioned whether they should be included in the Fish and Wildlife standard discussion.*

*Ms. Esterson explained that in land use there is a condition that aligns to the sensitive bird habitat overlay zone that includes buffer zones that prohibit work from occurring in those areas, and another condition in fish and wildlife which requires ongoing surveys to validate sites.*

*Council Member Jenkins explained that his concern is that these sites are not mentioned in the fish and wildlife standard and questioned whether there should be any connection to the land use standards.*

*Ms. Esterson responded that the fish and wildlife condition requires surveys within a quarter mile of the site, which includes the nest sites. Council Member Jenkins noted his concurrence that the sites would be captured by the requirements of condition 4.*

*Council Member Condon, regarding annexation to the fire station, noted that the conditions don't include reference to annexation. She questioned the fire potential and response, and whether their plan was to annex.*

*Council Member Jenkins provided that while the applicant will apply, it can't be guaranteed that the rural fire department will take them in. In this case, because the county has invited them to apply, it is likely to*

*be annexed, however the Council only has the authority to require they request to be annexed and cannot require they be annexed.*

*Council Member Condon questioned whether the conditions are sufficient in the event that the annexation does not occur.*

*Ms. Esterson referenced the letter, provided by the applicant from the fire district, acknowledging its annexation process, and informed that Public Services Condition 3 requires the application be filed and assumes that the annexation will occur. Council Member Condon noted the requirements of the condition, stating the applicant “must” apply and “must” receive annexation to move forward, and Ms. Esterson confirmed that should the annexation not occur an amendment to the site certificate would be required.*

*Vice-Chair Howe offered that language could be used that includes an allowance to contract for fire services in the event annexation does not occur.*

*Chair Grail commented that while she understood the reasons behind it, she found the encouragement to use diesel fueled trucks odd given the emission concerns in other areas.*

*Council Member Jenkins explained the reasons for this requirement include the fact that gas fueled vehicles have hotter exhausts than diesel. Chair Grail commented that another law has been passed on the sales of catalytic converters noting interest in the connection.*

*Council Member Jenkins, referencing Waste Minimization Condition One, asked staff to evaluate the need for the word “may” as it appears to offer the Department discretion.*

*Mr. McVeigh-Walker said he would do so.*

*Council Member Jenkins confirmed with Mr. McViegh-Walker that the perimeter fence for the facility would encompass 280 acres.*

*Chair Grail thanked staff for their thorough presentation.*

**J. Montague Solar Facility, Update on Preconstruction Survey Reports (Information Item)<sup>9</sup> – Sarah Esterson, Senior Policy Advisor**, provided an update on preconstruction survey results. More information is located on the [Council Meetings website](#) for additional details pertaining to this [presentation](#).

*During the presentation the following discussion occurred:*

*Council Member Chocktoot questioned whether cultural resource studies have been completed for the project.*

*Ms. Esterson confirmed that extensive cultural resource studies were conducted as part of the amendment request, and that once all areas of potential disturbance have been surveyed ongoing surveys are not typically required, with the exception of ground squirrels and raptor nests due to potential changes over time.*

*Council Member Chocktoot noted that cultural resource sites can also change over time, and that five-year maintenance and monitoring needs to occur on all sites due to impacts from natural causes. He noted his surprise that a site of this size did not contain any cultural sites.*

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<sup>9</sup> Audio for Agenda Item J = 04:41:12 – 2021-04-22-23-EFSC-Meeting-Audio-Day-2

*Ms. Esterson clarified that the figure provided is a habitat map and does not include cultural sites. Due to the confidential nature of the documents, Ms. Esterson offered to share the information with Council Member Chocktoot but would not be able to display it on the screen.*

*Council Member Chocktoot reiterated that known cultural site are protected by state and federal law.*

*Chair Grail thanked Ms. Esterson for her presentation.*

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## **Adjournment**

Chair Grail noted that former Council Chair Barry Beyeler was in virtual attendance and pleasantries were exchanged.

Chair Grail adjourned the meeting at 1:44 pm.

DRAFT