

Oregon

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To: Oregon Energy Facility Siting Council

From: Thomas L. Jackman, Rules Coordinator

Date: January 12, 2024

Subject: Agenda Item C (Action Item) – 2024-2026 Rulemaking Update for the January 26, 2024 Council Meeting

Attachment: Attachment 1 – Proposed 2024-2026 Rulemaking Schedule
Attachment 2 – Proposed 2024 rulemaking schedule in greater detail

2024 RECOMMENDATIONS

For 2024, staff recommends the following rulemaking schedule:

- Completion of the following rulemakings:
 - Contested Case
 - Standby Generator
 - Research Reactor
 - Solar Noise (on behalf of DEQ)
- Initiation of the following rulemakings:
 - Site Certificate Amendment
 - Timely Communication with Tribal Governments
 - Carbon Offset Rate
 - Application Process Phase 2
 - Radioactive Material Transport Fees
 - Financial Assurance and Organizational Expertise
 - Exemptions
 - General Compliance

BACKGROUND AND SUMMARY

When a Council member, stakeholder, or staff member raises an issue related to a rule, policy, or procedure under the Council's jurisdiction, staff documents the issue and evaluates whether rulemaking is needed to address it. Unlike issues in a contested case or other formal proceedings, rulemaking issues may be raised at any time, such as during a Council meeting, in public comments, or in written advice to the Council's Rules Coordinator. When several related issues are identified, they may be combined to form a rulemaking project for the Council's

consideration. Each year, the Council prioritizes previously approved and newly proposed rulemaking projects based on factors including urgency, level of public interest, and complexity.

This staff report provides an overview of the rulemaking process, describes current and recently completed rulemaking activities, and provides staff's recommendations for the prioritization of previously approved and newly proposed rulemaking projects for the next three years. For each previously approved or newly proposed rulemaking project the Council may:

- Authorize staff to conduct preliminary work on the project as part of the rulemaking schedule;
- Reprioritize or postpone development of the rulemaking project; or
- Remove the project from the rulemaking schedule.

For each rulemaking project, staff have also identified a recommended method for engaging with stakeholders in the development of proposed rules. Methods include soliciting written advice, holding one or more public workshops, or convening a Rulemaking Advisory Committee (RAC). While staff will seek final approval of the method for stakeholder engagement at the initiation of a rulemaking project, if the Council does not concur with the method identified for a project in this report, it may direct staff to pursue an alternate method for that project.

This draft rulemaking schedule describes all ongoing and potential rulemaking projects which staff could work on in the 2024-2026 period. Additional rulemaking projects or rulemaking activities may be proposed before the next update in response to stakeholder petition, statutory changes, or emerging issues of concern. Staff may also propose other corrections or housekeeping changes for Council's consideration during regular Council meetings and may periodically file minor corrections described under ORS 183.335(7) as authorized by OAR 345-011-0005(4).

RULEMAKING PROCESS OVERVIEW

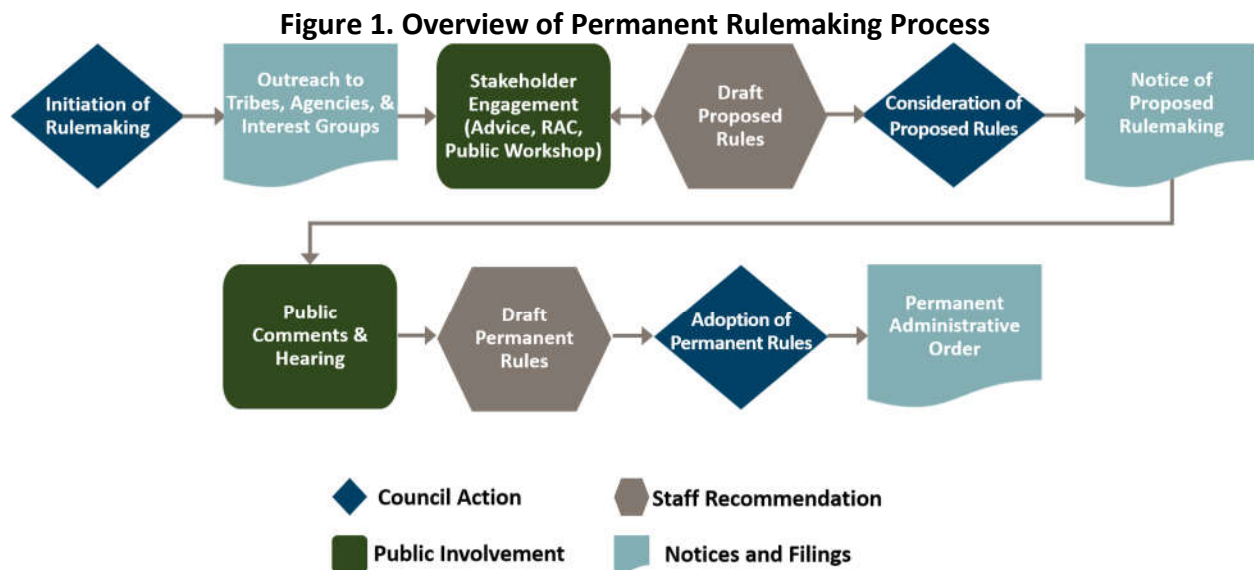
A rule is any directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency.¹ The Council must conduct rulemaking for several reasons, including to meet statutory obligation; to interpret broad statutory authority delegated by the legislature; or to amend, suspend or repeal existing rules.

ORS 469.470 requires Council to “adopt standards and rules to perform the functions vested by law in the council including the adoption of standards and rules for the siting of energy facilities pursuant to ORS 469.501, and implementation of the energy policy of the State of Oregon set forth in ORS 469.010 and 469.310.” Several other sections of ORS chapter 469 supplement this broad rulemaking mandate with specific rulemaking requirements.

The rulemaking process is governed by ORS chapter 183, the Administrative Procedures Act (APA). Among other things, the APA requires each agency that adopts rules to appoint a rules coordinator, provide notice of permanent rulemaking, and to give interested persons a

¹ ORS 183.310(9).

reasonable opportunity to submit data or views on proposed rulemaking actions.² For the purposes of this statute, Council has sole jurisdiction over the rules in OAR 345 and therefore functions as state agency. Figure 1 provides an overview of the typical permanent rulemaking process used by the Council.



Generally, the rulemaking process takes between three and twelve months to complete. The amount of time needed depends on the complexity of issues, the level of public interest and involvement, and the availability of staff resources.

While not required, the APA encourages agencies to involve the public in the development of proposed rules and to seek public input to the maximum extent possible before giving notice of intent to adopt a rule. After the Council initiates a rulemaking project, staff may conduct preliminary outreach to local and tribal governments, agencies with jurisdiction of the rulemaking subject, and other interest groups and stakeholders that are likely to be interested in the proposed rule. After this preliminary outreach, staff will engage with stakeholders to discuss policy issues and obtain advice on what alternatives should be considered in the development of draft proposed rules.

Common methods for stakeholder engagement include soliciting written advice on rulemaking issues from interested parties, appointing a rulemaking advisory committee (RAC), or hosting one or more public workshops.³ More than one of these methods may be used during the course of a rulemaking.

Appointing a RAC may increase the amount of time needed to develop proposed rules, but the RAC’s input may improve the quality of the proposed language and may help the agency identify and address concerns and potential issues with proposed rules before the public comment period. If the Council determines that a RAC is appropriate for a rulemaking project, staff will provide a list of potential organizations and individuals that may be interested in

² ORS 183.330(2), ORS 183.335(1), and ORS 183.335(3).

³ ORS 183.333.

participating so that Council may appoint RAC members. Each RAC should have enough members to ensure appropriate representation of the varied interests associated with the particular rulemaking, but not so many that the efficiency of establishing meetings and completing tasks is compromised. Staff will also ask Council for input on the number and location of any RAC meetings. For rulemaking projects where the Council has included public workshops in the rulemaking process, staff will ask Council for its input on the number and location of any public workshops before any workshop is convened.

Staff will consider all advice provided by the Council and stakeholders when preparing draft proposed rules and may solicit additional informal advice on draft rule language before making its final recommendations to the Council. In reviewing staff's recommendations, the Council may direct staff to make any revisions to the draft proposed rules or any associated statements of need and fiscal impact it sees fit.

Once the proposed rules are approved, staff will file the Notice of Proposed Rulemaking with the Secretary of State. The notice initiates the formal public comment period on the proposed rules and can include notice of a rulemaking hearing. A rulemaking hearing is not always required but will generally be scheduled to be held during a Council meeting near the end of the public comment period. After fully considering comments and oral testimony received during the public comment period, the Council may adopt permanent rules. Council may also suspend a rulemaking project at any time during the process.

RULEMAKING ACTIVITY IN 2023

At its meeting on December 16, 2022, the Council approved its rulemaking priorities for 2023 to 2025. Since that date, the Council has completed two additional rulemaking projects and initiated work on several others.

Completed

Protected Areas, Recreation, & Scenic Resources

On December 16, 2022, Council approved permanent rules to better ensure that the siting, construction and operation of energy facilities is accomplished in a manner consistent with the protection of public health and safety and in compliance with Oregon's energy, land use, and environmental protection policies.

Application Process Phase 1

On August 24, 2023, Council approved permanent new and amended rules governing the site certificate application process. This rulemaking was the first phase of a holistic review of the rules governing the process for applying for a site certificate. The rulemaking resulted in a review and reorganization of the rules in Divisions 15 to 26, creating a clear separation of the various procedural and substantive provisions in the rules.

Radioactive Waste

On November 17, 2023, Council approved permanent rules Division 50, regarding the disposal of radioactive waste in the state of Oregon. This rulemaking was the result of Oregon Senate Bill 246, passed in 2021, which directed Council to review and, as necessary, revise its rules to

further consider and adopt standards and rules as necessary to prevent the disposal of radioactive waste within this state.

Ongoing

Standby Generators (R223)

The legislature enacted HB 2063 in 2021, which prohibits the Council from requiring a person proposing to construct a standby generation facility to submit an exemption request to the Council. The rulemaking would implement HB 2063 by removing requirements for a person proposing to construct a standby generator to request an exemption. Staff intends to present final rules for consideration at the Council's January 26, 2024 meeting.

Contested Cases

Interest and participation in the contested case process has increased in recent years, and several high-profile contested cases have raised issues regarding the Council's rules for contested cases under OAR chapter 345, division 015. Current changes under review for the Council's contested case rules can be divided into roughly five categories:

- 1) Reorder and reorganize the rules to better match the flow of the contested case process.
- 2) Update the rules to reflect a proposed adoption of the Office of Administrative Hearing's model rules for contested cases.
- 3) Improve the consistency of the rules, both internally and to ensure they properly match Oregon laws and other administrative rules.
- 4) Improve the clarity of the rules by providing or enhancing definitions where appropriate.
- 5) Improve the efficiency of the contested case process by providing additional guidance to all parties and prospective parties who are affected by these rules.

This rulemaking is expected to be completed in May, 2024.

Research Reactors (R202)

Oregon State University and Reed College both operate Training, Research, Isotopes and General Atomic (TRIGA) Class nuclear research reactors. Like other nuclear installations, the research reactors operate under licenses issued by the Nuclear Regulatory Commission, and the Council provides state level monitoring and oversight of the facilities as provided by their site certificates and the administrative rules in OAR chapter 345, division 030. This rulemaking project would update division 030 and other rules applicable to research reactors to ensure consistency with federal reporting and notification requirements. Staff has solicited feedback from the operators of these research reactors and is now meeting with various stakeholders to determine the efficacy and viability of the feedback.

FUTURE RULEMAKING PROJECTS

Staff has identified rulemaking projects that it believes can be reasonably expected to begin and/or finished in 2024. Staff has also further identified additional projects which it recommends for consideration in 2025, 2026, and beyond. Staff welcomes any additional input from the Council on the timing or sequencing of any of the potential projects discussed below. There will also be a public comment opportunity during this agenda item at Council's January meeting to specifically allow feedback on the rulemaking agenda.

Staff is recommending that EFSC start 2024 with the Amendment rulemaking, which was initially authorized in 2022. Assuming this is acceptable to the Council, staff seeks guidance as to which of the other rulemaking projects (presented below in no particular order) to begin and/or complete in 2024.

PROPOSED FOR 2024

2022 Site Certificate Amendment Rulemaking

On October 28, 2022, Council initiated rulemaking to develop proposed revisions to the rules governing the expiration, amendment, and termination of site certificates under OAR chapter 345, division 027.

The project will evaluate outstanding issues raised by stakeholders during the rulemaking proceedings on the permanent amendment rules adopted in January 2020 and will evaluate options to improve opportunities for public participation while minimizing adverse economic impacts on certificate holders.

As part of this process, staff has been authorized and will issue a notice seeking public comment to assist in the review described under ORS 183.405(1) for permanent rules adopted under Administrative Order EFSC 1-2020.

This rulemaking is a priority given both the number of amendments compared to new applications and the timing of the statutory requirement that recently adopted rules be reviewed.

Timely Communication with Tribal Governments

OAR 345-022-0090 requires Council to find that the construction and operation of a facility, taking into account mitigation, are not likely to result in significant adverse impacts to certain historic, cultural or archaeological resources.

Staff often recommends that applicants coordinate with tribal cultural resource specialists early in the application process to better identify historic, cultural or archaeological resources under OAR 345-022-0090. This rulemaking project would evaluate additional options to encourage communication and cooperation between the Department, applicants and tribal governments to identify historic, cultural, and archaeological resources early in the application process.

Staff proposes to hold one or more listening sessions for this rulemaking project in areas that are accessible to interested tribal members or government representatives. Consistent with

direction provided during prior rulemaking updates, staff proposes to begin outreach on this project in 2024.

This rulemaking is a priority given how much time has passed since this issue was identified, the interest from a specific tribal government (Confederated Tribes of the Umatilla Indian Reservation) that we engage in this effort, and the State of Oregon's ongoing mission to better engage with Oregon's tribal governments.

Application Process Review – Phase 2

Phase 2 of the Application Process Review Project will include review of application information and procedural requirements currently located in division 020 and 021 to ensure that requirements align with what is needed to demonstrate compliance with the Council's standards. If requirements that do not align with an existing standard are identified, staff will evaluate whether the requirements should be removed, or if the standards should be modified. However, most substantial modifications to either application requirements or standards will not be done until Phase 3.

Due to the complex nature of this project, and the high level of stakeholder interest anticipated, staff recommends Council appoint a Rulemaking Advisory Committee for the project, with the expectation that committee membership may be amended or supplemented for each phase.

Radioactive Material Transport Fees (and Div 60 Review)

In accordance with the rules in Oregon Administrative Rules chapter 345, division 060, any person who wishes to transport certain radioactive materials identified in federal code through Oregon must first obtain an Oregon Radioactive Materials Transport Permit. On average, around 400 permitted shipments travel through Oregon each year. Statutory direction authority for the program comes from Oregon Revised Statutes 469.605 et seq.

The permit fee amounts are currently set at \$70 for most shipments and \$500 annually for some medical and industrial shipments. These amounts have not been updated since 1986. The fees are primarily used to provide training to first responders and other emergency personnel along the State's transport corridors.

During this rulemaking project staff will evaluate:

- Whether the current radioactive transport fee amounts are adequate to fund programs to prevent, prepare for, and respond to potential accidents involving the transport of radioactive material in Oregon.
- Whether additional updates to the rules found in OAR 345-060 are needed to incorporate changes to federal safety standards that have occurred since the rules were last updated.

Staff anticipates that Nuclear Safety and Emergency Preparedness Division staff would head this up this project and provide the substantive work for this rulemaking, while Siting Division staff would take care of the procedural work.

Exemptions

Certain energy facilities are exempt from the requirement to obtain a site certificate under ORS 469.320. Depending on the type of facility, the person who wishes to claim an exemption may be required to submit an exemption request subject to Council's review and approval. The Council's rules for exemption requests are currently located under OAR 345-015-0350 to 345-015-0380. This rulemaking project would evaluate several outstanding policy questions related to exemptions, including whether the Council may impose conditions on an exemption, ongoing monitoring and reporting requirements for exempt facilities, and the process for loss of an exemption.

General Compliance

This project would consist of a review of the rules for construction and operation of energy facilities under OAR 345-026-0005 to 345-026-0170. Generally, the rulemaking would focus on improving the clarity and consistency of requirements and providing additional specificity for monitoring and reporting requirements and timeframes.

Council previously approved this project to begin in 2018 and appointed a RAC to begin development of proposed rules for the project, however due to staffing issues within the Department, the rulemaking did not move forward at that time. Staff recommends that Council reprioritize this project and move forward with it in 2024.

Financial Assurance and Organizational Expertise

This project would evaluate issues related to the Financial Assurance and Retirement Standard as well as the Organizational Expertise Standards under OAR 345-022-0050 and OAR 345-022-0010 and as well as any other rules for the development, maintenance, and use of financial assurance instruments. Issues that may be considered include whether the current rules are adequate to ensure the development of accurate retirement cost estimates; whether the financial instruments allowed by rule sufficiently protect the State from financial liability in the event that a certificate holder defaults on its retirement obligations; to what extent LLCs can rely on parent organizations to meet the Organizational Expertise Standard; and whether application information requirements are aligned with the goals and intent of the Financial Assurance and Retirement Standard.

2024 Carbon Offset

This project would update the Monetary Carbon Offset Rate under OAR 345-024-0580 to address historic increases in offset costs. The rate may be increased by up to 50% as of 7/1/2024 under ORS 469.503(2)(c)(C). Due to years of failing to increase this rate, regular increases (which can be no more than 50% every two years) need to take place to get the rate where it should be to ensure the rate is at intended amounts.

Rulemaking Projects Proposed for 2025 or Beyond

The projects proposed for 2025 or beyond are either dependent on other rulemaking projects or external processes with uncertain timing or are still in early stages of development.

Application Process Review – Phase 3

Phase 3 of the Application Process Review would evaluate the Council's standards and substantive requirements to determine if requirements should be adjusted for different types of energy facilities, including facilities which generate energy from renewable resources. Specific recommendations would be informed advice provided during Phase 1 and Phase 2 of the project. Staff notes that one output of this project may be proposals for subsequent rulemaking projects focused on specific standards or groups of standards linked by subject matter or interest groups.

Because of the complex nature of this project, and the high level of stakeholder interest anticipated, staff recommends Council appoint a RAC for the various rulemakings that fall under this project, with the expectation that committee membership may be amended or supplemented for each standard.

Staff is still analyzing which specific standards to prioritize as part of this set of rulemakings. Preliminary work to determine what standards staff will recommend that the Council should prioritize will take place over the course of 2024.

Geospatial Resources

This rulemaking project would consider options to improve the collection and use of geospatial data and resources in the siting process, including but not limited to, requiring applicants and certificate holders to submit GIS data for energy facilities; and, use of tools, analysis, and recommendations produced by the Oregon Renewable Energy Siting Assessment (ORESAs) Project, which the Department conducted in partnership with the Department of Land Conservation and Development and Oregon State University's Institute for Natural Resources through a grant from the U.S. Department of Defense Office of Economic Adjustment. Due to the technical nature of the subject matter and broad applicability, staff recommends the Council appoint a RAC to assist in the development of proposed rules.

Mandatory Conditions

This project would review rules in OAR 345-025 to ensure that the mandatory conditions specified by rule are clear, complete, and necessary to be included in each site certificate and would consider options for allow greater flexibility to address site specific conditions and circumstances.

Due to the technical nature of the subject matter, and the potential for fiscal or economic impacts on certificate holders, staff recommends the Council appoint a RAC to assist in the development of proposed rules for this project.

Natural Hazards Mitigation

Oregon's Natural Hazards Mitigation Plan (NHMP) provides statewide and regional information on the natural hazards most likely to occur in the state. The NHMP also reports on the potential

impacts of natural hazards on people, property, and the environment, and establishes a mitigation strategy to reduce those impacts. Oregon's latest NHMP was approved on September 24, 2020 and is expected to be updated in 2025.

This rulemaking project would evaluate whether and how the siting review process can support the goals of the NHMP and implement natural hazard mitigation strategies either by amending the Land Use or Structural Standards and associated information requirements or adopting a new standard. The scope and timing of this project will likely be influenced by the Wildfire Prevention & Response Project and Phase 3 of the Application Process Review Rulemaking Project. Due to the technical nature of the subject matter, and the potential for fiscal or economic impacts on certificate holders, staff recommends the Council appoint a RAC to assist in the development of proposed rules for this project.

Communication with Federal Agencies

This rulemaking would seek to codify existing outreach that occurs with military contacts regarding siting projects early in the review process. Staff may propose that this rulemaking include additional related elements or be combined with a rulemaking projects listed above as possible opportunities for increased efficiencies arise.

PENDING 5-YEAR REVIEWS

Within five years after adopting a new rule, the Council must conduct a review to determine:

- Whether the rule has had the intended effect;
- Whether the anticipated fiscal impact of the rule was underestimated or overestimated;
- Whether subsequent changes in the law require that the rule be repealed or amended;
- Whether there is continued need for the rule; and
- What impacts the rule has on small businesses.

After the review, the Council must submit its findings to the Secretary of State, the Small Business Rules Advisory Committee, and any RAC appointed by the Council to assist in the development of proposed rules.

OAR 345-027-0311 to 345-027-0400 – Amendment of Site Certificates

Following the Oregon Supreme Court's finding that rules governing the process for review of site certificate amendment requests adopted by the Council in 2017 were invalid, the Council conducted rulemaking to repeal the invalidated rules and adopted new permanent rules in their place. While these new rules are substantively similar to the previous rules, a 5-year review is still required to be completed by January 28, 2025. During the proceedings to adopt the new rules, the Council committed to initiating a new rulemaking project to review any outstanding substantive issues related to the new rules within two years after their adoption. The Department proposes to complete the 5-year review of the new amendment rules as part of this project, which is discussed further in the section on the 2022 Site Certificate Amendment Rulemaking Project.

OAR 345-001-0250 – Solar Photovoltaic Power Generation Facilities

As part of the Solar PV Facilities Rulemaking Project, the Council adopted a new rule explaining the criteria and process for determining when a proposed solar photovoltaic power generation

project is an expansion of an existing or proposed solar photovoltaic power generation facility. The 5-year review of this new rule must be completed by June 26, 2025.

OAR 345-015-0003 – Remote and Electronic Public Meeting and Hearings

At its meeting on October 23, 2020, the Council adopted a new rule authorizing the Council or Chair to waive specific rule provisions requiring that a public meeting or public hearing be held in person or in a specific geographical area, if the Council or Chair finds that in person attendance at the meeting or hearing would present a risk to public health or safety or the health and safety of the participants, unless those provisions of rule are in statute. The 5-year review of this rule must be completed by October 23, 2025.

OAR 345-029-0503 to 345-029-0560 – Radioactive Materials Enforcement (R195-029)

On February 26, 2021, the Council adopted permanent rules for the enforcement of regulations governing the transport and disposal of radioactive materials and wastes. This rulemaking resulted in the adoption of a new series of rules under OAR chapter 345, division 029, and as such, a five-year review under ORS 183.405 is required to be completed by February 26, 2026.

OAR 345-024-0503 – Carbon Standards

On July 22, 2022, the Council adopted permanent rules implementing new restrictions on the siting of fossil-fueled power plants under HB 2021 (2021) and updating existing carbon dioxide standards adopted under ORS 469.503. The rules were filed, and became effective, on July 25, 2022. One new rule, OAR 345-024-0503, was adopted as part of this rulemaking and as such a five-year review under ORS 183.405 is required to be completed by July 25, 2027.

OAR 345-022-0115 – Wildfire Prevention and Risk Mitigation

On July 22, 2022, the Council adopted a new siting standard for Wildfire Prevention and Risk Mitigation that is applicable to all types of energy facilities. The rules were filed and became effective on July 29, 2022. A five-year review under ORS 183.405 is required to be completed by July 25, 2027.