

PUBLIC COMMENTS REGARDING HB 2020

These comments relate to Section 14 (k) of this bill which retains the relationship between the newly named Oregon Energy and Climate Board (previously the Oregon Department of Energy) and the Energy Facility Siting Council.

This relationship has morphed over time to the extent that the Oregon Energy and Climate Board no longer serves in a function of "staff", but rather as the decision maker. They present their decisions and the Energy Facility Siting Council approves those decisions. The Energy Facility Siting Council's primary function is to provide a barrier that eliminates the Department of Energy being required to be accountable for their decisions.

For example: In the February 23 and 24 meeting of the Energy Facility Siting Council, the following occurred:

1. The Department of Energy recommended that five contested case issues for the Golden Hills Wind Farm Amendment be denied. The EFSC denied all requests.
2. The Department of Energy recommended that the EFSC approve the Sage Grouse Rules including a change they made to remove the requirement that energy developers identify Federally Threatened and Endangered Species in their site applications. The Energy Facility Siting Council approved that rule. Developers will no longer be required to include any information regarding these federally protected species in their applications for site certificates, nor will this information be considered for issues such as mitigation for habitat impacts of developments.
3. The Department of Energy recommended the approval of new rules regarding the Contested Case rules on Amended Site Certificates. This was over the objections of representatives from utilities, energy developers and the public. The comment period on those rules was extended, but the rules continue to move forward in spite of the overwhelming negative response from the stakeholders.
4. The Department of Energy accepted the application from Wheatridge Wind Farm without including the transmission line which will connect the wind farm to the power grid. The Energy Facility Siting Council has now determined that "related or supporting structures" such as transmission lines, roads, offices or public buildings, etc. are only considered part of the development in the issuance of a site certificate if the developer chooses to include them in their application. The specific instance bringing about this decision was the developers of Wheatridge Wind Farm contracted with Umatilla Electric to construct the transmission line connecting Wheatridge to the grid. Wheatridge is paying all costs associated with the construction of the line. This transmission line is no longer considered a "related and supporting structure" according to this decision. The developer benefits due to the fact that Umatilla Electric has the power of eminent domain and can force private landowners to allow the transmission line to cross their land. They also avoid the mitigation requirements for habitat damages and wildlife fatalities resulting from the transmission line. The bigger issue is that because the Department accepted the application without including the transmission line, now developers will be deciding what is included as part of the development, not the statutory definition. I have attached Page 1 and Page 3 of the order which overrules what clearly is the legislative intent that related and supporting structures be included as part of energy developments. The critical language is noted. **I encourage you to amend this bill to require developers to include in their applications for site certificates all related and supporting structures to address this example of an overreach by the Department of Energy and Energy Facility Siting Council.**

A continuation of these types of decisions coming from the role the Department of Energy has assumed with the Energy Facility Siting Council is not in the best interests of the state and should not be allowed to continue. All staffing costs in support of the Energy Facility Siting Council are billed directly to the Developer, so moving this staff function will have no impact on any state budget. This function is most closely aligned with LCDC or the Oregon Department of Fish and Wildlife as these two agencies are the ones most impacted by Energy Development Decisions.

Thank you very much.

Irene Gilbert
2310 Adams Ave.
La Grande, Oregon 97850
Email: ott.irene@frontier.com

84 **Answer to Certified Question No. 2**

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86 In response to Hearing Officer's Certified Question No. 2, the Council relies upon the reasoning
87 presented by Counsel to the Department, Jesse Ratcliffe, during the February 23, 2017 Council meeting
88 in The Dalles and as included in the Department's February 10, 2017 *Response to Certification of*
89 *Questions*, which is incorporated in relevant part in this order.

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91 Consistent with the reasoning provided in part in response to Hearing Officer's Certified Question
92 No. 1, the Council finds that the phrase "proposed to be built in connection with" does not further define
93 the phrase "proposed by the applicant" because it ignores the phrase "by the applicant." The Council finds
94 that the rule's interpretation does not address the actor – i.e., the person or entity that is "proposing."
95 Rather, it addresses the relationship between two objects – the proposed structure and the energy facility –
96 and defines the circumstances in which a proposed structure must be considered to be built "in connection
97 with" an energy facility: when it would not be built "but for construction or operation of the energy
98 facility." Because OAR 345-001-0010(51) does not bear on the interpretation of the phrase
99 "proposed by the applicant" in ORS 469.300(24), it is necessary to rely on principles of statutory
100 interpretation. Therefore, in order for a "structure" to be a related or supporting facility, it must
101 both be (1) proposed by the applicant, and (2) "not be built but for construction or operation of
102 the energy facility." For these reasons, the Council concludes that the phrase "but for construction or
103 operation of the energy facility" in Council's rule at OAR 345-001-0010(51) was not intended to affect the
104 meaning of the phrase "proposed by the applicant" in ORS 469.300(24).

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106 **Answer to Certified Question No. 3**

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108 In response to Hearing Officer's Certified Question No. 3, the Council concludes that a
109 structure be considered a "related or supporting facility" under ORS 469.300(24) only if the applicant
110 has proposed the structure by including it as a related and supporting facility in the applicant's
111 application for site certificate (ASC).

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113 The Council follows the statutory interpretation methodology described in *PGE v. Bureau of*
114 *Labor and Industries*, 317 Or 606, 610-12 (1993) and modified in *State v. Gaines*, 346 Or 160 (2009)
115 ("*Gaines*"), to determine legislative intent by examining first the text, context and the legislative history of
116 the statute. *Gaines* at 171-72. If, based on the text, context and legislative history, the meaning of
117 "proposed by the applicant" is still ambiguous, the Council may apply general maxims of statutory
118 construction. *Id.* at 172.

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120 The relevant dictionary definition of "propose" is: "to offer or suggest (a matter, subject, case,
121 etc.) for consideration, acceptance, or action."² The definition includes the concept that there is a "thing"
122 that is being offered or suggested. It also includes the concept that the offer or suggestion is being made
123 for a reason: "consideration, acceptance, or action." The definition does not, however, say anything
124 inherent about other characteristics of the offer or suggestion: for example, by whom it is made, to whom
125 it is made, or the process by which it is made. Those characteristics must be addressed by other words.
126 The text of ORS 469.300(24) addresses only one of these characteristics: by whom. The structure must be
127 offered or suggested "by the applicant." The text thus requires the applicant to have *some* involvement in
128 the proposal. But because the text is silent as to the questions of to whom the proposal is made and the
129 process by which it is made, the text is necessarily ambiguous as to the *level* of involvement by the
130 applicant sufficient to consider a structure to be "proposed by the applicant." As relevant here, the text is
131 ambiguous as to whether the structure can only be considered to be proposed by the applicant if the

² Accessed online at <http://www.dictionary.com> on February 9, 2017.
Wheatridge Wind Energy Facility ASC 3
Council Order On Certified Questions

**BEFORE THE
ENERGY FACILITY SITING COUNCIL
OF THE STATE OF OREGON**

IN THE MATTER OF THE APPLICATION)
FOR SITE CERTIFICATE FOR THE)
WHEATRIDGE WIND ENERGY FACILITY) ORDER ON HEARING
OFFICER'S CERTIFIED
QUESTIONS

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2 Wheatridge Wind Energy LLC, a wholly owned subsidiary of Swaggart Wind Power, LLC,
3 submitted an application for a site certificate ("ASC") for the construction and operation of the proposed
4 Wheatridge Wind Energy Facility, to be located in Morrow and Umatilla counties. The ASC is currently
5 in the contested case proceeding phase of the application process.
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7 On February 3, 2017, the Hearing Officer in the above referenced matter elected to use his
8 authority to certify certain legal questions to the Energy Facility Siting Council ("Council"), that are
9 relevant to the contested case and that raise an important issue of law and policy, for the Council's
10 consideration and disposition. The Hearing Officer may, at his discretion, "certify any question to the
11 Council for its consideration and disposition" pursuant to Oregon Administrative Rule (OAR) 345-015-
12 0023(k).
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14 The Hearing Officer certified the following three questions related to the statutory definition of
15 "related and supporting facility" and interpretation of the phrase "proposed by the applicant" as included
16 in the statutory definition, to the Council:
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- 18 1) *How does OAR 345-001-0010(51) modify, explain, expand [if at all] the phrase*
19 *"proposed by the applicant" as set forth in ORS 469.300(24)?*
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21 2) *Did the Council intend, in drafting the OAR 345-001-0010(51) phrase "but for*
22 *construction or operation of the energy facility," to include as "related or supporting*
23 *facilities" any structures not requested by an applicant to be reviewed and approved in a*
24 *site certificate application?*
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26 3) *Does the requirement in ORS 469.300(24) that a structure must be "proposed by the*
27 *applicant" in order to be considered a "related or supporting facility" mean that the*
28 *applicant must choose to request review of the structure in the application for site*
29 *certificate, or may a structure also be a "related or supporting facility" if the applicant*
30 *has a level of involvement with the proposed structure sufficient to consider it to be*
31 *proposed by the applicant?*
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