



1 Perennial failed to either begin construction by that deadline or to submit an application to  
2 extend the deadline in compliance with valid Council rules. Instead, Perennial filed, and the  
3 Oregon Department of Energy (“ODOE” or “Department”) processed, its amendment  
4 application pursuant to invalid rules. The Oregon Supreme Court has held that the rules relied  
5 on by Perennial in its application “are invalid.” *Friends of the Columbia Gorge, et al. v. Energy*  
6 *Facility Siting Council*, 365 Or 371, 396 (2019). Additionally, the Council’s August 2019 so-  
7 called “temporary rules” are also invalid. Thus, the Council cannot implement or rely upon  
8 these rules in approving the application.  
9  
10

11 The Council has attempted to avoid this outcome by readopting the invalid rules as so-  
12 called “temporary” rules. In so doing, however, the Council once again violated the Oregon  
13 Administrative Procedures Act (“APA”) and the “temporary” rules are also invalid. As  
14 Requesters explained in their Opening Brief filed with the Oregon Supreme Court (Exhibit B),  
15 the “temporary” rules are invalid for a number of reasons, including that: the Council failed to  
16 adopt adequate findings demonstrating an emergency; the Council cannot retroactively apply  
17 the “temporary” rules; and the Council is prohibited from readopting as “temporary” rules  
18 identical language that had already been in effect for more than 650 days as permanent rules.  
19 The so-called “temporary” rules are invalid and cannot be used to review, process, or approve  
20 Perennial’s RFA. At a minimum, the Council should stay the processing of Perennial’s RFA  
21 pending the resolution of Requesters’ challenge to the “temporary” rules in the Oregon  
22 Supreme Court.  
23  
24  
25

26 Additionally, Perennial’s RFA is not complete. Perennial’s “Complete Request for  
27 Amendment 1,” dated June 25, 2019, indicated that the construction commencement deadline  
28 in the facility’s air permit from the Department of Environmental Quality (“DEQ”) was

1 expired. *See* Complete Request at 5. Perennial noted that it had an opportunity to request an 18-  
2 month extension from DEQ, but did not indicate whether it had done so. *Id.* With respect to  
3 federally delegated permit applications, Council rules require that applicants submit “evidence  
4 that the responsible agency has received a permit application and the estimated date when the  
5 responsible agency will complete its review and issue a permit decision.” OAR 345-021-  
6 0010(1)(e)(D). Perennial did not include this evidence in its RFA; thus, ODOE should never  
7 have accepted the RFA as complete.  
8

9  
10 Perennial’s application is also incomplete because its RFA fails to provide a sufficient  
11 explanation for why the company has not yet secured a power purchase agreement or what steps  
12 it has taken to do so. In the Proposed Order, EFSC asserts that “Council rules include no  
13 substantive review criteria for why the extension is needed and requested.” Proposed Order at 21.  
14 The alleged vagueness of the requirement makes this issue ripe for a contested case hearing. A  
15 contested case hearing would provide an opportunity for a hearing officer to assist EFSC with  
16 exploring and resolving this issue, given the alleged absence of clear standards. The contested  
17 case hearing process would also allow Requesters to seek discovery on this issue to learn from  
18 the applicant what its anticipated construction timeline is and what due diligence it has  
19 undertaken in furtherance of the project.  
20  
21

22 The Proposed Order also fails to consider potential methane emissions from the  
23 proposed plant as part of the assessment of Perennial’s carbon emissions. The Council’s  
24 Carbon Standard specifically requires that methane be considered as part of the carbon  
25 emissions analysis. *See* OAR 345-024-0590(2).  
26

27 Finally, in the four years since the Council first issued Perennial’s site certificate, the  
28 environmental impacts of fracked gas have become increasingly apparent. In reviewing a

1 request for amendment to extend construction deadlines, OAR 345-027-0375(2)(b) (2019)  
2 requires the Council to consider “any changes in law or fact since the date the current site  
3 certificate was issued.” ODOE interprets this provision as requiring, among other things, the  
4 review of any change to the existing environment. *See* Proposed Order at 17. The Department  
5 dismissed Requesters’ concerns about the environmental impacts of a new gas-fired power  
6 plant as being outside the scope of the Council’s review, noting that the proposed facility does  
7 not, itself, include drilling for natural gas. *See* Proposed Order at 5 n.2. However, that statement  
8 misses the heart of Requesters’ concerns: construction of a new gas-fired power plant,  
9 especially one for which there is no established need, will increase demand for fracked gas,  
10 which will, in turn, increase drilling, and increased drilling will lead to increased emissions. To  
11 combat climate change, we need to rapidly phase out all fossil fuel infrastructure—not  
12 construct new gas-fired power plants like Perennial. Climate change is a global problem that  
13 will never be fixed if government agencies continue to ignore the global effects of seemingly  
14 local actions.

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18       The identified issues justify a contested case hearing for multiple reasons. First, a  
19 contested case is needed to allow Requesters to submit new evidence, including sworn expert  
20 witness testimony. Second, a contested case is needed to allow Requesters to seek from  
21 Perennial discoverable information likely to bear on the disputed issues, and Requesters have  
22 no other means of obtaining such information and presenting it to the Council. *See* OAR 345-  
23 015-0023(5)(c), OAR 137-003-0568(4), OAR 137-003-0025(4). Third, the Council should  
24 utilize the assistance of a neutral hearing officer to resolve disputes of fact, law, and policy  
25 regarding these issues (rather than relying solely on ODOE staff), and to ensure that the  
26 Council abides by its mandates to follow its own rules and to act consistent with prior Council  
27  
28

1 decisions or otherwise provide valid reasons for departing from prior decisions. Fourth, the  
2 issues involve the setting of standards that “call[] for the factual kind of judgment and  
3 procedures appropriate thereto” that can be “made more concrete only in the course of a  
4 proceeding focusing on a particular kind of [energy] installation at a particular location.”  
5 *Marbet v. PGE*, 277 Or 447, 460–63, 561 P2d 154 (1977) (quoting ORS 183.310(2)). In such  
6 instances, the Oregon Supreme Court has held that “[t]he procedure for adopting [such]  
7 standard[s] to be applied in a few complex, large-scale decisions such as the site certifications  
8 entrusted to the council” is via the “‘contested case’ procedure,” which “is to be used in  
9 applying statutory or agency policy to specific parties on particular facts.” *Id.* And finally, a  
10 contested case is needed to allow “the agency and not the courts [to] pass[] first on the  
11 contention[s] of the participants”; the Council should allow Requesters to pursue the disputed  
12 issues in an “effective[] and meaningful[]” manner and to allow the Council (with the  
13 assistance of a hearing officer) to vet and resolve the disputed issues via a contested case, rather  
14 than consigning the issues to the Oregon Supreme Court to resolve them on first impression.  
15 *Hennesey v. SEC*, 285 F.2d 511, 515 (3d Cir. 1961) (cited in *Marbet*, 277 Or at 455).

16  
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19  
20 The Council should conduct a contested case, which will allow the disputed evidentiary,  
21 legal, and policy issues to be fully vetted and resolved by the Council (with the assistance of a  
22 hearing officer), rather than consigning these issues to the Oregon Supreme Court to resolve on  
23 first impression. Requesters recognize that it is rare for the Council to hold a contested case on  
24 proposed amendments to site certificates. However, Requesters implore the Council to do so  
25 here, given the numerous unique and heavily disputed issues involving this controversial  
26 project.  
27  
28



1 and almost 1,800 miles of federally designated wild and scenic rivers. Oregon Wild works to  
2 maintain and enforce environmental laws while building broad community support for its  
3 campaigns.  
4

### 5 **III. REQUESTERS' CONTACT INFORMATION**

#### 6 **A. Columbia Riverkeeper**

7 Attn: Erin Saylor  
8 Columbia Riverkeeper  
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10 Portland, OR 97214  
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#### 13 **B. Friends of the Columbia Gorge**

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15 Friends of the Columbia Gorge  
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#### 20 **C. Oregon Wild**

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22 Oregon Wild  
23 P.O. Box 11648  
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### 27 **IV. REQUESTERS' ATTORNEYS**

28 Requesters are represented by the following attorney:

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1  
2 Requester Columbia Riverkeeper is also represented by the following attorney:

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#### 16 **V. REQUEST TO PARTICIPATE AS PARTIES**

17 Requesters request to participate as full parties to the contested case.

#### 18 **VI. REQUESTERS' INTERESTS IN THE PROCEEDING**

19 Requesters are nonprofit public interest organizations, representing more than 43,000  
20 collective members and supporters, with strong interests in responsible energy generation and  
21 the proper implementation of state laws and rules governing the review, construction, and  
22 operation of large energy facilities in Oregon generally, and the Perennial Wind Chaser Station  
23 specifically. Requesters seek to represent the following public interests in this proceeding and  
24 are qualified to do so by virtue of Requesters' organizational missions (*see supra* Part II),  
25 Requesters' comments on the record in this matter, and Requesters' extensive experience  
26 representing public interests in prior administrative and quasi-judicial proceedings (including  
27 prior EFSC proceedings).  
28

1 Requesters have significant interests in whether the Request for Amendment complies  
2 with all applicable laws; whether the Department and the Council properly implement and  
3 interpret state laws and rules governing energy siting; whether the construction start and  
4 completion deadlines for the Project will be extended; and whether the Applicant ultimately  
5 constructs and operates the Project.  
6

7 Requesters' specific interests include: assisting with the evaluation and determination of  
8 whether Perennial's requested extensions of the construction deadlines are necessary,  
9 appropriate, and consistent with all applicable laws; whether the Council should grant or deny  
10 Perennial's request in full or in part; and ensuring that the Application is neither processed nor  
11 approved pursuant to invalid rules.  
12

13 Requesters also have significant interests in the protection and enhancement of the  
14 scenic, recreational, and wildlife resources threatened by this Project. Requesters' members and  
15 staff regularly lead and participate in recreational activities in the areas affected by this Project  
16 and intend to continue these activities. These activities include hiking, running, walking,  
17 bicycling, horseback riding, rock climbing, swimming, boating, river rafting, kayaking,  
18 canoeing, fishing, hunting, collecting edible and medicinal plants and mushrooms, viewing  
19 salmon and other fish and wildlife, birdwatching, botanical identification, viewing and  
20 experiencing cultural resources, general sightseeing, and quiet enjoyment.  
21  
22

23 Requesters' interests would be adversely affected or aggrieved if the Council violates  
24 applicable laws or rules in its review of, and decision-making on, the Application; if the  
25 Council grants the requested extensions of the construction deadlines; if the Project is  
26 constructed and operated despite noncompliance with applicable laws or rules; and/or if the  
27 construction and/or operation of the Project adversely affects resources. The Council's approval  
28

1 of this RFA as proposed may establish adverse precedents; harm resources; and/or diminish the  
2 use and enjoyment of these resources by Requesters, their members, and the general public.  
3 Requesters seek to advocate for and protect these public interests by participating as parties to  
4 the contested case proceeding.  
5

6 No other persons or organizations can adequately represent the above-described public  
7 interests. Requesters are unaware of any other organizations or persons who raised all the same  
8 issues as Requesters on the record of the public hearing. Nor are Requesters aware of any other  
9 potential parties to this contested case proceeding who possess the same institutional capacities  
10 or that intend to fully represent the same interests and issues raised by Requesters.  
11

12 **VII. THE ISSUES THAT REQUESTERS DESIRE TO**  
13 **RAISE IN A CONTESTED CASE PROCEEDING**

14 In reviewing a request to amend a site certificate, the Council must consider “any  
15 changes in facts or law” since the current site certificate was executed and whether the facility’s  
16 amendment application “complies with all laws and Council standards applicable to an original  
17 site certificate application.” OAR 345-027-0375(2)(b) (2019). In consideration of those  
18 standards, Requesters desire to raise the following issues in a contested case proceeding.  
19

20 **A. The Council Cannot Approve Perennial’s Application Under Invalid Rules.**  
21

22 The Council cannot approve Perennial’s application for a site certificate amendment.  
23 Perennial was required to begin construction by September 23, 2018. *See* Site Certificate for  
24 the Perennial Wind Chaser Station, Condition No. GEN-G2-02 (Sept. 23, 2015). Perennial  
25 failed to begin construction by that deadline and instead submitted an application to extend the  
26 deadline pursuant to the October 2017 Council rules. However, the October 2017 rules have  
27 since been declared invalid by the Oregon Supreme Court. *See Friends of the Columbia Gorge,*  
28

*et. al. v. Energy Facility Siting Council*, 446 P.3d 53, 67 (2019) (“The rules approved by the

1 Energy Facility Siting Council through Permanent Administrative Orders EFSC 4-2017 and  
2 EFSC 5-2017 are invalid”). Moreover, the Council’s so-called “temporary rules” are also  
3 invalid and therefore cannot be implemented. The Council cannot approve applications under  
4 invalid rules; thus, the Council cannot approve Perennial’s application as submitted.  
5

6 **1. The October 2017 rules relied upon by Perennial and the Council are invalid.**

7 In its RFA, Perennial expressly cited to OAR 345-027-0085 (2018) in requesting a  
8 three-year extension of its construction commencement deadline. *See* RFA1 at 1. In a letter  
9 dated August 22, 2018, EFSC informed Perennial that, pursuant to OAR 345-027-0085(5)  
10 (2018), Perennial is only eligible for a two-year extension. Since the provision governing site  
11 certificate amendments was renumbered from -0030 to -0085 as part of the October 2017  
12 rulemaking, there is no question that these citations were to the rules adopted in October 2017,  
13 which the Oregon Supreme Court has overturned.  
14

15 The Oregon Supreme Court’s recent decision in *Friends of the Columbia Gorge v.*  
16 *EFSC*, substantially changed the law after Perennial submitted its extension request. That  
17 opinion held that the Council violated the APA when proposing and adopting the rules at OAR  
18 Chapter 345, Division 27, in October 2017. *Friends of the Columbia Gorge v. EFSC*, 365 Or  
19 371, 446 P3d 53 (2019). Therefore, the Court held, the rules “are invalid.” *Id* at 396. Oregon  
20 courts have long held that invalid rules cannot be implemented, enforced, or relied upon. *See*  
21 *Homestyle Direct, LLC v. Dep’t of Human Serv.*, 245 Or App 598, 605, 263 P3d 1118 (2011)  
22 (state agencies cannot enforce invalid rules), *rev’d on other grounds*, 354 Or 253, 311 P3d 487  
23 (2013); *Gooderham v. Adult & Family Servs. Div.*, 64 Or App 104, 107–08, 667 P2d 551  
24 (1983) (invalid rule could not be used to reduce or terminate benefits); *Clark v. Pub. Welfare*  
25 *Div.*, 27 Or App 473, 477, 556 P2d 722 (1976) (“The decision of the hearings officer having  
26  
27  
28

1 been made pursuant to invalid rules is itself invalid.”); *Kessler v. Or. Corr. Div.*, 26 Or App  
2 271, 274, 552 P2d 589 (1976) (agency decision reversed and remanded because it applied  
3 invalid rules), *overruled on other grounds by Rutherford v. Or. State Penitentiary*, 39 Or App  
4 431, 439, 592 P2d 1028 (1979). Because the October 2017 rules are invalid, the Council cannot  
5 approve Perennial’s application under those rules.<sup>3</sup>

7 Requesters raised this issue at pages 1–2 of their August 22, 2019, comment letter to the  
8 Council. This issue involves a significant issue of law that directly impacts Perennial’s RFA.  
9 The Council should hold a contested case, utilizing a neutral hearing officer, to resolve the  
10 disputed issues.

12 **2. The August 2019 “temporary” rules are also invalid.**

13 On August 22, 2019, the same day the public comment period on Perennial’s RFA  
14 closed, the Council attempted to adopt new “temporary” rules governing amendments to site  
15 certificates. *See* Temporary Administrative Order, EFSC 9-2019 (Aug. 22, 2019). The  
16 Proposed Order cites to these “temporary rules,” which are virtually identical in language to the  
17 rules recently held invalid by the Oregon Supreme Court. The “temporary” rules are also  
18 invalid for a number of reasons, including: a) the Council failed to adopt adequate findings  
19  
20

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21 <sup>3</sup> When the Oregon Supreme Court invalidated the October 2017 rules, the rules that were in effect prior  
22 to that rulemaking became the effective rules. *See Gooderham v. Adult & Family Servs. Div.*, 64 Or App  
23 104, 100, 667 P2d 551 (1983) (stating that a rule “not promulgated according to the APA . . . [is] not  
24 effective to repeal the previous rule”); *see also Back in Action Physical Therapy v. Liberty Northwest*  
25 *Insurance Corp.*, 259 Or App 743, 752, 316 P3d 324 (2013) (holding that “[t]here is no question that the  
26 former permanent rule would be controlling if the temporary rule were determine to be inapplicable or  
27 invalid”). However, if the pre-October 2017 rules are applied to Perennial’s RFA, its request must be  
28 denied because Perennial’s application was untimely under that version of the rules. Pursuant to the pre-  
October 2017 rules, a request to extend construction deadlines must be submitted “no later than six  
months before the date of the applicable deadline.” *See* OAR 345-027-0030(1) (2017). Perennial’s  
application, however, was filed just one month before the construction deadline expired. Thus, under the  
pre-October 2017 rules, the site certificate expired when Perennial failed to begin construction by the  
September 23, 2018 deadline. *See* OAR 345-027-0000 (2017) (“[i]f the certificate holder does not begin  
construction of the facility, the site certificate expires on the construction beginning date specified by  
the Council in the site certificate or in an amendment of the site certificate *granted* according to the  
rules of this division.”) (emphasis added).

1 demonstrating an emergency, b) the Council cannot retroactively apply the “temporary” rules  
2 to transactions and occurrences prior to the adoption of these rules, and c) the Council is  
3 prohibited from readopting as “temporary” rules identical language that had already been in  
4 effect for more than 650 days as permanent rules. *See* Exhibit B; *see also* ORS 183.335(6)(a)  
5 (stating that a temporary rule may not be in effect for longer than 180 days). Because the so-  
6 called “temporary” rules are also invalid, the Council cannot rely on them to review, process, or  
7 approve Perennial’s RFA. *See supra* Section VII.A.1.  
8  
9

10 A contested case is warranted because this issue raises significant questions of law that  
11 may affect the Council’s determination as to whether the proposed facility complies with the  
12 applicable laws and rules and, ultimately, whether the Council should grant or deny the  
13 requested construction extension. *See* OAR 345-027-0371(9) (2019). Requesters were not able  
14 to raise this issue during the public comment period because the Council adopted the  
15 “temporary” rules *after* the comment period on the RFA closed. As the Council is no doubt  
16 aware, Requesters have challenged the “temporary” rules before the Oregon Supreme Court.  
17 *See* Exhibit B. The Council should hold a contested case, utilizing a neutral hearing officer, to  
18 resolve whether the “temporary” rules can be relied upon in this matter. At the very least, the  
19 Council should stay further action on Perennial’s RFA until the Supreme Court has issued a  
20 ruling on the validity of the “temporary” rules.  
21  
22

23 **B. Perennial’s Application is Incomplete Because it Failed to Include Accurate**  
24 **Information About the Status of its DEQ Air Permit.**

25 Pursuant to OAR 345-021-0000(7), Perennial’s RFA application should never have  
26 been deemed complete because Perennial failed to submit accurate information regarding the  
27 status of its DEQ air permit. In fact, the Council and Department did not receive the required  
28 information until after the close of the public comment period, and, thus, Requesters were not

1 given an opportunity to comment accurately on the issue. A contested case hearing on this issue  
2 is appropriate because it involves a significant issue of fact and law that may affect the  
3 Council's determination as to whether the proposed facility complies with the applicable laws  
4 and rules, and ultimately whether the requested construction extension should be granted or  
5 denied. *See* OAR 345-027-0371(9) (2019).

7 The Council's rules require applicants for site certificates to demonstrate that they  
8 have obtained or will obtain all permits needed for construction and operation of proposed  
9 energy facilities. With respect to federally delegated permit applications, applicants must  
10 submit "evidence that the responsible agency has received a permit application and the  
11 estimated date when the responsible agency will complete review and issue a permit decision."  
12 OAR 345-021-0010(1)(e)(D). The "[d]epartment may not find the site certificate application to  
13 be complete before receiving" this documentation. OAR 345-021-0000(7). The regulations are  
14 clear that until the application is affirmatively determined to be complete, it is considered a  
15 preliminary application. *See* OAR 345-021-0000(10). On June 25, 2019, the Department  
16 published on its website what it determined to be a "complete" request for an amendment. In  
17 that document, Perennial notes,  
18  
19  
20

21 "[t]he Air Contaminant Discharge Permit and Prevention of Significant  
22 Deterioration Permit (Air Permit) were initially issued on January 26, 2016. An  
23 application to extend the construction start date was submitted on April 5, 2017.  
24 Oregon Department of Environmental Quality (DEQ) approved the extension on  
25 May 17, 2017. The Air Permit now has a required start date of January 26, 2019.  
26 The DEQ may grant an additional 18 month [*sic*] extension for good cause."

27 RFA1 at 5. But when Perennial made this allegation in June 2019, the construction  
28 commencement deadline in the Air Permit was already six months expired. Perennial failed to  
disclose this fact, explain whether it ever sought an additional 18-month extension, or indicate  
DEQ's expected timeframe to complete its review. In the absence of this critical information,

1 pursuant to OAR 345-021-0000(7), the application should never have been deemed complete  
2 and should never have moved beyond the preliminary application stage.

3           The Council did not receive clarity on the status of Perennial’s DEQ air permit until  
4 September 9, 2019, long after the close of the public comment period for RFA1. *See* Staff  
5 Report to the Council on Perennial Wind Chaser Station, Attachment 1 (Sept. 12, 2019). The  
6 September 9th email exchange between ODOE and DEQ fails to provide “the estimated date  
7 when the responsible agency will complete review and issue a permit decision” required by  
8 OAR 345-021-0010(1)(e)(D). In fact, Requesters posit that Perennial’s DEQ permit has expired  
9 due to the company’s failure to submit a timely application for an extension of its construction  
10 deadlines; an argument Requesters raised in their October 10, 2019, comments to DEQ.<sup>4</sup> If  
11 Perennial’s DEQ permit is indeed expired, the company will have to resubmit a new  
12 application for a new air permit to DEQ; a process that is unlikely to be completed before the  
13 construction commencement deadline in Perennial’s EFSC site certificate expires again.  
14  
15  
16

17           Requesters raised this issue on pages 2–3 of their August 22, 2019, comment letter to  
18 the Council, to the extent information was available before the close of the comment period. A  
19 contested case is justified because this issue raises significant issues of fact and law that may  
20 affect the Council’s determination as to whether the proposed facility complies with the  
21 applicable laws and rules, and ultimately whether the requested construction extension should  
22 be granted or denied. *See* OAR 345-027-0371(9) (2019).  
23  
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<sup>4</sup> DEQ issued a public notice for Perennial’s proposed air quality permit on September 12, 2019. Requesters have attached their comments to DEQ as Exhibit C.

1 **C. Perennial Failed to Adequately Explain Why it Needs Extensions of the Construction**  
2 **Deadlines.**

3 The Department also erred in determining that Perennial’s RFA was complete because  
4 Perennial’s purported explanation for why it needs an extension of the construction deadlines for  
5 the Project is legally inadequate. To the extent EFSC’s invalid rules can be applied here, those  
6 rules require Perennial to explain the need for an extension. *See* OAR 345-027-0385(1) (2019).  
7 Implicit in that rule is a requirement that the applicant’s explanation must be compelling.  
8 Perennial merely claims it has “been unable to obtain a power purchase agreement and it is  
9 unlikely that one will be obtained before the required construction date.” However, Perennial  
10 failed to explain what, if any, steps it took to attempt to obtain a power purchase agreement.  
11 More importantly, Perennial failed to explain why its inability to find customers warrants  
12 reviving the void site certificate and keeping it alive even further by granting a construction time  
13 extension. Perennial has failed to proffer an explanation sufficient to justify an extension.  
14

15  
16  
17 In addition, under the invalid rules, the Council has authority to approve an extension for  
18 *up to* two years. OAR 345-027-0385(5)(d) (2019). In other words, the Council could approve an  
19 extension, but for a period of *less than* two years. Perennial’s RFA fails to demonstrate why it  
20 needs a full two-year extension of both the construction start deadline and the construction  
21 completion deadline, and why an extension of less than two years for either of these deadlines  
22 would not be sufficient.  
23

24 Such an explanation is especially necessary given that Perennial itself has admitted that  
25 the construction deadline in its DEQ Air Permit cannot be extended more than 18 months past  
26 January 26, 2019. *See* RFA at 5. The regulations governing DEQ’s approval of the Air Permit  
27 are clear that if construction does not begin within fifty-four months of the initial permit  
28

issuance, the permit is void and the permittee must apply for a new permit. *See* OAR 340-224-  
REQUEST FOR CONTESTED CASE  
Page 16

1 0030(5)(c). The initial Air Permit was issued on January 26, 2016; since the regulations require  
2 construction to begin within fifty-four months, the current Air Permit may not be extended  
3 beyond July 26, 2020. Since Perennial’s Air Permit requires construction to begin, at the  
4 absolute latest, by July 26, 2020, there is no reason for EFSC to extend the construction start  
5 deadline in the site certificate beyond that date.  
6

7 Perennial’s attempted explanation of the need for construction extensions, in addition to  
8 being legally insufficient, admits a lack of market demand for energy from this project.  
9

10 Perennial’s application states that “[t]here have been tremendous changes in the energy market  
11 and in pending federal regulations covering the energy sector since the issuance of the Site  
12 Certificate. Perennial is optimistic that as soon as future energy planning becomes stable, the  
13 need for the Facility will become apparent to the marketplace.” RFA at 1. Perennial made no  
14 effort to explain the source of its optimism that the market will somehow swing in its favor,  
15 particularly when state energy policy is clearly moving in the opposite direction, away from  
16 fossil fuel infrastructure. There is simply no room in Oregon for a new fracked gas-fired power  
17 plant; the Council should not continue to allow this zombie project to linger any longer, given  
18 the absolute lack of need for the project.  
19  
20

21 In the Proposed Order, the Department asserts that “Council rules include no substantive  
22 review criteria for why the extension is needed and requested.” Proposed Order at 21. The  
23 alleged vagueness of the requirement makes this issue ripe for a contested case hearing. A  
24 contested case hearing would provide an opportunity for a hearing officer to assist the Council  
25 with exploring and resolving this issue, given the alleged absence of clear standards. The  
26 contested case hearing process would also allow Requesters to seek discovery on this issue to  
27 learn from the applicant what its anticipated construction timeline is and what due diligence it  
28

1 has undertaken in furtherance of the project. Requesters have no other means of obtaining this  
2 important information.

3 Requesters raised this issue on pages 5–6 of their August 22, 2019, comment letter to  
4 the Council. A contested case is justified because this issue raises significant questions of fact  
5 and law that may affect the Council’s determination as to whether the proposed facility  
6 complies with the applicable laws and rules, and ultimately whether the requested construction  
7 extension should be granted or denied. *See* OAR 345-027-0371(9) (2019).  
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10 **D. The Council Must Consider Methane Emissions From the Proposed Facility.**

11 In the Proposed Order, the Department improperly dismisses Requesters’ concerns  
12 regarding methane emissions from Perennial’s fracked-gas fired power plant. Proposed Order  
13 at 97 n. 170. Specifically, the Department alleges that “[u]pstream carbon emissions, such as  
14 methane released during the production and transportation of natural gas, are not within the  
15 scope of the Council’s Carbon Standard.” *Id.* This ignores Requesters’ earlier-stated concerns  
16 that new studies have shown that natural gas power plants directly release 21 to 120 times more  
17 methane than suggested by EPA’s Greenhouse Reporting Program data. *See* Requesters’  
18 Comments at 4 n.14. Contrary to the Department’s suggestion, the study Requesters cited to in  
19 support of that statement does not address methane released during the production and  
20 transportation of fracked gas, *it specifically addresses methane released from the power plants*  
21 *themselves* during operation. Methane pollution from Perennial’s proposed facility is very  
22 much within the scope of the Council’s Carbon Standard. In reviewing an application, the  
23 Council “must determine the gross carbon dioxide emissions that are reasonably likely to result  
24 from the operation of the proposed energy facility.” OAR 345-024-0590(1). The term “carbon  
25 dioxide emissions” means either carbon dioxide itself or the “carbon dioxide equivalent of  
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1 other greenhouse gases,” and the rules expressly consider methane as equivalent to 25 pounds  
2 of carbon dioxide. *Id.* The Council must consider potential methane emissions related to the  
3 operation of the proposed facility.  
4

5 Requesters raised this issue on page 4 of their August 22, 2019, comment letter to the  
6 Council. A contested case is justified because this issue raises significant questions of fact and  
7 law that may affect the Council’s determination as to whether the proposed facility complies  
8 with the applicable laws and rules, and ultimately whether the requested construction extension  
9 should be granted or denied. *See* OAR 345-027-0371(9) (2019).  
10

11 **E. Pursuant to OAR 345-027-0375(2)(b), the Council Should Consider the Rapidly**  
12 **Developing Climate Crisis when Deciding Whether to Approve Perennial’s Request.**

13 In the four years since EFSC first issued a site certificate to Perennial, the  
14 environmental impacts of fracked gas have become increasingly apparent, as have the rapidly  
15 growing effects of climate change. This new understanding of the impact of fracked gas on our  
16 climate is a factual change that has occurred since the issuance of Perennial’s site certificate  
17 and that the Council should consider in its review of the RFA. To combat climate change, we  
18 need to rapidly phase out all fossil fuel infrastructure—not construct new gas-fired power  
19 plants like Perennial.  
20

21 In reviewing a request for amendment to extend construction deadlines, OAR 345-027-  
22 0375(2)(b) (2019) requires the Council to consider “any changes in law or fact since the date  
23 the current site certificate was issued.” ODOE interprets this provision as requiring, among  
24 other things, the review of any change to the existing environment. *See* Proposed Order at 17.  
25 In the Proposed Order, the Department dismissed Requesters’ concerns about the  
26 environmental impacts of a new gas-fired power plant as being outside the scope of the  
27 Council’s review, noting that the proposed facility itself does not intend to drill for natural gas.  
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1 See Proposed Order at 5 n.2. However, that statement misses the heart of Requesters' concerns:  
2 Assuming Perennial finds a purchaser for its power, the construction and operation of a new  
3 gas-fired power plant will increase demand for fracked gas which will, in turn, increase  
4 fracking and related methane emissions. Climate change is a global problem that will never be  
5 fixed if government agencies continue to ignore how their seemingly local actions influence  
6 global effects.  
7

8 Since Perennial initially applied for its site certificate in 2014, multiple studies have  
9 demonstrated the cradle-to-grave climate change and air pollution impacts of fracked gas. For  
10 example, methane released into the atmosphere during the production and transport of fracked  
11 gas is a far greater contributor to climate change than previously understood.<sup>5</sup> Additionally,  
12 approving Perennial's RFA would contradict Oregon's goals to reduce greenhouse gas  
13 emissions. See Requester Comments at 5.  
14  
15

16 Requesters raised this issue on pages 3–5 of their August 22, 2019, comment letter to the  
17 Council. A contested case is justified because this issue raises significant issues of fact that may  
18 affect the Council's determination as to whether the proposed facility complies with the  
19 applicable laws and rules, and ultimately whether the requested construction extension should be  
20 granted or denied. See OAR 345-027-0371(9) (2019).  
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24 <sup>5</sup> See Steven Mufson, *Methane Leaks Offset Much of the Benefits of Natural Gas, Study Says*, Wash. Post,  
25 June 24, 2018, [https://www.washingtonpost.com/business/economy/methane-leaks-offset-much-of-the-benefits-of-natural-gas-new-study-says/2018/06/21/e381654a-7590-11e8-b4b7-308400242c2e\\_story.html](https://www.washingtonpost.com/business/economy/methane-leaks-offset-much-of-the-benefits-of-natural-gas-new-study-says/2018/06/21/e381654a-7590-11e8-b4b7-308400242c2e_story.html), see also Alvarez, et al., *Assessment of methane emissions from the U.S. oil and gas supply chain*, Science (2018), available at  
26 <https://science.sciencemag.org/content/361/6398/186?rss=1>; Sierra Club, *Fracked Gas: Nothing "Natural" About It* (2018) (reviewing literature and estimating leakage rate of 3 percent), available at  
27 [https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/FACTSHEET\\_FrackedGasClimateImpact](https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/FACTSHEET_FrackedGasClimateImpact.pdf)  
28 [s.pdf](https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/FACTSHEET_FrackedGasClimateImpact.pdf)

1 **F. Responding to Issues, Arguments, and Evidence Raised by Other Parties**

2 Requesters reserve all rights to respond to issues, arguments, and evidence raised by  
3 other parties to the contested case. *See* ORS 183.413(2)(e) (all parties to a contested case have  
4 “the right to respond to all issues properly before the presiding officer and present evidence and  
5 witnesses on those issues”); ORS 183.417(1) (all parties have the right to “respond and present  
6 evidence and argument on all issues properly before the presiding officer in the proceeding”);  
7 *Marbet*, 277 Or at 453, 455 (a party to an EFSC contested case has the right to seek judicial  
8 review on “issues that the agency in fact decided on someone else’s initiative”).  
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**III. CONCLUSION**

For the reasons stated above, Requesters Columbia Riverkeeper, Friends of the Columbia Gorge, and Oregon Wild respectfully request that the Energy Facility Siting Council conduct a contested case proceeding on the Request for Amendment 1 of the Site Certificate for the Perennial Wind Chaser Station, and admit Requesters as parties to the proceeding.

Dated this 1st day of November, 2019.

Respectfully submitted,

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