



Oregon

Kate Brown, 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

To: Oregon Energy Facility Siting Council (EFSC)

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

Date: June 17, 2016

Subject: Information Item: Update on current rulemaking activities related to the
1) Amendment Processes for Site Certificates and 2) Fish & Wildlife Standard

1) Amendment Processes for Site Certificates

Background

At its August 24, 2012 meeting, the Council directed ODOE staff to begin rulemaking activities to evaluate the Council's rules governing amendments to site certificates. These rules are found in OAR Chapter 345, Division 27.

From around August 2012 to around October 2014, ODOE staff worked on developing concepts that would improve the existing amendment processes. During this phase of concept development, staff received and considered public input on the site certificate amendment processes by holding two public workshops and three Rulemaking Advisory Committee (RAC) meetings. Generally speaking, public input ranged from comments on how the existing amendment processes function to suggestions of what modifications could be made to improve them. Along the way, Staff evaluated proposed improvement concepts by balancing the Council's interest in process efficiency with the Council's interest in ensuring meaningful public participation.

At its November 21, 2014 meeting, the Council received staff's analysis of two potential rulemaking concepts and directed staff to draft rule language for both concepts.

The first concept proposed was to create a set of rules for a "one-size-fits-most" amendment process. This version would funnel nearly all types of amendments through a single process. At the time, the design of this single process contemplated adding an array of new procedural steps aimed at increasing process efficiency, increasing the opportunity for public participation, or both. Some of the new procedural steps that were contemplated included: a pre-amendment conference; a preliminary request for amendment; a determination of completeness phase; a draft proposed order; a public hearing; and a "raise it or waive it" public notice and comment period (parties that do not comment during the "raise it or waive it" comment period would be prohibited from participating in any subsequent contested case).

The second concept proposed was to create a set of rules that would funnel some types of amendments through a standard process (comparable to the "one-size-fits-most" process) and

other types of amendments through a more expedited process. The standard process would serve as the default process for those amendments not qualifying for the more expedited process. Staff suggested a more expedited process could be created by removing or altering some of the steps included in the standard process, such as the public hearing.

Current Status

Transforming the concepts into workable rule language has amounted to a complete overhaul of the various processes for making amendments to site certificates. While the basic concepts staff presented the Council in November of 2014 were sound and workable, the exercise of transforming concepts into clear and congruent rule language to successfully integrate new procedural steps into the existing process has proved time consuming. In some instances entire rules and sections of rules have had to be re-written.

The first version of proposed revisions to the Div. 27 rules reflecting the first concept (the “one-size-fits-most” process) is nearly complete. This creates a single process generally applicable to most types of amendments (not including amendments to transfer a site certificate and amendments to apply later-adopted laws). The estimated completion date for the first version of proposed rules is the end of June.

The second version of proposed revisions to the Div. 27 rules to reflect the second concept (a standard process for some types of amendments and a more expedited process for other types of amendments) is underway. The estimated completion date for the second version of proposed rules is the end of July.

After these two versions of proposed rules are complete, staff will provide the Council with a detailed review of the concepts and rule language at a regularly scheduled EFSC meeting. This will provide the Council an opportunity for additional input and direction to staff.

Before any proposed rules could be officially adopted: 1) staff must reconvene the RAC to gather its input on any fiscal impacts of the proposed changes, 2) staff must issue the required rulemaking notice, 3) Council is advised to hold a public hearing, and 4) Council must consider public comments received.

A projected schedule with estimates of the time to complete this rulemaking is attached.

2) Fish & Wildlife Standard

Background

In 2015, as part of Oregon’s strategy to demonstrate to the U.S. Fish & Wildlife Service why listing the sage-grouse species under the Federal Endangered Species Act (ESA) was not necessary, Oregon added regulatory mechanisms to its greater sage-grouse conservation policy by administrative rulemaking through the Oregon Department of Land Conservation and Development (DLC) and the Oregon Department of Fish and Wildlife (ODFW).

On July 24, 2015, DLCD adopted OAR 660-023-0115, a rule that provides specific land use protection for sage-grouse habitat and has the potential to impact energy development projects by requiring all “large-scale development” located in “significant” sage-grouse habitat to go through a “mitigation hierarchy.”¹

On July 27, 2015, ODFW amended its rules, OAR 635-140-0000 through -0025. These rules describe ODFW’s responsibilities for developing and maintaining maps identifying Oregon’s “significant” sage-grouse habitat, and provide ODFW’s policy and requirements for compensatory mitigation.

DLCD’s rule and ODFW’s rules are intended to work together; DLCD’s rule lays out the general framework for protecting sage-grouse under the statewide planning goals and ODFW’s rules lay out the conservation and mitigation details, including target habitat conservation numbers and the process for implementing mitigation measures.

Proposed language changes are necessary to align EFSC rules with Oregon’s sage-grouse conservation policy and to clarify what application exhibits are required to support the Fish and Wildlife Habitat standard and the Threatened and Endangered Species standard.

Current Status

The preliminary work staff is currently engaged in includes analyzing the impacts of Oregon’s sage grouse conservation policy on EFSC rules and statutes, and setting the final scope of this rulemaking. After staff has completed its analysis, staff will meet with members of the Governor’s Office, DLCD and ODFW to have a discussion on how modifications to EFSC rules can be made to best align with Oregon’s sage-grouse conservation policy.

After this preliminary work is complete, staff will provide the Council with a detailed review of proposed rule language at a regularly scheduled EFSC meeting. This will provide the Council an opportunity for additional input and direction to staff.

Before any proposed rules could be officially adopted: 1) staff must issue the required rulemaking notice, 2) Council is advised to hold a public hearing, and 3) Council must consider public comments received.

A projected schedule with estimates of the time to complete this rulemaking is attached.

¹ An overview of OAR 660-023-0115 and definitions to key terms was provided in a Council staff report dated July 31, 2015, which was presented as Agenda Item F at the August 7, 2015 Council meeting.

EFSC Amendment Rulemaking

June 17	<u>EFSC Meeting</u> • Status update and estimated completion schedule
June 30	Conclude drafting first version of proposed Div. 27 rules for amendments processes
July 21, 22	<u>EFSC Meeting</u> (Likely not to occur)
2nd half of July	Contact RAC to schedule a fiscal impact meeting for second half of August
End of July	Conclude drafting second version of proposed Div. 27 rules for amendments processes
2nd half of August	Reconvene RAC to gather input on fiscal impacts
August 18, 19	<u>EFSC Meeting</u> • Detailed review of concepts & language • Opportunity for Council input • Authorize filing w/ Secretary of State
September 15, 16	<u>EFSC Meeting</u> • Detailed review of concepts & language • Opportunity for Council input
October 1	Notice published in Oregon Bulletin
October 20, 21	<u>EFSC Meeting</u> • Rulemaking hearing 1
November 24, 25	<u>EFSC Meeting</u> • Rulemaking hearing 2 • Written comment deadline
December 15,16	<u>EFSC Meeting</u> • Consider comments received • Adopt final language • Authorize filing of permanent rules
2017	

EFSC Fish & Wildlife Rulemaking

June 17	<u>EFSC Meeting</u> <ul style="list-style-type: none"> • Status update and estimated completion schedule
June 24	Schedule a meeting for the second half of July with members of: <ul style="list-style-type: none"> • Governor’s Office • Dept. of Land Conservation and Development (DLCD) • Oregon Dept. of Fish and Wildlife (ODFW)
July 21, 22	<u>EFSC Meeting</u> (Likely not to occur)
2nd half of July	Convene with stakeholders listed above
End of July	Conclude drafting proposed rule language
August 18, 19	<u>EFSC Meeting</u> <ul style="list-style-type: none"> • Review proposed changes • Opportunity for Council input • Authorize filing w/ Secretary of State
September 15, 16	<u>EFSC Meeting</u> <ul style="list-style-type: none"> • Status update
October 1	Notice published in Oregon Bulletin
October 20, 21	<u>EFSC Meeting</u> <ul style="list-style-type: none"> • Rulemaking hearing • Written comment deadline • Consider comments received • Adopt final language • Authorize filing of permanent rules
November 24, 25	<u>EFSC Meeting</u>
December 15,16 2017	<u>EFSC Meeting</u>