Attachment 2

FRIENDS OF THE COLUMBIA GORGE
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SUBMITTED VIA EMAIL ONLY

August 1, 2025

Oregon Energy Facility Siting Council
c/o EFSC Rules Coordinator
Via email to EFSC.rulemaking@oregon.gov *and* EFSC.rulemaking@energy.oregon.gov

Re: Comments on EFSC Proposed Rulemaking Entitled "Improving EFSC Amendment Process Through Greater Clarity and Enhanced Public Comment Process"

Dear Chair Howe and Council Members:

Friends of the Columbia Gorge ("Friends") submits the following comments regarding the EFSC proposed rulemaking entitled "Improving EFSC Amendment Process Through Greater Clarity and Enhanced Public Comment Process." Friends is a nonprofit organization with more than 4,000 members dedicated to protecting and enhancing the resources of the Columbia River Gorge, and with strong interests in responsible energy generation and the proper implementation of state law governing the approval, construction, and modification of large energy facilities in Oregon.

1. The caption, need statement, and related sections of the Notice of Proposed Rulemaking fail to alert the public as to what type(s) of "amendments" are involved in the proposed rulemaking, and thereby fail to sufficiently inform the public about the subject matter of the proposed rulemaking.

In the Notice of Proposed Rulemaking ("Notice"), the filing caption for the proposed rulemaking is "Improving EFSC *Amendment* Process Through Greater Clarity and Enhanced Public Comment Process" (emphasis added). Unfortunately, this caption does not explain what *type(s)* of "[a]mendment[s]" are involved in the proposed rulemaking. "Amendment" could mean any number of various types of amendments, including amendments to the Council's Rules; amendments to Council orders; amendments to EFSC hearing officer orders; amendments to energy facility sites, construction plans, or application materials; amendments to public notices; amendments to Department-issued documents such as project orders; amendments to site certificates—or even some combination of multiple types of amendments.

The Notice's need statement, racial equity statement, fiscal and economic impact statement, cost of compliance statement, small business involvement statement, and rules

advisory committee statement do not shed any further light on what type of "amendments" are contemplated in the proposed rulemaking. Instead, at most these statements simply use the vague words "amendment" or "amendments" without explanation.

As a result of these deficiencies, EFSC has failed to sufficiently alert the public about what type(s) of "amendments" are involved in the proposed rulemaking. As it turns out, the proposed rulemaking apparently involves *amendments to site certificates*. Yet the public was not adequately informed of that fundamental fact, and thereby was deprived of meaningful notice of the subject matter of the proposed rules.

It is a mystery why EFSC omitted two simple words ("Site Certificate") from the caption of the Notice, the need statement, and the various other explanatory statements in the Notice. In fact, given that the current caption is only 12 words long, two more words could have been added while still complying with the requirement to limit captions to 15 words or less. *See* ORS 183.335(2)(a)(A).

Since these rules are still only in proposed form, it is not too late for EFSC to correct its significant procedural errors here and provide the public with the adequate notice that it is entitled to. EFSC should issue and disseminate a revised rulemaking notice to the public and provide another comment period on the proposed rulemaking in order to allow for meaningful public participation.[1] Unless and until EFSC does so, the agency is violating its mandate to sufficiently notify the public about the subject matter of the proposed rulemaking.

2. The Council should <u>not</u> eliminate any and all opportunities to seek contested case proceedings on proposed amendments to site certificates.

As part of the proposed rule changes, the Oregon Department of Energy ("Department" or "ODOE") proposes a massive, radical change to the Council's Rules governing amendments to site certificates: the Department would have the Council completely eliminate any and all opportunity for interested persons to even *request* a contested case proceeding on proposed amendments to site certificates. Friends strongly opposes this proposed substantial change to the Council's existing procedures, and urges the Council to reject it.

The Council's current Rules guarantee that, for so-called "Type A" proposed amendments to certificates, interested persons are, at the very least, entitled to request a contested case proceeding. OAR 345-027-0371. This established process allows interested persons a fair and equitable opportunity to convince the Council that a contested case is warranted to evaluate and resolve more complex and serious issues presented by certificate amendment requests, as well as to evaluate and resolve substantial changes to energy facilities or approval conditions applicable thereto that are proposed in such requests. Although the current system is not exactly favorable to interested persons and is weighted heavily in both design and

[1] Friends also encourages EFSC to refrain from including in its captions self-serving and biased descriptions of proposed rules, such as the language "[g]reater [c]larity" and "[e]nhanced" as used in this caption. Rule captions should, wherever possible, be neutrally and dispassionately worded. For the record, Friends disagrees with the proposition that these proposed rules would result in "greater clarity" or would "enhance" public comment processes.

implementation to result in the routine denial of requests for contested cases, the Council can legitimately proclaim that, under its current Rules, the public at the very least has the opportunity to request EFSC resolution of serious disputes for these types of applications through a trial-like proceeding, and that the Council can evaluate such requests on a case-by-case basis.

The Department now asks the Council to entirely gut this existing, established structure, and without even clearly explaining any need for, or benefits from adopting, such a radical rewriting of the Council's Rules, other than cursory statements that "[t]hese proposed changes should result in a quicker start to amendments"[2] and that "Staff is hopeful that the proposed changes will significantly streamline the siting process for [certificate] amendments." (June 4, 2025 Memorandum by Thomas L. Jackman, Rules Coordinator ("ODOE Memorandum") at 4–5.)

While it is undoubtedly true that stripping from the public any opportunity to request a contested case would in fact "streamline" and shorten the timeline of the review process, those benefits (to the extent they even are benefits) are outweighed by the severe prejudicial impacts to the public of the proposed rule changes. If the Council's sole goal here is to churn out amendments to site certificates as quickly as possible, then the proposed rule would undeniably further such a goal. But the Council must instead balance the whims and desires of self-interested energy developers with the public interest considerations of allowing serious disputes to be equitably resolved, where appropriate, in a formal contested case proceeding with meaningful participation by interested persons.

The Department proposes to replace the current system (allowing the public to request contested cases for "Type A" applications) with new public comment procedures that the Department refers to as an "enhanced" process. Friends disagrees that the process would be "enhanced"—especially given the new barriers and hurdles that would be imposed on the public for raising issues (discussed later in this comment letter). But even if the new public comment procedures were "enhanced," they would be no replacement for the current ability to request a contested case.

Contested cases allow disputed evidentiary, legal, and policy issues to be fully vetted and resolved by the Council (with the assistance of a hearing officer), rather than abdicating these issues to the Oregon Supreme Court. In this way, the current opportunities to request contested cases promote judicial efficiency. Furthermore, contested case proceedings can be needed to allow interested persons to seek from energy developers and site certificate holders discoverable evidence and information likely to bear on compliance with the applicable laws and rules—information that interested persons would have no other means of obtaining and presenting to the Council. Friends recognizes that it is rare for the Council to in fact hold contested cases on proposed amendments to site certificates. But the option for the public to request them should be preserved.

[2] It is unclear what the Department means with the phrase "a quicker start to amendments." This could be referring to the processing of applications for certificate amendments or approvals of such applications.

To elaborate, contested cases allow interested parties to submit new evidence, including sworn expert witness testimony, on disputed issues, and to seek from certificate holders and energy developers discoverable information likely to bear on such issues—information that such interested parties would have no other means of obtaining and presenting to the Council. Contested cases also utilize the assistance of a neutral hearing officer to resolve disputes of fact, law, and policy regarding this issue (rather than relying solely on Department staff), and help ensure that the Council abides by its mandates to follow its own rules and to act consistent with prior Council decisions or otherwise provide valid reasons for departing from prior decisions. *See Harsh Investment Corp. v. State Housing Division*, 88 Or App 151, 157, 744 P2d 588 (1987); *Moki, Inc. v. OLCC*, 68 Or App 800, 803, 683 P2d 159 (1984).

Moreover, contested cases can help resolve disputed issues involving "judgments about technological feasibility, economic projections, costs, safety, environmental consequences, and similar probabilities that will call for factual information and agency expertise, and judgments about the relative importance of conflicting goals, about values and priorities, in short, policy judgments," as well as the setting of standards that "call[] for the factual kind of judgment and procedures appropriate thereto" and that can be "made more concrete only in the course of a proceeding focusing on a particular kind of [energy] installation at a particular location," and in such instances, the Oregon Supreme Court has held that [t]he procedure for adopting [such] standard[s] to be applied in a few complex, large-scale decisions such as the site certifications entrusted to the council" is via the "'contested case' procedure," which "is to be used in applying statutory or agency policy to specific parties on particular facts." *Marbet v. PGE*, 277 Or 447, 460–63, 561 P2d 154 (1977) (quoting ORS 183.310(2)).

In conclusion, contested cases can allow "the agency and not the courts [to] pass[] first on the contention[s] of the participants"; can allow interested parties to pursue disputed issues in an "effective[] and meaningful[]" manner; and can allow the Council (with the assistance of a hearing officer) to vet and resolve disputed issues via a trial-like proceeding, rather than abdicating the resolution of such issues to the Oregon Supreme Court. *Hennesey v. SEC*, 285 F.2d 511, 515 (3d. Cir. 1961) (cited in *Marbet*, 277 Or at 455). The Council should preserve the ability for the public to request contested case proceedings as allowed in its existing rules.

The current standards for obtaining a contested case under the Council Rules are as follows:

> After identifying the issues properly raised the Council must determine whether any properly raised issue justifies a contested case proceeding on that issue. To determine that an issue justifies a contested case proceeding, the Council must find that the request raises a significant issue of fact or law that is reasonably likely to affect the Council's determination whether the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24.

OAR 345-027-0371(9).

In attempting to rationalize and justify its proposal to do away with these standards, the Department mischaracterizes them, falsely asserting that a person requesting a contested case must convince the Council to "change its mind":

> This is a significant burden, as it effectively requires the Council to only grant contested cases on an amendment where it finds that evidence and arguments raised would have changed its mind on an issue. But of course, if the evidence and arguments were compelling to the Council, then the Council likely would have changed its mind the first time it saw the evidence. The fact that the Council previously reviewed the evidence and did not find it compelling is thus a strong basis for not granting a contested case on an amendment.

(ODOE Memo. at 4.)

This is an entirely false framing of the existing standards, and it is highly misleading. First, ODOE's interpretation would have the Council entirely ignore the existing Rule language "with the change proposed by the amendment." OAR 345-027-0371(9). In other words, the question is not whether the Council might change its mind on the project (a.k.a. energy facility) as originally proposed and approved, but rather the facility *with the proposed changes* would comply with current law. For example, a site certificate holder could propose to *double* the size or output of an approved energy facility; potential contested case proceedings absolutely should continue to be available to allow interested persons and the Council to evaluate such changes via the formal setting provided by a contested case.

Furthermore, ODOE's false framing ignores any number of other scenarios that could be triggered. For example, new evidence might have come to light that was unknown or unavailable during the contested case on the original application for a site certificate. There might be a request to *seek*, via discovery, such new evidence. There might be changes in the applicable laws. There might be new issues that were not previously presented to or decided by the Council. In any of these very plausible scenarios, the current Council Rules, at the very least, provide the public with the opportunity to pursue a contested case to resolve such issues. But ODOE, under false premises, asks the Council to take that opportunity away from the public. The Council should reject ODOE's requests.

ODOE asserts, without providing any evidence or statistics, that the current above-quoted Council Rule at OAR 345-027-0371(9) "rarely lead[s] to a contested case for [certificate] amendment requests." (ODOE Memo. at 4.) But the standards in OAR 345-027-0371(9) have only been in place for approximately five years,[3] and ODOE sheds no light on how many requests for contested case proceedings have been made during that time under these standards. Friends has not filed any requests for a contested case under these standards since they were first adopted, and is unaware of how many such requests have been filed and decided. ODOE should provide that information to fully inform the public and the Council about how the rules have actually been implemented, rather than relying on conjecture and unverified assertions.

[3] The standards were adopted as temporary rules in 2019, and as permanent rules in 2020.

Shortly before the standards in OAR 345-027-0371(9) were adopted, Friends filed a request for a contested case proceeding under a different set of standards. Although Friends' request was denied by the Council, there was a split of opinion among the Council members as to whether Friends' request justified a contested case. Specifically, on May 17, 2019, the Council voted on a motion by Council Member Ann Gravatt to grant a request for a contested case proceeding filed by Friends of the Columbia Gorge, Oregon Wild, and Central Oregon LandWatch involving the proposed Summit Ridge Wind Farm. Although the motion failed by a 5 to 2 vote, this shows that some Council members believed that a contested case was warranted to resolve the significant issues raised by Friends and our co-petitioners. ODOE now proposes to forever eliminate the right and ability for organizations like Friends to make such requests.

The Council should reject ODOE's proposal to completely gut the Council's current procedures and standards in its rules that allow interested persons to request contested case proceedings on certain types of certificate amendment proposals. This serious, substantial proposed change to existing law is unwarranted, would decrease judicial efficiency, is premised on a false framing of what the Council's Rules mean and how they operate, would thwart due process, would decrease public participation, would harm the public interest and lead to environmental and resource impacts, and would severely prejudice Friends and other interested organizations and persons.

The Council should retain the ability for the public to, at the very least, ask the Council for a contested case proceeding on certain types of proposed certificate amendments, thus allowing the Council to continue determining on case-by-case bases whether to allow such proceedings. ODOE fails to identify any valid reason for completely jettisoning this established system.

3. The Council should retain the current requirement for site certificate holders to demonstrate the need for requested time extensions to the durations of site certificates.

The Council's current rules require certificate holders, when requesting time extensions to the durations of site certificates, to "include an explanation of the need for an extension." OAR 345-027-0385(1). The Department proposes to eliminate this current requirement, asserting that "the Council has no need standard for purposes of seeking an extension." (ODOE Memo. at 3.)

The Department is incorrect. The "need standard" is in the very rule that ODOE proposes to amend. By requiring certificate holders to explain why they need extensions, the Council Rules impose that very requirement as a standard.

Certificate holders should continue to have to explain why, six years after obtaining certificates, they still have not started construction of their approved energy facilities. This is not a burdensome requirement, and it can potentially be satisfied in any number of ways. But three-year extensions should not be freely handed out by the Council for no reason whatsoever other than that certificate holders request them.

To the extent it is unclear in the Council's Rules whether the Council in fact has a need standard for time extensions, then the Council could and should amend its Rules to make such a standard clear. Most importantly, the Council should reject the Department's proposed amendments to OAR 345-027-0385(1) that would excuse certificate holders from having to explain alleged or perceived needs for requested extensions of certificate durations.

4. The Council should reject the proposed changes to the Council's rules governing how the public can raise issues in their public comments.

The Council's Rules currently require commenters to raise issues "with sufficient specificity to afford the Council, the Department, and the certificate holder an adequate opportunity to respond to the issue" and further explain that "[t]o raise an issue with sufficient specificity, a person must present facts . . . that support the person's position on the issue." OAR 345-027-0367(5)(b).

The Department now proposes to substantially revise this standard in ways that would impose significant new hurdles on the public, making it much more onerous (and in some cases even impossible) to raise issues, and in ways that would be inconsistent with established case law for raising issues in these types of proceedings. Specifically, the Department proposes that the Council should adopt the following new standards:

> To raise an issue with sufficient specificity, a person must in their comment:
> (A) Identify the recommended findings of fact, conclusions of law or conditions of approval identified in the proposed order to which they object;
> (B) Specify the Council standard or other applicable state and local requirements on which their objection is based; **and**
> (C) Present facts or statements supporting that objection.

Proposed Rule 345-027-0367(7)(a) (emphasis added).

In order to meet these onerous proposed standards, commenters would have to include **all three** of the specified elements (A, B, and C) for each issue. That would conflict with the common, established understanding of what it means to raise issues with "sufficient specificity" to allow the agency and applicant to respond. As applied here, interested commenters are not required to *preserve* issues in their initial comments—as one would do in a judicial action in the event of appeal. Instead, interested commenters are merely required to put the certificate holder, ODOE, and the Council *on notice* of disputed issues. The Oregon Court of Appeals has explained that a "sufficient specificity" requirement merely requires "no more than fair notice" to decision makers and to not involve "strict preservation principles." *Boldt v. Clackamas County*, 107 Or App 619, 623–24, 813 P2d 1078 (1991) (interpreting ORS 197.763(1) (1991)); *see also Lett v. Yamhill County*, 32 Or LUBA 98, 106–07 (1996) (interpreting ORS 197.763(1) (1996)).

Specifically, there are a number of appropriate ways that issues may be raised at the initial commenting stage. An interested person may raise an issue by "referr[ing] to the subject

matter of the criteria that the ordinance establishes." *Boldt*, 107 Or App at 624. Or a person may raise an issue by citing a statutory or regulatory provision or by discussing its operative terms. *Lett*, 32 Or LUBA at 107. But persons are not required to do **all of the above** for every issue raised; to impose such a requirement would conflict with the applicable notice standard and impose unreasonable hurdles on commenters, thus thwarting public participation.

In addition, for part (A) in Proposed Rule 345-027-0367(7)(a), commenters would need to identify findings of fact, conclusions of law, or conditions of approval recommended by ODOE that correspond to each issue. But what happens when a proposed revised facility would be unlawful or improper in a certain respect and the Department completely misses that issue in its proposed order? Why should commenters *always* have to link the issues they wish to raise to specific language in a proposed order? That proposed requirement makes no sense and is designed for failure, *i.e.*, under this Proposed Rule, if and when the Department overlooks an issue, the public would not be allowed to challenge the Department's omissions in the proposed order, thus punishing the public for the Department's mistakes.

Part (B) in Proposed Rule 345-027-0367(7)(a) is also unlawful because it would limit the scope of issues to only those involving a "Council standard or other applicable state and local requirements." This language is narrower and inconsistent with the broader, established language "applicable laws and Council standards," already used throughout the Council Rules. For example, "state and local requirements" may not include applicable federal and interstate laws, such as the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544–544p, and the Management Plan for the Columbia River Gorge National Scenic Area. Yet, EFSC is required to comply with these authorities, ORS 196.155, so it would be illogical to exclude them here.

The Council should reject the Department's recommendation to change and impose new hurdles in the process for raising issues in their public comments on proposed site certificate amendments. The Council should instead simply retain the existing Rule language at OAR 345-027-0367(5)(b).

5. The Council should require, via its Rules, direct notice to the public when amendment determination requests are filed and when the Department decides them.

The Council's Rules authorize certificate holders to submit "amendment determination requests" ("ADRs") to the Department (defined as a "request [for] a written determination of whether [a] proposed change requires [a certificate] amendment under OAR 345-027-0350") and authorize the Department to decide such requests. OAR 345-027-0357. The Council's Rules also require the Department to post on its website ADRs when they are received, and to post the Department's decisions on ADRs when these decisions are made, the latter of which must be posted "as promptly as possible." OAR 345-027-0357(5), (6).

While Friends appreciates that these materials are required to be posted on ODOE's website, the public should not be forced to continually check each webpage for each energy facility to look for any updates in order to learn about the existence of ADRs and ODOE decisions thereon.

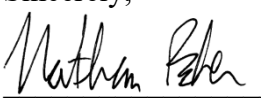
ODOE decisions on ADRs are agency actions, and interested persons are at least entitled to direct notice of such agency actions. Friends requests that the Council require, via its Rules, direct notice to the public when ADRs are filed and when the Department decides them. This could be as simple as requiring notice to EFSC's notice list that it keeps specifically for each relevant energy facility. Such notice could and should be required by the Council Rules to ensure that it occurs. The burden on agency staff is minimal, and by providing direct timely notice, this will reduce the likelihood of "late appeals" challenging ODOE's actions when interested persons learn about the actions after the fact—in some cases many months or even years later.

Simply put, early and full disclosure of agency actions is never a bad policy. The Council should include requirements in its Rules for direct notifications to interested persons regarding filings of ADRs and issuance of decisions on ADRs.

6. Conclusion

Thank you for the opportunity to comment on the proposed revisions to the Council's Rules. Friends hopes that our comments and recommendations will be useful to ODOE and the Council in resolving and remedying the questions and concerns we have identified, and in complying with applicable law and the stated goals of this rulemaking endeavor. If we can be of any further assistance, please do not hesitate to contact us.

Sincerely,



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July 31, 2025

Comment to Council regarding amendments in OAR 345 Division 27

My concern is primarily focused on denial of the public Due Process for decisions made by the Oregon Department of Energy and the Energy Facility Siting Council. By blocking impacted citizen access to a Circuit Court reconsideration appears in contrast to EFSC's mission in protecting Oregon's environment and public safety. Because we have witnessed first-hand the inaccuracies of studies and surveys that site certificates, mitigation plans and amendments are based upon, we have lost certain protections for our environment and safety. The availability of a Circuit Court reconsideration is a safety net for impacted citizens to just and fair legal review that must be kept in force.

OAR 345-027-0357 Amendment Determination Requests: A decision to allow changes to the requirements of a site certificate absent a public process required by an amendment denies the public any opportunity to participate in the evaluation of the change. There should be ample notice and I'm concerned the rule revision is a departure of ODOE's original intent to include public participation. All amendments and pre-operational request for amendment should require notice to impacted landowners.

Because of HB 3681, Rule makers must understand the differences between Energy producing/storage facilities vs. transmission facilities. As Todd said in the EFSC meeting July 18, 2025, energy renewable developers don't come to EFSC having condemned properties. However, transmission projects do. This Y in the road is where you need to tread carefully. Amendment rulemaking is not a one-size-fits-all scenario.

(4) In any proceeding for condemnation of land or an interest therein, a certified copy of a site certificate for an energy facility that is a high voltage transmission line under ORS 469.300 (12)(a)(C) shall be conclusive evidence that the high voltage transmission line for which the land is required is a public use and necessary for public convenience.

Because your rulemaking is a pathway for a site certificate amendment, it may lead to additional condemnation of private property without due process. Sure, there will be an opportunity for a court case but I believe that only determines the amount of compensation. The trigger of improved reliability or need, that opens a pathway for additional "taking," or "condemnation," must be approached with extreme care. To overburden private citizens in additional takings is not protecting their environment or safety.

Because Idaho Power was in the process of condemning lands for B2H, they understood their proposed amendment RFA-2 expanded site boundary was not supported by impacted landowners and those who were refused alternate route consideration. IPC must have realized that they did not have favorable landowners, so they sent out a notice to community members titled **B2H Update** seeking support. They wanted the community to support the RFA-2 amendment that helped 12 landowners who were awarded alternate routes on their property.

The amendment also included an expanded site boundary that confused and upset many landowners. If IPC had treated all impacted and condemned landowners equitably, (like renewable energy developers) it is likely the legal expense to condemn private property offering the most minimal price possible, would have been unnecessary.

Notably, the least Cost rule greatly discriminates impacted landowners because the least cost has no consideration of the increased cost of private injury. And is this in conflict with:
(3) **Costs associated with any of the factors listed in subsection (2) of this section may be considered**, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. ORS 215.275 (3)

The Division 27 Rule Revisions need to state that an amendment is required when a change in a Site Certificate Condition, Monitoring or Mitigation Plan is made. The change requires an amendment under OAR 345-027-0357, OAR 345-027-0365.

The term "update" was the check valve that gave justification in changing the construction wildfire prevention and suppression plan at the July 18, 2025 EFSC meeting without a public process. Rather than informing the public to allow comments or discussion, the change was briefly discussed and approved by council. Because this agenda item was buried at the end of the meeting, after the public comment opportunity, and with the August EFSC meeting canceled, it appears public involvement was not welcome. I would have liked to have shared my concerns and experience to give the council a better perspective of how the change might be irresponsible. So far, this year Morrow County has had 5 combine started fires. Combines are not considered road vehicles and it is unknown what type of fire suppression equipment they contained. My point being, this is an example of why the Fire Prevention and Suppression Plan was developed in detail and expected to be followed. Members of my family halted wheat harvest on July 10, to help extinguish a wheat field fire in Sand Hollow Valley. During the entire fire season, all construction equipment should follow the original plan because the lack thereof places elevated risk to equipment operators, private croplands, homes, and people surrounding the project.

What is the threshold that constitutes and "update" versus an "amendment," and who makes that determination? I object to Updates or Changes that I was not notified and allowed to evaluate or review. When the applicant requests changes or exceptions to mitigation plans, it basically means they need relief from their responsibilities and commitments therefore impacted citizen rights are lessened. If I decide to press charges against IPC in circuit court because they did not follow a mitigation plan, there is nothing to stop them from going to EFSC to ask for an update to the plan thus making my complaint mute.

Site Certificates by definition, in ORS 469.300(26) provide a binding agreement between the State of Oregon and the Applicant authorizing the applicant to construct and operate a facility on an approved site, incorporating all conditions imposed by the council on the applicant. ORS 469.320 provides no exception from requiring an amendment when Monitoring and Mitigation Plans are changed.

ORS 469.401 Requires state and local agencies to issue permits, licenses and certificates subject only to conditions in the site certificate. When changes are made to the conditions in the site certificate absent an amendment, it fails to comply with the requirements of this section and negates the requirement that other agencies not be allowed to provide local proceedings to address their requirements.
ORS 469.440 provides that a failure to comply with terms or conditions of the site certificate or amended site certificate is grounds for revoking or suspending a site certificate.

Division 27 Rule Revisions advocate for the developer. The protections to impacted landowners appears to be eroding and well-resourced developers are the champion for Oregon's Energy Strategy. EFSC must use care in balancing Oregon's energy supply while protecting Oregon's environment and public safety. It is my experience that compliance or lack of can sway EFSC energy projects out of balance. Idaho Power's cultural studies and surveys on our private property did not provide accurate information and the flawed results did not fulfill the purpose or intention of the studies to implement mitigation plans. To meet compliance, I propose the following:

1. Landowners and their approved participants shall be notified of surveyor schedule to enter their property and be allowed to observe, participate in, and record the session.
2. Studies and survey results of private properties must be disclosed to the landowner timely and allow adequate time for review.
3. Studies and surveys submitted to landowner must include surveyor contact information and procedures they used to determine results.
4. ODOE must provide landowner a process to correct errors with corrections entered into the record of applicant which is then sent to ODFW, SHPO and other agencies.
5. EFSC shall provide and affirm with the applicant that results qualify for mitigation before compliance is deemed achieved.

While this comment may seem off-topic, it is applicable to amendments that require expanding the construction corridor, site boundary or adjacent lands needed for added infrastructure.

I may misinterpret the revision process of the department issuing a temporary order granting a pre-operational RFA. It appears the council would meet in executive session to approve the order all while excluding public participation. If this is the case, I am concerned there is no public notice and/or notice to impacted landowners. The lack of transparency is not how an Oregon agency should operate.

In summary, I appreciate the opportunity to comment. I believe Irene Gilbert is bringing forward many of the same issues in which I agree. I ask that you view this process through the lens of your mission and do unto others as you would have them do unto you.

Sincerely,
Wendy King, Redmond, OR on behalf of
Myers Family, Morrow County, OR

To: Council
Date: July 17, 2025
From: Greg Larkin
Subject: Division 27 Rule Amendment Denies Public Due Process for Decisions Made by the Oregon Department of Energy and Energy Facility Siting Council

I am writing to express my concerns regarding the proposed amendment to OAR 345-027, which I believe will deny due process as required by the 5th and 14th Amendments to the U.S. Constitution.

Neither the Oregon Department of Energy (ODOE) nor the Oregon Legislature has the authority to deny individuals who disagree with the decisions of the ODOE Siting Division and the Energy Facility Siting Council access to due process. The proposed delay in allowing citizens to object to agency decisions means that the agency could proceed without probable cause, potentially subjecting the public to irreparable harm before they have any opportunity to seek redress.

Oregon's Administrative Procedures Act (APA) provides for judicial review of agency orders, ensuring due process for citizens affected by state agency actions. However, this rule removes access to legal review for decisions that do not allow for a contested case under ORS 183.482, which encompasses most decisions made by the agency and council. Below, I outline the rights provided by ORS 183.282 during contested case hearings, which are also applicable during a Circuit Court reconsideration under ORS 183.284 when an agency denies access to a contested case. This rule effectively denies access to Circuit Court reconsideration.

Relevant Statutes

• ORS 183.315: Identifies provisions of the APA that are not applicable to certain agencies. The ODOE is not listed as exempt from any chapters.

• ORS 183.415: States that persons affected by actions taken by state agencies have a right to be informed of their rights and remedies.

• ORS 183.480: Grants persons adversely affected by an order the right to judicial review of a final order, whether affirmative or negative.

Two chapters of the APA ensure due process for citizens impacted by state agency actions:

• ORS 183.484: Provides for due process during a reconsideration hearing held by the Circuit Court when an agency refuses to provide a contested case hearing.

• ORS 183.490: Allows citizens to request that an agency be required to act when there are delays in decision-making.

Following a full hearing, the Circuit Court may affirm, reverse, or remand the order. However, under the amended Chapter 27, there is no opportunity for those denied contested cases by the agency to access due process through the Circuit Courts before appealing to the Oregon Supreme Court. This denial of a contested case is a de facto denial of due process as required by the 5th and 14th Amendments.

Additional Statutes:

• ORS 183.482: Provides jurisdiction for judicial review of contested cases, which is conferred upon the Court of Appeals.

The following APA statutes apply to contested cases held by the agency:

• ORS 183.413: Requires parties to be informed of their rights and procedures before a hearing.

• ORS 183.415: Affirms the right to be informed of rights and remedies regarding agency actions.

The rights currently included in Circuit Court redetermination hearings under ORS 183.482, which are provided by contested cases allowed by the agency under ORS 183.484, will no longer be available to those denied agency-held contested cases prior to appeal to the Oregon Supreme Court. This means that most citizens objecting to decisions of the Energy Facility Siting Council will not be afforded rights guaranteed by the 5th and 14th Amendments or the APA.

Conclusion

Previously, an agency's denial of a contested case did not preclude a citizen's access to due process or the opportunity to have their arguments fully vetted. Citizens could request reconsideration of agency decisions by the Circuit Court under ORS 183.484 before having them heard by the Oregon Supreme Court.

Irene Gilbert appealed directly to the Oregon Supreme Court after being denied a contested case by the agency. The process limited her ability to present arguments and did not allow for in-person testimony or cross-examination of witnesses. This lack of due process is concerning and highlights the need for access to the Circuit Court prior to

appealing an agency decision to the Oregon Supreme Court.

I urge the Council to reconsider the implications of the proposed amendment to ensure that citizens retain their rights to due process as guaranteed by the Constitution and the Administrative Procedures Act.

OSSIA
OREGON SOLAR + STORAGE INDUSTRIES ASSOCIATION

EFSC Rules Coordinator
Oregon Department of Energy
550 Capitol St. NE
Salem, OR 97301
Email: EFSC.rulemaking@energy.oregon.gov

August 1, 2025

Dear Energy Facility Council Members and EFSC Rules Coordinator,

On behalf of the Oregon Solar + Storage Industries Association (OSSIA), we respectfully submit the following written comments in addition to our oral testimony at the June 13 EFSC meeting. OSSIA supports the Council's efforts to streamline the Site Certificate Amendment process and agrees that the proposed rulemaking is a positive step toward more efficient and effective project reviews. However, we are concerned about the retroactive application of these procedural rules to amendments currently under review.

It is our understanding that, because the proposed rules are procedural rather than substantive, they will apply to both future **and** pending amendments. OSSIA urges the Council to reconsider this approach and instead apply the rules that were in effect at the time an amendment was submitted. Amendments currently under review were not developed with the proposed changes in mind—including those related to evidentiary standards, analysis area definitions, public hearing requirements, contested case procedures, and construction deadlines. Historically, EFSC and ODOE staff have sought to avoid disrupting in-process applications through rule changes, and we respectfully request that this precedent be maintained.

To address this concern, we recommend revising the **Applicability** section (OAR 345-027-0001) to clarify that amendments submitted prior to the effective date of the new rules will continue to be reviewed under the prior framework. While we appreciate the current language indicating that certificate holders will not be required to resubmit or revise their applications, we believe additional clarity is needed to ensure that applicants are not adversely affected by midstream procedural changes.

Respectfully,

Angela Crowley-Koch
Executive Director

PO Box 14927, Portland, OR 97293-0927
Email: admin@oseia.org
www.orssia.org

Outlook

First Comment on Amendment to Division 27 Rules

From Irene Gilbert <ott.irene@frontier.com>

Date Thu 7/17/2025 9:21 PM

To JACKMAN Tom * ODOE <tom.jackman@energy.oregon.gov>; Todd. Cornett <todd.cornett@energy.oregon.gov>; BENNER Janine * ODOE <janine.benner@energy.oregon.gov>

1 attachment (28 KB)

comments on rule revision DENIAL OF DUE PROCESS.docx;

To: Tom, Todd, Janine and EFSC members:

Attached is my first submission regarding a comment on the denial of Due Process of the Amended Rules. I have several other concerns, however, the due process issue is of such significance that it requires a separate submission.

To: Council; Date: July 17, 2025

From: Irene Gilbert, Representing herself and the public interest

Subject: Division 27 Rule Amendment Denies the public Due Process for most decisions being made by the Oregon Department of Energy and Energy Facility Siting Council.

Due process required by the 5th and 14th amendment to the constitution will be denied in the event that Amendment to OAR 345-027 is promulgated.

Neither the Oregon Department of Energy or the Oregon Legislature have the authority to deny those disagreeing with the decisions of the Oregon Department of Energy Siting Division and the Energy Facility Siting Council access to Due Process. The delay in allowing citizens to object to decisions of the agency means the agency will be allowed to proceed without probable cause and the public may be subjected to irreparable harm prior to having any opportunity to access due process.

Oregon's Administrative Procedures Act Statutes provide for judicial review of agency orders which assure due process for citizens impacted by state agency actions. This rule removes access to legal review of any decisions not allowed a contested case under ORS 183.482 which includes most decisions being made by the agency and council. Following is a compilation of the rights provided by ORS 183.282 during contested case hearings which are provided during a Circuit Court Reconsideration under ORS 183.284 when an agency denies access to a contested case. Access to a Circuit Court reconsideration is being denied by this rule. Below you will find listings of statutes which assure citizen access to due process when agency decisions impact them.

ORS 183.315 identifies provisions of the Administrative Procedures Act chapters not applicable to some agencies. The Oregon Department of Energy is not listed as exempt from any of the chapters.

ORS 183.415 Notice of right to hearing. (1) The Legislative Assembly finds that persons affected by actions taken by state agencies have a right to be informed of their rights and remedies with respect to the actions.

ORS 183.480 Judicial review of agency orders.

(1) Persons adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order, whether such order is affirmative or negative in form.

2) Judicial review of final orders of agencies shall be solely as provided by ORS 183.482, 183.484, 183.490 and 183.500.

Two Chapters of the Administrative Procedures Act Statutes assure due process for citizens impacted by state agency actions:
ORS 183.484 provides for due process during a reconsideration hearing held by the Circuit Court for Marion County or the county in which petitioner resides or has a principle residence when an agency refuses to provide a contested case hearing.

Date of service is the date on which the agency delivered or mailed its order in accordance with ORS 183.470. ORS 183.490 allows a citizen to request that the agency be required to act when they delay taking action or making a decision. (Such as deferring issuing a final order until months or years after an action is taken which will apply with the amended Div. 27 rules)

Following a full hearing of the issue including provision of due process the circuit court may affirm, reverse or remand the order.

According to the Amended Chapter 27 there is no opportunity for those denied contested cases by the agency to access due process through the Circuit Courts prior to appealing to the Oregon Supreme Court. The agency denial of a contested case is a de facto denial of due process required by the 5th and 14th amendments to the U.S Constitution.

ORS 183.482 is the other statute which provides due process through contested case hearings held by the agency. Very few contested cases are allowed on original applications and nearly none when site certificates are amended. These cases go directly to the Oregon Supreme Court for review of the file and decisions made by the agency.

ORS183.482 Jurisdiction for review of contested cases; procedure; scope of court authority. (1) Jurisdiction for judicial review of contested cases is conferred upon the Court of Appeals. Date of service shall be the date on which the agency delivered or mailed its order in accordance with ORS 183.470.

The following Administrative Procedures Act statutes apply to contested cases held by the agency:

NOTICE REQUIREMENTS

ORS 183.413 Notice before hearing of rights and procedures

Parties must be informed regarding procedures, their rights in hearings, the import and effect of hearings and their rights and remedies with respect to actions taken by state agencies.

ORS 183.415 Notice of Right to a Hearing

Persons affected by actions taken by an agency have a right to be informed of their rights and remedies with respect to the actions.

The following items currently included in Circuit Court Redetermination hearings under ORS 183.482 which are provided by Contested Cases allowed by the agency under ORS 183.484. These rights will no longer be available to those denied agency held contested cases prior to appeal to the Oregon Supreme Court. This means that most citizens objecting to decisions of the Energy Facility Siting Council directed by the Oregon Department of Energy Siting Division will not be provided

rights guaranteed by the 14th and 5th amendments to the US Constitution or the Administrative Procedures Act Statute

EVIDENCE ACCESS, DISCOVERY, INCLUSION IN RECORD, SUBPOENAS, RIGHT TO CROSS EXAMINE WITNESSES.

1. **ORS 183.425 Access to depositions and requirements to provide.**
2. **ORS 183.440 Subpoenas in Contested cases to obtain evidence and require witnesses to appear.**
3. **ORS 183.450 The right to cross examine witnesses and provide rebuttal evidence.**
4. **ORS 183.450 All evidence is allowed to be offered and included in the record of the case.**
5. **ORS 183.417 Testimony is provided under oath or affirmation of witness, hearings officer responsible for ensuring record shows a full and fair inenquiry into facts and application of law.**
6. **ORS 183.417 The record developed must include: All pleadings, motions and rulings, evidence received or considered, stipulations, matters officially notex, uestions and offers of proof, objections and rulings on them, proposed findings and exceptions, proposed, intermediate or final order, a verbatim oral, written or mechanical record of all motions, rulings and testimony in proceeding.**
7. **ORS 183.470 Orders in Contested Cases**
    a. **Final orders must include findings of fact and conclusions of law to support each contested issue of fact necessary to support agency decision and the final order and accompanying findings and conclusions must be provided to each party.**

CONCLUSION

Previously, an agency denial of a contested case did not deny a citizen access to due process or the opportunity to have their arguments fully vetted. Citizens were able to access due process denied by the agency by

requesting reconsideration of the agency decisions by the Circuit Court under ORS 183.484 prior to having them heard by the Oregon Supreme Court.

The Oregon Supreme Court Rules limit the length of motions and exhibits, and decisions must be based upon the material in the agency file including contested cases and reconsideration hearings.

EXAMPLE FROM MY PERSONAL EXPERIENCE

I argued an issue before the Oregon Supreme Court. Based upon the demands of the Oregon Department of Energy, I appealed directly to the Oregon Supreme Court in spite of being denied a contested case by the agency. Excerpts from that final order will be provided as an attachment to supplemental comments I will be providing prior to the end of the comment period.

I appeared as a pro se citizen appealing decisions by the Department of Energy and council. Another citizen also filed an appeal on another issue. Both appeals were handled the same way. The following applies to the procedure:

1. **I was allowed to provide my arguments in writing contained in a document that is limited in both length and exhibits allowed.**
2. **The agency and the developer were allowed to respond to my arguments.**
3. **The court issued a decision based upon these documents and the agency file.**

What was not included in the process was any in person arguments, no responses to the statements of the developer and the agency were allowed. The file contained nothing but my brief comment regarding the Draft Proposed Order and my denied requests for a contested case hearing. There had been no opportunity for me to have discovery, question or cross examine the developer's witnesses or any other components that would indicate there was any opportunity for me to be

provided due process required by the constitution. Removing the opportunity to access the Circuit Court prior to appealing an agency decision to the Oregon Supreme Court denies citizen rights included in the US Constitution and the Administrative Procedures Act.

Outlook

Additional Comments and Concerns regarding the revisions to Division 27 rules currently planned

From Irene Gilbert <ott.irene@frontier.com>

Date Fri 7/18/2025 3:32 AM

To JACKMAN Tom * ODOE <tom.jackman@energy.oregon.gov>; CORNETT Todd * ODOE <todd.cornett@oregon.gov>; Todd. Cornett <todd.cornett@energy.oregon.gov>; BENNER Janine * ODOE <janine.benner@energy.oregon.gov>

2 attachments (200 KB)

Supplimental comments on rule revision.docx; B2H Amend II decision (regarding siting corridors.pdf;

Attached is additional concerns regarding the above rule revision and Attachment 1 providing the entire Oregon Supreme Court decision that Type C review was not available for changes in Siting Corridors. The renaming of Type C review does not change the fact that changes in siting corridors requires a full amendment process, not approval under the rules entitled "Pre-operational requests for amendment" which was being called a Type C review at the time the court issued the attached order. The order includes expansive comment regarding the fact that expanding a site boundary does not provide the opportunity to move construction corridors into the expanded site boundary. Changes in the construction corridors must be made through a formal amendment.

Please make these documents available to council prior to the hearing on changes to Division 27 rules so that I may reference them in my in person comments.

To: Council; Date: July 18, 2025

From: Irene Gilbert, Representing herself, the public interest, and Stop B2H

Subject: Additional Public Hearing Comments regarding Division 27 Rule Amendment

Note: All my comments should be reflected as representing myself, the public interest and Stop B2H.

AMENDMENT TO 27 FAILS TO COMPLY WITH COURT DECISION

Issue One:

345-027-0350 Changes requiring an amendment needs to include "(5) Changes to previously approved construction corridors." to comply with the following Oregon Supreme Court Order:

The Oregon Supreme Court decision SC SO71487, SC SO71520 , SC S071521 Order states that while EFSC can allow changes to the site boundary without requiring an amendment, they cannot approve changes in Siting Corridors without requiring an amended site certificate. Attached is a more complete justification based upon the language in the court order. (Attachment 1)

The changes to Division 27 change the term "Type C review" to "Pre-operational Requests for Amendment". This change which is clearly noted in the proposed changes does not avoid the fact that the Oregon Supreme Court has included in their order the fact that changing the location of construction corridors cannot be done through a "Type C review" which is now called a a" Pre-operational Request for Amendment".

Failing to list the fact that the Oregon Supreme Court has determined that changes to the Siting Corridor requires an amended site certificate could result in the agency or a developer concluding that an amendment is not required when completing the evaluation under OAR 345-027-0355.

It could also result in the department or the council deciding during review of an Amendment Determination Request under OAR 345-027-0357 that a change in a siting corridor did not require an amendment when in fact, it does.

Issue Two:

OAR 345-027-0357 Amendment Determination Requests

A decision to allow changes to the requirements of a site certificate absent a public process required by an amendment denies the public any opportunity to participate in the evaluation of the change.

There is no notice provided to those impacted by a decision that an amended site certificate is not being required, no opportunity to object to the change, no requirements for the agency to provide justification necessary for other siting decisions, no legal recourse provided or any opportunity for those impacted to require the Oregon Department of Energy to refer the decision to EFSC for concurrence, modification or rejection. Information required for an amendment determination request needs to include the names and mailing addresses of property owners of record required by OAR 345-027-0360(g) so that notice can be provided regarding request, decisions and appeal rights.

Issue Three:

OAR 345-027-0365

In order to make meaningful comments regarding the proposed order, it must include findings of fact, conclusions of law and conditions being required to comply with council standards. The last line in this rule uses the term "may" rather than "shall" include these items. The courts have consistently determined that the use of "may" means the item is not required. Failing to require the proposed order to include these items will make it impossible for the public to comply with the requirements that their comments be provided with "sufficient specificity" defined as providing

reference to “findings of fact, conclusions of law and conditions of approval” contained in the proposed order which are required in OAR 345-027-0367.

Issue Five:

OAR 345-027-0367(5) What the Notice of request for amendment, proposed order and public hearing must include:

--Nearly all those receiving this notice are provided the information by email. Requiring the public to go to a physical location or a website to view the request and proposed order creates an unnecessary barrier for the public.

When the notice is provided by electronic means, it should include a copy of these items or a link that provides immediate access to the information.

--When the Site Certificate or Amended Site Certificate identifies likely impacts of the site certificate to individuals receiving notice, they should be provided that information so they can respond in their comments.

For example, when the Proposed Order projects that there will be exceedances to the DEQ Noise Standard at a residence, or if the Site Certificate for a Transmission Line may be used as a Certificate of Public Convenience and necessity for condemnation of private property.

The rule should be updated to include these as a requirement for the notices. Lacking requiring this appears to conflict with the public right to notice when an agency action will impact them.

Issue Six:

OAR 345-027-0367(8)(d)

Upon what authority does the rule limit those who can respond to public comments and agency or developer responses to only “(d) Reviewing agencies and members of the public my submit written replies to the responses to their own respective comments in (c)” ????

Limits these rules impose regarding the length of time allowed to develop and provide comments, the specific requirements for information that must be included in the comments and the lack of allowing for the development of a file providing due process prior to requiring the public to file their objections with the Oregon Supreme Court mean there is no fair or equitable treatment for the public. It is likely that there will be members of the public who lacked the time to present all issues they objected to, or who are aware of additional resources supporting an issue that has been presented during the public hearing by someone else. These individuals would be able to testify during a contested case procedure and should be allowed to comment during these hearings which provide the only opportunity to enter information into the record for appeal for most issues.

Issue Seven:

THE AMENDMENT FAILS TO REQUIRE TIMELY NOTICE OF ACTIONS AND APPEAL RIGHTS

The rule needs to provide timely notice of denials of actions related to the issuance of a site certificate rather than waiting until the site certificate or amended site certificate is issued. Notice is not timely when the action is taken but notice is not provided until months after when a site certificate is issued.

For example, citizens denied access to contested cases due to procedures, public hearing comments, summary determination, etc. will not be provided timely notice(Required by OAR 183.490). Taking actions while withholding final notice until the site certificate is issued can result in the agency proceeding without probable cause or having a citizen suffer irreparable harm in addition to denying the citizen their due process rights. Delaying notice conflicts with ORS 183.415 and ORS 183.480.

Issue Eight:

OAR 345-027-0380 Pre-operational Requests for Amendment

This section requires significant evaluation and consideration regarding first, why is it even included as an option? Given the current description of the process for approving what was previously called a “Type C Review” it is clear that this provides the opportunity for a developer to delay obtaining necessary information in a timely fashion that would have allowed them to complete a normal amendment process. One thing that makes these types of requests more likely is changes to site certificate conditions which remove the requirement that Mitigation and Monitoring plans be completed 90 days prior to the start of construction.

The developer has taken the time to submit a complete Amendment request required by OAR 345-027-0360(l) including the names and addresses of property owners. Suggesting the department of energy employees will make a decision regarding approval within 3 business days and provide a temporary order within 7 days absent any opportunity for comment from the public or agencies makes the potential for error extremely high. If these timeframes are reasonable, you must question why it takes the agency so long to make a decision and issue a proposed order in a typical amendment process.

I question why there continues to be a type C review now renamed a “pre-construction amendment” process in the rules. It it is going to be allowed, there appears to be no justification for not extending the response times to provide notice to those impacted and an opportunity to comment and participate in the decision process.

The questions which need to be answered need to include such things as:

Could the developer taken action, completed surveys or obtained information earlier that would have avoided the request?

Not only should the use of this procedure require a change that is unavoidable, but it should also be necessary for construction of the facility.

IDENTIFICATION OF COURT DECISIONS REGARDING AGENCY ACTIONS :

Following are some of the court decisions which appear to relate to the Div. 27 language and which should be included in evaluating the failure of Div. 27 to allow due process for citizens impacted by EFSC decisions:

Goldberg v. Kelly (1970)

A pre-termination evidentiary hearing is necessary to provide procedural due process when the interests of the individual outweigh the states competing concern to prevent any increase in its fiscal or administrative burdens.

Mullane v. Central Hanover Bank and Trust Co. (1950)

A fundamental requirement of due process in any proceeding that is to be final is noticed that under all circumstances apprise interested parties of the pendency of the action and affords them an opportunity to present their objections.

Crowley v. City of Bandon 48 OR LUBA 545 (2005).

By statute, an opportunity for a de novo appeal must be provided where a permit decision is made without first providing a hearing ORS 227.175(10)(E)(ii)

Mathews v. Eldridge 424 US 319 (1979)

Procedural due process must be evaluated by using a balancing test that accounts for the interests of the affected individual, the interests of the government in limiting procedural burdens and the risk of erroneously curtailing individual interests under the existing procedures, as well as how much additional procedures would help reduce the risk of error.

Fuentes v. Shevin (1972)

From the standpoint of due process, it is immaterial that a deprivation of property may be temporary and non-final.

Filed: March 27, 2025

IN THE SUPREME COURT OF THE STATE OF OREGON

Irene Gilbert,

Petitioner,

v.

Oregon Department of Energy, Oregon Energy Facility Siting Council, and Idaho Power Company,

Respondents.

Irene Gilbert,

Petitioner,

v.

Oregon Department of Energy, Oregon Energy Facility Siting Council, and Idaho Power Company,

Respondents.

Kevin March,

Petitioner,

v.

Oregon Department of Energy, Oregon Energy Facility Siting Council, and Idaho Power Company,

Respondents.

(SC S071487, SC S071520, SC S071521)

En Banc

On judicial review from a final order of the Energy Facility Siting Council.

Petitioner Irene Gilbert, La Grande, filed the petitions and briefs *pro se;* submitted on the briefs December 4, 2024 (S071487) and on December 24, 2024 (S071520).

Petitioner Kevin March, La Grande, filed the petition and brief *pro se;* submitted on the briefs December 24, 2024 (S071521).

Jordan R. Silk, Assistant Attorney General, Salem, filed the answering briefs for respondents on review Oregon Department of Energy and Oregon Energy Facility Siting Council. Also on the answering briefs were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General, Salem.

Sara Kobak, Schwabe, Williamson & Wyatt, P.C., Portland, filed the answering briefs for respondent on review Idaho Power Company. Also on the answering briefs were Andrew J. Lee, Schwabe, Williamson & Wyatt, P.C., Portland, and Jocelyn C. Pease, McDowell, Rackner & Gibson, P.C., Portland.

BUSHONG, J.

The final order of the Energy Facility Siting Council is affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents.
[X] No costs allowed.
[ ] Costs allowed, payable by:
[ ] Costs allowed, to abide the outcome on remand, payable by:

BUSHONG, J.

Two petitioners challenge an amendment to the energy facility site certificate that we addressed in *Stop B2H Coalition v. Dept. of Energy*, 370 Or 792, 525 P3d 864 (2023), regarding the construction of a high-voltage electrical transmission line from Boardman, Oregon, to Hemingway, Idaho.[1] In *Stop B2H*, we affirmed the Energy Facility Siting Council's (EFSC) order granting Idaho Power Company's (Idaho Power) request for a site certificate to construct that transmission line. EFSC subsequently approved Idaho Power's request to amend that site certificate. Petitioners challenge the process that EFSC followed in addressing Idaho Power's requested amendment, and, in two respects, the substance of that amendment.

Regarding process, petitioners contend that they were entitled to a contested case proceeding to address the substantive issues they have raised, and petitioner Gilbert also contends that the circuit court -- not this court -- has jurisdiction to decide that issue.[2] Petitioners contend in their substantive challenges that: (1) the amended site certificate does not comply with the rules governing the form and amount

[1] Two petitioners have filed three different petitions challenging the approval of the amended site certificate: case numbers S071487 and S071520, both filed by petitioner Irene Gilbert (Gilbert), and case number S071521, filed by petitioner Kevin March (March). The Energy Facility Siting Council and the Department of Energy have appeared in opposition. We consolidate the three petitions for purposes of this opinion, and, except where noted, refer to Gilbert and March collectively as "petitioners."

[2] Gilbert indicated that she did not dismiss her petition in this court and file in the circuit court because EFSC and Idaho Power insisted that she had to file her petition in this court.

of the required bond; and (2) the amendment could allow construction within the expanded area without requiring Idaho Power to comply with legal protections for watersheds and fish and wildlife habitats.

As we will explain, we conclude that we have jurisdiction to address petitioners' process challenge, and we reject that challenge. We also reject petitioners' substantive challenges because: (1) the challenge to the form and the amount of the required bond is untimely, because the bond was set in the original site certificate that we approved in *Stop B2H* and was not changed by the recent amendment; and (2) under the governing rules and EFSC's order, Idaho Power is not permitted to engage in any construction activity in the additional areas that the amendment added to the site boundary. Accordingly, we affirm EFSC's order approving the amended site certificate.

I. BACKGROUND

Oregon law provides for "a comprehensive system for the siting, monitoring and regulating of the location, construction and operation of all energy facilities in this state." ORS 469.310. Under that system, a party who seeks to build an "energy facility" must obtain authority -- known as a "site certificate" -- from EFSC before it can proceed. *See* ORS 469.300(11) (defining "energy facility"); ORS 469.320 (site certificate requirement). Because a high-voltage electricity transmission line is generally considered an "energy facility" under ORS 469.300(11), Idaho Power was required by Oregon law to obtain a site certificate from EFSC before it could construct the line. In *Stop B2H*, we summarized the statutory scheme that governed EFSC's decision to approve Idaho Power's request for a site certificate, *see* 370 Or at 795-97

(discussing statutes), and the process that led EFSC to issue a site certificate for this transmission line, *id.* at 797-800.

Specifically, as we explained in *Stop B2H*, the site certificate process began when Idaho Power gave notice of its intent to seek a site certificate in 2008. *Id.* at 797-98. That was followed by years of public meetings and the participation of 17 different public agencies, *id.* at 798; a contested case proceeding with about 50 petitioners, *id.* at 799; and, ultimately, a final order by EFSC approving the site certificate, *id.* at 799-800. Three parties petitioned this court to review the final order, and we ultimately affirmed EFSC's order approving the site certificate. *Id.* at 795, 821.

Idaho Power subsequently asked EFSC to approve an amendment to the site certificate to expand the site boundary and make other changes. Petitioners filed separate objections and requested contested case proceedings to address their concerns. EFSC denied their requests for contested case proceedings and approved Idaho Power's request to amend the site certificate.[3] Petitioners challenge those decisions in this court.

II. DISCUSSION

As noted above, petitioners assert process and substantive challenges to EFSC's orders denying them contested case proceedings and approving Idaho Power's request to amend the site certificate. We review EFSC's orders for errors of law in its legal decisions, for lack of substantial evidence in its factual findings, and for abuse of

[3] The amendment at issue here is the second amendment to the original site certificate. EFSC had previously approved the first amendment, and no party challenged that decision in this court.

discretion in any exercises of discretion. ORS 469.403(6); ORS 183.482(7), (8); *see Stop B2H*, 370 Or at 800 (so noting). We begin with petitioners' process challenge.

A. *Petitioners' Request for a Contested Case Proceeding*

As noted above, petitioners contend that they were entitled to contested case proceedings to address their various concerns about Idaho Power's amendment request. An EFSC rule, OAR 345-027-0371, sets out the process for parties to seek a contested case proceeding in connection with a proposed amendment to a site certificate. Before addressing whether petitioners were entitled to contested cases under that rule, however, we must first address petitioner Gilbert's contention that we lack jurisdiction to decide that issue.

1. *Gilbert's challenge to Supreme Court's jurisdiction*

Gilbert contends that the circuit court, and not this court, has jurisdiction to review EFSC's decision to deny her request for a contested case proceeding. We disagree.

Oregon law gives this court exclusive jurisdiction to review an EFSC order that approves or rejects an amended site certificate. *See* ORS 469.403(3) ("Jurisdiction for judicial review of [EFSC's] approval or rejection of an application for a site certificate *or amended site certificate* is conferred upon the Supreme Court." (Emphasis added.)). That jurisdiction necessarily includes jurisdiction to review the process followed by EFSC in deciding whether to approve or reject the amendment to the site certificate.

Our case law supports that proposition, albeit implicitly. In *Blue Mountain Alliance v. Energy Facility Siting*, 353 Or 465, 300 P3d 1203 (2013), the petitioners

challenged EFSC's approval of an amended site certificate to construct a wind energy facility. Among other things, the petitioners contended that EFSC had erred when it denied their requests for a contested case proceeding. We addressed that contention on the merits, concluding that EFSC "did not err in rejecting [the] petitioners' requests for a contested case proceeding." *Id.* at 496. Although no party challenged our jurisdiction, we could not have addressed petitioners' argument on the merits if we lacked jurisdiction. The fact that we addressed the merits of the petitioners' arguments thus implies that we recognized our jurisdiction to do so.[4]

In arguing that the circuit court, not this court, has jurisdiction to decide whether EFSC erred in denying petitioners' request for a contested case proceeding, Gilbert relies on the Court of Appeals' decision in *Friends of Columbia Gorge v. Energy Fac. Siting Coun.*, 314 Or App 143, 498 P3d 875 (2021), *rev den*, 369 Or 338 (2022) (*Friends II*). The petitioners in *Friends II* filed an action in circuit court challenging EFSC's orders denying them a contested case proceeding. The circuit court transferred the case to the Court of Appeals pursuant to ORS 14.165(1)(b) to decide "which court has jurisdiction to provide judicial review" of the challenged orders. *Id.* at 144. The Court of

[4] Our decision in *Blue Mountain Alliance* is consistent with other decisions of this court. For example, in *Save Our Rural Oregon v. Energy Facility Siting*, 339 Or 353, 377, 121 P3d 1141 (2005), we concluded that, although ORS 469.403 did not allow petitioners to "directly challenge [EFSC's] denial of their request for rulemaking in this proceeding," that statute gave this court jurisdiction to consider whether "the absence of rules renders [EFSC's] final order invalid." In *Friends of Columbia Gorge v. Energy Fac. Siting Coun.*, 365 Or 371, 394-95, 446 P3d 53 (2019) (*Friends I*), exercising jurisdiction under ORS 469.403, we struck down EFSC rules that had impermissibly limited judicial review of cases that had not gone through contested case proceedings.

Appeals concluded that the challenged orders had been issued in "other than contested cases," so "the circuit court -- not [the Court of Appeals] -- ha[d] jurisdiction" under ORS 183.484(1). *Id.* at 153. In reaching that conclusion, the court stated in a footnote that ORS 469.403(3) -- the statute giving the Supreme Court exclusive jurisdiction over the approval or rejection of applications to amend a site certificate -- did not apply, because the petitioners in that case "d[id] not seek judicial review of EFSC's 'approval or rejection of an application for a[n] * * * amended site certificate.'" *Id.* at 146 n 4 (quoting ORS 469.403(3)).

This court is not bound by that Court of Appeals' decision. But even assuming that *Friends II* was correctly decided, it would not apply here, because petitioners in this case are, in effect, seeking review of EFSC's approval of Idaho Power's application for an amended site certificate.

We hold now, as we implicitly determined in *Blue Mountain Alliance*, that this court has jurisdiction to address a petitioner's contention that EFSC erred in denying a request for a contested case proceeding on objections to a proposed amendment to a site certificate. We turn to the merits.

2. *Petitioners' contention that they should have been given contested case proceedings*

Under the governing rule, EFSC is required to give a contested case proceeding in connection with the type of site certificate amendment at issue here only if the request "raises a significant issue of fact or law that is reasonably likely to affect [EFSC's] determination whether the facility, with the change proposed by the

amendment, meets the applicable laws and [EFSC] standards." OAR 345-27-0371(9).[5]

Petitioners contend that they were entitled to contested case proceedings because the two substantive issues they raise -- (1) whether Idaho Power has met the bonding requirement of OAR 345-022-0050, and (2) whether the site boundary should be expanded as proposed in the amendment -- are "significant issue[s] of fact or law" that are "reasonably likely to affect" EFSC's decision on the proposed site certificate amendment. We disagree.

Petitioner Gilbert's challenge to the bond provisions does not present a "significant issue of fact or law" that could affect EFSC's decision on the proposed amendment.[6] As discussed in more detail later in this opinion, Gilbert argues that Idaho Power should not be allowed to post a nominal bond for part of the facility's expected life. But that condition of the bond was approved years ago, in the original site certificate. In the amendment before us, EFSC determined that it did not need to revisit its earlier determination that a nominal bond for that portion of the facility's life was adequate.

Thus, Gilbert's objection to the form and amount of the bond is, in effect, a challenge to the bond terms established in the original site certificate. That challenge is

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[5] EFSC has established different review processes for different types of amendments. *See* OAR 345-027-0351 (establishing review processes called "type A," "type B," and "type C"). Because EFSC here gave Idaho Power's request for amendment Type A review, OAR 345-27-0371 applies. *See* OAR 345-027-0351(2) (making that rule applicable, among others, to Type A review).

[6] Petitioner March does not challenge the bond.

untimely. Under ORS 469.403(3), a challenge to the final order approving Idaho Power's application for a site certificate must be filed "within 60 days after the date of service of [EFSC's] final order or within 30 days after the date the petition for rehearing is denied or deemed denied." That period has long expired. Indeed, Gilbert was one of the parties that filed a timely challenge to the final order approving Idaho Power's application for a site certificate, and we addressed the merits of the challenge in *Stop B2H*. If Gilbert wanted to challenge the form or amount of the bond, she should have included that challenge in her petition in *Stop B2H*.

Petitioners' challenge to the expansion of the site boundary does not present a "significant issue of fact or law" either. Petitioners contend that the final order unlawfully approves adding areas to the existing site boundary without the surveys required to assess the impacts construction would have on watersheds and fish and wildlife habitat. By doing so, petitioners contend, Idaho Power will be able to shortcut otherwise mandatory processes required for future changes. That argument *sounds* significant, but closer examination reveals that it is not. As we will explain, the argument misunderstands the effect of the amendment and the relationship between those areas within the "site boundary" where construction is permitted -- known as the "micrositing corridors" -- and the areas where construction is not permitted.[7]

[7] Under the governing rule, a "site boundary" is "the perimeter of the site of a proposed energy facility, its related or supporting facilities, all temporary laydown and staging areas and all corridors and micrositing corridors proposed by the applicant." OAR 345-001-0010(31). A "micrositing corridor" is "a continuous area of land within

Under the governing rule and EFSC's order, all construction that occurs within the "site boundary" must occur within a "micrositing corridor." *See* OAR 345-001-0010(21) (micrositing corridor is "area of land within which construction of facility components may occur"). The amendment that EFSC approved expanded the "site boundary" but it did not authorize construction outside the boundaries of any existing "micrositing corridors." The final order approving Idaho Power's proposed amendment confirmed that (1) Idaho Power was "limited to locating facility components within the approved micrositing areas, subject to site certificate conditions"; and (2) Idaho Power was *not* authorized "to locate facility components within the expanded site boundary."

The "surveys" and "mandatory processes" that petitioners fear will be ignored or subject to "shortcuts" are those that apply to construction that must occur within the "micrositing corridors." Because petitioners do not challenge any changes to the boundaries of the "micrositing corridors," the surveys and other processes that, by law, apply to construction have not changed. It follows that petitioners' requests for contested case proceedings to address the expanded site boundaries do not present a significant issue of fact or law that had to be addressed in a contested case proceeding.

B. *Petitioners' Substantive Challenges to EFSC's Final Order*

Although petitioners' challenges primarily focus on EFSC's denial of their requests for contested case proceedings, their petitions and briefing can also be

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which construction of facility components may occur, subject to site certificate conditions." OAR 345-001-0010(21).

understood to contend that EFSC's order is legally erroneous in two respects that this court should address even in the absence of a contested case proceeding. First, petitioner Gilbert argues that the bond is legally insufficient. Second, both petitioners assert that the expanded site boundary approved in the amendment would allow Idaho Power to carry out future construction in the expanded areas that might unlawfully and adversely affect watersheds and fish and wildlife habitats.

Those arguments overlap with the petitioners' primary challenge: that EFSC should have given them contested case proceedings to address their concerns. Regardless, the arguments fail, as we will explain in more detail below. We begin with Gilbert's challenge to the form and amount of the bond.

1. *Gilbert's challenge to the bond*

Under the governing rules, Idaho Power cannot begin constructing the facility until it submits a bond or letter of credit "in a form and amount satisfactory to [EFSC] to restore the site to a useful, non-hazardous condition." OAR 345-025-0006(8); *see also* OAR 345-022-0050(1) (EFSC cannot approve a site certificate application without finding that the site can be restored adequately to a useful, non-hazardous condition after construction ends or the facility is no longer operated); OAR 345-022-0050(2) (applicant must demonstrate "a reasonable likelihood" of obtaining a bond or letter of credit to pay for that restoration).

In its final order approving the original site certificate in 2022, EFSC made extensive findings and conclusions regarding the appropriate bond for this facility. EFSC estimated at that time that the total cost to restore the site to a useful, non-hazardous

condition would be $141 million in 2016 dollars. It found that the useful life of the transmission line facility was 100 years, and that there was very little likelihood that the transmission line would be retired early. It also concluded that Idaho Power was very unlikely to default because, as a regulated public utility, it could pass on any decommissioning costs to its customers.

EFSC's final order set different bonding requirements for different phases of the project. The first phase was the construction period. Across the estimated construction time, Idaho Power was required to post a bond that steadily rose to equal the full amount of restoration costs, to account for the possibility that the facility might never become operative. EFSC determined, however, that, after the facility began operating, a nominal $1 bond would be sufficient for the first 50 years of the 100-year estimated lifetime. EFSC explained that a $1 nominal bond for the first 50 years of operation would be "satisfactory" given the "very low" "risk that the facility would be abandoned or retired after construction and before 50 years of service." For the last 50 years of operation, EFSC required the bond amount to rise annually, until by year 100 the bond amount would be the full decommissioning cost. EFSC retained authority to adjust the bond upward to the total decommissioning cost, and it required Idaho Power to report on that matter every five years.

In addressing Idaho Power's request to amend the site certificate, EFSC noted that, under the rule governing amendments, it was required to determine whether the amount of the bond required by the original site certificate "is adequate" given the

proposed amendment. OAR 345-027-0375(2)(e).[8] EFSC concluded that that rule required it to (1) determine what additional steps, if any, Idaho Power would need to take to restore the site as a result of the changes made by the proposed amendment; (2) determine the updated restoration costs for the whole facility; and (3) examine any updated evidence of Idaho Power's ability to obtain a bond.

On the first point, EFSC found that the acts needed to restore the site if the proposed amendment was approved were "substantially similar" to those already required by the original site certificate. On the second point, EFSC found that the updated costs to restore the entire facility was $170 million in 2024 dollars. EFSC expressly added that the changes proposed by the amendment did not otherwise affect EFSC's prior determination that a $1 bond for the first 50 years of the facility life was sufficient.[9] Finally, EFSC explained that an approved financial institution had indicated it was

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[8] OAR 345-027-0375 provides in relevant part:

> "(2) To issue an amended site certificate, [EFSC] must determine that the preponderance of evidence on the record supports the following conclusions:
>
> "* * * * *
>
> "(e) For all requests for amendment, the amount of the bond or letter of credit required under OAR 345-022-0050 is adequate."

[9] EFSC reiterated the reasons for its prior finding that a $1 nominal bond for the first 50 years of operation, and explained why the proposed amendment would not affect its prior conclusion. Specifically, EFSC stated that the bond provisions "are not impacted" by the changes it approved in the amendment and noted that it had approved the bond approach "twice in the last two years" after issuing the original site certificate. Under those circumstances, EFSC found no reason to change that aspect of the bond.

willing and able to issue a bond to Idaho Power for up to $180 million.

Gilbert's arguments about the bond go to provisions that were established in the original site certificate: specifically, the nominal $1 bond for the first 50 years of the facility's operation. She argues that, as a matter of law, OAR 345-027-0375(2)(e) always requires a bond for the full amount of the restoration costs. But that argument addresses a condition set in the original site certificate that was not changed by the amendment. Accordingly, Gilbert's challenge to that provision is untimely.

Gilbert also contends that EFSC had applied a "balancing test," contrary to OAR 345-022-0000(2), when it concluded that a nominal $1 bond was "adequate." Again, that challenge is untimely, and Gilbert has not explained how the amendment's minor revisions to the bond requirement -- largely limited to updating the expected restoration costs -- invalidated EFSC's earlier finding of adequacy. Instead, as indicated above, Gilbert's arguments challenge EFSC's original bond determination and, accordingly, are untimely.

Moreover, Gilbert's argument also fails on the merits. The rule she relies on provides in part as follows:

> "[EFSC] may issue or amend a site certificate for a facility that does not meet one or more of the applicable standards adopted under ORS 469.501 if [EFSC] determines that 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."

That rule does not apply to EFSC's decision here. EFSC did not determine that the bond failed to meet "applicable standards," nor did it find that the overall public benefits of the facility outweighed any such failure. Instead, EFSC determined that the bond was

adequate given the proposed amendment, and Gilbert has not shown any error in that determination. EFSC was not required to -- and did not -- decide that the "overall public benefits" outweighed any adverse effects caused by the facility's failure to meet some applicable standard relating to the bond.

Finally, to the extent Gilbert is contending that the nominal amount of the bond during the first 50 years of operation is just unreasonable under the circumstances, that argument goes to whether EFSC had abused its discretion in determining that the "form and amount" of the bond for that 50-year period was "satisfactory." *See* OAR 345-025-0006(8). But, as we have explained, the adequacy of a nominal $1 bond had been approved by EFSC in its 2022 final order approving the original site certificate. The time to challenge that decision has long since expired. ORS 469.403(3). If Gilbert wanted to challenge the bond as "unreasonable," she should have included that challenge in a timely petition that we could have addressed in *Stop B2H*.

2. *Petitioners' challenge to the expanded site boundary*

Petitioners' challenge focuses on the new areas within the expanded site boundary -- but outside the micrositing corridors -- resulting from the amendment. They contend that those areas have not been surveyed to determine the effects construction would have on watersheds and fish and wildlife habitats, as required by Oregon law, and they worry that construction in those areas might occur under the amendment.[10] That

[10] March's arguments are similar to Gilbert's, though he focuses specifically

argument fails because, as explained above, construction is not allowed outside the micrositing corridors even after the amendment.[11]

In arguing that construction might be allowed in the expanded area outside the micrositing corridors without any of the required surveys, petitioners misunderstand the governing rules (and one statute). First, they misread OAR 345-027-0375(2)(a) to always require surveys to the full extent of the expanded site boundary. But the rule only requires surveys to ensure compliance with all laws and EFSC standards for "*the portion of the facility within* the area added to the site by the amendment." (Emphasis added.)[12] As explained above, no "portion of the facility" can be placed "within the area added to the site by the amendment" to the site boundary. Idaho Power can only construct the facility *within the micrositing corridors*, and petitioners do not challenge construction within those corridors.

Second, petitioner Gilbert suggests that Idaho Power would be able to engage in future construction in those areas without full review because, she claims, the

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on watersheds and fish and wildlife habitats. We address those arguments together.

[11] Surveys on the effects that construction and operation within the amended micrositing corridors would have on watersheds and fish and wildlife habitats either have already been completed, or they will be completed before construction begins. Petitioners do not challenge those surveys.

[12] OAR 345-027-0375(2)(a) provides, "For a request for amendment proposing to add new area to the site boundary, the portion of the facility within the area added to the site by the amendment complies with all laws and [EFSC] standards applicable to an original site certificate application[.]"

amendment would allow Idaho Power to utilize a "truly expedited" form of review known as "Type C" review for that future construction. *See* OAR 345-027-0380 (setting out requirements for Type C review); *Friends of Columbia Gorge v. Energy Fac. Siting Coun.*, 365 Or 371, 375, 446 P3d 53 (2019) (*Friends I*) (characterizing Type C review as "truly expedited").[13]

But EFSC's order did not authorize Idaho Power to use Type C review for any future construction, nor did it authorize any future construction outside the micrositing corridors. Type C review is *only* available if a site certificate holder seeks a change for part of the facility "not yet in operation, but *approved for construction* in the site certificate or amended site certificate." OAR 345-027-0380(1) (emphasis added). Again, the second amended site certificate does not approve any construction outside the micrositing corridors. Because no construction outside the micrositing corridors has been

[13] More specifically, when a site certificate holder seeks a change to a site certificate, it files an "amendment determination request." OAR 345-027-0357. The Department of Energy determines which of three possible types of review must follow. *See* OAR 345-027-0351.

The full form of review is Type A review. OAR 345-027-0351(2). It is the "default review process." *Id.*

The expedited form of review is Type B review. OAR 345-027-0351(3); *see Friends I*, 365 Or at 375 (characterizing Type B review as "expedited"). The Department of Energy and EFSC must consider a number of identified factors before they can approve Type B review. *See* OAR 345-027-0357(8) (listing factors).

The "truly expedited" form of review is Type C review, OAR 345-027-0351(4), which is available only in very limited circumstances, OAR 345-027-0380(1).

"approved for construction in the site certificate or amended site certificate," any request by Idaho Power to construct outside the micrositing corridors cannot qualify for expedited Type C review. Nothing in the final order provides otherwise.[14]

Finally, petitioners also suggest that ORS 469.320(5) means that the expanded site boundary will *automatically* permit Idaho Power to carry on construction in the newly added areas without any further review. But that is a misreading of the statute.

The only arguably applicable provision of that statute, ORS 469.320(5)(b), provides that a separate site certificate is not required for "[e]xpansion within the site or within the energy generation area of a facility for which a site certificate has been issued,

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[14] EFSC imposed an additional condition if Idaho Power later seeks approval to construct outside the micrositing corridors. Petitioners may have mistakenly concluded that that condition was the *only* condition imposed for that construction.

Petitioners identify New General Standard of Review Condition 12 (GEN-GS-07; AMD2) as the source of the claim that Idaho Power can now obtain Type C review. Under the amended Condition 12, if Idaho Power asks for permission to construct outside the micrositing corridors, it must "provide evidence of private landowner consent of changes on their property."

EFSC added that requirement to "memorialize [Idaho Power's] representation and intent to coordinate with landowners to accommodate the facility and related or supporting facilities on their land." But that was an additional condition that Idaho Power would have to comply with *if* it decides to request permission to construct outside the micrositing corridors. It was *not* an approval to construct outside the micrositing corridors, nor was it the *only* requirement that Idaho Power would have to comply with if it decided to request that approval. Condition 12 also expressly required Idaho Power to request changes under OAR 345-027-0357, which results in either Type A, Type B, or Type C review. *See* ___ Or at ___ n 13 (slip op at 16 n 13). Again, Type C review definitionally would not be available.

if the existing site certificate has been amended to authorize expansion[.]" Petitioners seem to be equating "expansion" with "construction," suggesting that, by expanding the site boundary, EFSC is implicitly authorizing "construction" outside the existing micrositing corridors. That is incorrect. The existing site certificate has *not* been "amended to authorize" any construction in the areas of the expanded site boundary that are outside the existing micrositing corridors.

III. CONCLUSION

For the reasons discussed, we conclude that (1) we have jurisdiction over the petitions for judicial review challenging EFSC's denial of a contested case proceeding; (2) EFSC did not err in denying petitioners a contested case proceeding; (3) EFSC did not err in concluding that the existing form of bond is adequate to address the amendment; and (4) EFSC did not err in expanding the site boundary.

The final order of the Energy Facility Siting Council is affirmed.

Outlook

FW: Revision to Div. 27 amendment regarding changes to site certificate conditions requiring amendments

From CORNETT Todd * ODOE <Todd.CORNETT@energy.oregon.gov>
Date Mon 7/21/2025 7:38 AM
To JACKMAN Tom * ODOE <Tom.JACKMAN@energy.oregon.gov>
Cc ESTERSON Sarah * ODOE <Sarah.ESTERSON@energy.oregon.gov>

1 attachment (26 KB)

Third Submission to Council regarding changes to Div. 27 rules.docx;

Tom,

You were not included on this email but they are comments related to the Amendment Rulemaking.

Todd

From: Irene Gilbert <ott.irene@frontier.com>
Sent: Sunday, July 20, 2025 7:12 PM
To: CORNETT Todd * ODOE <todd.cornett@oregon.gov>; BENNER Janine * ODOE <janine.benner@energy.oregon.gov>; ESTERSON Sarah * ODOE <sarah.esterson@state.or.us>
Cc: Fuji Kreider <fkreider@campblackdog.org>; Jim Kreider <jkreider@campblackdog.org>; Matt Cooper <mcooperpiano@gmail.com>; Charlie Gillis <charlie@gillis-law.com>; Susan Geer <susanmgeer@gmail.com>; Joel and Susan Rice <joelrice@me.com>; Doug Bean <dbean516@gmail.com>; Brent Smith <brent@baumsmith.com>; Intermountainlaw Info <info@intermountainlaw.com>; 1000 Friends of Oregon <landuse@friends.org>; Blue Mountain Alliance <bluemountainalliance@charter.net>; Wendy King <wkingproshop@gmail.com>; Sam Myers <sam.myers84@gmail.com>; Greg Larkin <larkingreg34@gmail.com>
Subject: Revision to Div. 27 amendment regarding changes to site certificate conditions requiring amendments

Attn: Todd, Janine, Sarah and Energy Facility Siting Council Members

Please accept this Third Document outlining a need for a revision to the Div. 27 rules. It addresses changes in Site Certificate Conditions Requiring a formal Amendment to the Site Certificate which are not being made through an amendment of the site certificate, but rather through a recommendation from the Oregon Department of Energy that Council Approve Changes to the Monitoring and Mitigation Plans.

It is being submitted prior to the deadline for comments on Div. 27 rule changes of Aug. 1, 2025;

To: Oregon Energy Facility Siting Council July 20, 2025

From: Irene Gilbert on behalf of herself, public interest and Stop B2h

Regarding: Third submission outlining a significant Concern with the Div. 27 Rule Revisions to Contested Cases

Issue: Monitoring and Mitigation Plans provide the details regarding how developers are to comply with council standards. Developers are requesting and the Oregon Department of Energy is recommending changes to Monitoring and Mitigation Plans that require an amendment under Oregon Statutes and Rules absent the processing of the change as an amendment. The Division 27 Rule Revisions need to state that an amendment is required when a change in a Site Certificate Monitoring and Mitigation Plan is made which require an amendment under OAR 345-027-0357, OAR 345-027-0365.

The Div. 27 rules need to include the following statement under Required Amendments: Changes to Monitoring and Mitigation Plans that change site certificate conditions must be made through an amendment process.

REASON THIS IS NECESSARY:

Monitoring and Mitigation Plans are included in and considered part of a Site Certificate under Oregon Statutes.

Site Certificates by definition in ORS 469.300(26) provide a binding agreement between the State of Oregon and the Applicant authorizing the applicant to construct and operate a facility on an approved site, incorporating all conditions imposed by the council on the applicant.

ORS 469.320 povides no exception from requiring an amendment when Monitoring and Mitigation Plans are changed.

ORS 469.401 Requires state and local agencies to issue permits, licenses and certificates subject only to conditions in the site certificate. When changes are made to the conditions in the site certificate absent an amendment, it fails to comply with the requirements of this section and negates the

requirement that other agencies not be allowed to provide local proceedings to address their requirements.

ORS 469.440 provides that a failure to comply with terms or conditions of the site certificate or amended site certificate is grounds for revoking or suspending a site certificate.

Any change in a site certificate Monitoring and Mitigation Plans that establish how a developer will comply with Council Standards must be evaluated regarding whether the change requires an amendment to the site certificate.

CURRENT ACTIONS WHICH FAIL TO COMPLY WITH REQUIREMENTS OF STATUTES AND RULES

Changes to Site Certificate Conditions included in Monitoring and Mitigation Plans are being made which require review under the Contested Case Rules without consideration of whether or not an amendment to a site certificate is required. This is resulting in no public notice to impacted citizens, no evaluation of facts and statutes being impacted, and no notice to citizens of the results of the review and their appeal rights. A failure to provide public notice and an amendment process results in decisions being made which fail to address requirements that the public is aware of which would preclude or change the language of the changes.

The public is being denied notice required under ORS 183.413 and ORS 183.415. They are also being denied public access to the following Statutory requirements contained in ORS 183.417, ORS 183.425, 440, 445, 450, 457, 458, 460, 462, 464, 470, 480, 484, 486,490, 630, 650, and 500. In addition, the public is not provided access to requirements contained in OAR 345-027-0357 and OAR 345-027-0365.

Example: On July 13, 2025, the Oregon Department of Energy advised the Energy Facility Siting Council to approve changes to the Fire Mitigation Plan which removed the following requirements for equipment. (Discussion provided examples of cranes and ATV's as being exempt from requirements as

they are “equipment” not “motor vehicles”) The Fire Mitigation Plan addresses the issue of Protection of public health and safety, including necessary safety devices and procedures as well as multiple other standards identified in ORS 469.501. including impacts to Agricultural and Forest land, impacts to wildlife, etc.

REQUIREMENTS REMOVED FOR EQUIPMENT:

One long-handled roundpoint shovel with 8-inch or greater blade, a double bit ax or Pulaski.

16-20 lb. dry chemical fire extinguisher

20-50 gallons of water with mechanism to spray

CHANGES TO REQUIREMENTS FOR MOTOR VEHICLES:

Fire extinguisher size changed to 5-10 lb. dry chemical fire extinguisher rather than the previous requirement for a 16-20 lb. dry chemical fire extinguisher

Motor vehicles required to carry 5 gallons of water with mechanism to spray rather than the 20-50 gallons of water with spray mechanism previously required.

This change removed all requirements for fire fighting equipment on vehicles not used on roadways unless there is a high or extreme red-flag warning in effect.

The change occurred absent meeting the requirements for changes in site certificate conditions requiring an amendment under the Contested Case Rules. No public notice other than on the department web site, no statement of facts or the statutes which would allow the change in the site certificate without public input, no opportunity for public comment, input, objection or documentation of why the change should not occur, and no public notice of decision to allow change or notice of the public opportunity to appeal the decision.

IMPACTS WHICH SHOULD HAVE BEEN ADDRESSED THROUGH AN AMENDMENT PROCESS THAT ALLOWED THE PUBLIC TO PROVIDE INPUT INCLUDE BUT ARE NOT LIMITED TO:

1. Does the change address the mitigation necessary due to the increased fire danger that results from construction of the Boardman to Hemingway transmission line? No.

   While there are no doubt multiple reasons reflected in Management Plans and requirements of agencies involved with wildfire prevention which the public could have informed the council of, the public was provided no such opportunity.
   One such agency is the Bureau of Land Management. The decision is not consistent with BLM fire requirements and restrictions effective July 4, 2025 for Vale District issued June 27, 2025. The announcement states most wildfires were human caused and most were equipment caused fires. Restrictions were not based upon a determination of "High or Extreme" wildfire announcement. "Notice applies to all public lands within Malheur and Baker Resource Areas and all Bureau of Reclamation-managed lands protected by BLM's Fire Division, including the Owyhee River below the dam, Beulah Reservoir, Bully Creek Reservoir and other scattered tracts in eastern Oregon."
   Restrictions include:

   i. Operating a motor vehicle off existing routes or on roads where dried vegetation may touch the undercarriage.
   ii. Use of chain saws or blow torches, or the cutting, grinding or welding of metal and other restrictions.
   iii. Parking of vehicles and equipment must occur in areas barren of flammable materials.
   iv. Internal combustion engine vehicles must carry a shovel, and one gallon container of water or a fully charged and operable 2.5 pound fire extinguisher. (BLM defines "motorized vehicle" as any self-propelled vehicle.

Additional firefighting information provided by BLM:.

"All portable gasoline-powered equipment used in wildland areas, such as chainsaws and weed-eaters, should have spark arresters."

REQUEST RESULTING FROM THIS ACTION

I specifically requested after the EFSC meeting approving this change that the Oregon Department of Energy issue a letter to the developer stating what basis they used to determine that the change in condition would not impact the public safety and health requirements. The Wildfire Plan is to address mitigation for the increased fire hazard that results from the development of a transmission line in areas which previously lacked the risks that the development creates. This request was made so an impacted citizen or group could use it as a basis for any request for contested case or court redetermination should they chose to object to the change. I was told this would be provided. While this will allow one impacted property owner and one non-profit representing property owners to evaluate and address the basis of the change and whether or not there is a need to formally object, it does not provide the public at large or other property owners the same rights.

Oregon Statutes do not support a process which requires a citizen to accidentally discover that a change in site certificate conditions is being made which may impact them. Such changes made through a site certificate condition change require an amendment process including public notice, determination that the change does not require an amended site certificate, and notice to the public regarding the right to request a contested case or reconsideration regarding the change.

Given the existing and proposed changes to the Contested Case rules, there is a conflict when the agency and EFSC making changes to Monitoring and Mitigation Plans changing the requirements of the site certificates in a manner that may impact citizen safety, resources or other standards required for

compliance with Site Certificates including providing mitigation to address impacts of the developments..

There are multiple state and federal court decisions which relate to this request. I am including only 3 which appear to relate to this issue:

Mullane v. Central Hanover Bank and Trust Co. (1950)

A fundamental requirement of due process in any proceeding that is to be final is noticed that under all circumstances apprise interested parties of the pendency of the action and affords them an opportunity to present their objections.

Crowley v. City of Bandon 48 OR LUBA 545 (2005).

By statute, an opportunity for a de novo appeal must be provided where a permit decision is made without first providing a hearing

Mathews v. Eldridge 424 US 319 (1979)

Procedural due process must be evaluated by using a balancing test that accounts for the interests of the affected individual, the interests of the government in limiting procedural burdens and the risk of erroneously curtailing individual interests under the existing procedures, as well as how much additional procedures would help reduce the risk of error.

SUMMARY:

I encourage council to include language that requires changes to site certificate monitoring and mitigaton plans which impact the justification provided for meeting a council standard (including requirements that a developer has proposed to show compliance with a standard) be reviewed under the rules regarding when an amendment is required.

Outlook

:omment: Facts and predictable consequences due to Changes to Division 27 Rules: for consideration during Council Review of Div. 27 Rules

From Irene Gilbert <ott.irene@frontier.com>

Date Thu 7/31/2025 7:04 PM

To JACKMAN Tom * ODOE <Tom.JACKMAN@energy.oregon.gov>; CORNETT Todd * ODOE <Todd.CORNETT@energy.oregon.gov>; BENNER Janine * ODOE <Janine.BENNER@energy.oregon.gov>

Cc Wendy King <wkingproshop@gmail.com>; Fuji Kreider <fkreider@campblackdog.org>; Jim Kreider <jkreider@campblackdog.org>; Matt Cooper <mcooperpiano@gmail.com>; Charlie Gillis <charlie@gillis-law.com>; Susan Geer <susanmgeer@gmail.com>; Greg Larkin <larkingreg34@gmail.com>; 1000 Friends of Oregon <landuse@friends.org>; Nathan Baker <Nathan@gorgefriends.org>; Anne Morrison <morrison.a@eoni.com>; Joann Harris Rode <joannharrisrode@gmail.com>; Intermountainlaw Info <info@intermountainlaw.com>; Brent Smith <brent@baumsmith.com>; Rep Levy B <LevyB@oregonlegislature.gov>; Senator Kim Thatcher <kim@kimthatcher.com>; Sen Nash <Sen.ToddNash@oregonlegislature.gov>; Jayson Jacoby <jjacoby@bakercityherald.com>; Sam Myers <sam.myers84@gmail.com>; Suni Danforth <cdsj@yahoo.com>; Dave Price <dpricemule@gmail.com>

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----- Forwarded Message -----
From: Irene Gilbert <ott.irene@frontier.com>
To: JACKMAN Tom * ODOE <tom.jackman@energy.oregon.gov>; CORNETT Todd * ODOE <todd.cornett@oregon.gov>; BENNER Janine * ODOE <janine.benner@energy.oregon.gov>
Sent: Thursday, July 31, 2025 at 05:57:08 PM PDT
Subject: Facts regarding the Changes to Division 27 Rules:

FACTS REGARDING DUE PROCESS PRIOR TO THE PROPOSED AMENDMENTS TO DIV. 27;
1. Due Process is guaranteed citizens by the 5th and 14th Amendments to the US Constitution.
2. States lack the authority to deny citizens due process.
3. The Oregon Supreme Court statutes do not require them to provide and to decide outcomes based upon them providing a due process proceeding.
4. The Oregon Supreme Court relies upon the agency file for their decision process on appeal.
5. The public has been able to obtain and include in the agency file the results of a due process hearing held by either the agency o rthrough a circuit court hearing prior to appeal to the Oregon Supreme Court.

THE AMENDMENTS TO DIVISION 27 FACTS:
1. Following notice, all appeals will go directly to the Oregon Supreme Court.
2. The public will only have information in their file resulting from a due process proceeding if the agency grants a Contested Case.
3. Multiple actions taken against the public will not receive timely notice or appeal rights prior to the action being taken.
4. In sume instances, the public will not receive notices of decisions and their appeal rights until months after the action is taken.
"
PREDICTABLE OUTCOMES IN THE EVENT THE AMENDMENT TO DIVISION 27 IS APPROVED IN ITS CURRENT FORM:
1. Litigation

2. If expediting the siting processes is at all the reason for this rule revision, removing timely notice, due process and access to contested cases will not result in your desired outcome. It will only serve to increase the numbers and issues which will require legal decisions.

3. It is not possible to predict all the negative outcomes that may occur when an agency denies citizens the right to due process when making decisions which directly impact them. One example from the most recent legislative session is being provided as an example. This alone could generate dozens of appeals.

A-Eng HB 3681, Page 7, LinRes 44 and 45 and Page 8, Lines 1 and 2

"ORS 469.401(4) In any proceeding for condemnaton of land or an interest therein, a certified copy of a site certificate for an energy facility that is a high voltage transmission line under ORS 469.300(12)(a)(C) shall be conclusive evidence that the high voltage transmission line for which the land is required is a public use and necessary for public convenience."

I do not believe that it takes a great deal of imagination to figure out that if ODOE and EFSC follow the procedures proposed in Div. 27 which lack notice of the potential use of a site certificate up front, lack an opportunity to appeal decisions as they are made and which denies landowners and the public access to Due Process through either the agency or the Circuit Courts may have a very long period of litigation.

RECOMMENDATION:
Since ODOE participated in the workgroup that developed this bill absent any input from the public or landowners, I recommend the following:\
ODOE and EFSC provide Contested Case hearings for those who request them or there be provided a third party contested case process for those denied one through the agency which follows the procedures in the Administrative Procedures Act. This will insure due process is available to those desiring it..

I would be happy to work with the agency in developing changes to the planned Division 27 rules that will incorporate the necessary opportunities to provide due process for citizens impacted by agency decisions.

Sincerely,
Irene Gilbert
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