



Oregon

John A. Kitzhaber, M.D., Governor



OREGON
DEPARTMENT OF
ENERGY

625 Marion St. NE
Salem, OR 97301-3737
Phone: (503) 378-4040
Toll Free: 1-800-221-8035
FAX: (503) 373-7806
www.Oregon.gov/ENERGY

Date: **November 21, 2014**

To: **EFSC members**

From: **Jason Sierman, Policy Analyst**
Todd Cornett, Siting Division Administrator

Subject: **Information Item: Update and Proposed Concept Options for Revising the OAR 345 at Division 27 Rules for Site Certificate Amendments**

UPDATE:

Since on or before November 2012, ODOE staff has diligently analyzed conceptual modifications to the existing OAR 345 Division 27 rules for amending EFSC site certificates. Over the past year, staff's analysis and evaluation of potential modifications to the Div. 27 rules has been reviewed by the Rulemaking Advisory Committee (RAC) that the Council appointed in June 2013. During this time, staff has received and considered a tremendous amount of valuable feedback from the RAC. Staff has learned how the current amendment process affects individual EFSC stakeholders and stakeholders have helped staff identify new issues with the proposed changes to the site certificate amendment process.

In the course of identifying issues with the existing process and the proposed rule changes, staff and RAC members produced many questions about how the amendment process could be improved, and questions about what the ramifications of potential changes might be. While many of these questions have resulted in unclear answers, and while some are more rhetorical in nature than others, they have all received a significant amount of time and deliberation by Department staff and the RAC.

When staff moves forward with the drafting of rulemaking language to modify the existing site certificate amendment rules, many of these questions will ultimately have to be answered by the Department to some degree. Also, because many of the questions highlight some of the critical issues influencing the rulemaking, staff sees value in presenting the questions to Council and welcomes its input.

By presenting these questions to the Council, staff aims to inform Council members of the tensions and dynamics that staff and the RAC have identified through the concept development portion of the rulemaking process. The questions also help provide a foundational understanding of how and why certain aspects of potential draft rule language may be written. While the questions are difficult and somewhat rhetorical in nature, staff will consider any input that the Council wishes to provide.

TWO PROPOSED CONCEPT OPTIONS:

Should the Council decide to move forward with substantive process changes to the OAR 345 at Division 27 rules, staff sees two viable concepts it can draft language around:

- 1) Council may decide to make substantive process changes that expand the opportunity for meaningful participation within one standard “one-size-fits all” process, or
- 2) Council may decide to make substantive process changes that expand the opportunity for meaningful participation within a standard process **and** create an expedited secondary process that is only available for certain types of non-discretionary amendments that are enumerated in a closed list.

1) ONE STANDARD PROCESS:

The first concept choice contemplates extensive revisions to the Division 27 rules relating to the site certificate amendment process. The ultimate goals of making the process revisions are to enhance the opportunity for meaningful public participation while minimizing process inefficiencies. Each of the steps identified below corresponds to the numbered steps on the “Proposed Standard Process” chart that is supplied in your handouts.

Global questions staff has considered regarding the first concept:

1. *Does the proposed standard process provide sufficient opportunity for better meaningful participation from the public?*
2. *Is the proposed standard process substantially more inefficient than the existing amendment process?*

Step 1: Pre-Amendment Conference: The rationale for adding this step is to promote a more open dialogue between certificate holders and the Department. Currently, the Department is often given little notice of a certificate holder’s intent to file an amendment before it does so. And, on the other hand, the situation also arises where the Department does not receive any notice of when a certificate holder decides to make a change without filing an amendment.

Specific questions staff has considered:

1. *Should this conference be mandatory or optional?*
 - a. *How would a mandatory conference be enforced?*
2. *What threshold types of changes trigger a certificate holder to initiate a pre-amendment conference?*
3. *Possible outcomes of the pre-amendment conference:*
 - a. *Department and certificate holder agree that an amendment is not required*
 - b. *Department and certificate holder agree that an amendment is required*
 - c. *Certificate holder disagree with the Department that an amendment is required*
 - d. *Certificate holder disagrees with the Department that an amendment is not required*

Step 2: Preliminary Request for Amendment: The addition of this step to the process will allow the Department to efficiently and effectively assist the certificate holder with the filing of a complete amendment request. The preliminary request serves as notice to the Department so that the Department may budget an adequate amount of time to effectively respond to the certificate holder’s amendment request. Providing the certificate holder with clear and detailed feedback on their amendment request will increase the overall

efficiency of the amendment process by avoiding future confusion, reducing downstream conflicts, and reducing the amount of downstream time that the certificate holder may have otherwise wasted in filing an incomplete, or fatally flawed, amendment request. After receiving a preliminary amendment request, the Department will also decide whether the amendment needs to be reviewed by any reviewing agencies and will notify those agencies accordingly.

Step 3: Department Review for Completeness: This step continues with the idea of providing the Department a sufficient period of time to assist the certificate holder in preparing a complete amendment request.

Step 4: Complete Request for Amendment:

Specific questions staff has considered:

1. *What kind of notice, if any, should be made to the public upon a determination of completeness? (Should notice be made simultaneously with issuance of a Staff Report?)*
2. *Should the reviewing agencies be notified upon a determination of completeness?*

Step 5: Department Review and Prep of Staff Report: The intent behind the addition of a Staff Report is to give the public the information it may need to make effective and meaningful comments on the site certificate amendment request. In other words, the intent is to give sufficient notification to the public of the critical facts and findings that the Department is considering in its review of whether the request meets the applicable siting standards. In many ways this report will function similarly to the Draft Proposed Order (DPO) that is issued by staff in an original site certificate application process.

Step 6: Public Notice of Complete Request & Staff Report, Written Comment Period Begins, Opportunity to Make Written Request for a Public Hearing

Specific questions staff has considered:

1. *Who must make a request for a public hearing? (Anyone wishing to comment at the hearing?)*
2. *What details must be in the written request for a public hearing? (Generic request, or specific issues tied to specific standards?)*

Step 7: Public Hearing held before Council: The purpose of adding the opportunity for a public hearing before Council is to enhance the ability for the public to meaningfully participate in the amendment process. With the original site certificate application process, there is an automatic contested case and any person who submitted comments on the draft proposed order may request party status in the contested case. The existing amendment process does not include an automatic contested case, and only allows for contested cases at Council's discretion. Historically, contested case requests for site certificate amendments have not been granted because the Council has determined that they do not meet the threshold criteria required for Council to grant a contested case. The differences between the opportunity to participate in the application process and the opportunity to participate in the amendment process has created a concern from the public that they do not have the

opportunity for meaningful participation in the amendment process. The addition of an automatic public hearing upon request seeks to enhance the opportunity for the public to participate in the amendment process.

Specific questions staff has considered:

1. *Who may comment at the public hearing? Are participants limited to only those who made a prior written request for a hearing?*
2. *Are the issues limited to only those that were raised in public comments and those raised in written requests for a hearing?*

Step 8: Department Review and Preparation of a Proposed Order

Step 9: Public Opportunity to Request a Contested Case

Specific questions staff has considered:

1. *Who may request a contested case? (Existing rules have no limitations)*
2. *Should issues be limited to only those that have already been raised during the public comment period or the public hearing?*
3. *Should a person's eligibility to request a contested case be limited to only those that have already commented orally or in writing?*

Step 10: Council Review of Contested Case Requests

Specific questions staff has considered:

1. *Should the evaluative criteria and the amount of Council discretion that currently exists in OAR-345-027-0070(7) and (8) be retained?*

Steps 11 & 12: Council Review of Proposed Order / Review of Contested Case Order

Specific questions staff has considered:

1. *Can the evaluative criteria that currently exists in OAR-027-0070(10) for approving a site certificate amendment be clarified?*

2) STANDARD PROCESS PLUS AN EXPEDITED PROCESS:

The second concept choice contemplates the addition of an expedited process on top of, and as an alternative to, the rule revisions that will result in the standard process discussed above. Existing rules allow for an expedited process, but the existing expedited process serves a different purpose and function from what the newly proposed expedited process would. Currently, the certificate holder must make an explicit expedited request to the Council Chair. Council Chair may grant the request if a delay would cause undue harm to the certificate holder and if the change would not likely result in a significant new adverse impact. The existing expedited process will likely be removed from the rules. The purpose of the proposed expedited process is to give an alternative to the proposed standard process that provides enhanced efficiency for ministerial amendment requests while maintaining a sufficient opportunity for meaningful public participation.

Other than the removal of the opportunity to request a public hearing, the proposed expedited process is the exact same as the standard process. However, there are many options and questions that have been considered, and could be considered further.

Global questions staff has considered regarding the second concept:

1. *Will an expedited process ensure the Department is not spending unnecessary time and effort on ministerial amendment requests?*
2. *Should the expedited process include a staff report? Or, if the amendment is straightforward enough, should the process jump straight to a proposed order?*
3. *Does the expedited process need to have the pre-amendment conference?*
4. *Should the expedited process have the opportunity to request a contested case?*
5. *If there are two processes, a Standard process and an Expedited process, should the Council apply different standards of discretion in granting contested cases for each process?*
6. *What types of non-discretionary amendments should be allowed to be expedited? If a closed list is not possible, then how does the determination to allow an expedited amendment get made?*
7. *If there is disagreement between the certificate holder and the Department over the classification of an amendment request, how is this appealed/challenged?*
8. *Does a closed list of specific changes that are eligible for expedited review provide enough flexibility to capture future ministerial amendment requests?*