



1 declaring many of the preconstruction conditions in PWC’s Site Certificate “N/A [not  
2 applicable] for Phase 1” of construction. Because ODOE lacked statutory authority to issue this  
3 Order, ODOE did not have probable cause to issue it, and it is therefore reviewable under ORS  
4 183.480(3).

5 Petitioners have been adversely affected and aggrieved by ODOE’s Final Orders and thus  
6 have standing under ORS 183.480(1) to challenge these Orders. The Orders have directly  
7 harmed Petitioners’ substantial interests, and Petitioners seek to further interests that the  
8 Legislature specifically intended to be considered in decisions made under the Energy Facility  
9 Siting Act. For these reasons, Respondents’ Motions to Dismiss should be denied.

## 10 **II. BACKGROUND**

11 This case is brought under the Oregon Administrative Procedures Act (“APA”), ORS  
12 Chapter 183, and the Oregon Energy Facility Siting Act (“Siting Act”), ORS Chapter 469.  
13 Petitioners allege that ODOE grievously erred when it determined that PWC lawfully began  
14 construction of the Perennial Wind Chaser Station (“Facility”), an unbuilt methane gas-fired  
15 power plant that would be located in Umatilla County adjacent to the existing Hermiston  
16 Generating Station gas-fired power plant. If constructed, the Facility would become one of the  
17 largest stationary sources of greenhouse gases and other air pollutants in the State of Oregon.

18 Pursuant to the Siting Act, ORS 469.370(12), and its implementing regulations, PWC’s  
19 Site Certificate, initially issued by EFSC in 2015, imposed a construction start deadline of  
20 September 23, 2018, the date after which the Site Certificate would be voided if construction did  
21 not lawfully commence. In November 2019, at the request of PWC, EFSC approved an  
22 amendment to the Site Certificate that pushed back the construction start date to September 23,  
23 2020, and the construction completion date to September 23, 2023.<sup>1</sup> Again, if construction did  
24 not lawfully commence by that extended deadline, then the Site Certificate would automatically  
25 expire. *See* OAR 345-027-0313 (“If the certificate holder does not begin construction of the

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26 <sup>1</sup> The First Amended Site Certificate for the Perennial Wind Chaser Station also made numerous administrative  
27 changes to reflect regulatory changes that had occurred since the Site Certificate was initially issued. *See generally*  
Ex. A to Forzley Decl. (Final Order on Request for Amendment 1 to the Site Certificate).

1 facility by the construction beginning date specified in the site certificate or amended site  
2 certificate, the site certificate expires on the construction beginning date specified . . .”).

3 The first two Final Orders at issue in this case involve various determinations by ODOE  
4 that either PWC had met the necessary preconstruction conditions set forth in the First Amended  
5 Site Certificate for the Perennial Wind Chaser Station (“Site Certificate”) or that these  
6 preconstruction conditions were waived or no longer applied. The third Final Order contains  
7 ODOE’s determination that “construction” of the “Facility”—as these terms are defined in the  
8 Siting Act, its implementing regulations, and in the Site Certificate itself—had lawfully  
9 commenced.

10 The three ODOE Orders appealed in this case are as follows:

- 11 • An Order issued and served upon a representative of Riverkeeper—with a copy  
12 served upon PWC—entitled “Response to Letter Dated August 20, 2020” (Sept.  
13 2, 2020) (“First Order”);
- 14 • An Order issued and served upon representatives for PWC and its parent  
15 company, Perennial Power Holdings (“PPH”), entitled “Preconstruction  
16 Compliance Evaluation for Perennial Wind Chaser Station Site Certificate” (Sept.  
17 18, 2020) (“Second Order”); and
- 18 • An Order issued and served upon representatives of PWC and/or PPH entitled  
19 “Commencement of Perennial Wind Chaser Station Phase I Construction.” (Sept.  
20 21, 2020) (“Third Order”).

21 Petitioners timely filed this action on November 2, 2020, within the 60-day period  
22 required by ORS 183.484(2).

### 23 III. ARGUMENT

#### 24 A. All Three Orders are Final Orders Subject to Review Under ORS 183.484.

25 First, it should be noted that neither ODOE, nor PWC, challenges the finality of the Third  
26 Order (issued on September 21, 2020). Contrary to ODOE and PWC’s claims, the First and  
27 Second Orders are also “final orders” subject to review under ORS 183.484.

1 Under Oregon’s Administrative Procedures Act (“APA”), “any person adversely affected  
2 or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a  
3 final order.” ORS 183.480(1). Additionally, pursuant to the APA, an action or suit regarding the  
4 validity of an agency order may be brought “upon showing that the agency is proceeding without  
5 probable cause.” ORS 183.480(3). “Order” is defined as an “agency action expressed orally or in  
6 writing directed to a named person or named persons, other than employees, officers or members  
7 of an agency.” ORS 183.310(6)(a). A “final order” is “final agency action expressed in writing.”  
8 ORS 183.310(6)(b). A “[f]inal order does not include any tentative or preliminary agency  
9 declaration or statement that (A) [p]recedes final agency action; or (B) [d]oes not preclude  
10 further agency consideration of the subject matter of the statement or declaration.” *Id.* For the  
11 reasons set forth below, all three Orders at issue in this case are “final orders” subject to review  
12 under ORS 183.484.

13 **1. The First Order is a Final Order that Addresses a Subject Matter Not Discussed**  
14 **in ODOE’s Subsequent Orders.**

15 The First Order (issued on September 2, 2020) is a final order because it “precludes  
16 further agency consideration of the subject matter” and it “represents the complete statement of  
17 the agency’s decision” on at least one issue that was not addressed in either the Second or Third  
18 Orders. *See* ORS 183.310(6)(b); *see also Teel Irrigation Dist. v. Water Resources Dept.*, 323 Or  
19 663, 677–78, 919 P2d 1172 (1996) (holding that a letter unequivocally stating Teel’s rights with  
20 respect to a specific subject was a final order with respect to that subject). Additionally, the First  
21 Order was served upon not just Riverkeeper but also PWC. Thus, it was a final agency action  
22 expressed in writing and directed to named persons, and therefore constitutes a final order. *See*  
23 ORS 183.310(6)(a), (6)(b).

24 The Oregon Supreme Court has clearly held that an agency order can be final and subject  
25 to judicial review with respect to some issues and not to others. In *Teel*, the Court held that the  
26 agency order at issue in that case was preliminary with respect to some issues but final with  
27 respect to another. 323 Or at 677. Specifically, the Court held that a particular paragraph in an

1 agency order “clearly gave Teel notice that McKay water could not be used under the permits”  
2 and that this statement “does not provide for any further agency consideration of the matter” and  
3 “constituted the department’s final determination as to Teel’s rights to McKay water under the  
4 permits.” *Id.*

5 Similarly, ODOE’s First Order constituted the Department’s final determination  
6 regarding whether PWC had the necessary “construction rights” to start construction despite its  
7 lack of an Air Contaminant Discharge Permit from the Oregon Department of Environmental  
8 Quality (“DEQ”). This issue was not subsequently addressed in either the Second or Third  
9 Orders. As Petitioners discuss below, the Second Order addresses only whether PWC had met  
10 the preconstruction conditions set forth in the Site Certificate, while the Third Order addresses  
11 only whether PWC had met the construction commencement deadline. The First Order, in  
12 contrast, addresses at least one other subject not addressed in either of the later Orders.  
13 Specifically, in the First Order, ODOE expressly determined that PWC may begin construction  
14 despite the fact that it lacked an air permit from DEQ and thus did not have “the legal right to  
15 engage in construction activities” as required by OAR 345-025-0006(5). Despite the plain  
16 language of the regulations, in the First Order, ODOE determined that “DEQ’s Air Contaminant  
17 Discharge Permit is not a ‘construction right’ as defined in OAR 345-025-0006(5) because it is  
18 not a ‘legal right to engage in construction activities;’ rather, it is a permit used to regulate  
19 sources of air contaminant emissions.” Ex. C to Forzley Decl. at 3.

20 Like the order at issue in *Teel*, ODOE’s statement in the First Order regarding the DEQ  
21 air permit did “not provide for any further agency consideration of the matter,” and neither was it  
22 tentative or preliminary. *Teel*, 323 Or at 677. The First Order was ODOE’s final decision as to  
23 whether and how OAR 345-025-0006(5) applies to this Facility. There is no question that this  
24 was ODOE’s determination on a key issue, and the issue was not addressed in any subsequent  
25 order. Furthermore, ODOE served copies of the First Order on both Riverkeeper and PWC. Ex.  
26 C to Forzley Decl. at 5. Thus, PWC was entitled to rely on the determinations ODOE made in  
27 the Order, and the agency was precluded from further consideration of the subject matter.

1 Even if the Court were to find that the First Order is not a final order, the Court may still  
2 consider the Order in the context of its review of the Second and Third Orders. The Oregon  
3 Supreme Court has held that on review of a final order, a court may “consider a claim that,  
4 during its consideration of the matter, the agency issued an erroneous nonfinal order that  
5 warrants relief under [ORS 183.484(5)].”<sup>2</sup> *Oregon Health Care Ass’n v. Health Division*, 329 Or  
6 480, 492, 992 P2d 434 (1999). Thus, even if the First Order were not a final order, it sets forth  
7 much of the findings of fact, conclusions of law and reasoning that led to the Second and Third  
8 Orders, and is therefore ripe for review.

9 **2. The Second Order is a Final Order that Addresses a Different Subject Matter**  
10 **from the Third Order.**

11 ODOE’s Second and Third Orders are both final orders that address two separate, distinct  
12 subject matters. The Second Order addresses whether PWC had met the preconstruction  
13 conditions set forth in the Site Certificate and thus, whether it could commence “construction” of  
14 the “Facility,” while the Third Order addresses whether PWC had, in fact, commenced  
15 “construction”<sup>3</sup> of the “Facility,”<sup>4</sup> as these terms are defined in the Energy Facility Siting Act.<sup>5</sup>

16 First, the Second Order is not, as Respondents claim, a preliminary determination  
17 addressing whether PWC had started construction. Rather, it was ODOE’s *final* determination as

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19 <sup>2</sup>The *Oregon Health Care* decision cites ORS 183.484(4). That statutory provision was subsequently  
20 renumbered to ORS 183.484(5) between the time the case was argued and when the decision was filed. The current  
21 subsection (4) does not fit with the context of the Court’s decision, but subsection (5) does. For this reason,  
22 Petitioners suspect the Court had not been made aware of the renumbering.

23 <sup>3</sup> “Construction” is defined in the Siting Act as “work performed on a site, excluding surveying, exploration or  
24 other activities to define or characterize the site, the cost of which exceeds \$250,000.” ORS 469.300(6); *see also*  
25 OAR 345-001-0010(12) (same). Thus, before the \$250,000 threshold has been met, all activities on the site are  
26 characterized merely as “work.” *See also* Ex. B. to Forzley Decl. at 14 (requiring the certificate holder to notify  
27 ODOE before “conducting any work on the site” and to provide evidence “that its value is less than \$250,000 or  
evidence that the applicant has satisfied all conditions that are required prior to beginning construction”).

<sup>4</sup> “Facility” is defined in the Siting Act as “an energy facility together with any related or supporting facilities.”  
ORS 469.300(14); *see also* OAR 345-001-0010(21) (same).

<sup>5</sup> Not only are these terms defined by the statute and regulations, the Site Certificate itself also mandates that  
“[t]he definitions in ORS 469.300 and OAR 345-001-0010 apply to the terms used in this site certificate, except  
where otherwise stated, or where the context clearly indicates otherwise.” Ex. B to Forzley Decl. at 6.

1 to whether PWC had met numerous preconstruction conditions set forth in the Site Certificate.  
2 Under the terms and conditions of the Site Certificate itself, as well as the applicable law, only  
3 once PWC had met all preconstruction conditions set forth in the Site Certificate could it  
4 lawfully commence construction of the Facility. The Second Order was ODOE's final  
5 determination on exactly this topic with respect to numerous conditions of the Site Certificate.

6 The Second Order also sets forth ODOE's final determination that some of the  
7 preconstruction conditions were allegedly "N/A [not applicable]" to a newly concocted "Phase  
8 1" of construction. The Site Certificate, however, does not allow for phased construction. The  
9 Second Order sets forth ODOE's final (unlawful) determination that PWC could complete  
10 construction in "phases" and therefore would not have to meet many of the preconstruction  
11 conditions set forth in the Site Certificate because ODOE had determined them to be "not  
12 applicable" to PWC's construction of an access road and bridge (which ODOE characterized as  
13 "Phase 1" of construction). In its Second Order, ODOE purports to make these de facto  
14 amendments to the Site Certificate, despite lacking any legal authority to do so. The Second  
15 Order is ODOE's *final* determination regarding which preconstruction conditions PWC must  
16 allegedly comply with prior to starting "construction" of the Facility, *and also* whether, in  
17 ODOE's determination, those preconstruction conditions had been met.

18 Contrary to ODOE's argument, the Second Order does not contemplate further  
19 consideration of whether the preconstruction conditions had been met, nor whether phased  
20 construction would be permitted. In fact, once ODOE communicated to PWC its conclusions  
21 regarding phased construction and the applicability of certain preconstruction conditions, ODOE  
22 was precluded from any further consideration of the matter, because the Order was, in effect,  
23 ODOE's permission for PWC to start construction.

24 Condition PRE-GS-01 of the Site Certificate requires that:

25 "[a]t least 90 days prior to beginning construction . . . the certificate holder shall  
26 submit to the Department a compliance plan documenting and demonstrating  
27 actions completed or to be completed to satisfy the requirements of all terms and  
conditions of the amended site certificate and applicable statutes and rules. The plan

1 shall be provided to the Department for review and *compliance determination for*  
2 *each requirement.*”

3 Ex. B to Forzley Decl. at 13 (emphasis added). The Second Order purports to be ODOE’s  
4 compliance determination for numerous preconstruction requirements; ODOE’s argument to the  
5 contrary that the Second Order was issued merely “as a courtesy” and “was a preliminary  
6 communication lacking any ultimate decision” is simply not accurate. ODOE Motion at 9.  
7 Condition PRE-GS-01 expressly requires ODOE to make a “compliance determination for each  
8 requirement.” The Second Order represents ODOE’s final determination regarding PWC’s  
9 compliance with numerous preconstruction conditions that the agency determined to be “[not  
10 applicable] for Phase 1” of construction.

11 There is absolutely nothing in the Second Order to suggest that ODOE could or would  
12 revisit the agency’s determinations set forth therein at a later date. Moreover, contrary to  
13 ODOE’s arguments on appeal, the Second Order does *not* address whether “construction”—as  
14 that term is defined in the Siting Act and its implementing authorities—had begun. Rather, it  
15 constitutes ODOE’s final determination as to whether PWC had fulfilled the preconstruction  
16 conditions that ODOE determined were applicable to “Phase 1” of construction. That question is  
17 a completely separate inquiry from whether PWC *later* lawfully commenced “construction” of  
18 the Facility.

19 In contrast, the Third Order—which neither Respondent disputes is a final order—  
20 represents ODOE’s determination that “construction” had lawfully begun. Contrary to ODOE’s  
21 arguments, the Third Order covers a completely different topic from the Second Order. Under  
22 the Siting Act, “construction” means “work performed on the site . . . the cost of which exceeds  
23 \$250,000.” ORS 369.300(6); *see also* OAR 345-001-0010(12) (same). The Third Order  
24 represents ODOE’s determination that the \$250,000 monetary threshold had been met and that  
25 PWC had fulfilled Condition GEN-GS-02 of the First Amended Site Certificate, which required  
26 PWC to begin construction by September 23, 2020, or else the Site Certificate would be void and  
27 terminated. *See* Ex. B of Forzley Decl. at 9; *see also* OAR 345-027-0313.

Again, the question in the Third Order of whether construction had lawfully commenced

1 is a completely separate topic from the focus of the Second Order, which addressed *only* whether  
2 certain preconstruction conditions had been complied with. Because the two Orders address  
3 completely separate topics, the Second Order cannot be considered preliminary to the Third  
4 Order.

5 **3. The Second Order is Reviewable Even if the Court Finds it was Not a Final**  
6 **Order, because ODOE Lacked Probable Cause to Issue that Order.**

7 As outlined above, the Second Order was in fact a final order. However, even if the Court  
8 finds that the Second Order was not final, this Court still has jurisdiction to review it because  
9 ODOE did not have probable cause to issue it.

10 Pursuant to the APA:

11 “No action or suit shall be maintained as to the validity of any agency order except  
12 a final order as provided in this section . . . or *except* upon showing that the agency  
13 is proceeding without probable cause.”

14 ORS 183.480(3) (emphasis added). The APA does not define “proceeding without probable  
15 cause,” but the Court of Appeals has defined it as proceeding “without a reasonable basis for the  
16 action or inaction.” *Mongelli v. Or. Life & Health Guaranty Ass’n*, 85 Or App 518, 524, 737 P2d  
17 633 (1987). Here, ODOE proceeded without probable cause because it acted outside the  
18 authority granted to it by law.

19 Specifically, the terms of the Site Certificate are clear that it is “a binding agreement  
20 between the State of Oregon . . . acting through the Energy Facility Siting Council . . . and  
21 Perennial-WindChaser, LLC.” Ex. B to Forzley Decl. at 5. Pursuant to ORS 469.402, EFSC may  
22 delegate certain review and approval tasks to ODOE. However, any such delegation to ODOE  
23 must be expressly made by EFSC, and ODOE’s authority would be limited to the scope of the  
24 delegation. Otherwise, ODOE’s functions are limited to that of providing “clerical and staff  
25 support to the [C]ouncil.” ORS 469.450(6).

26 In the instant case, EFSC granted ODOE the authority to review and make a “compliance  
27 determination” for each of the preconstruction conditions set forth in the Site Certificate, prior to

1 the commencement of construction. *See* Ex. B to Forzley Decl. at 13. Here, ODOE exceeded that  
2 authority by instead *waiving* numerous preconstruction conditions, which ODOE couched as  
3 findings that these conditions were “not applicable” to the newly concocted “Phase 1” of  
4 construction and/or were instead applicable only to the construction of the remainder of the  
5 Facility—despite the fact that the Site Certificate itself expressly requires that *all* of these  
6 conditions must be met before “construction” of the “Facility” (*i.e., any portion* of the Facility).  
7 *See* Ex. D to Forzley Decl. at 3–8.

8 In effect, ODOE determined in the Second Order that numerous terms and conditions of  
9 the Site Certificate that, by their own express language, applied to construction of the entire  
10 “Facility,” now applied only to construction of certain “related or supporting facilities” (*i.e., the*  
11 *access road and bridge*). Both of these terms, “facility” and “related or supporting facilities,”<sup>6</sup>  
12 are distinct, statutorily defined terms. Where one of these terms is used in a site certificate, the  
13 statutory definition of that term controls. Here, however, ODOE entirely disregarded the  
14 statutory definitions and unilaterally decided that the term “facility,” as that term is used in  
15 numerous preconstruction conditions of the Perennial Site Certificate, now means only an access  
16 road and a bridge for certain conditions, and yet means the remainder of the Facility for other  
17 conditions. ODOE’s determinations in its Second Order were in blatant violation of the Siting  
18 Act, its implementing regulations, and EFSC’s prior orders regarding this Facility.

19 Moreover, ODOE’s unilateral, purported waiver of numerous preconstruction conditions,  
20 and its conclusions that numerous conditions that had previously applied to construction of the  
21 Facility as a whole now no longer applied to certain components of the Facility, were all *de facto*  
22 amendments to the Site Certificate. Only EFSC, not ODOE, has the authority to make such  
23 amendments. *See* ORS 469.405(1) (“A site certificate may be amended with the approval of the  
24 Energy Facility Siting Council.”).

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25 <sup>6</sup> “Related or supporting facilities” is statutorily defined as “any structure, proposed by the applicant, to be  
26 constructed or substantially modified in connection with the construction of an energy facility, including associated  
27 transmission lines, reservoirs, storage facilities, intake structures, *road* and rail *access*, pipelines, barge basins, office  
or public buildings, and commercial and industrial structures.” ORS 469.300(24) (emphases added). In addition, the  
term “facility” includes all “related or supporting facilities.” ORS 469.300(14).

1 The EFSC-issued Site Certificate sets forth a series of requirements that must be met  
2 “prior to beginning construction” or “before beginning construction” of the Facility. *See* Ex. B to  
3 Forzley Decl. at 13–22. The Site Certificate does not carve out certain preconstruction conditions  
4 as only being applicable to certain “phases” of construction or to certain portions of the Facility.  
5 By the plain terms of the Site Certificate, *all* of the preconstruction conditions must be met  
6 before PWC could lawfully commence “construction” of the Facility.

7 By declaring that certain preconstruction conditions are “[not applicable] for Phase 1,”  
8 ODOE effectively amended the terms and conditions of the Site Certificate. Ex. D to Forzley  
9 Decl. at 3–8. Yet, as noted above, that is an action and authority that the Legislature reserved  
10 solely for EFSC. *See* ORS 469.405(1) (“A site certificate may be amended with the approval of  
11 the Energy Facility Siting Council.”); *see also* OAR 345-027-0350 (stating that an amendment to  
12 a site certificate is required in order to “[d]esign, construct, or operate a facility in a manner  
13 different from the description in the site certificate, if the proposed change . . . [c]ould require a  
14 new condition *or a change to a condition* in the site certificate.”) (emphasis added). Here, EFSC  
15 never delegated to ODOE the authority to amend this Site Certificate. Nor *could* EFSC do so,  
16 even if it wanted to, in light of the statute. Because ODOE acted outside the authority granted to  
17 it by law, ODOE acted without probable cause when it issued the Second Order, in pertinent part  
18 declaring that “Perennial has provided sufficient information to satisfy all preconstruction  
19 condition requirements *applicable to Phase 1.*” Ex. D to Forzley Decl. a 1 (emphasis added). The  
20 Second Order is reviewable by this Court pursuant to ORS 183.480(3).

21 **B. Petitioners Have Standing Because They Have Suffered Injuries to Substantial**  
22 **Interests and Seek to Further Interests that the Legislature Expressly Wished to**  
23 **Consider.**

24 Contrary to ODOE and PWC’s assertions, Petitioners have each been adversely affected  
25 and aggrieved by ODOE’s Final Orders. As a result, Petitioners have standing to bring this  
26 action.

27 Under the APA, “any person adversely affected or aggrieved by an order or any party to  
an agency proceeding is entitled to judicial review of a final order.” ORS 183.480(1). Although

1 the APA does not define “adversely affected” or “aggrieved,” the Oregon Supreme Court has  
2 clarified that a person must demonstrate one of the following: “(1) the person has suffered an  
3 injury to a substantial interest resulting directly from the challenged governmental action . . . , (2)  
4 the person seeks to further an interest that the legislature expressly wished to have  
5 considered . . . , or (3) the person has such a personal stake in the outcome of the controversy as  
6 to assume concrete adverseness to the proceeding.” *McNichols v. Dept. of Fish & Wildlife*, 308  
7 Or App 369, 372 (2021) (quoting *People for the Ethical Treatment of Animals v. Instit. Animal*  
8 *Care & Use Committee*, 312 Or 95, 101–02, 817 P2d 1299 (1991)). In the present case,  
9 Petitioners have both suffered injuries to substantial interests and are seeking to further interests  
10 that the Legislature expressly wished to have considered.

11 **1. Petitioners have suffered injuries to substantial interests resulting directly from**  
12 **ODOE’s Final Orders.**

13 ODOE’s Final Orders resulted in direct, substantial injuries to Petitioners’ interests,  
14 including the preclusion of Petitioners’ ability to participate in the proper public processes  
15 required by law before EFSC for a site certificate amendment; a loss of return on Petitioners’  
16 organizational resource investments to try to protect the Columbia River watershed and  
17 Columbia Gorge airshed from the impacts of air pollution and climate change; harm to  
18 Petitioners’ organizational missions; and reduction in recreational opportunities and enjoyment  
19 because of decreased air quality and the impacts of climate change. Each and all of those impacts  
20 on Petitioners’ interests is very real and substantial.

21 **a. ODOE’s Final Orders precluded Petitioners from participating in the**  
22 **public processes provided by the regulations for site certificate**  
23 **amendments.**

24 The energy siting regulations are very clear that to extend the construction beginning or  
25 completion deadlines set forth in a site certificate, or to “design, construct, or operate a facility in  
26 a manner different from the description in the site certificate,” a certificate holder must apply to  
27 EFSC for a site certificate amendment. *See* OAR 345-027-0350(3), (4). Here, ODOE’s ultra  
vires actions effectively waived numerous preconstruction conditions, thereby allowing PWC to

1 avoid applying for a certificate amendment to seek such waivers from the Council. Moreover,  
2 PWC told the Council at its May 22, 2020, meeting that PWC fully intended to apply for a  
3 certificate amendment to extend the construction start deadline because PWC would be unable to  
4 meet several of the preconstruction conditions due to COVID-19 related delays. *See* Petition for  
5 Judicial Review at ¶ 18. However, subsequent to making these representations, PWC instead  
6 (apparently with encouragement from ODOE staff) pursued an artificially created “phased”  
7 approach to construction involving just a small portion of the Facility—an access road and  
8 bridge—in an unlawful attempt to start construction before the construction commencement  
9 deadline and thereby keep the Site Certificate from expiring. In order to approve of this new  
10 approach to “construction,” however, ODOE had to waive many of the preconstruction  
11 conditions set forth in the Site Certificate by declaring them “[not applicable] for Phase 1” of  
12 construction. That is exactly what ODOE did in the Second Order. And in the Third Order,  
13 ODOE subsequently declared that construction had lawfully begun.

14 As a result of ODOE’s unlawful actions in all three Orders, PWC was effectively  
15 exempted from the required procedures, public processes, and extensive Council review of the  
16 entire Facility that would have come with a request for a second extension of the construction  
17 start deadline. In effect, ODOE not only gave PWC the functional equivalent of an extension of  
18 the construction start deadline, but also allowed PWC to construct the Facility in a manner  
19 different from that described in the Site Certificate, without having to go through any of the  
20 Council-led review and public scrutiny that was legally required. Petitioners were prevented  
21 from participating in these legally required public processes, and therefore were directly harmed  
22 by ODOE’s unlawful actions. *See* Declaration of Lauren Goldberg in Support of Petitioners’  
23 Opposition to Motions to Dismiss (“Goldberg Decl.”) at ¶¶ 11–13; Declaration of Michael Lang  
24 in Support of Petitioners’ Opposition to Motions to Dismiss (“Lang Decl.”) at ¶¶ 17–18, 20, 22.

25 **b. ODOE’s Final Orders prevented the Council from considering changes in**  
26 **facts and law related to PWC’s impact on climate change and air quality**  
27 **throughout the region.**

When considering a request for a site certificate amendment to extend a construction

1 commencement deadline, EFSC is required to evaluate the entire facility anew, just as it would  
2 for an original site certificate application, including a review of “any changes in facts or law  
3 since the date the current site certificate was executed.” *See* OAR 345-027-0375(2)(b). ODOE’s  
4 ultra vires actions here effectively exempted PWC from having to seek such an amendment, and  
5 thereby prevented Petitioners from alerting the Council to the evolving scientific understanding  
6 of the climate change and air quality impacts of fracked-gas infrastructure such as this Facility,  
7 as well as the state’s revised goals for reducing greenhouse gas emissions. In addition, ODOE’s  
8 Final Orders facilitated PWC’s avoidance of the recently strengthened monetary offset rate for  
9 carbon emissions, which is imposed by law on new methane gas power plants like the Facility as  
10 partial mitigation for their role in exacerbating climate change. Had PWC followed the law here  
11 and applied for an amendment to the Site Certificate to extend the construction start deadline,  
12 EFSC would have been required to revise the Site Certificate to impose the recently increased  
13 monetary offset rate. By Petitioners’ calculations, this alone resulted in an estimated \$11 million  
14 savings for PWC.<sup>7</sup> That is \$11 million less that will be invested in projects to mitigate the  
15 considerable greenhouse gas emissions that would be caused by this Facility. In these and other  
16 ways, ODOE’s unlawful actions harm the organizational missions and goals that Petitioners have  
17 invested a substantial amount of their scarce resources, time and effort attempting to achieve. *See*  
18 Goldberg Decl. at ¶¶ 11–13; Lang Decl. at ¶¶ 17–22.

19         Petitioners are stunned that ODOE is now attempting to characterize Petitioners’ interests  
20 in avoiding, reducing, and/or mitigating climate change and its impacts as a “political choice.”  
21 ODOE Motion at 11. Climate change is a reality, not a political choice. Early last year, Governor  
22 Brown issued Executive Order 20-04, which recognizes that “climate change and ocean  
23 acidification caused by greenhouse gas (GHG) emissions are having significant detrimental  
24 effects on public health and on Oregon’s economic vitality, natural resources, and environment.”

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25         <sup>7</sup> In its Motion, PWC asserts that Petitioners cannot be harmed by PWC’s avoidance of the strengthened  
26 monetary offset rate because the recipient of that money would be The Climate Trust, not Petitioners. PWC Motion  
27 at 12. This argument completely ignores the fact that the mitigation projects that The Climate Trust invests in are for  
the benefit of the public—including *Petitioners*—not for The Climate Trust personally. The more money that energy  
facilities are required to pay into the Trust, the more mitigation of carbon emissions occurs.

1 Ex. 1 to Fahey Decl. (“EO 20-04”). The Executive Order goes on to note that “the world’s  
2 leading climate scientists, including those in the Oregon Climate Research Institute, predict that  
3 these serious impacts of climate change will worsen if prompt action is not taken to curb  
4 emissions” and that “GHG emissions present a significant threat to Oregon’s public health,  
5 economy, safety, and environment.” Ex. 1 to Fahey Decl. at 1. The Executive Order also directs  
6 state agencies, including ODOE, to “exercise any and all authority and discretion vested in them  
7 by law to help facilitate Oregon’s achievement of the GHG emissions reduction goals.” *Id.* at 5.  
8 Now, despite the direction provided by EO 20-04, which is based on scientific facts and issued  
9 by the head of Oregon’s executive branch, of which ODOE is a part, ODOE argues to this Court  
10 that combating the threats posed by climate change is merely a “political choice.”

11 Contrary to ODOE’s assertions, climate change is not at all analogous to the interests at  
12 issue in *PETA*. There, the petitioner’s alleged injuries were to general organizational concerns  
13 stemming from injuries to animals that the petitioner sought to protect. *See* 312 Or at 102. Here,  
14 in contrast, climate change directly affects every single person living in the State of Oregon as  
15 well as every organization incorporated in and doing business in the state, including Petitioners  
16 and Petitioners’ members. There is nothing “speculative” about these impacts. As Governor  
17 Brown correctly pointed out in her Executive Order, “climate change . . . caused by greenhouse  
18 gas emissions . . . [is] having significant detrimental effects on public health and on Oregon’s  
19 economic vitality, natural resources, and environment.” Ex. 1 to Fahey Decl. at 1 (emphasis  
20 added). ODOE’s orders unlawfully authorized PWC to begin constructing a new fossil fuel  
21 power plant that would become one of the largest contributors to climate change in the state.<sup>8</sup>

22 Respondents also attempt to significantly downplay the other air quality impacts to the  
23 Columbia Gorge region that will result if PWC is allowed to unlawfully complete construction of

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25 <sup>8</sup> In its 2013 application to Oregon DEQ for a Prevention of Significant Deterioration Permit / Air Contaminant  
26 Discharge Permit, PWC estimated its total greenhouse gas emissions would be 1,058,349 tons per year. *See* PWC’s  
27 Complete Site Certificate Application, Exhibits A-G at 129, available at <https://bit.ly/2OmzpAj>. Based on 2019 data  
compiled by Oregon DEQ, PWC would be the sixth largest stationary greenhouse gas emitter in the state. *See* 2019-  
Greenhouse Gas Emissions from Facilities Holding Air Quality Permits, <https://www.oregon.gov/deq/aq/programs/Pages/GHG-Emissions.aspx>.

1 the Facility and begin operating. Petitioners have spent a great deal of time and money protecting  
2 the Columbia River Gorge, the Columbia River, and their special and unique resources such as  
3 their airshed and watershed. *See* Goldberg Decl. at ¶¶ 5–8; Lang Decl. at ¶¶ 9–16. Petitioners  
4 will be substantially injured as a result of ODOE’s unlawful Orders, which directly threaten  
5 these resources and Petitioners’ interests in protecting them. *See* Goldberg Decl. at ¶¶ 11–13;  
6 Lang Decl. at ¶¶ 16–22.

7 PWC argues that Petitioners’ interests in protecting the recreational opportunities that  
8 will be harmed by this Facility are “preposterous on its face” because the Facility would be  
9 constructed in a heavily industrialized area. *See* PWC Motion at 14. This argument completely  
10 ignores the fact that Petitioners’ primary concern with this Facility is the massive amounts of air  
11 pollution it would generate. As the Court will undoubtedly recognize, the Facility’s air pollution  
12 will not remain within the boundaries of the specific site where the Facility would be built, nor  
13 even in the immediate vicinity, but rather will be felt throughout the Columbia Gorge region.

14 Furthermore, PWC’s arguments that Petitioners’ injuries are the result of the Facility—  
15 and not the challenged ODOE Orders—and that “the three Department letters *did not* authorize  
16 construction” of the Facility are factually inaccurate and ignore the legal effects of each of the  
17 challenged Orders. PWC Motion at 13 (emphasis in original). As Petitioners explained above,  
18 pursuant to Condition PRE-GS-01 in PWC’s Site Certificate, ODOE was legally required to  
19 review PWC’s compliance plan and to provide a compliance determination for each of the  
20 conditions in the Site Certificate. Without such a compliance plan, PWC *would not have been*  
21 *authorized* to start construction. Thus, contrary to PWC’s assertion, ODOE’s Second Order—  
22 which declared that PWC “has provided sufficient information to satisfy all preconstruction  
23 condition requirements applicable to Phase 1”—purports to be such a compliance plan as well as  
24 ODOE’s authorization for PWC to begin construction of the Facility.

25 ODOE’s three Orders, which unlawfully waived numerous pre-construction conditions,  
26 unlawfully altered the construction schedule for the Facility, effectively (and unlawfully)  
27 amended the Site Certificate, unlawfully authorized construction of the Facility, and erroneously

1 declared that construction of the Facility had lawfully commenced, all have directly harmed  
2 Petitioners and their interests. *See* Goldberg Decl. at ¶¶ 11–13; Lang Decl. at ¶¶ 16–22. Had  
3 ODOE not issued these Orders, then the Site Certificate would have been voided and terminated  
4 when PWC failed to start construction on September 23, 2020, and the project either would have  
5 disappeared entirely or PWC would have needed to file a new application for a new site  
6 certificate—a process that would have afforded Petitioners an opportunity to provide written and  
7 oral testimony to EFSC directly and to participate in a contested case proceeding.

8       Additionally, had PWC’s Site Certificate expired, necessitating a new application for a  
9 new site certificate, that new site certificate would have applied any and all newly adopted  
10 substantive laws and regulations, including the current carbon mitigation monetary offset rate.  
11 By allowing PWC to avoid public scrutiny and bypass full Council review under the procedures  
12 mandated by law, ODOE has caused injury to Petitioners’ substantial interests.

13       **2. Petitioners seek to further interests that the Legislature expressly wished to have**  
14       **considered.**

15       Another reason that Petitioners have standing to bring this case is because they seek to  
16 further interests that the Legislature expressly wished to have considered. *See McNichols*, 308 Or  
17 App at 372. By issuing the three Orders challenged in this case, ODOE completely disregarded  
18 not only the narrow powers and authorities afforded to it, but also the policies set forth by the  
19 Legislature. Specifically, in enacting the Siting Act, the Legislature stated that “it is the declared  
20 public policy of this state that the siting, construction and operation of energy facilities shall be  
21 accomplished in a manner consistent with protection of the public health and safety and in  
22 compliance with the energy policy and air, water, solid waste, land use and other environmental  
23 protection policies of this state.” ORS 469.310.

24       As the Oregon Supreme Court held in a seminal case involving a large energy facility  
25 proposed under the Siting Act, “[w]hatever may be the reach of ‘person . . . aggrieved’ in  
26 different settings, it surely includes one whom the agency itself, pursuant to statutory directive,  
27 has recognized to present an interest that the legislature wished to have considered.” *Marbet v.*

1 *Portland Gen. Electric*, 277 Or 447, 457–58, 561 P2d 154 (1977). As organizations whose goals  
2 are to protect and advocate for the “. . . air, water . . . and other environmental protection policies  
3 of this state. . .” the Legislature intended for Petitioners’ voices to be heard and represented in  
4 disputes over the construction of energy facilities throughout the State of Oregon. ORS 469.310.

5 Furthermore, the Orders that Petitioners challenge here are directly related to an issue that  
6 the Legislature specifically sought to avoid. The Siting Act’s requirement that site certificates  
7 must include construction commencement deadlines was added by the Legislature in 1993. *See*  
8 ORS 469.370(12) (“The council shall specify in the site certificate a date by which construction  
9 of the facility must begin.”). The legislative history for that statutory amendment indicates that  
10 the specific purpose of requiring construction commencement deadlines was to avoid “lengthy  
11 site banking.” *See* Ex. 2 to Fahey Decl. at 5; *see also* Lang Decl. at ¶ 16. “Site banking” is a term  
12 used in the Siting Act’s legislative history to describe a process whereby energy developers  
13 attempt to keep their site certificates and other permits alive, with no present intention to actually  
14 build the facilities. And “site banking” is exactly what ODOE facilitated here when it unlawfully  
15 gave PWC a de facto extension of the Site Certificate’s expiration date. Petitioners were injured  
16 by ODOE’s actions taken in violation of the Legislature’s expressly stated intent. *See* Lang Decl.  
17 at ¶¶ 16, 19.

18 Petitioners have shown numerous, individualized injuries resulting from ODOE’s Orders.  
19 But even if the Court finds those injuries insufficient, the Oregon Supreme Court has held that  
20 citizens, such as Petitioners, who represent the public interest have a right to challenge  
21 government actions made under the Siting Act. As the Oregon Supreme Court has noted:

22 “. . . this court [has] implicitly recognized that the Oregon Constitution does not  
23 limit the legislature’s power to deputize its citizens to challenge government action  
24 in the public interest. In fact, in *Marbet*, this court held the case to be justiciable  
25 even though its decision would have a practical effect only on the respondent, PGE,  
26 and not on the petitioner, *Marbet*, who had invoked the judicial power in the first  
place.”

27 *Kellas v. Dept. of Corr.*, 341 Or 471, 482, 145 P3d 139 (2006) (citing *Marbet*). The instant case

1 challenges agency actions stemming from the Siting Act—the very same statute at issue in  
2 *Marbet* and the very same statute that the Supreme Court held expresses a legislative intent to  
3 “deputize” citizens to challenge government actions in the public interest. *Id.*

4 Finally, the Oregon Supreme Court has also expressly recognized that in situations where  
5 the Siting Act is being implemented to create new standards (such as the overarching issue  
6 involved in this case—whether a site certificate may be retroactively rewritten by ODOE to  
7 allow “phased” construction of a facility), the Legislature has chosen to require “procedures for  
8 public participation” and has “deman[ded]” that these procedures must be “open to the assertion  
9 of viewpoints beyond those of the applicant and the agency staff.” *Marbet*, 277 Or at 463. Here,  
10 by litigating this case and ensuring that PWC meets its obligations to file a new application for a  
11 new site certificate in the event that it wishes to build the expired Facility, Petitioners will  
12 ultimately ensure that their viewpoints and the viewpoints of others will be heard in a contested  
13 case proceeding, just as the Legislature has required. *See* ORS 469.370(5) (requiring contested  
14 cases for all applications for site certificates). Petitioners seek to further the public participation  
15 interests that the Legislature expressly wished to have considered, and thus have standing to  
16 bring this case. *See McNichols*, 308 Or App at 372.

#### 19 IV. CONCLUSION

20 For all the reasons stated above, the Orders challenged by Petitioners are final orders and  
21 are subject to review under ORS 183.484, and Petitioners have standing to pursue this case.  
22 Consequently, this Court should deny both ODOE and PWC’s Motions.

23 Dated this 12th day March, 2021.

24 CRAG LAW CENTER

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**CERTIFICATE OF SERVICE**

I certify that on March 12, 2021, I served the foregoing RESPONSE TO MOTIONS TO DISMISS upon the following parties by email delivery and through the electronic filing system:

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