More Than You Ever Wanted to Know About EFSC Siting

Reviewing Agency Training
March 8, 2013
Agenda

• 8:30 Welcome & Introductions
• 8:40 EFSC Regulatory Framework
• 9:10 EFSC Process
• 10:00 Break
• 10:15 EFSC Current Projects
• 12:15 Questions
Regulatory Framework

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Department of Justice
Regulation of Energy Facilities

- ORS 469.300 et seq
  - Energy Facility Siting Council (EFSC)
  - Comprehensive System
  - Inter-Agency Coordination

- OAR Chapter 345
  - Application Requirements
  - Evaluation
  - Council Standards
ORS 469.310 (Policy)

The purpose of the regulation of energy facilities is to establish

“A comprehensive system for the siting, monitoring and regulating of the location, construction and operation of all energy facilities in this state”
• What does this policy mean?

• How is this policy accomplished?
“One-Stop Process”

• In order to issue a site certificate, EFSC must determine that the proposed facility complies not only with the Council’s standards, but also with the statutes and regulations of most other state and local permitting agencies

• Exception – federally-delegated permits

• Agencies are bound to issue all applicable permits and licenses addressed in the site certificate
EFSC

• ORS 469.450 Establishes Energy Facility Siting Council (EFSC)

• EFSC purpose to
  
  • Review, evaluate and issue orders approving or denying Applications for Energy Facilities (ORS 469.360-.370)
  
  • Issue Site Certificates for the construction and operation of energy facilities that meet all Council standards (ORS 469.503)
ORS 469.505
Agency Consultation

• Required consultation in evaluating compliance with regulations administered by or within ‘special expertise’ of other agencies

• Coordination and simultaneous review of federally delegated permits

• Resolution of conflict
  • EFSC required to notify and consult with agencies and local governments to resolve conflicting conditions
ORS 469.300-.370
Site Certificate Application Process

EFSC integration of other Agency requirements

• NOI and Application Consultation Requirements (ORS 469.330 -.350)

• Statutory Reviewing Agencies (ORS 469.350(2))

• Review/Comment Requirement (ORS 469.350(3))

“Any state agency * * * requested by the council to comment and make recommendations under this section shall respond to the council by the specified deadline.”
ORS 469.300-.370
Site Certificate Application Process

EFSC integration of other Agency requirements (continued)

• If agency unable to respond for lack of resources, agency “shall contract with another entity to assist in preparing a response.”

• EFSC may compensate an agency for expenses related to review of the NOI and application (ORS 469.360(1))
Common Statutory Issues

• Land Use Compatibility Statements
• Agency Compliance with Site Certificate
• Reviewing Agency jurisdiction over matters not included in and governed by Site Certificate
Land Use Compatibility Statements

ORS 469.378

When Reviewing Agency action requires land use compatibility statement (LUCS) under 197.180, agency must condition agency action on EFSC determination that agency action satisfies LUCS requirement
Agency Compliance with Site Certificate

ORS 469.401(3)

• Site Certificate Authority
  “shall bind the state and all counties and cities and political subdivisions in this state as to the approval of the site and construction and operation of the facility”

• Agency Compliance
  “After issuance of the site certificate, any affected state agency * * * shall, upon submission * * * of the proper applications and payment of the proper fees, but without hearings or other proceedings, promptly issue the permits, licenses and certificates addressed in the site certificate * * * subject only to conditions set forth in the site certificate”
Agency Jurisdiction over Matters not governed by Site Certificate

ORS 469.401(4)

Site Certificate does not pre-empt Agency jurisdiction over matters that are “not included in and governed by the site certificate” including

» Employee health and safety
» Building code compliance
» Labor regulations
» Local government fees/charges
» “Design or operational issues that do not relate to siting the facility”
Agency Coordination

- Agencies must inform ODOE of activities and programs related to energy (*ORS 469.520(1)*)

- If an agency is proposing a rule relating to energy facility development, it must first file a copy of the proposed rule with EFSC (*ORS 469.520(2)*)

OAR Chapter 345

General Framework

– Process (Division 15)
– Notice of Intent (Division 20)
– Application Requirements (Division 21)
– Council Standards (Divisions 22, 23, 24)
– Conditions of Approval (Division 27)
Division 21 Requirements

Application Requirements

• Includes requirements for information/evaluation of all reviewing agency regulations

• For state or local government agency permits, licenses or certificates, requires applicant to include all information that would otherwise be required by that agency

• For federally-delegated permits needed for construction or operation of facility, requires applicant to submit copy of each application
Division 22 Standards

• General Division 22 Standard of Review
  Council must find compliance with all statutory and Div. 21 requirements or that “the overall public benefits of the facility outweigh the damage to the resources protected by the standards the facility does not meet”

• “Allows Council to “balance” conflicting requirements/standards
“Balancing Standard”

Council may ‘balance’ compliance only

“when applicant has shown that the proposed facility cannot meet Council standards or * * * * that there is no reasonable way to meet the Council standards through mitigation or avoidance of the damage to the protected resources”

» Burden is on applicant to show “overall public benefits outweigh the damage to the resources”

» Burden increases proportionately with the degree of damage
Exclusions to Balancing Standard

Balancing Standard cannot be applied to:

- Land Use Standard
- Organizational expertise Standard
- Retirement & Financial Assurances Standard
- Need Standards
- Carbon Dioxide standards
- Protected Areas standard
- Federally-delegated programs
Division 27 - Amendments

Required when certificate holder proposes to change design, construction or operation of facility in manner that:

• Could result in ‘significant adverse impact’ not addressed in earlier order
• Could impair ability to comply with site certificate condition
• Could require new site certificate condition
• Changes facility site boundaries
• Extends construction deadlines
EFSC Process

Todd Cornett
Siting Division Administrator

Ginny Gustafson
Senior Policy Advisor
Interagency Agreements

• Applicant responsible for all expenses incurred in processing and evaluating applications
• All agency expenses reimbursable, including
  • Review of NOI, ASC and DPO
  • Participation in Council Proceedings
• Ensure Inter-Agency Agreement is up-to-date
Notice Of Intent (NOI)

• The NOI is:
  • Applicant’s Conceptual Plan
  • Agencies’ First Opportunity to Participate

• The NOI is not:
  • A Detailed Application
  • A Complete or Final Plan
MEMORANDUM ON NOTICE OF INTENT

Agency Comment Requirement

Department shall request:

• Name, contact information for agency contact person
• Comments on aspects of proposed facility within agency’s expertise
• Recommendations regarding the size/location of analysis area(s)
• List of studies that should be conducted to identify potential impacts and mitigation measures
• If project includes multiple corridors, relative merits of each
MEMORANDUM ON NOTICE OF INTENT
(continued)

Memorandum shall request:

• List of agency statutes, administrative rules and local ordinances that might apply to construction or operation

• Information needed by agency to determine compliance with those regulations

• List of any agency-administered permits that might apply to construction/operation

• Information needed by agency to review permit application
Reviewing Agency NOI Meeting

• Identified in Governor’s 10-Year Energy Plan & in ORS 469.330
• Part of ODOE Process Improvement
• Opportunity for Inter-Agency Discussion
Project Order

- Includes All Reviewing Agency Requirements
- “Blueprint” for Application
- Basis for EFSC Evaluation and Decision
  - Final Order & Site Certificate based on requirements/standards identified in Project Order
  - If Agency requirement(s) not in Project Order, Council cannot evaluate for compliance & requirements do not become part of Site Certificate
Draft Exhibit Review

Optional – At Applicant’s Request

• Opportunity for Applicant to submit drafts of all or select Exhibits
• Opportunity to resolve issues prior to preliminary application
• May include opportunity for agency comment
Preliminary Application for Site Certificate
Agency Comment Opportunity

- pASC reviewed for “Completeness”
  - Does application have sufficient information for ODOE/Reviewing Agencies to review, evaluate and make finding on each requirement listed in Project Order?
  - “Completeness” does not equal “compliance”

- Request to Reviewing Agencies to:
  - Identify need for additional information
  - Describe Status of applications for reviewing agency permits necessary for construction and operation
Requests for Additional Information (RAIs)

• If additional information is needed to review/evaluate application, RAI(s) provided to Applicant

• Reviewing Agencies may be requested to confirm adequacy of applicant responses
Complete Application

• Application ‘complete’ when
  – “applicant has submitted information adequate for the Council to make findings or impose conditions on all applicable Council standards.” Application may be complete before applicant has submitted all information required under Division 21

• ODOE can find application ‘complete’ without requiring applicant to submit all Div. 21 information
  • Does not eliminate application requirement
  • Allows application review to proceed during pendency of receipt
  • All required information must be submitted before Dept. can make recommendation to Council
Application for Site Certificate

Agency Comment Opportunity

Notice of Complete Application

• Accompanies ASC
• Notice must include:
  – Date of Application Filing
  – Explanation of “Raise it or Waive it” requirement
  – Request for Agency Report
• Agency reports are part of the ODOE application record
Agency Report on ASC

- Agency Recommendations on applications for permits administered by the agency
- Issues Significant to the Agency
- Agency conclusions on facilities compliance with agency regulations
- List of agency recommended site certificate conditions
- Other information agency “believes will be useful to the Council” in reviewing ASC (including outstanding substantive issues)
Draft Proposed Order

• ODOE Draft Recommendation to EFSC on each Council Standard
• Incorporates/evaluates all Agency comments/recommendations/conditions
DPO Hearing
Agency Comment Opportunity

• Hearing historically before Hearing Officer
• New Process: Before EFSC or Joint hearing before Hearing Officer and EFSC
• Raise it or Waive it hearing
  • Agency Report qualifies to ‘raise’ issue
  • Issues not raised in Agency Report must be raised to preserve right to participate in Contested Case
Proposed Order

• Council Order adopting, amending or rejecting ODOE Draft Proposed Order
• Accompanied by Notice of Contested Case
Contested Case

- Conducted by Independent Hearing Officer
- Only parties (including agencies) that raised issues during DPO hearing process can participate
- If no participant requests party status,
  - Contested Case closed
  - Proposed Order becomes Recommended Order
Contested Case, con’t

• If participants request party status
  • Written direct/response testimony
  • Cross-examination hearing
  • Written closing argument
  • Hearing Officer Recommended Order
  • Written Exceptions to Recommended Order
Final Hearing
Final Order and Site Certificate

• Council hearing on Exceptions to Recommended Order
• Council adoption, amendment or denial of Recommended Order
• Issuance of Site Certificate
• Appealable to Oregon Supreme Court
Agency Action on Site Certificate

• Agencies must issue any required permits, without additional process/requirements

• Site Certificate Conditions binding on Agencies
  – If agency requirement is subject to site certificate and not reflected in conditions, Site Certificate Holder is not bound by them
  – Agency requirements not subject to Site Certificate continue to be enforceable
Amendments

- Similar, but less involved process
  - No NOI
  - No Preliminary Request
  - Agency Opportunity to Review Amendment Request
  - No Draft Proposed Order
  - Agency Opportunity to Review Proposed Order
  - Contested Case at Council discretion
Gov Space

• A place to post or download project documents that would otherwise take up thousands of pages

• Might remind you of social media – but no need to “friend” us
90-Day Look Ahead

- A monthly memo previewing upcoming Siting activity
- Includes status updates on all:
  - Applications for Site Certificate
  - Requests for Amendment
  - Federal Projects