Representative Helm and Committee Members February 8 2018

HOUSE BILL 4148 PUBLIC TESTIMONY

This bill is grossly inadequate to even begin to address the multiple problems within the Oregon Department of Energy and specifically the Energy Facility Siting Division. Given the amount of testimony provided to the Joint Oversight Committee regarding this out of control agency, it would seem that the Legislature would be taking the situation seriously. Recent events should require action on the part of the legislature if for no other reason than that this agency is now costing taxpayer funding due to the appeal of the Amendment Rules which broke multiple statutory requirements for rulemaking, due process, transparency, public participation, and on and on.

The notoriety of this agencies actions have become an embarrassment to the state and should be an embarrassment to this body. Just two days ago the Bend Bulletin provided the following editorial:

"Oregon's Department of Energy has been wracked by so many problems that legislators have debated if it should be shut down and its work distributed to other agencies. So it may come as no surprise that the department has a new problem.

Both the energy department and the Oregon Department of Agriculture have failed to perform audits as required by state law.

State law requires bigger state agencies to take a closer look at how they operate and their risks at least once every five years. They are supposed to do what are called governance and risk management audits. These internal audits can help identify what an agency is doing that works and what doesn't. They are also supposed to examine where an agency may be at risk for violating laws or rules.

Both the energy and agriculture departments have completed or participated in other audits — but not the governance and risk audit. They have excuses for not getting this one done. The energy department said it has not had an internal auditor since spring 2016. It has made an offer to an individual to take the position and that person is scheduled to start in the spring.

The agriculture department said it doesn't have an auditor. It said it was unable to borrow the Oregon Department of Forestry's auditor, as it had done in the past. So it didn't do it. The agency plans to look into hiring a contractor to perform the work.

We should note that other state agencies had auditing vacancies and are up to date on this audit requirement.

The statute with the requirement for the audit doesn't include a penalty. And it's hard to know if the failure of these two agencies to do this audit is allowing problems to fester. But the agriculture department is responsible for inspection, certification and regulation of food in Oregon. That's serious stuff.

The failure by the energy department is more worrying. The department mismanaged the state's Business Energy Tax Credit program so badly that the state closed the program. And in 2017 an energy department employee admitted he was guilty of taking nearly $300,000 in bribes to help arrange sales

of tax credits. "I'm dirty," he said, according to The Oregonian. In January, he asked to change his plea.

Oregon's state legislators are now busy creating new laws. Do they ever stop to check if existing laws are followed? There's no telling what they might find at the energy department."

Due to the abuses of power which have become commonplace within the Oregon Department of Energy Facility Siting Division and Energy Facility Siting Council, the entire department has become a joke in the public eye.

The Energy Facility Siting Division has the public sitting on the edge of their seats wondering if the next action of this department will be criminal, unethical or just outrageous. I will provide only two situations of the hundreds that have occurred. Many of which I am personally aware of.

EXAMPLE ONE: The Oregon Department of energy approved a site certificate and an amendment to the site certificate for the Summit Ridge Wind development. This wind farm will be erecting wind turbines within one mile of the Wild and Scenic Deschutes River which will be visible while floating on the river. Following are contested case requests, all of which were denied. Consider whether or not an agency is justified in denying all of these. The agency had gotten to the point prior to issuing the new amendment rules of stating reasons such as wildlife studies completed at the Starkey Experimental Station in Union County do not apply because the habitat wasn't exactly the same as the site, they did not allow contested cases on rules in the division they violated, information submitted on the initial site certificate could not be used to support a contested case on an amendment to that site certificate, and so I hope you are getting the picture.

Requests for Contested Case hearing regarding Summit Ridge Wind Development:

Significant issue of fact or law Number One:

The site certificate fails to provide protection for views from the Wild and Scenic Deschutes River Canyon and the river itself . The developer should be required to design the development so that turbines are placed outside the views from the area of the Deschutes River Canyon designated as "Wild and Scenic".

OAR 345-022-0040 states:The site certificate **must** show that the applicant can design and construct the facility to reduce cumulative adverse environmental effects **in the vicinity** by practical measures including designing the components of the facility to minimize adverse visual features.

Visual Impacts to Deschutes are protected by the following applicable standards:

WCCP Goal 5, Policy 5 The Deschutes and John Day River Scenic Waterways shall be maintained and protected as natural and open space areas with consideration for agriculture and recreation.

WCCP Goal 6, Policy l: Encourage land uses and land management practices which preserve both the quantity and quality of air, water and land resources.

OAR 345-022-0040

(3) Except as provided in sections (2) and (3), the Council shall not issue a site certificate for a proposed facility located in the areas listed below. **To issue a site certificate for a proposed facility located outside the areas listed below,** the Council must find that, taking into account mitigation, the design construction and operation of the facility are **not likely to result in significant adverse impact** to the areas listed below. References in this rule to

protected areas designated under federal or state statutes or regulations are to the designations in effect as of May ll, 2007.

Note: BLM recommended in their letter of Sept. 18, 2014 that turbines be placed outside the viewshed of the lower Deschutes river. Oregon Parks and Recreation commented on sept. 9, 2014 that turbines will be visible from the Deschutes river along several locations. Oregon Wild, Doug Heiker expressed concern regarding negative impacts on scenic values. Friends of the Grande Ronde Valley also commented on negative impacts to viewscapes.

Given the number of comments of concern it appears likely there will be significant negative impacts. The file does not contain a preponderance of evidence to support a finding that the development will not result in significant impacts to viewscapes.

OAR 345-024-0015 Siting Standards for Wind Energy Facilities

To issue a site certificate for a proposed wind energy facility, the Council must find that the applicant can design and construct the facility to reduce cumulative adverse environmental effects in the vicinity by practicable measures including, but not limited to, the following:

"(5) Designing the components of the facility to minimize adverse visual features." The site certificate fails to include meaningful requirements that will protect the Wild and Scenic Deschutes River corridor from the intrusion of turbines into the viewscapes.

Significant issue of fact or law Number Two

The file for the Summit Ridge Wind Development does not contain information necessary to make a determination regarding whether the development will have a significant impact on views from the Wild and Scenic Deschutes River.

The applicant has the responsibility for assuring that the file contains documentation that their development meets the siting requirements.

There are only 5 visual representations of the visual impacts of the development on a project that according to Figure R-l will be visible along approx. 30 miles of the river. There are areas exceeding 5 miles with no visual analysis. The visual representations were made from viewpoints easily accessible by vehicle. The "wild" portions of the river where impacts are going to be considered the most significant and offensive are going to be areas absent a developed access. The approach used is comperable to modeling impacts on wilderness by completing them from a parking lot.

Critical Information Missing: There is no information regarding the actual number of turbines that will be visible from the Wild and Scenic Deschutes River. In addition, there is no indication of the number of turbines with just the blades visible as opposed to portions of the supporting structures. This information is considered by virtually any observer as being necessary to make a determination regarding whether or not impacts are "significant."

Significant issue of fact or law Number Three:

The proposed 230KV line connecting the project to the grid must be treated as part of the site and all requirements of the application process must be met in order to issue an amended site certificate for this development.

ORS 469.300 includes the statutory definitions for what must be included in a site. The following definitions relate directly to the above hearing issue:

(2) **Application** means a request for approval of a particular site or sites for the construction and operation of an energy facility--------"

(25) **Site** means any proposed location of an energy facility and relate or supporting facilities."

(24) **Related or supporting facilities** means any structure, proposed by the applicant, to construct or substantially modified in connection with the construction of an energy facility, including associated transmission lines, reservoirs, ----"
(3) **Associated transmission lines** means new transmission lines constructed to connect an energy facility to the first point of junction of such transmission line or lines with either a power distribution system or an interconnected primary transmission system or both or to the Northwest Power Grid."

The site certificate cannot treat the 230kV transmission line connecting the development to the grid as a separate energy facility as it does not meet the statutory definition of a separate energy facility.

ORS 469.300 defines what determines when a transmission line can be treated as a separate energy facility. Under **ORS 469.300(11))(a)(C defining an energy facility, it states "A high voltage transmission line of more than 10 miles in length with a capacity of 230.000 volts or more to be constructed in more than one city or county in the state…."** The county cannot ignore the statutory definition, nor can the Department of Energy and Energy Facility Siting Council ignore the statute.

The transmission line connecting the development to the grid is less than 10 miles long and no other rule applies that I can find. County rules can be more restrictive than state statutes, but not less restrictive. The statute must apply in the site certificate.

Significant Issue Number Four:

Baseline surveys need to be completed in habitat suitable for spotted frogs to determine if they are present at the site.

Oregon spotted frog was listed as threatened in Oregon on August 28, 2014. This frog is known or believed to occur in Wasco County.

The file and the site certificate are silent regarding the potential for this species to exist in limited areas of the proposed site. Given the fact that the USFWS has identified them as potentially present, the file needs to contain documentation that they either are or are not present at the site and what they base that determination on.

Issue Five:

The site certificate needs to include the requirement for pre-construction biological surveys for the proposed 230kV line that will serve as the interconnect for the project. According to the Oregon Department of Fish and Wildlife, the potential effects on habitats and species due to construction and operation of the facility cannot be fully addressed without looking at the total project.

Significant Issue Six:

Statement of Issue:

The applicant should not be granted a reduced setback from roads as this will create an increased and unacceptable risk of death or injury to the public and employees of the developer.

Related Rules I am aware of:

The Department of Energy and Energy Facility Siting council are required to provide for the protection of public health and safety. ORS 469.50l(l)(g) and OAR 345–24-0010(2) Requiring the site certificate to show that the developer "Can design, construct and operate the facility to preclude structural failure of the tower or blades that could endanger the public safety ….."

The fact that turbines do fail is well documented. When failure occurs, there is the potential for flying objects to project further than the current setbacks. Any reduction in the distances allowed from roads and public right of ways will increase the potential for injury or death for the public as well as workers. There is no file documentation to support the idea that this reduction in the distances from public will not increase the probability of injury or death to the public. Blade failure is by far the most common accident with wind turbines. Pieces of blade have been documented to fly up to one mile according to the Summary of Wind Turbine Accidents to 30 June 2016, Cathines Windfarm Information Forum www.catheneswindfarms.co.ukdata The developers of this data base believe that they are only receiving information on approximately 9% of the actual accidents.

Significant Issue Seven:

Given the close proximity to the Wild and Scenic Deschutes River, there needs to be a requirement that the developer develop a program for monitoring ecological effects and pay for monitoring of noise impacts following construction of the wind development. Relying upon complaints from the public who will have no way of knowing who to complain to or even that there is a complaint process does not meet the need of assuring the standards are met.

The statutes require the developer to pay for monitoring to assure the standards are met, the standards require a limited amount of noise, and the site certificate is required to assure ongoing compliance with the standards during construction and operation of the development.

ORS 469.507(1) and (2) Monitoring environmental and ecological effects of construction and operation of energy facilities requires the establishment of programs for monitoring these impacts to assure continued compliance with the terms and conditions of the certificate and require the certificate holder or the operator of the plant to perform the necessary sampling and testing necessary to assure continued compliance with the site certificate.

This issue is particularly relevant given the fact that the developer may be installing a yet as undetermined generator and the new generator may have increased noise impacts due to the fact that the noise is being generated closer to the ground than is typical. The site certificate needs to include a monitoring program and testing to occur during the construction and operation of the development.

Significant Issue Number Eight:

Condition 10.2(b) and (c) need to be amended to read:

b. No facility components may be constructed**, no temporary disturbance or indirect impacts shall be allowed to impact Category 1 habitat during construction or operation of the development.** (~~within areas of Category 1 habitat and temporary disturbance of Category 1 habitat shall be avoided.~~)

c. The design of the facility and areas of temporary and permanent disturbance shall avoid impacts to ~~(any Category 1 habitat, to)~~ any State-listed threatened or endangered plant or wildlife species, and to any State Candidate plant species.

The Oregon Department of Fish and Wildlife mitigation rules require that there be NO permanent or temporary impacts to Category 1 habitat. The term “shall be avoided” allows for impacts to occur.

Significant Issue Nine:

The developer must be required to provide mitigation for Category 2 Big Game Winter Range at the 2:1 ratio required by the Oregon Department of Fish and Wildlife.

The Department of Energy for no apparent reason has started requiring mitigation for Category Elk and Deer critical habitat for wintering at a 1:1 ratio rather than the 2:1 ratio being used and recommended by ODFW. There is no file documentation indicating what basis they are using to fail to apply the standards utilized by the Oregon Department of Fish and Wildlife who's rules OAR 345-022-0060 requiring the development to be consistent with OAR 635-415-0025.

Example: On June 1, 2016, Steve Cherry, ODFW District Wildlife Biologist stated in his comments regarding the Wheatridge Wind Development the following regarding the mitigation for big game winter range:

"The Draft Habitat Mitigation Plan (HMP) that is attached to the DPO provides different levels of mitigation requirements for Category 2 habitat and Category 2 Big Game habitat. As per the ODFW Fish and Wildlife Habitat Mitigation Policy, the mitigation goal for Habitat Category 2 is no net loss of either habitat quantity or quality and (to) provide a net benefit of habitat quantity or quality (OAR 635-415-0025) regardless of whether that Category 2 habitat is big game winter range or otherwise)" "ODFW recommends that the Applicant mitigate for all Category 2 habitats with the mitigation ratios in the draft plan for Category 2 habitat and not use the mitigation ratios for Category 2 big game." ODFW provided the same comments on this development which will be provided at the contested case hearing. The ODFW rules require them to recommend against a development that fails to meet their habitat mitigation requirements for Category 2 habitat. Since the Department of Energy is supposed to meet those same requirements, you need to deny this site application unless the developer provides mitigation consistent with the rules of ODFW.

Significant Issue Number 10:

The file contains no documentation that there will not be significant impacts to Golden Eagles in the absence of implementing recommendations from the US Department of Fish and Wildlife. Surveys need to be completed to determine the presence of golden eagles within 6 miles of the development.

On September 20, 2010, the United States Department of the Interior submitted a nine page comment indicating multiple concerns and recommendations regarding the potential impacts to Golden Eagles due to this proposed development. I can find little indication that these recommendations were seriously considered in the site certificate. One recommendation that definitely should be applied is the fact that survey's should occur within 6 miles of the development. The US Fish and Wildlife Service now recommends 10 mile survey areas, however, the developer only surveyed areas within 500 feet of the development. The Oregon Department of Energy has stated that they do not adhere to the USFWS recommendations. This does not excuse them from a failure to provide protection for the public interest in wildlife in the state. Choosing to limit the survey area to a small fraction of the area which would actually provide information to predict impacts is unethical. Given the FACT that eagles utilize the corridor of the Deschutes River as a flyway, and the FACT that any lay person can observe eagles this area, and the FACT that turbines will be located within 1 mile of this river makes allowing this limited area of survey an abuse of power invested in the Department of Energy and it's management. The file contains no justification for believing that a survey within 500 feet of this development will provide information necessary to determine how significant the impacts to golden eagles and other raptors will be as a result of this development. Prior action such as the response to the Shepherd Flat raptor deaths exceeding the predicted amount make it clear that allowing developments to be built which have extreme risk of multiple raptor deaths will not result in meaningful consequences when the development exceeds thresholds.

All 10 of these issues would impact the site certificate decisions regarding site conditions and the determination of whether or not the development meets the siting criteria. All 10 were denied a contested case hearing. It is because of poorly sited developments such as this and the power grabs going on by the Siting Division and Energy Facility Siting Council that many environmentally responsible citizens and groups have lost for the Siting Division and the Department of Energy. I am not sure this legislature or this committee recognize what a problem you are

creating for yourselves by taking no meaningful steps to break up the strangle hold this division has on the public and appropriate siting of renewable energy.

Attached is one of three documents submitted by six environmental groups who had all their recommendations ignored along with over 160 others who commented opposing the just promulgated amendment rule revision.

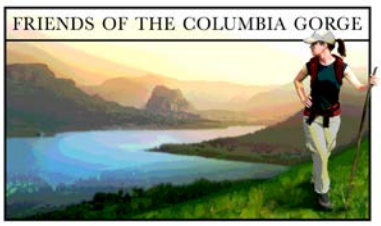
As you are aware, the amendment rules are so awful that nine environmental groups are appealing them.

Irene Gilbert, Legal Research Analyst

Friends of the Grande Ronde Valley

2310 Adams Ave.

La Grande, Oregon 97850



SUBMITTED VIA E-MAIL AND FIRST-CLASS MAIL

September 29, 2017

EFSC Rules Coordinator
Oregon Department of Energy
550 Capitol St. NE
Salem, OR 97301
Via email to EFSC.rulemaking@oregon.gov

Re: EFSC Rulemaking – Rules Governing Requests for Amendments to Site Certificates

To Whom It May Concern:

On behalf of our collective 20,000 members and supporters, Friends of the Columbia Gorge, the Northwest Environmental Defense Center, the Oregon Natural Desert Association, Oregon Wild, the Hood River Valley Residents Committee, and Columbia Riverkeeper (collectively, "Commenters") have reviewed the latest (September 8, 2017) rule revisions regarding amendments to site certificates proposed by the Energy Facility Siting Council ("Council" or "EFSC") and the Oregon Department of Energy ("ODOE") and offer the following supplemental comments.

As stated in our prior comment letter dated March 17, 2017, Commenters oppose the majority of the proposed rule revisions. Commenters also oppose the majority of the proposed rule revisions shown in the September 8, 2017 rulemaking document. Many of the proposed rule revisions are unlawful because they would violate the statutes that govern the approval and siting of energy facilities, the Administrative Procedure Act ("APA") procedures for contested cases and judicial review of Council actions, and/or applicable case law. In addition, the proposed rule revisions directly conflict with the agencies' stated purposes for this rulemaking endeavor, in particular because the proposed revisions would reduce opportunities for public participation. Finally, the agencies are violating the APA rulemaking procedures. Commenters urge the Council not to adopt the proposed rule revisions.

A. PROCEDURAL RULEMAKING ISSUES

1. ODOE must prepare and provide public notice of a rulemaking document that clearly indicates all proposed rule changes within the same document.

As a threshold matter, Commenters note that the September 8, 2017 document showing the proposed rules violates ORS 183.335(2)(d),[1] which requires that "[t]he copy of an amended rule shall show *all changes to the rule* by striking through material to be deleted and underlining all new material, or by any other method that *clearly shows all new and deleted material*" (emphasis added). The September 8, 2017 document violates this rule, is misleading, and is extremely difficult to follow, because it uses regular font not only for existing rules, but also for *proposed* rule changes that were proposed prior to September 8 but that have not yet been adopted. Even worse, the September 8, 2017 document also uses strike-through font to show differences between new proposed language and previously *proposed* (*i.e.*, not yet adopted) rules. The end result is that interested members of the public who review only the September 8 document would be led to believe that the language shown in regular and strike-through font is already part of the Council's rules, when in fact much of that language shows *propose*d rules.

The September 8, 2017 document also fails to disclose that some of the language shown in red underline font (thus indicating that this is proposed new language) is in fact already part of the existing rules, and also fails to disclose that other existing language in the current rules would be removed under the proposal. For example, as shown in the September 8, 2017 document, Proposed Rule 345-027-0080 has the appearance of an entirely new rule. There is no indication in the document that there is already an existing rule 345-027-0080 and that the proposal would largely revise this rule, while leaving some language intact (such as the first sentence of existing OAR 345-027-0080(7), which appears verbatim in Proposed Rule 345-027-0080(10)). When reviewing the September 8, 2017 document, it is literally impossible to understand which portions of OAR 345-027-0080 would be retained, deleted, and modified under the proposal. The same is true of several other provisions of the rules.

Given these deficiencies, the September 8, 2017 document utterly fails to disclose how existing law would be changed under the proposed rules. ODOE could have, and should have, avoided this result by using underlining, redline, and/or strike-through font to show *all* proposed changes to existing law.

Although previously proposed changes were shown in prior documents, ORS 183.335(2)(d) requires that *all* proposed changes must be shown in the rulemaking document released with the public notice. Moreover, the fact that previous versions of the rulemaking proposal show previously proposed changes does not remedy the inaccurate and misleading nature of the September 8, 2017 document. If the intent of the September 8, 2017 document was to focus on the newest proposed rule changes, these changes could easily have been indicated with highlighting or a different color font.

[1] Commenters received notice of the proposed rule revisions via the EFSC Rulemaking e-mail list. Thus, the requirements of ORS 183.335(2)(d) apply. *See* ORS 183.335(1)(c), 183.335(2)(d), 183.335(8); OAR 345-001-0000(1)(b).

To comply with ORS 183.335(2)(d), ODOE must prepare and provide public notice of a new version of the rulemaking document that clearly indicates *all* proposed rule changes and clearly distinguishes all proposed new and deleted rule language from existing rule language.

2. Commenters request an opportunity for an oral hearing.

The Council and ODOE have only allowed written comments on the rule revisions shown in the September 8, 2017 document. (Aug. 10, 2017 Public Notice at 1.) Pursuant to ORS 183.335(3)(a), Commenters request an opportunity for an oral hearing on the proposed rule revisions.

Although the Council held hearings in the first half of 2017 on prior proposed rules, the new proposed revisions shown in the September 8, 2017 document are radically different from the prior proposals and are inconsistent with the stated purposes of the rulemaking endeavor. (This will be discussed further below.) Given the significant differences and the completely different nature of the new proposed rules, the Council should hold a hearing on the proposed rule revisions once ODOE prepares a document compliant with ORS 183.335(2)(d) clearly indicating all proposed rule changes.

3. The proposed rule revisions directly conflict with the agencies' stated purposes for this rulemaking endeavor. In addition, Commenters request a statement of how EFSC and ODOE will subsequently determine whether the proposed rule revisions are in fact accomplishing the agencies' stated objective of bolstering opportunities for public participation in the site certificate amendment process.

The proposed rule revisions directly conflict with the agencies' stated purposes for this rulemaking endeavor of "enhanc[ing] opportunit[ies] for public participation," of "provid[ing] a standard, generally applicable, one-size-fits-most process that the Council would use to review most types of changes" to site certificates, of "having most types of proposed changes reviewed through a standard process," of limiting "[t]he scope of this rulemaking to be strictly procedural in nature and effect," and of "requir[ing] an amendment to the site certificate for changes proposing to add any quantity of area to the site boundary." (Aug. 10, 2017 Notice of Rulemaking at 1–2.)

The proposed revisions—especially the revisions shown in the September 8, 2017 document—would in multiple instances do the exact opposite of these stated purposes, thus reinforcing that the proposed revisions are unnecessary and counterproductive. As stated in Commenters' March 17 letter, many of the proposed revisions are solutions in search of a problem. Furthermore, for the reasons explained in our letters, the proffered solutions are in many cases severely flawed and in some cases, unlawful. The Council and ODOE should either revise the stated purposes of this rulemaking endeavor, or should revise the proposed rules to comply with the stated purposes.

In addition, pursuant to ORS 183.335(3)(d), Commenters request "a statement of how [the Council and ODOE] will subsequently determine whether the rule is in fact accomplishing

[the] objective" of "bolster[ing] the public's opportunit[ies] for participation." (June 13, 2017 Amended Statement of Need and Fiscal Impact at 1.)

4. Commenters request responses from the agencies to each of the specific comments raised in our letters.

Unfortunately, it appears that not a single suggestion made by Commenters in our March 17, 2017 letter has been implemented in the proposed rule revisions. Commenters raised numerous valid concerns and suggestions in our March 17 letter, and we are disappointed that these concerns and suggestions are apparently being ignored. We hereby renew all comments in our March 17 letter and encourage ODOE and EFSC to address our concerns and include our suggestions in any final rules. Commenters will not repeat our March 17 comments here, except to provide additional background for one of the items in those comments.

In addition, commenters have been unable to locate any agency response to the specific issues raised in our March 17 comment letter. All we have found is a two-page document entitled "Suggestions from Friends of the Columbia Gorge & others" (within Attachment F from the April 14, 2017 ODOE memo) that copies and pastes recommendations from our March 17 letter, without any agency analysis or response. Pursuant to ORS 183.335(3)(e)(C), Commenters request responses from ODOE and the Council to each of the specific comments raised in our March 17 letter, as well as the additional comments raised below.

B. SUBSTANTIVE COMMENTS ON PROPOSED RULES

1. The Council should retain the existing notice standards for raising issues for a contested case, should reject ODOE's recommendation to adopt a new "raise it or waive it" standard requiring the preservation of issues for contested cases, and should reject ODOE's recommendation to limit participation by parties in the contested case to only the issues they previously raised.

In our March 17 comment letter, Commenters opposed ODOE's proposal to replace the notice standard for contested cases required by statute and currently found in the Council's existing rules with new rules imposing a "raise it or waive it" standard that would require interested persons to "preserve" issues, thus creating new unlawful roadblocks for persons desiring a contested case. (March 17, 2017 Letter at 4–9.) Commenters reiterate our request that the Council not adopt the proposed unlawful rule language, and also note that the language in ORS 469.370(3) applying a notice standard to the Council's procedures was adopted by the Legislature in 1995. *See* 1995 Oregon Laws Ch. 505, § 11. This was four years *after* the *Boldt v. Clackamas County* case, in which the Oregon Court of Appeals held that nearly identical language in ORS 197.763(1) (1991) required "no more than fair notice to adjudicators and opponents, rather than the particularity that inheres in judicial preservation concepts." 107 Or App 619, 623–24, 813 P2d 1078 (1991). Thus, the Legislature, in applying to the Council virtually identical language in ORS 469.370(3) as found in ORS 197.763(1) (1991), and acting four years after the *Boldt* case, knowingly and intentionally applied a notice standard (not a "raise it or waive it" preservation standard) to the Council's contested cases. The Legislature has not changed the language of ORS 469.370(3) since adopting it in 1995.

As previously stated by Commenters in our March 17, 2017 letter, the Council's existing rules already lawfully and adequately provide the procedures for contested cases. In addition, in the specific context of amendments to site certificates, the existing rules already state that the contested case shall be "limited to the issues that the Council found sufficient to justify the proceeding." OAR 345-027-0070(8)(a). ODOE and the Council fail to explain how or why the existing law for contested cases is inadequate or should be revised to adopt new procedural hurdles making it more difficult for interested members of the public to participate in the Council's decision-making process, especially when doing so is unlawful and would violate the express purposes of this rulemaking endeavor (to increase public participation opportunities).

For the reasons stated in Commenters' March 17, 2017 letter, the proposed new "raise it or waive it" language would violate ORS 469.370(3); would violate *Boldt*; would violate ORS 183.417(1); would violate *Marbet v. PGE*, 277 Or 447, 453, 561 P2d 154 (1977); and would conflict with the Council's existing rules for contested cases. Rather than adopt the proposed new "raise it or waive it" language, the Council should simply retain the Council's existing rules for contested cases.

Recommendation: Delete all proposed new instances of the phrases "properly raise" and "properly raised" issues. (*See, e.g.,* Proposed Rules 345-027-0069(5), (6)(c), (7), (8), (9), (10), 10(a), 10(b), 10(c).) Delete all proposed new requirements for the Council to make threshold determinations on whether interested persons sufficiently raised issues for the contested case. (*See, e.g.,* Proposed Rules 345-027-0069(5), (6)(c), (7), (8).) Delete all proposed new language that would limit parties' participation in a contested case to only the issues they raised. (*See, e.g.*, Proposed Rule 345-027-0069(10).) Retain the Council's existing rules for contested cases, which already address many of these issues or similar issues.

2. The Council should reject the proposed arbitrary and unlawful rule framework that would create three new processes (Types "A," "B," and "C") for reviewing applications for amendments to site certificates.

The latest proposed rule revisions would take the current rulemaking endeavor in a completely opposite direction from what was originally intended and would violate the expressly stated purposes of the rulemaking. For example, one of the stated purposes of this rulemaking is to "provide a standard, generally applicable, one-size-fits-most process that the Council would use to review most types of changes proposed by energy facility site certificate holders." (Aug. 10, 2017 Public Notice at 1.) Despite that stated purpose, the proposed rules would take three existing categories of amendments to energy site certificates (standard amendments, expedited amendments, and transfer amendments) and expand them into four separate categories: transfer amendments plus three new categories of amendments called "Type A," "Type B," and "Type C." *See, e.g.*, Proposed Rule OAR 345-027-0051. This proposed change would violate the stated purpose of creating a "standard, generally applicable, one-size-fits-most process" for reviewing proposed changes to energy amendments. (Aug. 10, 2017 Public Notice at 1.) Rather than *reduce* the number of categories of amendments, as stated in the rulemaking notice (*see id.* at 1–2), the latest proposed rule revisions would *expand* the number of categories.

More importantly, the proposed framework of three new categories ("Type A," "Type B," and "Type C") would be unlawful. First, the three new categories are not in any way defined. For example, Proposed Rule 345-027-0057(3) says that the "type B review process [is] described in [OAR] 345-027-0051(3)." But Proposed Rule 345-027-0051(3) does not "describe" the Type B process. Rather, it merely lists the rule sections that would apply to Type B review, and, in circular fashion, points back to Proposed Rule 345-027-0057: "The type B review process . . . shall apply to the Council's review of a request for amendment that the Department or the Council approves for type B review under [OAR] 345-027-0057." When one turns back to Proposed Rule 345-027-0057, this rule likewise contains no definition or description of the proposed Type B process, nor any criteria explaining when the Type B process is to be applied. Instead, Proposed Rules 345-027-0057(3) and (7) merely state that "the certificate holder may submit an amendment determination request to the Department for a written determination of whether a request for amendment justifies review under the type B review process described in [OAR] 345-027-0051(3)" (again, in circular fashion, pointing back to a rule where the Type B process is not actually described) and that "[t]he Department shall, as promptly as possible, issue a written determination to the certificate holder."

In other words, the proposed rules would leave it solely in the discretion of the certificate holder whether or not to apply for a Type B review, and solely in the discretion of ODOE (not the Council) whether to allow a Type B review—*with no criteria whatsoever to govern ODOE's determination*. The proposed rules are arbitrary and capricious on their face, allowing certificate holders and agency staff to make determinations as to which type of process would be employed, with no criteria applying to such determinations. This is the epitome of a facially arbitrary rule because it would allow for case-by-case, subjective decisions about which procedures to use, divorced from any rule criteria governing how to make those decisions.

In addition, under the proposed rules for "Type B" review, the only circumstance under which ODOE must refer to the Council an ODOE determination that the Type B review process will or will not be applied is "[a]t the request of the certificate holder." Proposed Rule 345-027-0057(7). If a Council member, an interested member of the public, or even ODOE itself wishes to refer this question to the Council, that would not be allowed under the proposed rule. Nor would the proposed rules allow any comments from the public on whether a Type A or Type B review process should be applied. In these ways, the proposed rules would completely insulate from the public the decision-making process of which type of review process to apply.

As for review procedures, the sole apparent difference between Types A and B is that for Type B review, there would be no Council hearing and no opportunity to request a contested case. *See* Proposed Rules 345-027-0067, -0068, -0069. Thus, Type B would be a much more cursory process, with fewer opportunities for public participation. Other than that, Commenters cannot discern any meaningful differences between Types A and B.

Given that Type B review would allow certificate holders to effectively cut the public out of the site certificate amendment review process by completely avoiding any public hearing and the possibility of a contested case, Commenters cannot imagine that certificate holders would voluntarily pursue Type A review. Type B would become the default review request.

Additionally, the failure of the proposed rules to provide any standards or criteria for what types of applications must undergo "Type A" review versus "Type B" review, combined with the exclusion of any possibility of a contested case for Type B review, violates ORS 469.405(1), which requires the Council, if it adopts rules allowing for contested cases for amendments, to "establish by rule *the type of amendmen*t that must be considered in a contested case proceeding" (emphasis added). Here, the proposed rules would completely fail this test by not explaining which types of amendments would be considered in contested cases, other than the completely arbitrary and undefined classifications of "Type A" and "Type B."

The proposed rules would also make agency staff the gatekeepers who would decide which applications receive Type B review versus Type A review, and therefore which applications have hearings and which might be subject to contested cases. The Council should not delegate such important decisions to staff. The Council itself, not staff, is required to decide which types of amendment applications warrant consideration in a contested case proceeding. ORS 469.405; *see also* ORS 469.402 (limiting the allowable scope of delegated decision-making authority by the Council to staff to only those decisions necessary to ensure compliance with conditions of approval imposed by the Council).

As for the proposed "Type C" review, Proposed Rule 345-027-0080 contains some criteria specifying the circumstances under which Type C review might be available. (It appears that the proposed "Type C" review would essentially replace the current rules for expedited amendments found at OAR 345-027-0080.) However, the proposed Type C review still contains significant flaws. First, an application processed under Type C review would apparently still undergo Type A or Type B review after Type C review is completed. The same problems discussed above involving the lack of criteria for which types of applications would undergo Type A review versus Type B review would thus still apply.

Second, Proposed Rule OAR 345-027-0080 would strip all the public process opportunities found in current OAR 345-027-0080, such as the ability for the public to comment on the application prior to the proposed order and the ability for the public to request a contested case after a temporary order is issued. *See* OAR 345-027-0080(3)(b), (8). Such changes would violate the stated goal of this rulemaking endeavor to increase public participation opportunities.

Third, as with Type B review discussed above, Proposed Rule 345-027-0080(5) would only allow the certificate holder (and not the public, a Council member, or ODOE staff itself) to refer to the Council a staff determination that Type C review should be applied to the application. This unfairly tips the scales in favor of the certificate holder, depriving the public of any opportunity to argue against a staff determination that Type C review is appropriate.

Finally, if Proposed Rule 345-027-0080(6)(f) is adopted, the phrase "the Council's standards" should be replaced with "applicable laws and Council standards," in order to match similar language elsewhere in the proposed rules. The Council applies not just its standards, but also other applicable federal, state, and local laws. *See* Atty Gen Letter of Advice dated Nov. 4, 1991, to David Stewart-Smith, Dept. of Energy, 1991 WL 634941 (OP-6428); Letter of Advice dated Mar. 26, 1985, to Bill Dixon, Dept. of Energy, 1985 WL 199961 (OP-5796).

In all, the proposed scheme for Type A, Type B, and Type C reviews is severely flawed and inherently unlawful. The proposed scheme should not be adopted. If the Council still wishes to revise the rules for amendments to site certificates, it should reinstate the original agency proposal in this rulemaking to require a public hearing on all applications for amendments to site certificates, and to retain the provisions in the current rules that allow interested persons to request contested cases for all proposed amendments. In the alternative, the Council should focus on preparing objective criteria for which types of amendment applications warrant expedited review, which warrant hearings, and which warrant contested cases. Objectivity and bright-line criteria should be favored over vague rules delegating important decisions to staff on a case-by-case, discretionary basis. Either way, as stated in Commenters' March 17, 2017 letter, the Council should retain the provisions of current law that allow for early public participation opportunities on applications for certificate amendments (*e.g.*, allowing early public comments on the application and allowing for the possibility of early public meetings on applications).

Recommendation: Reject the proposed scheme for Type A/B/C review. If the Council still wishes to revise the rules for amendments to site certificates, then the Council should reinstate the original agency proposal in this rulemaking to require a public hearing on all proposed amendments to site certificates and to retain the current rules that allow interested persons to request contested cases for all proposed amendments. In the alternative, the Council could adopt objective criteria defining which types of amendments will have hearings, which ones will be considered in contested cases, and which ones will be considered in expedited review. Focus on adopting objective, bright-line criteria governing which processes would apply to which types of proposed amendments, rather than allowing subjective, discretionary decisions made on a case-by-case basis by staff in the absence of any criteria. Regardless of which approach is pursued, retain current early public participation opportunities.

3. The proposed rules purport to modify the judicial review processes for challenging Council decisions, which can be modified only by the Legislature or the courts.

Proposed Rules 345-027-0068(3)(e)(E), 345-027-0070(3)(a), and 345-027-0070(5) purport to modify the judicial review processes for challenging Council decisions. Judicial review of Council decisions on applications for amendments to site certificates is governed by ORS 469.403, 469.405(1), 183.310, 183.482, and other laws and case law. The judicial review processes for challenging Council decisions can be modified only by the Legislature or the courts, not by the Council. Proposed Rules 345-027-0068(3)(e)(E), 345-027-0070(3)(a), and 345-027-0070(5) would exceed the Council's agency authority and should be rejected.

Commenters would not be opposed to a new rule recognizing that any person who submits written comments, testifies at a hearing, or participates as a party or limited party in a contested case is automatically deemed to have an interest in the outcome of the proceeding pursuant to ORS 183.310(7) and 183.482(2). However, the remainder of the above-cited proposed rules should be rejected.

Recommendation: Delete Proposed Rules 345-027-0068(3)(e)(E), 345-027-0070(3)(a), and 345-027-0070(5). Adopt new rule language for amendments to site certificates recognizing that any person who submits written comments, testifies at a hearing, or participates as a party or

limited party in a contested case is automatically deemed to have an interest in the outcome of the proceeding.

4. Any proposed expansion of site boundaries should require an amendment to the site certificate.

The rulemaking notice states that "the proposed rules [would] require an amendment to the site certificate for changes proposing to add any quantity of area to the site boundary." (Aug. 10, 2017 Public Notice at 2.) Commenters support this concept, which Commenters believe would simply codify what in practice would already be required, since site boundaries are universally included as conditions of approval in site certificates, and under the current rules an amendment is required whenever a "proposed change . . . [c]ould require . . . a change to a condition in the site certificate." OAR 345-027-0050(1)(c).

Unfortunately, the September 8, 2017 proposed rules would no longer require an amendment to the certificate whenever a certificate holder proposes to expand the site boundary. This change does the exact opposite of the stated rulemaking objective quoted above. Commenters oppose this new change and urge the Council to return to the originally stated purpose, which is to ensure that any proposed expansion of site boundaries will require an amendment to the site certificate.

Recommendation: Delete Proposed Rule 345-027-0057(1) and replace it with language stating that all proposed expansions of site boundaries require amendments to site certificates.

4. For any materials that would be posted on ODOE's website under these rules, the Council should ensure that the rules also require public notice of the posted materials and opportunities for public comment.

In several places, the proposed rules would require specific materials to be placed on ODOE's website, but without providing any public notice to interested persons, nor any opportunities for public comment. Such materials would include amendment determination requests, ODOE written determinations on amendment determination requests, preliminary requests for amendments to site certificates, requests for amendments to site certificates, requests for "Type C" review, ODOE written determinations on requests for "Type C" review, and ODOE draft temporary orders on pre-operational requests for amendment under "Type C" review. *See, e.g.*, Proposed Rules 345-027-0057(5), (6), 345-027-0060(2), 345-027-0065(1)(b), 345-027-0080(3), (4), (7).

Merely posting materials on ODOE's website fails to ensure adequate notice to the public. ODOE and the Council should not expect potentially affected persons to have to check ODOE's website on a daily basis for possible proposed amendments to energy projects. For any of the above-listed materials posted on ODOE's website, the rules should also include the Council's standard public notification procedures (*e.g.*, public notice through the Council's general mailing list, any special mailing list established for the facility, reviewing agencies, and nearby property owners). In addition, the Council should allow for public comment on the above-listed materials. Ensuring adequate notice of these materials and allowing for public

comment on them will promote the agencies' stated rulemaking goal of bolstering public participation opportunities.

Recommendation: For all materials that would be posted on ODOE's website under Proposed Rules 345-027-0057(5), (6), 345-027-0060(2), 345-027-0065(1)(b), 345-027-0080(3), (4), and (7), require public notice of the posted materials to the Council's general mailing list, any special mailing list established for the facility, reviewing agencies, and nearby property owners, and allow for public comments on the posted materials.

5. The Council should adopt rule language clarifying and ensuring that the site certificate amendment process cannot be used to add to an approved certificate a new energy project that, itself, meets the statutory definition of a new "facility."

The Council should adopt rule language clarifying and ensuring that the site certificate amendment process cannot be used to add to an approved certificate a new energy project that, itself, meets the statutory definition of a new "facility."

ORS 469.320(1) mandates that "no facility shall be constructed or expanded unless a site certificate has been issued for the site." A "facility" is, in turn, defined as "an energy facility together with any related or supporting facilities," ORS 469.300(14), and an "energy facility" is defined to include an "electric power generating plant with a nominal electric generating capacity of 25 megawatts or more," ORS 469.300(11)(a)(A). Finally, a "site certificate" is defined as a "binding agreement between the State of Oregon and [an] 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 469.300(26).

Any proposed new energy facility requires an application for a site certificate. ORS 469.350(1). An application "means a request for approval of a particular site or sites for the construction and operation of an energy facility *or the construction and operation of an additional energy facility upon a site for which a certificate has already been issued*." ORS 469.300(2) (emphasis added).

Under the plain language of the above-cited statutory provisions, a site certificate holder that seeks to construct a new energy facility within the same site must submit a new application for a new site certificate. Despite this plain statutory language, site certificate holders have recently attempted to use the site certificate amendment process to seek approval of new facilities that are required by law to be processed as new energy facilities. The Council should prevent abuse of the site certificate amendment process by adopting rule language expressly prohibiting site certificate holders from seeking approval of new energy facilities via the amendment process.

Recommendation: Adopt rule language prohibiting the use of the site certificate amendment process for proposals that would constitute a new "energy facility" as that term is defined by ORS 469.300(11)(a). Require such proposals to seek new site certificates.

C. CONCLUSION

Thank you for the opportunity to provide supplemental comments on the proposed revisions to the Council's rules for reviewing requested amendments to site certificates. While we support the stated rulemaking goals of increasing public participation and simplifying existing procedures, we remain very concerned that many of the proposed rule revisions would do the exact opposite of the stated goals by decreasing opportunities for public participation, imposing new onerous hurdles and roadblocks to participating in contested cases, weakening and narrowing the scope of the Council's review of requested amendments, and increasing complexity by expanding the number of categories of review processes. Moreover, many of the proposed rule revisions would be unlawful. Given the many shortcomings of the proposed rule revisions, we urge the Council to reject the entire package of rule revisions.

Please ensure that we receive notice of any further proposals or actions on this rulemaking topic. E-mail notice will be sufficient. If we can be of any further assistance, please do not hesitate to contact us.

Sincerely,

Nathan Baker
Senior Staff Attorney
Friends of the Columbia Gorge
nathan@gorgefriends.org

Mark Riskedahl
Executive Director
Northwest Environmental Defense Center
msr@nedc.org

Dan Morse
Conservation Director
Oregon Natural Desert Association
dmorse@onda.org

Doug Heiken
Conservation and Restoration Coordinator
Oregon Wild
dh@oregonwild.org

Heather Staten
Executive Director
Hood River Valley Residents Committee
heather@hrvrc.org

Daniel Serres
Conservation Director
Columbia Riverkeeper
dan@columbiariverkeeper.org

cc (via email): Michael Kaplan, Director, Oregon Department of Energy
Jason Miner, Natural Resources Policy Manager, Office of the Governor