



ENERGY FACILITY SITING COUNCIL

Marcia Grail, Chair ■ Kent Howe, Vice-Chair ■ Hanley Jenkins ■ Jordan Truitt ■ Cynthia Condon ■ Perry Chocktoot ■ Phil Stenbeck

Energy Facility Siting Council Meeting Minutes December 16-17, 2021

Thursday, December 16, 2021 5:30 p.m.
WebEx Teleconference

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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>

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¹ Audio for Agenda Item A=00:03:13 - 2021-12-16-17-EFSC-Meeting-Audio Day 1

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¹⁰ Audio for Agenda Item I=00:58:10 - 2021-12-16-17-EFSC-Meeting-Audio Day 2, Part 2

¹¹ Audio for Agenda Item J=03:46:02 - 2021-12-16-17-EFSC-Meeting-Audio Day 2, Part 2 ** Agenda was modified to add this item

Thursday, December 16, 2021
WebEx Teleconference

Call to Order: The meeting was called to order on Thursday, December 16, 2021 at 5:30 p.m. by Vice Chair Howe.

Roll Call: Vice-Chair Kent Howe, Council Members Cynthia Condon, Hanley Jenkins, Perry Chocktoot, Jordan Truitt, and Phil Stenbeck 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; Operations and Policy Analyst, Wally Adams; and Fiscal Analyst, Sisily Fleming.

Secretary Cornett informed that there would likely be a request for an agenda modification when the Council meeting resumes Friday morning.

- A. Stateline Wind Project, Amendment #6 Draft Proposed Order Public Hearing (Hearing)¹²** – The Stateline Wind Project is an operational wind energy facility consisting of two units – Stateline 1 & 2 and Vansycle II. Stateline 1 & 2 is composed of 186 wind turbines and has a peak generating capacity of up to 123 megawatts. Vansycle II consists of 43 wind turbines with a peak generating capacity of 99 megawatts. The project is located in North Umatilla County north and east of the City of Helix. Amendment #6 (RFA6), entirely within the Vansycle II Unit, proposes to replace blades and nacelles (repower) of 43 existing wind turbines; decommission and replace up to 4 existing wind turbines; construct and operate up to 2 wind turbines; total not to exceed 45 wind turbines; and, construct and operate 50 MW of battery energy storage. (More information is located on the [Council Meetings website](#) for additional details pertaining to this [presentation](#).)

Chase McVeigh-Walker, Senior Siting Analyst, provided an overview and procedural history of RFA6.

Vice-Chair Howe, acting as Presiding Officer, provided an overview of the scope of the Hearing.

The Hearing was opened, and the following comments were offered by the applicant:

- Anneke Solsby, NextEra Energy Services
Ms. Solsby stated the benefits of repowering are utilizing a site's existing wind resources with greater efficiency using new technology and utilizing existing infrastructure. Under the analysis provided in the RFA, the difference in impacts between the current turbine blades and the new blades is indiscernible and added that the existing turbine blades would be recycled. She explained that wind facilities have a finite life and stressed the importance of long-term planning to remain operational and maintain the renewable goals accrued and be consistent with HB 2021.
- David Lawlor, Regional Development Director, NextEra Energy Resources
Mr. Lawlor reemphasized that the efficiency created through the repower is an important element in reducing climate emissions and thanked the Council for their review.

Council Member Condon, regarding Ms. Solsby's statement about the recycling of the existing turbine blades, noted that recycling wasn't mentioned in the RFA and asked whether recycling was a commitment of NextEra.

¹² Audio for Agenda Item A=00:03:13 - 2021-12-16-17-EFSC-Meeting-Audio Day 1

Mr. Lawlor affirmed that NextEra is committed to recycling to the extent possible as required by the site certificate conditions.

The following public testimony was offered:

- Irene Gilbert
Ms. Gilbert expressed concern over the lack of specific information regarding the removal and recycling of existing blades. She indicated that turbine blades are filling landfills and will impact the public's ability to utilize the landfills for other purposes. She questioned the need for the developer to replace the blades eleven years into operation and whether it was in the best public interest. She suggested the Site Certificate contain further specifications for recycling and requested Council evaluate it further.
- Richard Jolly, Blue Mountain Alliance
Mr. Jolly stated that he had submitted an email regarding waste management. He shared that an improper disposal of turbine blades occurred in Umatilla County and requested Council require the developer to track and document the waste to its end point in the site certificate to ensure proper disposal.

Secretary Cornett confirmed that Mr. Jolly's written comments had been received and would be forwarded to the Council.

Presiding Officer Howe confirmed that there were no additional public comments and offered the applicant the opportunity to respond to public testimony.

- Christopher Powers, NextEra
Mr. Powers explained that certificates indicating that the blades have been delivered to various recycling facilities are received by NextEra from their manufacturing partners. He went on to share that during recycling, turbine blades are ground up and used as an aggregate in concrete, and other components such as the nacelle are sent to salvage yards as appropriate, and certificates are also received in those instances.

Council Member Jenkins asked Mr. Powers whether the recycling certificates were something that could be provided to the Department.

Mr. Powers responded that the certificates would be provided as part of their annual reporting.

Council Member Condon noted in the proposed language in the site certificate conditions for recycling, the use of terms such as "when feasible" or "to the extent possible" and suggested, based on additional opportunities for recycling, the possibility of changing language in the site certificate to be more specific to the commitments offered.

Mr. Lawlor responded to Council Member Condon that there are a variety of ways of reducing and recycling, however there may still be some components that are unable to be recycled. He stated that some of the proposed conditions require the proof of recycling or proper disposal with a licensed facility, and offers the flexibility needed for those components that are not recyclable.

Council Member Condon clarified that the reporting would include details delineating the waste that was recycled from that that was properly disposed, to which Mr. Lawlor affirmed.

Secretary Cornett noted that two written comments had been received during the hearing that have not yet been shared with the Site Certificate holder, and offered the option for the site certificate holder to review and respond to the comments prior to the close of the hearing.

Council Member Jenkins motioned that the Council grant the Site Certificate Holder until December 17, 2021 at 10 a.m. to respond to the written comments and close the Hearing at that time.

Council Member Truitt seconded the motion.

Motion carried unanimously.

Presiding Officer Howe concluded the Hearing at 6:24 p.m. and closed the comment period with the exception of the site certificate holder's response as granted.

Recess

Vice Chair Howe recessed the meeting at 6:25 pm to reconvene on Friday, December 17, at 8:30 a.m.

Friday, December 17, 2021 WebEx Teleconference

Call to Order: The meeting was called back to order on Friday, December 17 at 8:32 a.m. by Vice Chair Howe.

Roll Call: Vice-Chair Kent Howe, Council Members, Cynthia Condon, Hanley Jenkins, Perry Chocktoot, Jordan Truitt, and Phil Stenbeck were present.

Oregon Department of Energy representatives present were Assistant Director for Siting/Council Secretary, Todd Cornett; Senior Policy Advisor, Sarah Esterson; Senior Siting Analysts, Chase McVeigh-Walker and Kathleen Sloan; Siting Policy Analyst and EFSC Rules Coordinator, Christopher Clark; Operations and Policy Analyst, Wally Adams; and Fiscal Analyst, Sisily Fleming. Oregon Department of Justice Senior Assistant Attorney General Patrick Rowe counsel to EFSC, and Senior Assistant Attorney General Jesse Ratcliffe, counsel to EFSC in ongoing contested cases, were also present.

Agenda Modification: Secretary Cornett requested Council modify the agenda to add Agenda Item J: Council Consideration and Disposition of two questions certified by Hearing Officer Greene-Webster in the Contested Case for the Boardman to Hemingway Transmission Line Application for Site Certificate. He explained that Council's authority to add agenda items is provided in Oregon Administrative Rule 345-011-0025, and that due to the timing of the cross examination hearing beginning on January 10, 2022, Council consideration should not be deferred until the next scheduled Council meeting of January 27-28.

Council Member Jenkins motioned that the two certified questions sent by Hearing Officer Greene-Webster to Council on December 14, 2021, are integral to the cross-examination phase of the Boardman to Hemingway contested case which begins on January 10, 2022, and are therefore so substantial and of such immediate concern that their consideration and disposition by Council should not be deferred to the January 27-28, 2022 next regularly scheduled Council meeting, and therefore should be added as Agenda Item J to today's Council meeting.

Council Member Condon seconded the motion.

Motion carried unanimously.

- B. Consent Calendar (Action Item & Information Item)¹³** – Approval of October 22, 2021 and November 18-19, 2021 meeting minutes; Council Secretary Report; and other routine Council business.

Consideration of the October 22, 2021 and November 18-19, 2021 Meeting Minutes

Council Member Jenkins motioned that the Council adopt the October 22, 2021 and November 18-19, 2021 meeting minutes as presented by staff.

Council Member Stenbeck seconded the motion.

Motion carried unanimously.

Council Secretary Report

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

Staffing / Council Appointment Updates

- Nancy Hatch has been hired to fill the Administrative Specialist position and will start January 3, 2022 and attend the January meeting.

Project Updates

- Golden Hills Construction Update (Senior Policy Advisor, Sarah Esterson, Compliance Officer Duane Kilsdonk)
Ms. Esterson reminded Council that September 1, 2021 the Department received a formal complaint from several tenant farmers, regarding dust, topsoil management and excessive disturbance at the construction site. Since then the Department has been working with the Site Certificate holder, Avangrid Renewables, to implement and evaluate corrective measures and has been providing monthly updates. In November, the Department began working directly with the tenant farmers to better understand their concerns about excessive and unnecessary disturbance on agricultural lands. Formal corrective action and evaluation requested from Avangrid was received December 15, 2021 and is currently under review. She explained that due to ongoing concerns additional site visits have been conducted to track the employment of erosion control materials to make sure there aren't ongoing impacts to agricultural lands. Mr. Kilsdonk shared details of the compliance inspection he and the Department's contractor conducted on December 8, 2021, where issues of non-compliance were documented. On December 12, 2021 the Department issued a Notice of Potential Non-Compliance and a formal records request to Avangrid to determine impacts to waters of the State which is a function of the 1200C permit under Oregon Department of Environmental Quality (DEQ). On December 15, 2021 the Department, in coordination with DEQ, conducted another site visit. Avangrid also submitted a report detailing their evaluation of violations to site certificate conditions and immediately issued a stop work order at the site. Avangrid indicated that a third-party engineer would be retained to implement their erosion control measures and maintenance in the future.

Future Meetings

- The next Council meeting is anticipated to be a single day and is scheduled to be held virtually on the 28th of January. Council Member Condon's availability noted as tentative; all other Council members present confirmed their availability.

¹³ Audio for Agenda Item B=00:07:43 - 2021-12-16-17-EFSC-Meeting-Audio Day 2, Part 1

- C. HB 2064 Rulemaking (Action Item)¹⁴** – Christopher Clark, ODOE Siting Policy Analyst & EFSC Rules Coordinator. The Council reviewed public comments and considered the adoption of permanent rules on the proposed revisions to OAR 345-011-0005 related to the implementation of HB 2064 (2021) and the Council's Quorum Requirements. The written comment period for the proposed rules closed on December 10, 2021 at 6:00 pm. 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.

Council Member Jenkins motioned the that the Council adopt the proposed rules as presented in the Notice for Proposed Rulemaking.

Council Member Truitt seconded the motion.

Motion carried unanimously.

Council Member Jenkins confirmed the rules would become effective January 1, 2022.

- D. Trojan ISFSI Rulemaking (Action Item)¹⁵** – Christopher Clark, ODOE Siting Policy Analyst & EFSC Rules Coordinator. The Council reviewed public comments and considered the adoption of permanent rules on the proposed updates to the rules for the Trojan Independent Spent Fuel Storage Installation (ISFSI) under OAR 345-026-0170 to 345-026-0390 and OAR 345-070. The written comment period for the proposed rules closed on December 10, 2021 at 5:00 pm. More information is located on the [Council Meetings website](#) for additional details pertaining to this [presentation](#).

Mr. Clark explained that no comments were provided at the hearing for this rulemaking, but the Council had received two written comments prior to the end of the public comment period, one from Portland General Electric Company and one from Oregon Conservancy Foundation. Mr. Clark included a review of the comments and presented staff's recommended responses as Attachment 2 to the staff report.

During the presentation the following discussion occurred:

Mr. Clark explained that a commenter objected to the proposed deletion of text in OAR 345-026-0340 because it provides important context. Mr. Clark explained that staff recommended that Council retain the proposed language with some editorial changes.

*["The certificate holder may not make changes to the security plan that **would** reduce the ability to detect or prevent unauthorized entry, reduce the ability to detect or prevent unauthorized entry, reduce the ability to detect or prevent the introduction of unauthorized material into a Protected Area, or otherwise reduce the effectiveness of the plan without prior written approval from the Council and Director, as required by ORS 469.530"]*

Council Member Condon expressed concern with the use of the word "would" in the recommended revisions to OAR 345-026-0340(3). She was concerned that "would" may imply that certainty was required and asked Mr. Clark to explain why it was chosen over "may".

¹⁴ Audio for Agenda Item C=00:18:47 - 2021-12-16-17-EFSC-Meeting-Audio Day 2, Part 1

¹⁵ Audio for Agenda Item D=00:23:58 - 2021-12-16-17-EFSC-Meeting-Audio Day 2, Part 1

Mr. Clark explained the word “may” is used in rulemaking to convey permission or privilege, however, he agreed that it could be changed to “may” or “could” if Council believed it provided more clarity, or alternatively, he suggested “would” could be removed entirely.

Vice Chair Howe supported replacing “would” with “could” as it allows for anticipation of an event during the evaluation of a change, and Council Member Jenkins agreed.

Council concurred the final rule language for OAR 345-026-0340(3) should be modified to change “would” to “could:”, adding the colon to tie this qualifier to all criteria in the text based on advice from Mr. Rowe.

Mr. Clark explained that a commenter objected to existing provisions of multiple rules that provide notification timelines for changes that do not require prior approval. Staff recommended no changes in response to the comments. There was no discussion from Council.

Mr. Clark explained that a commenter suggested that OAR 345-026-0370(4)(e) and (f) be amended to clarify what constitutes a “significant” change in effluents or increase radiological exposure that would require Council’s prior review and approval of a revision to the ISFSI decommissioning plan. Mr. Clark recommended that the word “significant” be removed from those subsections to remove the ambiguity. Council Members Jenkins and Condon stated they would support that approach.

Mr. Clark explained that a commenter raised a similar concern with regards to the requirement in OAR 345-026-0390(4)(a)) that the certificate holder maintain equipment to respond to accidents in a reasonable time frame. Mr. Clark explained that the Emergency Plan and Safety Analysis Report for the ISFSI provide details on the procedures and timeframes for responding to credible accident scenarios.

Council Member Condon asked Mr. Clark to define what is a “reasonable time period”.

Mr. Clark responded that while he couldn’t recall the timelines associated for each specific event, he explained that it depends on the nature of the event that created the needed repairs and that it would be a time within which they can address any risk of potential increased exposures to their workers or members of the public.

Council Member Condon asked, in the event that the needed repair is unknown, whether there is a required notice period.

Mr. Clark explained that there is another rule that requires specific notification periods based on the level of event. For example, in the event of a serious breach of security, immediate notification must be made to the Oregon Emergency Response System and the Nuclear Regulatory Commission (NRC), while other less serious events require 24-72 hour notification periods, as well as follow up reporting requirements for all events.

Council Member Condon clarified that the certificate holder is then determining what the reasonable time period is based on the event.

Mr. Clark affirmed and informed that this specific rule just requires that the site certificate holder must have, or provide, the equipment needed to repair the ISFSI due to an event, in a reasonable time frame. Specific time periods for accident response, issues arising during a site inspection are more clearly defined in the emergency plan and the inspection programs. He explained the intent of this rule is to ensure that the equipment is available to meet those timelines.

Council Member Jenkins confirmed that changes to OAR 345-026-0390(4)(a) are not currently proposed.

Mr. Clark explained that a commenter requested clarification of definitions in the proposed OAR 345-070-0015 and that staff recommended the Council make some revisions for clarification. Council member Jenkins supported making the rule clear.

Mr. Clark concluded his presentation with recommendations to correct scrivener's errors identified in comments.

Vice-Chair Howe asked if there was further discussion before the Council made its final decision.

Council Member Condon expressed discomfort in an undefined "reasonable time period", and desired language be added to provide clarity.

Vice Chair Howe acknowledged Council Member Condon's concern and pointed out the complexity in clarifying time periods for each potential scenario.

Council Member Jenkins asked whether the NRC has defined or provided guidance for the term "reasonable time period".

Mr. Clark explained that the requirement to maintain equipment is unique to the Department's rule set and not included in the NRC regulations. Specific emergency response requirements are found in the facility's Emergency Plans.

Council Member Chocktoot asked whether in the event that equipment breaks down or has an oil spill whether it would need to be reported to the Department of Environmental Quality (DEQ) within a certain time period.

Mr. Clark explained that all other federal reporting timeframe requirements remain intact and stated that in the event of an oil spill all federal and local regulations would need to be complied with.

Mr. Clark offered, based on Council Members concerns, that while he was hesitant to establish specific timeframes in this rule, Council could articulate its objectives in the determination of "reasonable time frame". He suggested adding qualifiers such as "...reasonable time frame to minimize risks to public health and safety of radiological hazards".

Council Member Condon suggested adding reference to the Emergency Plan or other requirements where the timelines are more clearly defined.

Mr. Clark offered that reference to the Safety Analysis Report could be included, which is an NRC approved document that establishes criteria for all programs.

Council agreed with Mr. Clark's suggestion, and action was postponed following the next agenda item.

E. Public Comment Period (Information Item)¹⁶ – 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

Ms. Gilbert attempted to make comments related to the Boardman to Hemingway Application for Site Certificate which is in the contested case period and Council was unable to receive comments. Ms. Gilbert inquired about, and was informed that, materials she recently submitted were currently being reviewed by the Council's Counsel, Jesse Ratcliffe, and will be addressed further during agenda Item J. Ms. Gilbert commented that when Council changes rules, or rule interpretations, partway through any

¹⁶ Audio for Agenda Item E=01:11:50 - 2021-12-16-17-EFSC-Meeting-Audio Day 2, Part 1

contested case, incredible stress is created for the participants. She shared details of the personal life challenge she's navigating and the difficulty this creates for her. She shared with Council her understanding of a recent federal court decision regarding the process that must be followed when an agency reinterprets rules and encouraged Council to familiarize themselves with the federal requirement.

- Lloyd Marbet

Mr. Marbet informed Council that while he had not appeared before the Council in nearly 20 years, he participated heavily in Council rulemaking proceedings for a time. He recalled during those proceedings, participants who had submitted comments were allowed the opportunity to speak to the Council during the review of the various issues raised in the comment period. He stated that the Council is not proceeding that way currently, and he would prefer that it did. He would have appreciated a copy of the staff letter submitted to the Council on the newly proposed changes and a copy the comments submitted by others. He stated that allowing participants the opportunity to review all comments establishes a fair procedure for Council review and would have afforded him the ability to be prepared to effectively participate in today's rulemaking proceedings.

No further comments were offered, and the public comment period was closed.

D. Continuation of Trojan ISFSI Rulemaking (Action Item)¹⁷ – Christopher Clark, ODOE Siting Policy Analyst & EFSC Rules Coordinator. The Council considered the adoption of permanent rules on the proposed updates to the rules for the Trojan Independent Spent Fuel Storage Installation (ISFSI) under OAR 345-026-0170 to 345-026-0390 and OAR 345-070. The written comment period for the proposed rules closed on December 10, 2021 at 5:00 pm.

*Mr. Clark presented the Council's final changes (**in bold**) to following rule language for their review.*

OAR 345-026-0340(3)

*The certificate holder may not make changes to the security plan that **could**: reduce the ability to detect or prevent unauthorized entry; reduce the ability to detect or prevent unauthorized entry; reduce the ability to detect or prevent the introduction of unauthorized material into a Protected Area, or; otherwise reduce the effectiveness of the plan without prior written approval from the Council and Director, as required by ORS 469.530.*

OAR 345-026-0390(4)(a)(E)

*A program for maintaining equipment onsite and having equipment available to respond to credible accident scenarios as required by the **Safety Analysis Report** and a plan for construction of new concrete casks.*

Council Member Condon asked, regarding the use of the word "equipment" versus materials, whether the expectation was that equipment would be needed over other types of resources.

Mr. Clark explained that specialized equipment would be needed in this type of scenario, and this rule is intended to cover this equipment, versus other materials that are more readily available.

Council Member Jenkins motioned that the Council adopt the rules in the Notice of Proposed Rulemaking proposed rules with changes based on public comment and include the changes to OAR 345-026-0340(3) and OAR 345-026-0390(4)(a)(E) described in the record and amended to read as follows:

OAR 345-026-0340(3)

The certificate holder may not make changes to the security plan that could: reduce the ability to detect or prevent unauthorized entry; reduce the ability to detect or prevent unauthorized entry; reduce the

¹⁷ Audio for Agenda Item D=01:25:18 - 2021-12-16-17-EFSC-Meeting-Audio Day 2, Part 1

ability to detect or prevent the introduction of unauthorized material into a Protected Area, or; otherwise reduce the effectiveness of the plan without prior written approval from the Council and Director, as required by ORS 469.530.

OAR 345-026-0390(4)(a)(E)

A program for maintaining equipment onsite and having equipment available to respond to credible accident scenarios as required by the Safety Analysis Report and a plan for construction of new concrete casks.

Council Member Condon seconded the motion.

Motion carried unanimously.

- F. Council Appointment of Consultant for West End Solar Energy Project (Action Item)¹⁸** – Sarah Esterson, Senior Policy Advisor, presented a request to Council for the Department’s use of consultants for assistance in completing the Draft Proposed Order for the West End Solar Energy Project in Q2 2022. More information is located on the [Council Meetings website](#) for additional details pertaining to this [presentation](#).

Council did not have questions or comments during this presentation.

Council Member Jenkins motioned Council approve the Department’s request to use Haley Aldrich for assistance and technical evaluation in completing the Draft Proposed Order for the West End Solar Project in Quarter 2, 2022.

Council Member Truitt seconded the motion.

Motion carried unanimously.

- G. Annual Election of Officers (Action Item)¹⁹** – Todd Cornett, Council Secretary. Consistent with OAR 345-011-0010(1), Council completed its obligation to annually elect a Chair and a Vice Chair. More information is located on the [Council Meetings website](#) for additional details pertaining to this [presentation](#).

Secretary Cornett informed the Council that Chair Grail and Vice Chair Howe have both indicated that they are willing to continue serving their current roles if Council wished to re-elect them.

Council Member Jenkins appreciated Chair Grail’s willingness to continue to serve and desired Council consider it. He went on to state that rotating the positions more often will also give more members the opportunity to serve and encouraged Council to consider a rotation plan in the future.

Council Member Jenkins moved that Ms. Grail be reappointed as Chair, and Mr. Howe be reappointed as Vice Chair.

Council Member Condon seconded the motion.

¹⁸ Audio for Agenda Item F=01:32:02 - 2021-12-16-17-EFSC-Meeting-Audio Day 2, Part 1

¹⁹ Audio for Agenda Item G=00:00:00 - 2021-12-16-17-EFSC-Meeting-Audio Day 2, Part 2

Motion carried unanimously.

H. 2022-2024 Rulemaking Prioritization (Action Item)²⁰ – Christopher Clark, Rules Coordinator. The Council received an update on rulemaking activities conducted in 2021 and will consider staff's recommendations for potential rulemaking projects to be undertaken in the 2022-2024 time period. More information is located on the [Council Meetings website](#) for additional details pertaining to this [presentation](#).

Council did not have questions or comments during this presentation.

Prior to opening the opportunity for oral public comments on this agenda item, Secretary Cornett confirmed that Council was in receipt of two written comments that were submitted from members of the public via email.

No oral public comments were provided, and the comment period closed.

Council Member Jenkins asked Mr. Clark to summarize the two written comments Council received.

Mr. Clark summarized that both comments sought higher prioritization of the Protected Areas, Recreation and Scenic Resources rulemaking project, which is currently scheduled for Council's consideration of proposed rules in April 2022. Mr. Clark explained that the project was scheduled in this way due to the significant amount of feedback already received, specifically related to the Scenic Resources standard, to allow time to thoroughly evaluate all of the resources, update the analysis and draft a recommendation to satisfy all stakeholder constituencies. He anticipated that a preliminary draft would likely be presented to Council at its February meeting to allow for additional stakeholder feedback, prior to offering the formal proposal in April 2022. He offered that the Department could, if Council desired, break out some of the more complicated issues for a separate rulemaking project, and otherwise expedite the project.

Council Member Jenkins was unsupportive of segmenting the rulemaking and believed that because the topics were related it is beneficial for the topics to follow the same track. He agreed it is a complicated effort and acknowledged associated workload and time constraints.

While Vice Chair Howe agreed that the topics are related and should not be segmented, Council Member Condon offered that, based on her participation in the rulemaking workshops, it becomes confusing to discuss all of the topics together. She stated that these issues tend to be the focus of the public and desired a faster track and asked whether it was feasible to split the rulemaking project.

Mr. Clark stated that it would be feasible and issues that are more administrative in nature that have been identified in the initial scope and could be broken out leaving the remaining more complicate issues to be folded in the Application Review Process Rulemaking.

Council Member Condon asked how changes to rules impact current certificate holders.

Mr. Clark explained that Council must find compliance with the standards in place at the time of the decision, unless an applicability clause is attached, for projects under review. In the case of amendments, applicability of rule changes is more complex and dependent on the type of request.

Secretary Cornett added that every amendment doesn't always trigger the review of every standard. He explained that if an amendment request is submitted and doesn't involve a standard changed by Council since

²⁰ Audio for Agenda Item H=00:05:28 - 2021-12-16-17-EFSC-Meeting-Audio Day 2, Part 2

the last approval, the updated standard would not apply. However, if the request did involve a standard that changed, compliance with the updated standard would be required.

Council Member Jenkins motioned that the Council approve the 2022-2024 EFSC rulemaking project schedule as presented by staff.

Council Member Truitt seconded the motion.

Council Member Condon suggested the motion be modified to acknowledge the urgency associated with the Protected Areas, Recreation and Scenic Resources Rulemaking project.

Mr. Clark noted, as Council's staff, that direction would not need to be included as part of the final action.

Council Member Condon was satisfied with the approach and the motion was not altered.

Motion carried unanimously.

I. Stateline Wind Project, Council Review of Draft Proposed Order on Amendment #6 (Information Item)²¹

– Chase McVeigh-Walker, and Kate Sloan, Senior Siting Analysts, presented the Draft Proposed Order (DPO) on Amendment #6 and issues raised in comments received on the record of the DPO hearing (see Agenda Item A). Council had the opportunity to provide comments to the Department on the DPO and comments received on the record, for consideration in the Proposed Order. More information is located on the [Council Meetings website](#) for additional details pertaining to this [presentation](#).

During the presentation the following discussion occurred:

Mr. McVeigh-Walker read comments received from the certificate holder into the record, which stated the certificate holders support for the revisions to Condition 144 recommended by Umatilla County, which proposed the certificate holder demonstrate that the recycling or disposal facility selected to receive the waste is qualified and approved by an applicable regulatory agency.

Before Ms. Sloan presented the Recommended Amended and New Conditions in the Departments Draft Proposed Order, Secretary Cornett reminded Council that this was now their opportunity to ask questions and make final recommendations for changes to findings or conditions to be included in the Proposed Order.

Council Member Condon, referencing the changes made to Condition 140, expressed concern about removing the requirement for inspections from the condition, and asked for the justification.

Ms. Sloan explained that the condition is currently very specific to the inspection regime for the components approved in Amendment #5 of the site certificate.

Council Member Condon asked if the requirement for inspections is included in another condition and stated her hesitancy in removing the requirement from the structural condition.

Ms. Esterson explained that the condition, if imposed as presented, provides that the final foundation suitability analysis will inform both any remediation measures and the inspection timing recommendation.

²¹ Audio for Agenda Item I=00:58:10 - 2021-12-16-17-EFSC-Meeting-Audio Day 2, Part 2

Council Member Condon then confirmed that the Council wasn't requiring inspection, that inspection would be based on the final analysis, and expressed continued concern with Council removing its requirement.

Council Member Stenbeck informed Council Member Condon that, outside of Council requirements, the facility is also subject to building code inspections.

Council Member Condon, acknowledging Council Member Stenbeck's comment, explained that her concern stemmed from the fact that the condition was changing from very specific inspection requirements, to removal of the requirement entirely.

Council Member Jenkins asked whether the turbine foundation suitability analysis is completed prior to construction, and whether an inspection is completed after construction. He explained that his concern is that if that turbine foundation suitability analysis is completed before construction, he was unsure how, or if, the foundation is determined to be adequate after construction.

Council Member Condon concurred with the concern, adding that she was also curious about the longer-term inspection plan.

Ms. Esterson clarified that this condition will predominately apply to the existing foundations that have been in place since 2009 and their ability to be adequately repowered. She explained that, based on her experience with other projects, she expects there to be an inspection and monitoring plan as a result of the foundation suitability analysis, in addition to the annual compliance inspections already conducted by the department. She suggested that Council could add specificity to the inspection regime at a minimum, add a third-party review requirement, or remove the word "or" from the condition as follows:

*Proposed Amended Condition 140: Prior to construction of facility modification approved in the Sixth Amended Site Certificate the certificate holder shall provide the Department with the turbine foundation suitability analysis. If the analysis results identify necessary mitigation and remediation measures, ~~or~~ **and** operational inspection timing recommendations, the certification holder shall implement the identified measures and recommendations prior to beginning the repowering activities unless others approved by the Department.*

Vice Chair Howe, and Council Member Jenkins agreed with the suggestion to remove the word "or".

Council Member Condon asked whether the results of the suitability analysis are then put into a plan, so inspection requirements are then known and documented.

Ms. Esterson offered that the Condition 140 be further broken out to require that: prior to construction the suitability analysis is provided to the Department; based on those results develop a plan for implementation during operations; plan must be reviewed and approved by the Department in consultation with a third party, and would include a minimum monitoring plan regardless of analysis results.

Council directed staff to revise Proposed Recommended Condition 140 as Ms. Esterson suggested for review.

Council Member Jenkins, regarding Proposed Recommended Condition 152 under the Council's Soil Standard, suggested retaining subparts (a) and (b) of Condition 152 the Fifth Amended Site Certificate or similar language related to the development of quantitative reclamation criteria to measure successful reclamation of disturbed soils, and stressed the importance of the ability to measure disturbance.

Ms. Esterson commented that subpart (a), as previously approved, utilized the word "may", and therefore provided additional options, and noted the Proposed Recommended Condition utilizes "shall".

Council Member Jenkins reiterated the need to measure success and Vice Chair Howe agreed with his suggestion.

Council Member Jenkins, regarding Proposed Recommended Condition 153 under the Council's Land Use Standard, asked whether zoning approval for battery storage was included, as the current language appeared specific to turbines and roads.

Ms. Esterson explained that battery storage isn't a trigger for an amendment to a conditional use permit.

Vice Chair Howe requested explanation as to why an amendment to a conditional use permit would be required due to an increase of generator output by more than 25 percent.

Council Member Jenkins explained that the requirement presumes an increase in the number of turbines, not the capacity of a turbine.

Council Member Condon asked whether developers are aware of which types of components require conditional use permits, and whether the condition should include language to also include any future requirements the county may adopt.

Secretary Cornett explained that land use regulations are locked in once a preliminary application or request for amendment is submitted, therefore any conditions adopted by the county after the submittal date would not apply.

Council Member Condon, regarding proposed recommended Conditions 109 and 157 under the Council's Retirement and Financial Assurance standard, asked why staff chose to add Condition 157 instead of amending Condition 109, noting that 109 appeared to have been previously amended, and that separate conditions create confusion.

Ms. Esterson agreed that amending Condition 109 was an option, however staff chose to separate the Conditions to preserve the compliance history and eliminate confusion in the implementation.

Council Member Condon questioned whether the methodology required by Condition 157 was the same as the formulas used in Condition 109, to which Ms. Esterson affirmed.

Council Member Condon asked whether these conditions are changed whenever a facility adds components of any kind.

Ms. Esterson explained that any time new components are proposed they are added to the decommissioning cost estimate and evaluated. She added that this evaluation is more complicated for facilities that are operational which is why an entirely new set of conditions are created when large amendments are proposed.

Council Member Jenkins stated that Condition 157 was specific to Amendment #6, and Condition 109 applied to all components approved through Amendment #4, given Amendment #5 did not get developed. He suggested adding clarity to Condition 109 to indicate that should Amendment #6 be developed, only Condition 157 would apply.

Council Member Condon suggested that Condition 109 be amended to add the facility components captured in Condition 157 instead of adding Condition 157. Ms. Esterson stated it was an option for Council to consider.

Council directed staff to consolidate the Proposed Recommended Conditions 109 and 157 for review.

Council Member Condon noted Proposed Recommended Condition 158, under the Council Fish & Wildlife Standard, requires the certificate holder to submit a Noxious Weed Control Plan and states “The Department shall review and approve the plan....”, and asked whether the department would have the opportunity to review, comment, and require changes before the plan is approved. She stated that the current language seemed to obligate the Department to approve the plan as submitted.

Vice Chair Howe, and Council Member Jenkins supported adding language to support the ability to modify the plan prior to approval.

Secretary Cornett agreed that the condition could be modified and informed Council it would be included in the Proposed Final Order.

Council Member Jenkins, noted Proposed Recommended Condition 159, under the Council’s Historic, Cultural, Archeological Resources standard, requires the certificate holder to consult with SHPO to determine NRHP eligibility, and asked whether the certificate holder has the opportunity to submit a request for eligibility determination.

Ms. Sloan affirmed, informing that the determination is made as part of the national register evaluation process which has not yet been completed by the certificate holder and therefore necessitated the condition.

Council Member Condon noted Proposed Recommended Condition 160, under the Council’s Public Services Standard, stated in part “...a valid water right which allows for municipal water use within the place of use of facility.”, and asked what protection is intended in the condition.

Ms. Esterson informed that the condition is intended to ensure that the water use by the facility is allowable within the context of the water right from the certificate holder’s selected provider.

Council Member Jenkins stated that the condition, as written, guarantees that they have a right to buy water from the city, and isn’t designed to protect the citizens.

Mr. McVeigh-Walker concluded the presentation by explaining the recommended modifications to be made in the Proposed Order, to include addressing all comments received; administrative conversion, edits, and corrections; and amending Attachment B to include the comment letter from Haley Aldrich.

J. Boardman to Hemingway Transmission Line (Action Item)²² – Jesse Ratcliffe, Senior Assistant Attorney General, counsel to Council for the B2H Contested Case: Council Consideration and Disposition of questions certified by Hearing Officer Greene-Webster in the Contested Case for the Boardman to Hemingway Transmission Line Application for Site Certificate.

Mr. Ratcliffe explained the purpose of Council’s consideration and provided an overview of the process. He explained that certifying questions for Council consideration is the Hearing Officer’s avenue to obtain early input from the Council, but that Council is not required to provide responses to the questions certified. While Council’s rules do not prescribe a process for the Council to accept testimony or briefs from parties in the contested case regarding the questions certified, Council could choose to do so, however, due to time constraints he did not recommend party participation in Council’s review. He added that parties would have the opportunity to comment on Council’s interpretation, should Council provide one, during the remaining phases of the contested case process.

²² Audio for Agenda Item J=03:46:02 - 2021-12-16-17-EFSC-Meeting-Audio Day 2, Part 2

Mr. Ratcliffe described the Hearing Officer's identification of tension in the Council's rules related to party status and issues in a contested case. The tension he explained is between the general practice of parties being limited to the issues they've raised on the record of the Draft Proposed Order Hearing, and the rules related specifically to proposing site certificate conditions, which appear to allow a party to propose conditions without limitations, and suggest the ability of any party to provide a response to anyone that has requested a condition be proposed.

The Hearing Officer is seeking Council's interpretation of OAR 345-015-0085 (1) and (2). Limited parties in the Boardman to Hemingway contested case have proposed conditions that do not pertain to issues they presented on the record of the Draft Proposed Order. Depending on Council's interpretation, the Hearing Officer could accept or reject these proposed conditions for consideration.

Mr. Ratcliffe mentioned the materials Ms. Gilbert inquired about during the public comment period and informed Council that because they are related to the questions certified by the Hearing Officer and the Council has not established a briefing schedule, the materials are not being provided to Council at this time. He also informed Council that the ruling mentioned by Ms. Gilbert is required at the federal level and does not impact state government agencies.

Mr. Ratcliffe displayed for the Council the rule language of OAR 345-015-0085 and explained interpretation principles. He explained that if Council were to allow parties the ability to comment and respond to all issues and the Supreme Court were to decide that Council's interpretation was incorrect, the Court would likely be able to remove the conditions not allowed and move forward, however, if Council denies parties the ability to comment on any issue and, the Supreme Court deemed the opportunity should have been granted, the information would not be in the record, and would likely be remanded back to Council. He recommended, based on this reason, that Council allow parties to comment on all issues.

Council Member Jenkins shared concern over interpretation of the rules individually and explained that the decision to limit parties was made under OAR 345-015-0016. He also stated that OAR 345-015-0083 references limiting parties to those issues raised in the record of the public hearing and prohibits the hearing officer from receiving evidence or hearing legal argument on issues not identified in the pre-hearing order. He believes the rules are clear and that the "raise it or waive it" clause is a general principle of law. He agreed that the language in OAR 345-015-0085 seemed to suggest that any limited party has the ability to identify issues, but he does not interpret it to stand alone from the other requirements.

Vice-Chair Howe agreed with Council Member Jenkins' assessment and believed that some rule aspects were being taken out of context, however, due to the language in the rule, he also acknowledged the tension.

Council Member Condon believed differences in the rules to be clear. She noted that OAR 345-015-0016 is particular to the request for party or limited status, OAR 345-015-0083 is particular to the pre-hearing conference and Order and identify the issues that have been raised. She then interpreted OAR 345-015-0085 to allow all parties granted status, (under the provisions of 0016 and 0083), the ability to comment on all issues identified as part of the contested case.

Council Member Jenkins asked whether the argument could be made that this rule could not be read and interpreted separately from the rest.

Mr. Ratcliffe explained that the challenge is that the court could interpret the plain text of the rule outside of the context of the other, due to the principle of statutory limitation which gives more weight to the more specific rule, in this case being OAR 345-015-0085(1). He agreed that while the argument could be made, it could be appealed on that ground, and remanded back to Council, creating a risk to time and resources.

Vice Chair Howe asked Mr. Ratcliffe to confirm that the Hearing Officer has identified all of the parties and issues of the contested case and is now only seeking clarification as to which parties may participate in proposing site certificate conditions.

Mr. Ratcliffe stated that there are a large number of issues in the contested case, some are related to proposed conditions and other are related to whether the project, as proposed, meets a standard. He described that, while still part of the contested case, Council's process of proposing additional conditions is somewhat of a side process and what OAR 345-015-0085 appears to address. He explained that, in his opinion, because this is a subset of the proceeding and separate from the overall question of site certificate approval or denial, a court would likely weigh more heavily on this rule in trying to resolve the tension.

Vice Chair Howe asked Mr. Ratcliffe to confirm what the Hearing Officer is asking beyond the merits of the application and is now trying to determine who is allowed to participate in the proposal of conditions of approval.

Mr. Ratcliffe explained that it's the applicant's burden to prove that standards are met and will likely propose conditions on their own to meet that standard in their application, and the Department proposes additional conditions to ensure all standards are met. This point in the process allows the opportunity for additional conditions to be proposed by parties to the contested case.

Council Member Jenkins expressed concern over conditions being proposed outside of the issues identified by limited parties that may be impossible for a site certificate holder to implement. He asked Mr. Ratcliffe if the Hearing Officer is then obligated to accept all conditions proposed.

Mr. Ratcliffe affirmed that the Hearing Officer is not obligated to accept all proposals and will evaluate all proposed conditions to determine whether the law requires the imposition of the condition. Additionally, any conditions accepted by the Hearing Officer could be challenged by an applicant if believed to be unnecessary for meeting a standard of approval.

Council Member Jenkins believed that without legislative history or preamble language in the rule describing it as an exception to generally held policy Council's choices were limited at this point in the process.

Vice Chair Howe asked Council if they wished to provide the Hearing Officer a response to the questions certified.

Council Member Condon suggested that Council does respond and believed the rule clearly states that any party is allowed to suggest or speak to conditions.

Council Member Jenkins agreed that Council should provide a response to the questions.

Council Member Stenbeck agreed with Council Member Jenkins earlier comments and he did not want to create unfairness for the applicant. He described a LUBA case in which a person who lived several miles from a facility sought party status in a proceeding and was denied.

Council Members Chocktoot and Truitt did not object to Council providing response.

Vice Chair Howe asked whether a motion and action was required should Council decide to proceed with providing response.

Mr. Ratcliffe affirmed that a motion would be needed to formally answer the question and suggested, based on his understanding of Council's interpretation, the motion language to be used: Council moves to answer question 1 "NO", OAR 345-015-0085(1) should not be read to limit a party's authorization to propose site

certificate condition to those that relate to and are within the scope of their party standing, and to answer question 2 “NO”, OAR 345-015-0085(2) should not be read to restrict responses to their limited party issues.

Council Member Condon motioned Council to answer question 1 “NO”, OAR 345-015-0085(1) should not be read to limit a party’s authorization to propose site certificate condition to those that relate to and are within the scope of their party standing, and to answer question 2 “NO”, OAR 345-015-0085(2) should not be read to restrict responses to their limited party issues.

Council Member Chocktoot seconded the motion.

Council Member Condon stated that she was unsure how this could create unfairness for an applicant because new issues are not being raised at this point in the process.

Council Member Jenkins stated that the Council’s process related to “raise it or waive it” is to specifically limit the number of issues involved and limit the number of parties that can participate, and believed it to be unfair to the applicant and process to allow the parties the opportunity to propose unlimited conditions now. He expressed frustration in the language because it does not adhere to the policy that was identified for this process. Vice Chair Howe concurred.

Council Member Chocktoot confirmed that a vote of “Yes” to the motion would result in a response of “No” to the questions.

Motion Failed. (Ayes: Condon, Chocktoot)

(Nays: Jenkins, Howe, Stenbeck, Truitt)

Mr. Ratcliffe explained that Council’s two remaining options were to: not provide a response and allow the Hearing Officer to determine the interpretation, or the Council could respond opposite of their previous motion and respond “Yes” to both questions and limit parties from proposing or responding to conditions outside of their party standing. He cautioned that limiting responding parties to their own issues presents the potential for the applicant or the Department to propose conditions that would not be subject to response from any party. While he believed the scenario to be unlikely in this case, he explained that Council’s interpretation in this case will set precedent for future cases.

Council Member Jenkins stated that while he didn’t believe sub (1) was intended to allow all parties to propose unlimited conditions, the rule is not written in that way. He asked whether Council could provide a “yes” response to question 1, and a “no” response to question 2.

Mr. Ratcliffe stated that Council could do this as long as the direction was clear for the Hearing Officer. He understood Council Member Jenkins to disagree with the current rule language and it’s interpretation to allow any party the ability to propose unlimited conditions, however, notwithstanding these policy concerns still acknowledged in the plain text of the rule.

Council Member Jenkins asked whether Council could provide a “no” response to question 1, and a “yes” response to question 2.

Mr. Ratcliffe reminded Council that a “no” response to either of the questions would represent the interpretation that there is not a restriction, and to answer “yes” to either of the questions would represent the interpretation that there is a restriction. He stated that while Council could split those answers, the concern over the text applies equally to both subsections (1) and (2).

Council Member Jenkins expressed concern that the second question certified by the Hearing Officer is different than the language of OAR 345-015-0085(2), believing that the question is asking whether there is a restriction on the limited parties to comment only on those conditions they have brought up issues with, whereas sub (2) of the rule is not as narrow and states that any party can comment on conditions. Vice Chair Howe agreed that the question certified is different than what the rule states.

Council Member Condon offered that the Hearing Officer is asking whether it should be limited, because the language doesn't state that it is.

Council Member Jenkins agreed, but stated that he was unsure whether the question goes to the rule.

Mr. Ratcliffe speculated that the Hearing Officer is considering that sub (2) is building from the last sentence of sub (1) stating that "parties shall submit proposed site certificate conditions to the hearing officer in writing according to a schedule set by the hearing officer", and believed the question to be focused on responses and arguments to proposed conditions that are submitted as result of sub (1) and not previously included in the Proposed Order. He suggested that rather than trying to come up with variations to the questions, Council provide responses to the questions as presented.

Council Member Jenkins stated that he was inclined to answer question number 1 with a statement that the plain language does support allowing limited parties the opportunity to respond to all conditions and that question number 2 supports the principle that limited parties should be limited to their issues.

Council Member Chocktoot noted the question seemed to lean in favor of the project proponent to limit the opportunity for response.

Council Member Condon disagreed with the Hearing Officer's assessment that when read together, OAR 345-015-0016 and OAR 345-015-0085 are in conflict.

Vice Chair Howe granted permission for separate motions to be considered for each question.

Council Member Stenbeck motioned that OAR 345-015-0085 (1) should be read to restrict a limited party's authorization to propose site certificate conditions to those that relate to and are within the scope of the issue(s) on which the limited party was granted standing in the contested case. Restated with one change as: OAR 345-015-0085 (1) should not be read to restrict a limited party's authorization to proposed site certificate conditions to those that relate to and are within the scope of the issue(s) on which the limited party was granted standing the contested case.

Council Member Jenkins seconded the motion.

Secretary Cornett confirmed that the motion as offered, would result in an answer of "No" to the Hearing Officer's first question and passage of this motion would mean the plain language of the rule applies and allows any party to raise conditions.

Council Member Stenbeck withdrew his original motion and offered the following.

Council Member Stenbeck motioned that OAR 345-015-0085 (1) be read to restrict a limited party's authorization to propose site certificate conditions to those that relate to and are within the scope of the issue(s) on which the limited party was granted standing in the contested case.

Motion failed.

Council Member Jenkins believed that Council Member Stenbeck changed his position from the previous motion offered.

Council Member Chocktoot suggested tabling the issue until legal Counsel can provide additional guidance. Council Member Jenkins explained that due to the timing of the contested case proceedings, deferring is not an option.

Mr. Ratcliffe suggested a straw poll be taken outside of a formal motion to determine whether Council believes the rule should be interpreted as restrictive or permissive to get a sense of where Council is leaning to better inform the proposed motion.

Council was polled and consensus was not reached. Vice Chair Howe and Council Members Truitt, and Stenbeck believed the interpretation should be restrictive, while Council Members Condon, Chocktoot and Jenkins believed the interpretation should be permissive.

Mr. Ratcliffe stated that without a majority opinion to answer the question the Council is unable to provide the Hearing Officer with sufficient guidance. He suggested Council inform the Hearing Officer that Council was unable reach consensus and therefore is not providing a response.

Vice Chair Howe and Council Member Jenkins and Truitt supported the suggestion.

Secretary Cornett confirmed that Mr. Ratcliffe would contact the Hearing Officer to provide the information.

Council Member Jenkins suggested a rulemaking project be added to the Council's list to correct this conflict of the rule.

Vice Chair Howe explained that he was leaning on the "restrictive" interpretation based on the larger context of language.

Council Member Jenkins expressed frustration over the writing of the rule language and believed that it could have been easily addressed for clarity in the beginning.

Adjournment

Vice Chair Howe adjourned the meeting at 4:04 pm.