

Verified Correct Copy of Original 10/25/2021.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

COLUMBIA RIVERKEEPER, and
FRIENDS OF THE COLUMBIA GORGE,

 Petitioners,

 v.

OREGON DEPARTMENT OF ENERGY,
and PERENNIAL WIND CHASER, LLC,

 Respondents.

Case No: 20CV38607

OPINION REGARDING
RESPONDENTS' MOTION TO
DISMISS

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The parties appeared via videoconference on June 4, 2021, on Respondents' Motions to Dismiss. Erin Saylor, Karl Anuta and Maura Fahey appeared for Petitioners. Richard Allan appeared for Perennial Wind Chaser ("PWC") and Sadie Forzley and Abigail Fallon appeared for the Oregon Department of Energy ("ODOE"). The Court invited the parties to submit supplemental briefing on Petitioners' argument that this Court has jurisdiction to review non-final orders under ORS 469.563 if the agency is proceeding without probable cause. See ORS 183.480(3). ODOE submitted its supplemental brief on June 18, 2021. Petitioners filed their brief on June 25, 2021. Respondents' motions to dismiss are based on two main contentions. First, Respondents assert that letters authored by ODOE on September 2, 2020 and September 18, 2020 were not final orders and thus not subject to judicial review. Second, Respondents assert that Petitioners lack standing to bring this action. After considering the submissions and arguments of the parties, the Court grants the motions to dismiss as to the September 2, 2020 letter from the ODOE to Petitioner Columbia Riverkeeper but otherwise denies Respondents' motions to dismiss.

Subject matter jurisdiction arguments

Procedural history

The PWC facility's original site certificate was effective September 23, 2015. Forzley Decl., Ex.A. The original site certificate required that construction on the facility begin within three years of the effective date of the site certificate, September 23, 2018. *Id.* When Respondents realized that beginning construction by September 23, 2018 would not be possible, Respondents applied to the Oregon Energy Facility Siting Council ("EFSC") for a two-year extension on the construction deadline. *Id.* In the summer of 2019, Petitioners provided written comments to EFSC during the public hearing phase of its decision to extend the construction deadline. Goldberg Decl. ¶ 9. In November 2019, Petitioners requested EFSC hold a contested case hearing on its proposed order to extend the deadline, EFSC denied this request. *Id.* at ¶ 10. On November 22, 2019, EFSC issued an amended site certificate which extended the construction deadline to September 23, 2020.

Petitioners seek judicial review of what they assert are three final Orders purportedly issued by ODOE on September 2, 2020, September 18, 2020 and September 21, 2020. Respondents move to dismiss review of the September 2nd and September 18th letters asserting that the Court lacks subject matter jurisdiction because these two letters are not final orders as defined in ORS 183.310(6)(b). Preliminary or tentative agency declarations or statements are not final if they either precede final agency action or do not preclude further agency consideration of the subject matter of the declaration or statement. As the Court explained in *Grobovsky, M.D. v. Board of Medical Examiners*, 213 Or App 136, 143 (2007), "a final order expresses final agency action and is in writing. A final order is neither tentative nor preliminary but is a complete statement of the agency's decision on the matter before it."

September 2, 2020 letter

Petitioner wrote ODOE on August 20, 2020, alleging that PWC failed to meet some of the site certificate's preconstruction conditions arguing primarily that:

- 1) Building a \$250,000.00 access road does not count as beginning construction with respect to the construction deadline provisions of the site certificate, and
- 2) PWC failed to obtain every permit and approval necessary to build every aspect of the facility before starting construction on any part of the site. Petitioner argued that since Perennial did not have an air emissions permit from the Oregon Department of Environmental Quality (DEQ), it did not have construction rights on all parts of the site and thus could not begin construction per OAR 345-025-0006(5).

On September 2, 2020, ODOE sent a response letter to Petitioner Columbia Riverkeeper and courtesy copied PWC. Forzley Decl., Ex. C. The letter outlined ODOE's interpretation of applicable administrative rules and ORS 469.300. The response included a statement that "if a certificate holder demonstrates to the Department that the cost of the work performed to construct part of a facility exceeds \$250,000, the construction commencement condition would be satisfied." ODOE explained that, "it is not necessary to meet all pre-construction requirements before beginning work on any part of a facility, such as the road and bridge Perennial will construct. Rather it is only necessary to meet the pre-construction requirements applicable to the part of the facility to be constructed." (emphasis in original).

Furthermore, ODOE explained that PWC is not required to acquire an Air Contaminant Discharge permit before commencement of construction, "DEQ's Air Contaminant Discharge Permit is not a 'construction right' as defined in OAE 345-025-0006(5) because it is not a 'legal

right to engage in construction activities,' rather it is a permit used to regulate sources of air contaminant emissions.”

September 18, 2020 letter

On September 18, 2020, ODOE sent a letter to Perennial Power Holdings, Inc., regarding ODOE’s “Preconstruction Compliance Evaluation for Perennial Wind Chaser Station Site Certificate.” The letter confirmed that ODOE had received Perennial’s summary of how it had purportedly met the preconstruction site certificate conditions applicable to Phase 1 of the project and contained the following statement, “Based upon the Department’s review of this summary and the attachments referenced in that summary, the Department confirms that Perennial has provided sufficient information to satisfy all preconstruction condition requirements applicable to Phase 1.” Forzley Decl., Ex. D.

September 21, 2020 letter

This letter was also addressed to Perennial Power Holdings, Inc. Respondents concede that this letter constitutes a final order. ODOE writes that because “construction commenced prior to the September 23, 2020 construction commencement deadline, the Department confirms that the site certificate has been activated.” Forzley Decl., Ex. E. Importantly, this letter also includes the following statement justifying the determination that the site certificate had been activated: “[I]nformation and materials submitted by the certificate holder for general and preconstruction conditions applicable to Phase I have been reviewed by the Department and determined sufficient to satisfy the requirements, as stated in our September 18, 2020 letter.” *Id.*

Discussion

In seeking judicial review of the September 2 and 18 letters, Petitioners rely on *Teel Irrigation Dist. v. Water Resources Dept.*, 323 Or 663 (1996), a case in which the Court

considered whether a particular letter in a series of written communication should be considered a final order. The Court noted that the question of whether a letter dated December 18, 1991, was a final order begs the question, “final as to what?” *Id.* at 676. The Court also considered the context in which the letter was written. *Id.* Ultimately, the Court held that one paragraph of the December 18 letter was final because it precluded further agency consideration of water use under the terms of an existing permit, while other paragraphs related to the Petitioner’s rights under proposed future certificates. *Id.* at 677.

Petitioner correctly points out that *Teel* stands for the proposition that an agency order may be final as to some issues and not others. With respect to section 2 of the September 2, 2020 letter, Petitioner argues that ODOE’s determination that DEQ’s Air Contaminant Discharge Permit is not a construction right was a final order because the decision cleared the way for Perennial to commence construction. Petitioner is incorrect. ODOE’s statement that a DEQ Air Contaminant Discharge Permit is not a construction right as defined in OAR 345-025-0006(5) was not a final order because it did not preclude further agency consideration of the subject matter. ORS 183.310(6)(b)(B). When considering the context of the letter, which was not addressed to Perennial and which was not a final determination that all preconstruction conditions requirements were satisfied, this letter from ODOE to Petitioner is nothing more than an attempt to provide a detailed response to a letter of concern from an advocacy organization.

The content of the subsequent September 18, 2020 letter supports the conclusion that the September 2nd letter was not a final order. ODOE, while communicating directly to Perennial, states that the Department “**confirms** that Perennial has provided sufficient information to satisfy all preconstruction condition requirements.” (emphasis added). A confirmation that all preconstruction conditions submitted pursuant to OAR 345-026-0048 were satisfied is an

expression that the agency necessarily, while considering the ultimate question of preconditions, also considered whether the absence of a DEQ Air Quality Discharge Permit was a failure to obtain a necessary construction right. Thus, the September 2nd letter was not a final order.¹²

Conversely, the September 18 letter was a final order subject to judicial review on the important issue of whether preconstruction conditions were met clearing the way for construction commencement. This finding is bolstered by the context provided by the subsequent letter to Perennial on September 21, 2020, in which ODOE reiterates that prior agency review of materials in support of preconstruction conditions took place days earlier which the agency “determined [were] sufficient to satisfy the requirements, as stated in our September 18, 2020 letter.” Forzley Decl., Ex. E. Of course, the purpose of the September 21 letter was to confirm that the site certificate had been activated, which could only legally occur if preconditions requirements were satisfied (September 18 letter) and if construction commenced before the deadline of September 23, 2020.

The Court notes that whether only one final order is reviewable (September 21 letter) or two final orders are reviewable (September 18 and September 21 letters), the Circuit Court may review the ODOE’s ultimate determination that the site certificate was properly and legally

¹ The portion of the September 2, 2020 letter dealing with the issue of whether building a \$250,000.00 access road counts as beginning construction with respect to the construction deadline provisions of the site certificate was also not a final order. ODOE dealt with this issue with finality when it issued the September 21, 2020 letter stating that “Phase I construction * * * includes constructing an approximately 200-foot by 30-foot access road and an access bridge across the Westland Irrigation District canal.”

² By holding that the September 2, 2020 letter is not a final order subject to judicial review, it does not follow that the letter cannot be considered when reviewing the subsequent final orders. ODOE’s detailed position outlined in the initial correspondence can certainly be examined in determining the legality of the later statements that preconstruction condition requirements were satisfied and that commencement of construction occurs upon the expenditure of \$250,000.00 to build an access road and bridge.

activated by the September 23, 2020 deadline. This review will necessarily include review of the issues raised by Petitioners. That is because the issues of precondition requirements and construction commencement are necessarily part of the ultimate decision that the site certificate was properly activated.³

Standing arguments

Respondents also move to dismiss for lack of standing claiming Petitioners are not adversely affected or aggrieved by ODOE's final orders. ORS 183.480(1) provides, "any person adversely affected or aggrieved by an order [...] is entitled to judicial review of a final order." The statute does not define "adversely affected" or "aggrieved." The Court ultimately provided clarification on the meaning of "aggrieved" in *People for the Ethical Treatment of Animals v. Instit. Animal Care & Use Committee*, 312 Or 95 (1991), stating that a person is aggrieved if, "(1) the person has suffered an injury to a substantial interest resulting directly from the challenged governmental action, (2) the person seeks to further an interest that the legislature expressly wished to have considered, or (3) the person has such a personal stake in the outcome of the controversy as to assure concrete adverseness to the proceeding." *Id.* at 101-102 (internal citations omitted). Petitioners allege standing based on "preclusion of Petitioners' ability to participate in the proper public processes required by law before EFSC for a site certificate amendment," which jeopardizes Petitioners' separate interests in the resources and recreation in the Colombia Gorge.⁴ Petitioners' Opposition to Motions to Dismiss, 12-13. Petitioners argue

³ Petitioners further argue that the Court may also review the September 18, 2020 letter based on an allegation that the ODOE acted without probable cause. ORS 183.480(3). Respondents raise several arguments in supplemental briefing for why a probable cause review is improper in the context of this case. The Court declines to address the issues raised as it is unnecessary to do so given the Court's ruling that the September 18 letter is subject to review as a final order.

⁴ Petitioners also allege standing based on the direct harms to the natural resources protected by Petitioners, loss of funds to The Climate Trust, or alternatively that Petitioners seek to further an

that ODOE's orders functionally amend the Site Certificate⁵ and had the Site Certificate been properly amended by the EFSC, Petitioners would have been afforded their procedural right to participate. This Court is not aware of any Oregon court that has addressed whether "aggrieved" under ORS 183.480 includes harm to procedural rights such as the right to public participation. However, the United States Supreme Court has decided similar issues surrounding the same language of "adversely affected or aggrieved" under the federal Administrative Procedure Act (APA). 5 U.S.C. § 702. In doing so, the Supreme Court noted that there is "much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572

interest the Legislature expressly wished to have considered. Additionally, on September 27, 2021, Petitioners filed Notice of Supplemental Authority arguing that the recent enactment of HB 2021, effectively prohibits the EFSC from issuing a site certificate for proposed fossil fuel power plants such as the one subject to this litigation. These arguments only provide a basis for standing to the extent they give context to the procedural standing argument made by Petitioners. That is to say, the procedural right to public participation is important precisely because participation from the public is a fundamentally important mechanism for enforcing rights and furthering interests.

⁵ ODOE's letter claim that the air emissions permit from Department of Environmental Quality is not required under OAR 345-025-006(5) to meet a "construction right;" however, the Amended Site Certificate states: "This remains true — even if the Council amends the site certificate to extend the construction commencement date to September 23, 2020, Perennial would not be able to commence facility construction without a valid DEQ permit." Forzley Decl., Ex A. "Condition B.6: The certificate holder shall obtain all necessary federal, state and local permits or approvals required for construction, operation and retirement of the facility or ensure that its contractors obtain the necessary federal, state and local permits or approvals. Condition B.7: Before beginning construction, the certificate holder shall provide confirmation in writing to the department that the third parties have obtained all necessary permits or approvals and shall provide to the department proof of agreements between the certificate holder and the third parties regarding access to the resources or services secured by the permits or approvals." Forzley Decl., Ex. B. The final order by ODOE functionally adds that only the permits required for the specific part of the facility must be obtained before construction on that part may begin. This language is not included in the Site Certificate and therefore arguably serves as an amendment to the Site Certificate.

n.7 (1992). The Supreme Court has recognized procedural injuries are a harm and will only deny standing on a procedural injury when harmless error results, *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009), or on Article III requirements of redressability, *Lujan*, 504 U.S at 572. More specifically, the Supreme Court has found that an injury to the right to provide commentary prior to an agency action is a procedural injury sufficient to provide standing, provided that failure to allow for public comment jeopardizes a separate concrete interest. *Summers v. Earth Island Instit.*, 129 S.Ct. 1142, 1151 (2009). The relevant standard for reviewing standing rests on whether the failure to provide the procedural right jeopardizes a separate concrete interest of the Petitioners. *Id.* In addition to the Supreme Court of the United States, the D.C. Circuit Court has addressed the issue and held that a procedural injury is sufficient to establish standing so long as it protects a separate concrete interest.⁶ The Court finds the interpretation of the Supreme Court of the United States that “any person adversely affected or aggrieved” to include a person who has had an injury to their procedural right persuasive. The Court finds that this interpretation to be consistent with the decision in *PETA.*, as that case involved an organization that claimed to be aggrieved by the agency’s final decision after having the opportunity to participate in the public hearing process. *PETA*, 312 Or at 99. The Supreme Court noted, the act at issue “specifically provides for representation of the public interest through the very committee whose decision PETA disputes.” *Id.* (citing Court of Appeals decision in *People for the Ethical Treatment of Animals v. Instit. Animal Care & Use Committee* 102 Or.App. 276, 794 P.2d 1224 (1990)). The Court finds that an injury to a procedural right that jeopardizes a separate concrete interest is an injury to a substantial interest consistent with the first prong of the *PETA* analysis.

⁶ *Electric Power Supply Ass’n v. FERC*, 391 F. 3d 1255, 1261-1262 (2004); *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 51 (D.C.Cir.1999); *Florida Audubon Soc’y v. Bentsen*, 94 F.3d 658, 664 (D.C.Cir.1996).

In this case, Petitioners standing rests on the allegation that ODOE amended the final decision of ESFC without allowing Petitioners their opportunity to be heard and protect their interests.

Petitioners claim that the functional amendment to the Site Certificate by ODOE eliminated their opportunity to be heard before EFSC. Petitioners were seeking to protect their separate concrete interests in the resources and recreation in the Colombia Gorge, as well as protection of the climate. In this case, the procedural right existed to protect the interests of the Petitioners and the loss of their opportunity to be heard creates a credible threat to Petitioners' separate interests. Thus, Petitioners have standing to challenge ODOE's final orders as it denied Petitioners their right to be heard before ESFC for amendments to the Site Certificate.

For all of these reasons, Respondents' Motions to Dismiss as to the September 2, 2020 letter is granted. Otherwise, the motions are denied. Petitioners shall prepare a proper form of Order consistent with, and referencing, this Opinion.

DATED this 21st day of October, 2021.



Michael A. Greenlick
Circuit Court Judge