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To: Energy Facility Siting Council

From: Sarah Esterson, Senior Policy Advisor

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Subject: Agenda Item F (Information Item): Sarah Esterson, Senior Policy Advisor. Part 1 Overview of the Energy Facility Siting Process Retirement and Financial Assurance standard for the August 27, 2021 EFSC Meeting.

BACKGROUND

The Energy Facility Siting Council (Council) was created to oversee a comprehensive system for the siting, monitoring and regulating of the location, construction and operation of all energy facilities in Oregon. ORS 469.300. To carry out this purpose, the legislature entrusted the Council with the authority to decide whether to issue a site certificate for any energy facility proposed to be constructed or operated in Oregon. ORS 469.470(1). The Council's decision to issue a site certificate is binding upon state agencies and local governments and requires those agencies and governments to issue any permits specified in the site certificate without further proceedings. ORS 469.401(3).

In order to issue a site certificate, the Council must, in part, determine that the preponderance of the evidence on the record of proceedings on an application supports the conclusion that the facility, “complies with the applicable standards adopted by the council pursuant to ORS 469.501 or the overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by the applicable standards the facility does not meet.” ORS 469.503(1). With some exceptions, the Council must make similar finding of compliance for other state laws and administrative rules, and with the statewide land use planning goals adopted by the Land Conservation and Development Commission. See ORS 469.503(3) and (4).

The legislature provided the Council with broad authority to determine both the scope and format of its standards, but has provided a number of subjects which the standards may address, including the “financial ability and qualifications of the applicant.” ORS 469.501(1)(d). The Council adopted a standard to address this subject under OAR 345-022-0050, the “Retirement and Financial Assurance Standard.”

SUMMARY OF HOW RETIREMENT AND FINANCIAL ASSURANCE STANDARD WORKS

The purpose of the standard and the Council’s other retirement rules is to ensure that part or all of the facility does not remain on the landscape, unless otherwise allowed, and that the site

is returned to a state where it could be used for purposes allowed by the underlying zoning, such as farming. It is important to note that the rules do not necessarily require the site to be restored to the same condition it was in before the construction and operation of the facility, and that some facility components, such as access roads, could be left in place if requested by landowner to support future uses.

The following provides a summary of the major steps that are used to ensure that a facility is appropriately decommissioned after permanent cessation of construction or operation.

- Application Phase
 - Applicant provides information about potential site impacts, proposed monitoring and mitigation measures, and proposed retirement activities as needed to demonstrate that the site can be restored to a useful, non-hazardous condition.
 - Applicant provides an estimate of amount of funds that will be needed to decommission the facility. Council reviews and determines the amount of financial assurance required.
 - Applicant provides documentation that it or its parent company can obtain a bond or letter of credit in the amount required.
- Pre-Construction Phase
 - Certificate holder provides monitoring and mitigation programs to prevent the development of hazardous conditions at the site.
 - Certificate Holder submits a bond or letter of credit in the amount necessary to decommission what is being constructed (entire facility or a portion or phase).
- Operation Phase
 - Certificate holder conducts monitoring and mitigation activities as needed to prevent the development of any conditions on the site that would preclude restoration of the site to a useful, non-hazardous conditions.
 - Certificate holder annually adjusts the bond or letter of credit for inflation.
- Decommissioning
 - Certificate holder submits a proposed decommissioning plan no later than 2 years after permanent cessation of construction or operation of facility.
 - Council reviews and approves decommissioning plan with or without changes.
 - Certificate holder decommissions facility and restores site according to approved decommissioning plan.
 - Council confirms retirement of facility is complete, terminates site certificate, and releases bond or letter of credit.

OR

- If Certificate Holder fails to meet decommissioning obligations, Council uses bond or letter of credit to pay for the costs of decommissioning.

STATUTE & RULE HISTORY

When the legislature established the Council in 1975, it authorized Council to establish standards and rules an applicant for a site certificate must meet “including, but not limited to,

standards of financial ability and qualifications as to ability to construct and operate the energy facility.” In keeping with this authority, throughout the early 1980’s, the Council adopted financial assurance standards for different types of facilities requiring an applicant to demonstrate that it had reasonable assurance of obtaining the funds necessary to cover estimated construction and operating costs for the design life of the facility. These early standards also required the Council to find that an applicant and the co-owners of the facility would be capable of providing funds to construct, operate, and retire the facility without violating their respective bond indenture provisions, articles of incorporation, common stock covenants, or similar agreements. While this requirement has been removed from the standard, the information needed to support the finding is still required to be provided as part of Exhibit M.

The 1990’s saw a number of sweeping changes to both the Council’s rules and ORS chapter 469, including the passage of SB 1016 (1993) which, among other changes, required Council to consider the retirement of facilities in its rules and siting standards.¹ Between 1993 and 1999, the Council completed a series of rulemakings that replaced many of the individual siting standards for specific types of energy facilities with the “general standards” that are currently found in OAR chapter 345, division 022. The resulting Financial Assurance Standard required an applicant to demonstrate that it had a reasonable likelihood of obtaining a bond or comparable security in an amount adequate to restore the site to a useful condition if the certificate holder failed to complete construction, or closed the facility prior to the establishment of a satisfactory financial mechanism or instrument to assure funding for retirement. The rules also contained a separate Retirement Standard which required the Council to find that the site, taking into account mitigation, could be restored adequately to a useful condition following facility retirement.²

In 2002, the Financial Assurance and Retirement Standards were consolidated into a single rule, and the mandatory conditions for financial assurance were amended to require a decommissioning bond or letter of credit to remain in place at all times for the life of the facility. There have been some editorial changes to the mandatory conditions and information requirements, but the standard has not been amended since that time.

SUBSTANTIVE Requirements

The standard requires the applicant to demonstrate, in the record, that (1) “the site, taking into account mitigation, can be restored adequately to a useful, non-hazardous condition following permanent cessation of construction or operation of the facility;” and (2) “the applicant has a reasonable likelihood of obtaining a bond or letter of credit in a form and amount satisfactory to the Council to restore the site to a useful, non- hazardous condition.”

These two requirements serve two distinct purposes. The first requirement is intended to ensure that, at the end of the operating life of the facility, the facility can be decommissioned and the site can be returned to a useful non-hazardous state. As discussed further below, the Council’s rules also provide site certificate conditions and compliance obligations to ensure that the decommissioning actually occurs. The second requirement is intended to ensure the

¹ 1993 Oregon Laws, chapter 569, sections 11 and 22.

² EFSC 1-1993, EFSC 5-1993, EFSC 1-1994

certificate holder can provide adequate financial assurance, in the form of a bond or letter of credit, to prevent the costs of decommissioning from falling on the people of Oregon if the certificate holder fails to fulfill its obligations to decommission the facility.

INFORMATION REQUIREMENTS

In the Application for Site Certificate, Exhibits M and W must include information to support the findings required by the Retirement and Financial Assurance Standard. Exhibit M must include information about the applicant's financial capability, including:

- An opinion or opinions from legal counsel stating that, to counsel's best knowledge, the applicant has the legal authority to construct and operate the facility without violating its bond indenture provisions, articles of incorporation, common stock covenants, or similar agreements. OAR 345-020-0011(1)(m)(A)
- The type and amount of the applicant's proposed bond or letter of credit to meet the requirements of OAR 345-022-0050. OAR 345-020-0011(1)(m)(B)
- Evidence that the applicant has a reasonable likelihood of obtaining the proposed bond or letter of credit in the amount proposed in paragraph (B), before beginning construction of the facility. OAR 345-020-0011(1)(m)(B)

As mentioned above, specific standards related to the applicant's overall financial capability have been removed from the Council's rules, but this information may still be helpful in determining whether or not the applicant is likely to be able to obtain a bond or letter of credit in the required amount. However, most applicants satisfy these requirements by providing a comfort letter, or other documentation, showing that the applicant has an existing relationship with a financial institution that is willing to provide the necessary bond or letter of credit.

Exhibit W must include information about site restoration, including:

- The estimated useful life of the proposed facility. OAR 345-020-0011(1)(w)(A)
- Specific actions and tasks to restore the site to a useful, non-hazardous condition. OAR 345-020-0011(1)(w)(B)
- An estimate, in current dollars, of the total and unit costs of restoring the site to a useful, non-hazardous condition. OAR 345-020-0011(1)(w)(C)
- A discussion and justification of the methods and assumptions used to estimate site restoration costs. OAR 345-020-0011(1)(w)(D)
- For facilities that might produce site contamination by hazardous materials, a proposed monitoring plan, such as periodic environmental site assessment and reporting, or an explanation why a monitoring plan is unnecessary. OAR 345-020-0011(1)(w)(E)

The information provided in Exhibit W provides an overview of the decommissioning and site restoration activities that will be taken at the end of the facility's useful life, and an estimate of their costs. While the rules do not include detailed requirements, the information must be specific enough to validate the decommissioning bond or letter of credit amount proposed in Exhibit M.

APPLICATION OF THE STANDARD

As part of its review, the Council must review the applicant's proposed retirement estimate and determine if the amount is sufficient, and if any additional monitoring and mitigation programs or conditions are required to ensure that the site will be able to be restored to a useful, non-hazardous condition. The Council's rules establish additional procedural and substantive requirements through mandatory conditions and compliance obligations. These include rules:

- Requiring the certificate holder to submit a bond or letter of credit that is acceptable to Council prior to beginning construction and maintaining that bond or letter of credit until the facility has been retired. OAR 345-025-0006(8)
- Requiring the certificate holder to submit a proposed retirement plan for Council approval within 2 years after permanent cessation of construction or operation of the facility, and retiring the facility according to the plan. OAR 345-025-0006(9)
- Authorizing use of the bond or letter of credit to retire the facility according to a retirement plan developed by the Department if the Council finds that the certificate holder failed to meet its obligations to retire the facility. 345-025-0006(16)

Staff proposes to follow up on this presentation with a more detailed explanation of the process for retiring a site and for preparing, reviewing, and updating cost estimates at a future Council meeting.

AUTHORITIES

Statutory Authority

469.501 Energy facility siting, construction, operation and retirement standards; exemptions; rules.

(1) The Energy Facility Siting Council shall adopt standards for the siting, construction, operation and retirement of facilities. The standards may address but need not be limited to the following subjects.

(d) The financial ability and qualifications of the applicant.

Administrative Rules

345-020-0011 - Contents of a Notice of Intent

*(1) The applicant must, to the extent reasonably practicable, include in the notice of intent (NOI) the information described in the following subsections. ***:*

*(m) **Exhibit M.** Information about the applicant's financial capability, providing evidence to support a finding by the Council as required by OAR 345-022-0050(2). Nothing in this subsection requires the disclosure of information or records protected from public disclosure by any provision of state or federal law. The applicant must include:*

(A) An opinion or opinions from legal counsel stating that, to counsel's best knowledge, the applicant has the legal authority to construct and operate the facility without violating its bond indenture provisions, articles of incorporation, common stock covenants, or similar agreements;

(B) The type and amount of the applicant's proposed bond or letter of credit to meet the requirements of OAR 345-022-0050; and

(C) Evidence that the applicant has a reasonable likelihood of obtaining the proposed bond or letter of credit in the amount proposed in paragraph (B), before beginning construction of the facility.

*(w) **Exhibit W.** Information about site restoration, providing evidence to support a finding by the Council as required by OAR 345-022-0050(1). The applicant must include:*

(A) The estimated useful life of the proposed facility;

(B) Specific actions and tasks to restore the site to a useful, non-hazardous condition;

(C) An estimate, in current dollars, of the total and unit costs of restoring the site to a useful, non-hazardous condition;

(D) A discussion and justification of the methods and assumptions used to estimate site restoration costs; and

(E) For facilities that might produce site contamination by hazardous materials, a proposed monitoring plan, such as periodic environmental site assessment and reporting, or an explanation why a monitoring plan is unnecessary

ENERGY FACILITY SITING COUNCIL STANDARD

345-022-0050 - Retirement and Financial Assurance

To issue a site certificate, the Council must find that:

(1) The site, taking into account mitigation, can be restored adequately to a useful, non-hazardous condition following permanent cessation of construction or operation of the facility.

(2) The applicant has a reasonable likelihood of obtaining a bond or letter of credit in a form and amount satisfactory to the Council to restore the site to a useful, non-hazardous condition.

CONDITIONS

345-025-0006 - Mandatory Conditions in Site Certificates

(7) The certificate holder must prevent the development of any conditions on the site that would preclude restoration of the site to a useful, non-hazardous condition to the extent that prevention of such site conditions is within the control of the certificate holder.

(8) Before beginning construction of the facility, the certificate holder must submit to the State of Oregon, through the Council, a bond or letter of credit in a form and amount satisfactory to the Council to restore the site to a useful, non-hazardous condition. The certificate holder must maintain a bond or letter of credit in effect at all times until the facility has been retired. The Council may specify different amounts for the bond or letter of credit during construction and during operation of the facility.

(9) The certificate holder must retire the facility if the certificate holder permanently ceases construction or operation of the facility. The certificate holder must retire the facility according to a final retirement plan approved by the Council, as described in OAR 345-027-0110. The certificate holder must pay the actual cost to restore the site to a useful, non-hazardous condition at the time of retirement, notwithstanding the Council's approval in the site certificate of an estimated amount required to restore the site.

(16) If the Council finds that the certificate holder has permanently ceased construction or operation of the facility without retiring the facility according to a final retirement plan approved by the Council, as described in OAR 345-027-0410, the Council must notify the certificate holder and request that the certificate holder submit a proposed final retirement plan to the Department within a reasonable time not to exceed 90 days. If the certificate holder does

not submit a proposed final retirement plan by the specified date, the Council may direct the Department to prepare a proposed final retirement plan for the Council's approval. Upon the Council's approval of the final retirement plan, the Council may draw on the bond or letter of credit described in section (8) of this rule to restore the site to a useful, nonhazardous condition according to the final retirement plan, in addition to any penalties the Council may impose under OAR chapter 345, division 29. If the amount of the bond or letter of credit is insufficient to pay the actual cost of retirement, the certificate holder must pay any additional cost necessary to restore the site to a useful, non-hazardous condition. After completion of site restoration, the Council must issue an order to terminate the site certificate if the Council finds that the facility has been retired according to the approved final retirement plan

TERMINATION

345-027-0110 - Termination of a Site Certificate

(1) A certificate holder may apply to the Council to terminate a site certificate at any time, subject to the requirements of this rule.

(2) A certificate holder must apply to the Council to terminate a site certificate within two years following cessation of construction or operation of the facility.

(3) If the certificate holder fails to apply to the Council to terminate the site certificate and the Council finds that the certificate holder has permanently ceased construction or operation of the facility, then the Council may terminate the site certificate according to the procedure described in OAR 345-025-0006(16).

(4) In an application for termination of the site certificate, the certificate holder must include a proposed final retirement plan for the facility and site. The certificate holder must submit two printed copies of the application for termination and the proposed final retirement plan, and an electronic version of the application for termination and the proposed final retirement plan in a non-copy-protected electronic format acceptable to the Department. The certificate holder must submit additional printed copies of the application for termination and the proposed final retirement plan to the Department upon request.

(5) In the proposed final retirement plan, the certificate holder must include:

(a) A plan for retirement that provides for completion of retirement without significant delay and that protects public health, safety and the environment;

(b) A description of actions the certificate holder proposes to take to restore the site to a useful, non-hazardous condition, including information on how impacts to fish, wildlife and the environment would be minimized during the retirement process;

(c) A current detailed cost estimate and a plan for ensuring the availability of adequate funds for completion of retirement; and

- (d) An updated list of property owners, as described in OAR 345-021-0010(1)(f).*
- (6) Within 15 days after receiving an application for termination of a site certificate, the Department must:*
- (a) Send a notice of the application, specifying a date by which comments on the application are due, by mail or email to:
 - (A) All persons on the Council's general mailing list, as defined in OAR 345-011-0020;*
 - (B) All persons on any special list established for the facility; and*
 - (C) The property owners on the updated list submitted by the certificate holder under section (5) of this rule;**
 - (b) Send copies of the application for termination by mail or email to the reviewing agencies for the facility, and ask those agencies to comment by a specified date; and*
 - (c) Post an announcement of the application for termination on the Department's website.*
- (7) The Council must review the proposed final retirement plan and must consider any comments received from the public and the reviewing agencies. The Council may approve the proposed final retirement plan or modify the plan to comply with the rules of this chapter and applicable conditions in the site certificate. If the plan is approved, the Council must issue an order authorizing retirement according to the approved or modified final retirement plan and subject to any conditions the Council finds appropriate. The Council's order may be appealed as described in ORS 183.480.*
- (8) When the Council finds that the certificate holder has completed the retirement of the facility according to the Council's order authorizing retirement, the Council must issue an order terminating the site certificate.*