ATTENTION—ACTION NEEDED

DEPARTMENT OF ENERGY PLANNED AMENDMENT RULES DENY PUBLIC ACCESS TO CONTESTED CASE PROCESS:

The Department of Energy uses amendments to make multiple significant changes in site certificates, but always denies the public access to a contested case hearing as a result of the changes. For example, amendments have been used to double the size of a wind farm (Helix Wind Farm), change the source of energy (Boardman change from coal to natural gas). The Department of Energy is currently proposing major changes to the administrative rules regarding the hearings process for Amendments to Site Certificates. The announcement states "This rulemaking is not intended to alter the substantive aspects of how the Council's rules and standards apply to the Council's review of a request for an amendment to a site certificate. The scope of this rulemaking is intended to be strictly procedural in nature and effect." This statement can only be interpreted to mislead, if not outright dishonest.

The public comment period for these rules closes at the end of the public hearing scheduled to start at 10:30 a.m. on Friday, February 24 and your comments must be received prior to the end of that hearing.

You are encouraged to comment on this rule change either by developing your own submission, or taking parts or all of this document. You can either comment directly in person or by phone, or send comments in. The hearing will be held at Cousins' Country Inn, Banquet Room/ 2114 W 6th St. NE/ The Dalles, OR 97058
Call in Number 877-873-8017 Passcode 799345

Written comments can be submitted to:
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Following is a list of rules being changed and impacts of the changes:

1. OAR 345-027-0030 changed to OAR 345-027-0085 Currently start dates are approved for 2 years at a time. The change means start dates would be approved 3 years each, with a maximum of 2 additional amendments of 3 years each. Allowing developers to amend site certificates to delay the start of construction for 9 years means that the basic information which the site certificate is based upon is extremely dated. Often things like wildlife surveys are already 2 or 3 years old by the time the original site certificate it issued. Developers should not be applying for a site certificates just to lay claim on land that they have no immediate plans to develop.. Letting these site certificates linger on for years leaves people who will be impacted by the development in a state of limbo. They often cannot sell their property for a reasonable asking price because of the limited number of buyers interested in living near a wind or other energy development and if they wait until the facility is actually built, they risk not being able to sell it at all.

2. OAR 345-027-0050(4) This amendment was supposed to say that adding area to the site boundary was to require an amendment and people and resources that are newly impacted as a result of the change would have an opportunity to have a contested case heard. Instead, the rule now reads that only when the design, construction or operation is different or it could result in "significant impacts" the council had not previously addressed and it impacts a resource or interest protected, etc. The proposed rule adds so many criteria including a determination of what is "significant" that the standard will make it impossible for anyone to actually be allowed a contested case.
   Note: The question that needs to be answered by the legislature is "Is it their intent that no one be allowed to access due process when the Department of Energy and Energy Facility Siting Council fail to fairly or accurately apply the statutes and rules in approving amendments to site certificates? This rule supports a continuation of that outcome. I addition, ORS 469.320(5)(c) talks to the fact that an amendment is not required when an expansion occurs within the site or within the energy generation area of a facility for which a site certificate has been issued, if the existing site certificate has been amended to authorize the expansion. It is clear to me that either an increase in capacity or an increase in the area of a facility requires an amendment according to the Oregon statutes.

3. OAR 345-027-0053 Provides multiple new situations where no amendment request is required, and thus there is no opportunity for public review, comment or objection.

   For Example: There can be an increase in generation capacity with no increase in the number of electric generators.

   Note: Typically, increasing the generation capacity means an increase in the height of the turbines. It also may mean increased noise impacts, may mean more risk to birds and bats. This is absolutely an inappropriate exemption from requiring an amendment. Any time the capacity increases, there should be a required amendment. ORS 469.407 states that an amendment is required to increase the capacity of a facility which indicates to me that this change is not consistent with the statute.

   The entire process for being exempted from having to submit an amendment included in OAR 345-027-0053 through OAR 345-027-0059 is controlled by the Oregon Department of Energy. They receive the information, complete conferences on the issues and make the decisions. Unless the developer requests a decision from the Energy Facility Siting Council, neither the council nor the public is aware that the requests have come in and a decision was made that no amendment is required. This is not consistent with a transparent process, provides for no public review or disagreement, and sets up a situation where abuses can occur without ever seeing the light of day.

4. OAR 345-027-0060(2) changes the rules regarding the area that must be included in the analysis of impacts of the development. Currently, the area is the larger of the study areas defined in OAR 345-00l-0000(59) or the area described in the project order. The amended rule adds UNLESS OTHERWISE APPROVED BY THE DEPARTMMENT IN WRITING FOLLOWING A CONFERENCE.

   Note: This is important because currently the rules lists minimum analysis areas for things such as the area that must be reviewed for habitat damages, protected areas, etc. Allowing the Department of Energy the ability to allow reduced areas to be reviewed is not going to provide

for protection of the resources protected by this definition. There are already problems with the Department allowing reviews to occur that only cover the siting corridor, however, they have denied all requests for these decisions to go to contested cases.

5. OAR 345-027-0063 Determination of Completeness for Requests for Amendment
   This change makes contact with reviewing agencies OPTIONAL.

   Note: There is no justification for denying reviewing agencies the right to comment on amendment requests. If there is no additional information they want to provide, they can make that determination. When during the last legislative session Todd Cornett removed the requirement that the developer pay for the legal costs if a reviewing agency chose to pursue a contested case, his justification was that they were "partners" in the site certificate process and therefore should have no need to pursue a contested case. This rule change would eliminate the "partner" role in site certificates due to the optional nature of their being allowed to provide input. This change is especially unsavory due to the fact that often applications are determined to be complete which are lacking critical information. The public is not allowed to comment on the completeness of the application, and the Department has denied requests for contested cases on the lack of information. The only group who could identify these issues and obtain any response would be the reviewing agencies.

6. OAR 345-027-0067 regarding will now require the public to comment at this newly required public hearing in order to be allowed a contested case hearing. This rule states that the Council will conduct the public hearing.

   Overall comment: This change is unnecessary. It adds to the timeframes for processing amendment requests, adds to the cost to the developers, adds the inconvenience of requiring the public to submit documents or appear twice instead of the one time as is currently required, adds confusing requirements to the process for requesting contested cases on amendments and does nothing to change the current decision process which has resulted in no contested cases on amendments being allowed since the Department of Energy began processing these.

7. OAR 345-027-0067(3)(c) States that comments must be receive by the department befor the close of the record of the public hearing.

   Note: This is one of those "procedural" roadblocks which serves no purpose other than to confuse the public and make people ineligible to be granted a contested case. For every site certificate or amendment, the due time is different. Other state and federal agencies allow comments postmarked on the due date, the Department of Energy is requiring comments to be in their hands at different times depending upon when the hearing is held and if they are not timely, the person cannot request a contested case. For this rule, the deadline will be sometime after 10:30 a.m., but no one will know exactly when as it depends upon how long the hearing lasts. Whenever the hearing is over, the written comments have to have been received. While the statute allows this, it is not a procedure adhered to by any other agency I have been able to identify.

8. OAR 335-027-0067(F) Requires that in order to meet the standard of being "specific", the person must present facts on the record that support the person's position.

Note: The statute ORS 469.370 (3) only requires the issue to be raised specifically enough so that it can be responded to. This does not require a presentation of facts to support the issue. This should be provided during a contested case hearing. Currently, the Department of Energy has denied allowing a contested case by deciding the issue is without merit based upon the limited information available in the public comments and the request for a contested case hearing without hearing the full arguments.

9. OAR 345-027-0069 THIS SECTION PROVIDES PIT FALL AFTER PIT FALL THAT DENIES CITIZENS ANY ACCESS TO CONTESTED CASES. The Statute does not impose any of these requirements other than the "raise it or waive it" requirement which currently only applies to initial applications.

   Section 1—Why is the Department of Energy issuing a proposed order that the Council has not seen?
   Section 5 –Again references the need to provide factual support at the public hearing to obtain a contested case hearing.
   Section 6—An e-mail should not be required. Many people in Eastern Oregon and other areas of the state do not have internet or e-mail. It also requires a "specific reference" to where and when the issue was raised. They require a DETAILED statement of the persons interest and how it will be impacted. If the person is representing a public interest or group, a detailed statement of the public interest, how it will be impacted and the persons qualifications to represent that interest. If a limited party, the PRECISE area which participation is sought and a DETAIED statement of persons interest in the proceeding and how interest is impacted .

   Note: Contested Case requests are being denied because an individual did not identify exactly where in their public comments they commented on the specific issue, or where in their written comments they described the specific issue. All this is specific to the Department of Energy and Energy Facility Siting Council actions. It exceeds any requirements from other agencies or those utilizing the Department of Justice hearings unit. If the person gets through the requirements for making public comments, and then gets through all the Section 8 specific requirements for writing to request a contested case, then they have to approach the next hurdle which is Section 9.

   Section 9—The individual must have justified the contested case. Then, the decision is made by the Department of Energy and Energy Facility Siting Council whether or not the issue is a SIGNIFICANT ISSUE OF FACT OR LAW that would CHANGE THE COUNCIL DECISION that the facility meets the standards of Division 22, 23, and 24.

   Note: According to the Project Orders issued by the Department o energy, "The following divisions of OAR Chapter 345 includes rules related to application requirements, EFSC review of an application, and construction and operation of an approved facility:" It then lists Division 21 (Site Certificate Application Requirements); Division 22 (Council Standards for Siting Facilities); Division 23 (Need Standard for Non-Generating Facilities); Division 24 (Specific Standards for Siting Facilities); Division 26 (Construction and Operation Rules for Facilities) and Division 27 (Site Certificate Conditions). This precludes contested cases relating to multiple areas of public concern such as changes in the definitions contained in Division 1. There are commonly problems with the Department "reinterpreting" terms in the definitions. Division 15 which is the determination that an application is complete when it is missing critical information, Division 27 meaning you can't contest the process being used to

obtain a contested case even though it is not supported by the statutes and requires an unattainable standard that discourages 99% of the people from even trying. No contested cases would be allowed on Div. 25 which includes the monitoring and mitigation requirements which tends to be an area where site certificates consistently are not in compliance with the rules or the amount of bond required for removing the development after it has ended its useful life which again is an area where the amounts required are consistently inadequate to restore the area impacted. A read of the statutes appears to support the fact that if a person comments specifically during the public hearing and asks for a contested case hearing that they will be granted one. Even if someday an individual is actually granted a contested case, they will be precluded from arguing multiple areas of concern.

10. OAR 345-027- 0071 (2) This rule only requires the review of the "portion within the area added" when an amendment is processed to increase the size of the development.

    Note: ORS 469.300(14) defines a "Facility" as an energy facility together with any related or supporting facilities. ORS 469.407 describes the fact that an increased capacity requires the enlarged facility meets all council standards. There is nowhere in the statute that the department can justify a rule that limits the review of an enlarged facility that adds land to a review of only the portion added. This also flies in the face of the requirement to review cumulative impacts when wind farms are sited.

11. OAR 34-027-0069(12) states the judicial review of the council's final order is provided by ORS 469.403.

    Note: This is not correct. ORS 469.403 Identifies the Oregon Supreme Court as the Court to hear appeals from "any party to a contested case". The proposed rules ignore the fact that the contested case only goes to the Oregon Supreme Court for "parties to a contested case". When individuals are denied standing, they do not appeal to the Oregon Supreme Court as they are forbidden to do so by statute. The statutes limit supreme court review to parties to a contested case. In addition, Supreme Court review is limited to the contested case file. The court has spoken to the issue of amendments to site certificates in Emerald PUD v Energy Facility Siting Council, 321 Or 562, 902 P2d 1134 (1995), where it was determined that the Supreme Court authority to review applications for initial site certificates does not extend to site certificate modifications. The Department of Energy is well aware of the fact that this rule is not consistent with the law. Mike Kaplan, Director of the Department of Energy, provided written and verbal testimony before the Joint Legislative Oversight Committee addressing problems with the Department of Energy. Mr. Kaplan stated that he did not know what court these appeals should go to. What is certain, is that it would not be the Oregon Supreme Court as is indicated in the proposed rules. It appears that it would be the county courts.

The issue that needs to be addressed is: Was it the intent of the legislature that no one be allowed a contested case on amendment requests? Was it the intent that due process is only allowed on initial site certificates? Is it legal for the Department of Energy and Energy Facility Siting Council to create the expectation that there is an opportunity to access due process, create multiple additional barriers which assure a continuation of 100% denial of all requests, and pretend that this recourse is available when it actually is not? It does nothing to improve the

public perception of the Department of Energy to claim that they are providing for increased public
input when there is no intent to allow a resolution of the concerns that are voiced.

12. A new change to OAR 345-015-0014(2)(c) will mean that those individuals who are denied a contested case will no longer even be notified that their request has been denied.

The Department of Energy is once again demonstrating that they should not have control over the hearings process as their focus is not on providing for a fair process. This rule change will make it easier for the Department of Energy and Energy Facility Siting Council to deny contested case requests on amendments absent any objective criteria. Since no amendment requests have been allowed on contested cases, there will simply be a new, and confusing rule for the public to follow and the outcomes will still be the same.

You are strongly encouraged to submit comments regarding this unnecessary, burdensome, costly and in several areas inconsistent with statutes rule. Feel free to sign this in it's entirety or pull from it any information or references you feel are relevant.

Please distribute this information to all parties which may be in a position of disagreeing with a Department of Energy Amendment to a site certificate.