



# Oregon

Kate Brown, Governor



550 Capitol St. NE

Salem, OR 97301

Phone: 503-378-4040

Toll Free: 1-800-221-8035

FAX: 503-373-7806

[www.oregon.gov/energy](http://www.oregon.gov/energy)

**To:** Oregon Energy Facility Siting Council

**From:** Thomas L. Jackman, Rules Coordinator

**Date:** December 16, 2022

**Subject:** Agenda Item H (Action Item) – 2023-2025 Rulemaking Update for the December 16, 2022 Council Meeting

**Attachment:** Proposed 2023-2025 Rulemaking Schedule

---

## 2023 RECOMMENDATIONS

For 2023, staff recommends that the Application Process Review – Phase 1 (R211) rulemaking, described in detail below, be prioritized first. This will be a substantial rulemaking that will start the year largely as an internal drafting project. Staff is further recommending that one of the following three projects be initiated in the first half of 2023, with the remaining two started towards the end of the year:

- Historic, Cultural and Archaeological Resources (R194)
- Contested Cases (R214)
- 2022 Site Certificate Amendment Rulemaking (R204)

Assuming this plan is acceptable, staff is looking to the Council for guidance on which of these three to start first. As discussed below, staff is also recommending that several smaller rulemakings be initiated and/or completed in 2023, regardless of what other projects are proposed.

## 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 rulemaking schedule update describes all ongoing, pending, or proposed rulemaking projects which staff expects to work on in the 2023-2025 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.<sup>1</sup> 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.

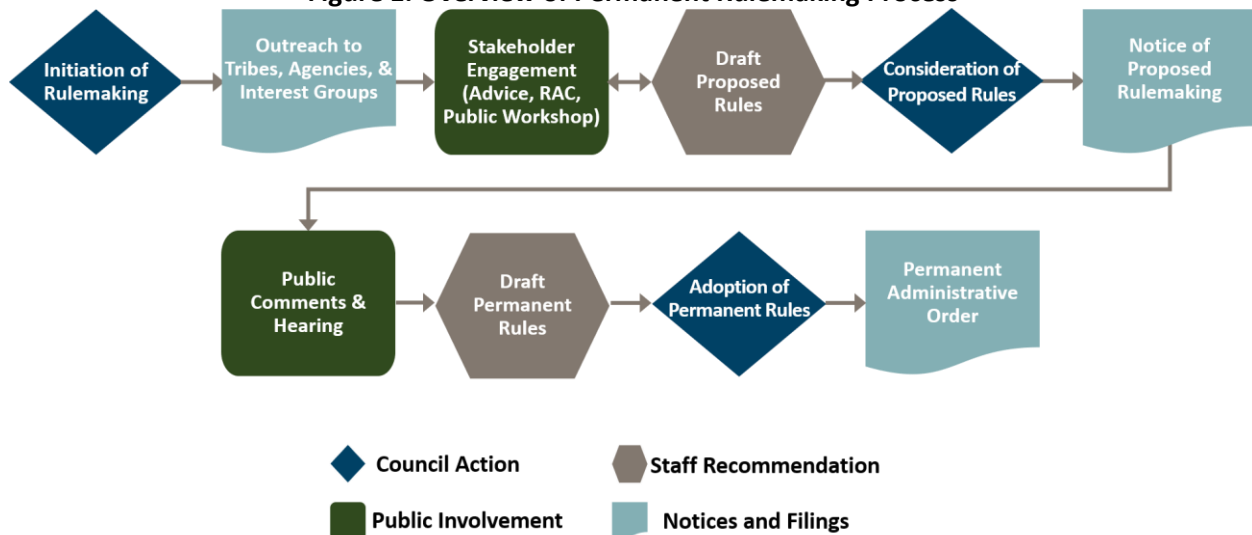
The rulemaking process is governed by ORS chapter 183, the Administrative Procedures Act (APA). Among other things, the APA requires each agency that adopts rules to appoint a rules coordinator, provide notice of permanent rulemaking, and to give interested persons a reasonable opportunity to submit data or views on proposed rulemaking actions.<sup>2</sup> For the purposes of this statute, Council functions as state agency. Figure 1 provides an overview of the typical permanent rulemaking process used by the Council.

---

<sup>1</sup> ORS 183.310(9).

<sup>2</sup> ORS 183.330(2), ORS 183.335(1), and ORS 183.335(3).

**Figure 1. Overview of Permanent Rulemaking Process**



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.<sup>3</sup> 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 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

<sup>3</sup> ORS 183.333.

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 2022**

At its meeting on January 28, 2022, the Council approved its rulemaking priorities for 2022 to 2024. Since that time, the Council has completed two rulemaking projects and initiated work on several others.

### Completed

#### *Wildfire Prevention & Response (R215)*

On July 22, 2022, Council approved permanent rules for the adoption of a new energy facility siting standard for Wildfire Prevention and Risk Mitigation.

#### *Implementation of HB 2021 & 2022 Carbon Monetary Offset Rate Update (R217)*

On July 22, 2022, Council approved permanent rules for the implementation of HB 2021 (2021) and updates to carbon dioxide emissions standard.

### Ongoing

#### *Protected Areas, Recreation, & Scenic Resources (R184)*

At its October 23, 2020, meeting, the Council initiated a review of the Protected Areas, Scenic Resources, and Recreation Standards and associated rules to ensure that the areas, designations, and resources protected by rules are up to date and that rules are clear and consistent with the Council's review process.

Staff issued a Notice of Proposed Rulemaking containing the proposed rules under consideration by Council on June 1, 2022. The Notice of Proposed Rulemaking scheduled a rulemaking hearing for June 23, 2022 and established July 21, 2022, as the deadline for written comments. As of the deadline, the Council had received 77 written comments on the proposed rules. At its meeting on October 28, 2022, the Council considered the comments and made several recommendations to the proposed rules in response. The Council also appointed a Fiscal Impact Advisory Committee to review objections to the fiscal impact statement, and authorized staff to issue an Amended Notice of Proposed Rulemaking based on the committee's recommendations.

The Department met with the Fiscal Impact Advisory Committee on November 14, 2022, and subsequently issued an Amended Notice of Proposed Rulemaking containing revised statements of Fiscal and Economic Impact on November 18, 2022. The Amended Notice extended the public comment period until December 8, 2022. The Council is expected to consider final rules at its December meeting.

#### *Radioactive Waste Materials (R195-050)*

The Council completed rulemaking project related to the enforcement of regulations for the transport and disposal of radioactive materials and wastes in February 2021. During the 2021 session, the legislature passed SB 246 which expanded the Council's authority to regulate radioactive waste and

directed the Council to adopt new standards and rules as necessary to prevent it from being disposed of in Oregon. At its meeting on August 27, 2021, the Council initiated rulemaking to implement the provisions of the bill and to ensure that regulations for the disposal of radioactive waste in OAR chapter 345, division 050 are sufficient to protect public health and safety and the environment. The Council appointed a RAC to assist in the development of proposed rules.

The Division 50 rulemaking project is ongoing. The RAC has met four times, most recently in early November. The RAC and ODOE staff continue to work through revised rule concepts and specific language options. Staff expect to present draft rules and options for Council's consideration in spring 2023.

#### *2022 Site Certificate Amendment Rulemaking (R204)*

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 the first step in 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.

#### **PENDING RULEMAKING PROJECTS FOR 2023-2025**

Staff has identified rulemaking projects that it believes can be reasonably expected to begin and/or finished in 2023. Staff has further identified additional projects which it recommends for consideration in 2024, 2025, and beyond. Staff welcomes any additional input from the Council on the timing or sequencing of any of the potential projects discussed below.

For 2023, staff has divided the suggested projects into two categories, a handful of smaller projects we hope to complete regardless of what other rulemakings are worked on, and more substantive projects that require guidance from Council as to their prioritization.

#### Small Rulemaking Projects Proposed for 2023

##### *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.

##### *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.

### *Radioactive Waste Materials (R195-050)*

This rulemaking is discussed above, under the 2022 overview. While not a small project per se, staff's involvement in this project should be minimal as this rulemaking is being handled largely by the Nuclear Safety and Emergency Preparedness Division.

### Large Rulemaking Projects Proposed for 2023

Staff is recommending that we start 2023 with the Application Process Review (Phase 1) rulemaking, discussed first below, as a largely internal effort. Staff would first work to draft a proposed alignment of the rules in the first quarter before presenting that effort to the Council and a RAC in the second quarter. Assuming this is acceptable to the Council, staff seeks guidance as to which of the other three larger rulemaking projects (presented below in no particular order) we should attempt to complete in 2023. Regardless of which rulemaking is selected for the start of 2023, staff recommends starting the remaining two projects before the close of 2023.

### *Application Process Review – Phase 1 (R211)*

To issue a site certificate, the Council must find the facility complies with the applicable standards adopted by the Council or that the overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by the applicable standards the facility does not meet. The Council has adopted 14 General Standards that are applicable to all proposed facilities as well as additional standards applicable to specific types of energy facilities. The Council's rules describe all the information that must be provided as part of a Notice of Intent, Application for Site Certificate and Request for Site Certificate Amendment in order to demonstrate compliance with the standard. Over time, the Council has separately amended standards and application requirements and, in some cases, the relationship between the application requirements and applicable standard is not as clear as it could be. This project is intended to create efficiencies and reduce the time and costs associated with siting reviews while having no negative effect on public participation. In particular, these rulemakings would clarify and simplify application requirements to reduce the need for requests for additional information during the application review process, improve consistency and standardization in the review process, and make the process clearer and more understandable for applicants, reviewing agencies, and interested members of the public.

Phase 1 of the project would reorganize some or all of the rules in divisions 015 to 026 to create clear separation of procedural and substantive provisions in rules. While this phase will primarily be organizational, it will also seek to clarify and simplify existing procedures for the application review process where practicable, consistent with the intent and objectives described above.

Because of the complex nature of this project, and the high level of stakeholder interest anticipated, staff recommends Council appoint a RAC for the project.

In addition to the benefits identified above, this effort seems especially prudent for 2023, given both the upcoming legislative session and the increased scrutiny on the time and cost for obtaining a site certificate as the pressure to install more renewable projects builds. It is for all these reasons staff is recommending that this rulemaking project be prioritized at the start of 2023. It should be noted that the Council authorized this project at its August 2021 meeting.

### *Historic, Cultural and Archaeological Resources (R194)*

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 2023.

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

#### *Contested Cases (R214)*

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. This rulemaking project would evaluate these issues and make recommendations to improve clarity in the process and improve consistency with the Attorney General's Model Rules for Contested Cases under OAR chapter 137 and the Quasi-Judicial Land Use Hearing process used by local governments. Specific topics that could be considered include the process for appointing hearing officers, requirements for preserving standing and raising issues, and the availability and use of procedural motions.

Because of the high level of stakeholder interest anticipated, staff recommends Council appoint a RAC for the project.

This rulemaking is a priority given the recent Boardman to Hemingway contested case proceeding and the siting team is motivated to take the lessons learned from that experience while they are fresh in our minds to update the contested case rules to improve this process as we deal with future contested cases.

#### *2022 Site Certificate Amendment Rulemaking (R204)*

Discussed in detail above, in the 2022 section, 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.

Feedback on recently adopted amendment rules is expected by the end of 2022 and that makes 2023 an ideal time to take this feedback and what we have learned as a team about what changes worked and what needs to be tweaked and polished.

#### Rulemaking Projects Proposed for 2024

Projects proposed for 2024 include projects which are high priority but may be influenced or affected by projects that are currently in progress or proposed for 2023.

#### *Application Process Review – Phase 2 (R212)*

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. This project is expected to incorporate recommendations produced by the siting program evaluation being conducted as part of the Department's implementation of Executive Order (EO) 20-04, although preliminary work to identify issues and possible rule changes may begin before the evaluation is finalized.

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.

#### *Exemptions (R185)*

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 (R182)*

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 to begin after the siting program evaluation being conducted as part of the EO 20-04 implementation plan has been completed and any recommendations for the compliance program are finalized.

#### *Financial Assurance and Retirement (R221)*

This project would evaluate issues related to the Financial Assurance and Retirement Standard under OAR 345-022-0050 and 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; and whether application information requirements are aligned with the goals and intent of the Financial Assurance and Retirement Standard.

Staff recommends this project be prioritized for 2024 based on the Council's high level of interest in this subject.

#### 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 (R213)*

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 by the siting program evaluation being conducted as part of the EO 20-04 implementation plan and 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 project, with the expectation that committee membership may be amended or supplemented for each phase.

#### *Geospatial Resources (R201)*

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 (R205)*

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 (R216)*

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.

### **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 345-001-0250 – 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 any provision of rule 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. The 5-year review of this rule must be completed by October 23, 2025.

#### 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 345-029-0503 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.