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To: Energy Facility Siting Council

From: Sarah Esterson, Senior Policy Advisor

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Subject: Agenda Item C (Action Item): Review of Council's Delegation Authority Under ORS 469.402 for the September 19, 2025 EFSC Meeting

INTRODUCTION

The purpose of the Energy Facility Siting Council (EFSC or Council) is to evaluate applications for site certificate (ASC) and requests for site certificate amendment (RFA) and determine whether a preponderance of evidence supports a conclusion that the proposed facility, or facility with proposed changes, complies with Council standards and applicable requirements. ORS 469.503. Consistent with this framework, an applicant or certificate holder submits, and the Council reviews, an ASC or RFA containing the facts, analysis, evidence and applicant/certificate holder commitments designed to demonstrate an applicant/certificate holder's ability to comply with the applicable Council standards and other requirements as identified in the Project Order (and any amendments thereto). If the applicant/certificate holder has demonstrated compliance with Council standards and applicable requirements, the Council must issue a final order approving the ASC or RFA and issue a site certificate/amended site certificate.

Site certificates often contain conditions that require further action by the applicant/certificate holder and subsequent review and approval of that action, such as final development of monitoring or mitigation plans, based on exceptions or limitations on the availability of information needed during the Council's review of an ASC or RFA. Limitations in the availability of specific information is well understood and allowable so long as the information is obtained and reviewed in the future, by the Department, through a certificate holder's compliance with site certificate conditions. This is explicitly addressed in ORS 469.402 which authorizes the Council to delegate the final review and future action on the fulfillment of conditions to the Department, where it deems appropriate.

469.402 Delegation of review of future action required by site certificate. *If the Energy Facility Siting Council elects to impose conditions on a site certificate or an amended site certificate, that require subsequent review and approval of a future action, the council may delegate the future review and approval to the State Department of Energy if, in the*

council's discretion, the delegation is warranted under the circumstances of the case.
[1995 c.505 §27; 1999 c.385 §3]

REVIEW OF ORS 469.402 IN CONTESTED CASE PROCEEDINGS

The Council's delegation authority in ORS 469.402 has been evaluated in at least two contested case proceedings on ASCs under Council review. Analyzed by a third-party hearings officer and adopted by Council, those example evaluations are summarized here for reference to interpretation of the statute.

Example 1: Saddle Butte Wind Park Facility

In the 2016 matter of the ASC for the Saddle Butte Wind Park Facility, the Council evaluated ORS 469.402 in the context of the Fish & Wildlife Habitat standard (OAR 345-022-0060). In this case, the applicant had prepared a draft Habitat Mitigation Plan (HMP), which the public had the opportunity to review and comment on when commenting on the DPO. The Department recommended Council allow the certificate holder to finalize the HMP after issuance of the site certificate, subject to a condition (H.1.) requiring that:

- The certificate holder hire a qualified biologist to conduct a preconstruction review of general habitat in areas potentially disturbed by the facility components (including turbines) and reevaluate and update habitat disturbance tables.
- Before beginning construction and after considering all micrositing factors, the certificate holder provide ODOE, ODFW, and the Planning Directors of Gilliam County and Morrow County maps showing the final locations of all facility components and a table showing the acres of temporary and permanent habitat impact by habitat category and subtype.

A commenter took issue with the fact that, because the final siting and mitigation areas would not be determined until after the site certificate was issued, the public would not have an opportunity to review or comment on the final mitigation details. Commenter requested the aforementioned condition be modified or a new condition be imposed to require an opportunity for public review and input on the final HMP, either before the site certificate was issued or prior to commencement of construction.

For the following reasons, the Council found no additional condition language was necessary and it was appropriate to allow the applicant to finalize the HMP after issuance of the site certificate:

- Until the exact location of the turbines was known, the specific amount of mitigation required could not be known.
- The applicant had provided a draft HMP that included applicable mitigation ratios, habitat enhancement actions, monitoring procedures, reporting requirements and success criteria. None of these parts of the draft HMP were expected to change in the final HMP.
- The finalization of the HMP would generally be limited to confirming habitat categories in consultation with ODFW and a final calculation of acreages to determine habitat mitigation acreage based on the methodology/ratios in the draft HMP.

- The public had an opportunity to comment on the draft HMP including the substantive components: applicable mitigation ratios, habitat enhancement actions, monitoring procedures, reporting requirements and success criteria. None of these parts of the draft HMP were expected to change in the final HMP.

Example 2: Boardman to Hemingway Transmission Line

In the 2022 matter on the ASC for the Boardman to Hemingway Transmission Line, the Council evaluated ORS 469.402 within the context of the Fish and Wildlife Habitat standard; Historic, Cultural and Archaeological Resources standard; and Public Services standard.

For this case, there were three separate issues arguing the same foundation – that site certificate conditions requiring draft mitigation plans to be finalized prior to construction, but after a site certificate was issued, needed to be subject to public review and comment. The Hearings Officer rejected these arguments, explaining: 1) there was no statute or rule requiring the certificate holder to submit its final mitigation plan for public review and comment as part of the Council’s ASC review process, and 2) ORS 469.402 authorizes Council to delegate the future review to the Department

FINAL ORDER AND SITE CERTIFICATE APPLICATION

The Council exercises its authority under ORS 469.402 in Site Certificates and mitigation plans, under numerous Council standards. Examples include:

Organizational Expertise (OAR 345-022-0010)

Example condition: Prior to construction of the facility or phase, as applicable, the certificate holder shall notify the Department of the identity and qualifications of the major design, engineering and construction contractor(s). The certificate holder shall select contractors that have substantial experience in the design, engineering and construction of similar facilities. The certificate holder shall report to the Department any changes of major contractors.

Staff Notes: For the above condition, Council delegated future review by the Department of the construction contractor and their qualifications for being capable of designing and constructing an energy facility. The basis for the delegated future review was that the information was unknown at the time of the Council’s review of the ASC.

Soil Protection (OAR 345-022-0022)

Example condition: Prior to operation, the certificate holder shall develop a Soil Monitoring Plan to evaluate impacts of topsoil loss and erosion during construction activities. The Soil Monitoring Plan shall identify the testing method, evaluative criteria and best management practices/corrective actions to be implemented if the results identify a significant impact to soil productivity.

Staff Notes: For the above condition, Council delegated future review to the Department of a soil monitoring plan based on data to be obtained by the certificate holder following completion of construction. The condition specified the requirements of the plan to make clear the scope of the future review. The basis for the delegated future review was that the information required by the condition would not be available until completion of construction, and therefore was unknown at the time of the Council's review of the ASC.

Structural Standard (OAR 345-022-0020)

Example condition: Prior to construction of the facility or phase, as applicable, the certificate holder shall submit a site-specific geotechnical investigation report, consistent with the Oregon State Board of Geologist Examiners Guideline for Preparing Engineering Geologic Reports, or newer guidelines if available to the Department, for review in consultation with its third-party consultant.

Staff Notes: For the above condition, Council delegated future review by the Department of the results and recommendations of a site-specific geotechnical investigation, to be used to inform siting and foundation design. The basis for the delegated future review was that this type of evaluation, given cost and complexity, is not typically done until there is certainty on the project and project schedule; therefore, the information was unavailable at the time of the Council's review of the ASC.

Fish and Wildlife Habitat (OAR 345-022-0060)

Example condition: Prior to construction of the facility or phase, as applicable, the certificate holder shall finalize the Revegetation and Reclamation Plan, based on Attachment G of the Final Order on the ASC, and submit to the Department for review and approval.

Staff Notes: For the above condition, Council delegated future review by the Department of the finalization of a draft Revegetation and Reclamation Plan. The basis for the delegated future review was that the substantive requirements of the plan were established, and finalization requires little discretion, limited to updating the plan to be based on the final location and impacts of the facility, and updated based on predisturbance data collected on vegetation characteristics. Because final layout and impacts are not typically known at the time of the Council's review of an ASC, and predisturbance data is most valuable in close proximity to the timing of the impact, the information was not unavailable at the time of the Council's review of the ASC.

Delegation of future review and approval by the Council primarily applies to preconstruction conditions, preoperational conditions, and mitigation plan amendments. Although, for mitigation plan amendments, historically, the language included in these plans does not provide absolute authority to the Department to review and approve changes. Mitigation plan amendments typically include language requiring that future plan amendments be reviewed by the Council for concurrence, modification or rejection, as presented below.

This Plan may be amended from time to time by agreement of the Applicant and the Oregon Energy Facility Siting Council (EFSC). Such amendments may be made without amendment of the site certificate. EFSC authorizes ODOE to agree to amendments to this plan. ODOE shall notify EFSC of all amendments, and EFSC retains the authority to approve, reject, or modify any amendment of this plan agreed to by ODOE. This Plan may also be amended periodically as the Certificate Holder continues to evaluate and modify, as needed, agricultural dual use activities at the Facility.

RECOMMENDATIONS

It is important for the Council to include findings and analysis supporting when and where it is authorizing future review and approval to the Department under ORS 469.402. Conditions that include a delegated future review and approval must make clear the scope of review. This ensures that the scope of changes that may be reviewed and approved by the Department are clear at the time of the Council's review

The Council's findings should explain why Council finds delegating to the Department the authority to review and approve a future action is warranted under the circumstances of the case. For example, as the Saddle Butte Final Order explained, delegating future review of the HMP was warranted because the draft HMP was well-developed, the public had the opportunity to comment on it, but the final impacts (acres) and location of facility components wouldn't be known until the certificate holder was closer to the construction start date.

The Department recommends Council incorporate the following into orders where it intends to exercise ORS 469.402.

Pursuant to ORS 469.402, the Council finds the following circumstances warrant delegating to the Department *[and any other agency involved]* the authority to *[describe the authority being delegated – e.g., review and approval of the final XXX Plan]* as described in Condition XX:

- The draft _____ Plan includes information needed to assess the merit of the plan, including: *[list key elements included in the draft Plan]*
- The public has had the opportunity to review and comment on the draft _____ Plan
- It is not *[feasible/practical/possible]* to finalize the _____ Plan prior to issuance of the site certificate because *[xxx]*.