



# Oregon

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**To:** Energy Facility Siting Council

**From:** Christopher M. Clark, Siting Policy Analyst & Rules Coordinator

**Date:** August 13, 2021

**Subject:** Agenda Item G (Action Item):  
Surety Bond Template Update for the August 27, 2021, EFSC Meeting

**Attachments:** Attachment 1: Draft Amended Bond Template  
Attachment 2: Draft Amended Letter of Credit Template

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## STAFF RECOMMENDATION

Staff recommends the Council amend the Surety Bond Template, as shown in Attachment 1, to ensure that a bond would perform if a Surety gives notice of its intent to cancel a bond and the certificate holder fails to provide an acceptable replacement.

## BACKGROUND

The Council has adopted rules requiring each certificate holder to provide a surety bond or letter of credit before beginning construction of a facility. The bond or letter of credit must be provided in a form and amount satisfactory to the Council to restore the site to a useful, non-hazardous condition, and must be maintained at all times until the facility has been retired. OAR 345-025-0006(8). These requirements provide assurance that the people of Oregon will not be burdened with the costs of restoring the site if the certificate holder is unable or unwilling to properly decommission the facility following permanent cessation of construction or operation of the facility.

Both bonds and letters of credit are commonly used and accepted forms of security, but there are some important differences. A surety bond provides a guarantee that the principal (e.g. the certificate holder), will meet the requirements of a contract (e.g. the site certificate.) If there is a documented breach in the terms of the contract, the surety will make payment to the Obligee (e.g. the State) to ensure that the contract is fulfilled. A letter of credit, on the other hand, is a bank's guarantee that it will pay a set amount to the letter holder upon demand and does not typically require proof of a breach to perform.

As shown in the table below, the Council has financial assurance on file for approximately \$168.2 million in estimated retirement costs. About 56 percent of the total amount was assured through letters of credit, with the remaining 44 percent assured through surety bonds.

**Table 1: Energy Facility Security Deposits as of April 1, 2021.**

<b>Project Name</b>	<b>Instrument</b>	<b>20-21 Value</b>
Biglow Canyon Wind Farm	LOC	\$17,825,000
Columbia Ethanol Project	Bond	\$315,244
Carty Generating Station	LOC	\$23,011,000
Coyote Springs Cogeneration	LOC	\$4,117,500
Golden Hills Wind	Bond	\$11,903,000
Hermiston Generating Project	Bond	\$7,102,200
Hermiston Power Project	LOC	\$5,139,883
Klamath Cogeneration Project	Bond	\$5,431,244
Klamath Generation Peakers	Bond	\$709,759
Klondike Wind Power III	Bond	\$11,857,000
Leaning Juniper Wind Power	Bond	\$12,245,000
Mist Underground Storage Facility	Bond	\$4,557,800
Montague Wind Power	Bond	\$7,865,000
Port Westward Generating Project	LOC	\$11,276,462
Shepherds Flat Central	LOC	\$10,451,000
Shepherds Flat North	LOC	\$8,672,000
Shepherds Flat South	LOC	\$10,225,000
South Mist Pipeline Extension	Bond	\$120,228
Summit Ridge Wind Farm	LOC	\$63,129
Stateline Wind Project-1&2	Bond	\$7,004,000
Stateline Wind Project-3	Bond	\$4,903,000
Wheatridge Renewable Energy Facility 1	LOC	\$3,444,000
<b>TOTAL</b>		<b>\$168,238,449</b>

The Council has adopted standardized templates for each security instrument that is accepted under the rules. The Council and Department periodically review the template language to ensure that the templates provide adequate assurance for the costs associated with retirement and site restoration and is consistent with current industry and regulatory practices. While both the bond and letter of credit templates were reviewed and are attached to this staff report, staff is not recommending changes to the letter of credit template at this time.

### **BOND TEMPLATE ASSESSMENT**

The bond template provides that the bond will perform only when the certificate holder has failed to fulfill its obligations to retire the facility and restore the site. When a certificate holder permanently ceases construction or operation of a facility it must provide an application for termination of its site certificate that includes a final retirement plan for the site explaining the actions that will be taken to restore the site to a useful, non-hazardous condition. OAR 345-027-0110. The bond is released once the restoration activities described in an approved retirement plan are complete. If the certificate holder fails to submit a retirement plan, or fails to comply

with the plan it submitted, the Council may call on the bond as needed to restore the site. To ensure that funds will be available to restore the site in the event a certificate holder fails to retire the site the certificate holder must maintain a bond or letter of credit for the life of the facility.

During its last review of the bond template language at the January 22, 2021 meeting, the Council noted that the current bond template language does not clearly state that the bond would perform if a certificate holder fails to maintain acceptable security for the life of the facility. Specifically, the template states that in the event that a certificate holder fails to provide an acceptable replacement after a Surety provides notice of its intent to cancel the existing bond instead of providing that the bond will perform, the template states that the Department may take enforcement measures under OAR chapter 345, division 029:

“6. If the Surety cancels the bond prior to the Principal fulfilling its obligation to retire the facility and restore the site, but Principal does not provide alternate financial assurance approved by the Council within 90 (ninety) days after the date of notice of cancellation is received by the Obligee from the Surety, the Oregon Department of Energy *may take enforcement measures as described in OAR 345-029-0000 through OAR 345-029-0100.*” (Emphasis added.)

The enforcement procedures in OAR 345-029 are generally intended to obtain compliance through corrective actions but allow for sanctions such as civil penalties and the suspension or revocation of a site certificate if a certificate holder is unable, or unwilling, to take appropriate action. It is unclear that these sanctions would be effective to compel compliance with the retirement and financial assurance requirement, particularly when a certificate holder has permanently ceased construction or operation of a facility, or is facing financial conditions that would cause a surety to not renew or cancel its bond. We further note that any civil penalties assessed and collected through enforcement actions are statutorily required to be deposited in the State’s general fund and would not necessarily be available for the decommissioning and site restoration activities the bond is intended to assure.

The lack of a clear and effective mechanism to ensure that a certificate holder maintains a bond or letter of credit until the facility has been retired could expose the State to unacceptable risk. For this reason, staff recommends that the Council amend the bond template to clarify that if the certificate holder does not provide an acceptable replacement after a surety has given notice of its intent to cancel the bond, the surety may become liable for payment. This is consistent with the terms of the LOC template, and with decommissioning bond forms used by other regulatory agencies.<sup>1</sup>

In addition, staff recommends that the provisions for expiration of the bond be removed so that the bond remains valid for the life of the facility, or until the surety provides a notice of intent to cancel the bond. The amount of bond may still be adjusted annually to reflect changes in inflation through the use of riders. In the alternative, an “evergreen” clause could be included

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<sup>1</sup> For an example, see Oregon DOGAMI Performance Bond to Conduct Geothermal Well Drilling or Prospecting at: [https://www.oregongeology.org/mlrr/forms/geothermal/Performance\\_Bond\\_Geo\\_06-2013.pdf](https://www.oregongeology.org/mlrr/forms/geothermal/Performance_Bond_Geo_06-2013.pdf)

in the bond template which causes the bond to be automatically renewed every year unless the surety provides notice of its intent to not renew the bond. If the Council chooses not to remove the provisions for expiration of the bond, staff recommends that the conditions of performance be amended to allow the state to call on the bond if an appropriate replacement is not provided at least 30 days before the bond's expiration date in addition to the other changes recommended in this report.

Staff's recommended changes to the bond template are provided in Attachment 1. The current bond template requires the surety to give a 120-day written notice of its intent to cancel the bond to the Council. Staff recommends that the revised template language should also require notice to be given to the certificate holder, and that the certificate holder should continue to have 90 days from that date to provide a replacement before action is taken on the bond. If the Council adopts the recommended revision, staff will review internal operating procedures to ensure that appropriate notice is given to both the surety and certificate holder prior to taking action on any bond.

These changes are generally consistent with the Letter of Credit template provided as Attachment 2. The template establishes an Irrevocable Standby Letter of Credit (ISLOC) which is payable upon presentation to the issuing financial institution subject to certain terms and conditions. One condition requires a dated draw certificate describing the conditions under which the Council is presenting the ISLOC for payment. The draw certificate provided under ISLOC Exhibit B allows for presentation to be made when a financial institution provides notice of intent to not renew the ISLOC and the certificate fails to provide acceptable replacement security at least 30 days before prior to its expiration.

#### **RECOMMENDED COUNCIL ACTION**

Staff recommends the Council amend the bond template to provide that (1) the bond will not expire, but may be cancelled by the Surety with 120 days' notice and (2) the Surety will become liable for payment if the certificate holder does not provide an acceptable replacement for the bond at least 30 days before the cancellation date. Staff's recommended changes are provided in Attachment 1. Staff does not recommend changes to the Letter of Credit template at this time.