

Secretary of State
NOTICE OF PROPOSED RULEMAKING HEARING*
A Statement of Need and Fiscal Impact accompanies this form.

Oregon Department of Energy, Energy Facility Siting Council (EFSC)	345
Agency and Division	Administrative Rules Chapter Number

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RULE CAPTION

Reorganization of Division 27 and rewrite of rules governing requests for amendments to site certificates.

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

07-28-17	8:30 a.m.	Columbia Room, Best Western Hood River Inn, 1108 E. Marina Way, Hood River, OR 97031	Jason Sierman
Hearing Date	Time	Location	Hearings Officer

Auxiliary aids for persons with disabilities are available upon advance request.

RULEMAKING ACTION

Secure approval of new rule numbers (Adopted or Renumbered rules) with the Administrative Rules Unit prior to filing.

ADOPT: OAR 345-027-0051, 345-027-0053, 345-027-0055, 345-027-0057, 345-027-0059, 345-027-0063, 345-027-0065, 345-027-0067, 345-027-0068, 345-027-0071, 345-027-0072, 345-027-0075.

AMEND: OAR 345-015-0014, 345-015-0016, 345-015-0080, 345-015-0083, 345-027-0011, 345-027-0050, 345-027-0060, 345-027-0090, 345-027-0100.

REPEAL: OAR 345-027-0070, 345-027-0080.

RENUMBER: OAR 345-027-0020 to 345-025-0006, 345-027-0023 to 345-025-0010, 345-027-0028 to 345-025-0016.

AMEND & RENUMBER: OAR 345-027-0000 to 345-027-0013, 345-027-0030 to 345-027-0085.

Stat. Auth.: ORS 469.405, 469.470 and 469.501

Other Auth.: n/a

Stats. Implemented: ORS 469.350, 469.501 and 469.503

RULE SUMMARY

The ultimate goals of the proposed rules are to enhance the opportunity for public participation while minimizing increases in review time. This rulemaking is not intended to alter the substantive aspects of how the Council's rules and standards apply to the Council's review of a request for an amendment to a site certificate. The scope of this rulemaking is intended to be strictly procedural in nature and effect.

The proposed rules would provide a standard, generally applicable, one-size-fits-most process that the Council would use to review most types of changes proposed by energy facility site certificate holders in a request for amendment (RFA). The idea of having most types of proposed changes reviewed through a standard process is not new and is consistent with existing rules. Existing rules provide three Council review processes: a standard, one-size-fits-most process; a transfer process; and an expedited process.

The originally proposed rules provided for only two processes: a standard, one-size-fits-most process and a transfer process. However, based on direction staff received from the Council after the first rulemaking hearing it held on February 24, 2017, staff revised the proposed rules to include a new expedited review process that is functionally similar to the existing standard review process in terms of the estimated time it takes the Council to complete its review. The proposed new expedited process is also similar to the proposed new standard process in that the steps comprising the new expedited process are the same as the steps in the proposed new standard process, minus the public hearing step, minus the step for the Council to comment on the DPO, and minus the opportunity for persons to request a contested case. Finally, the new expedited process is also similar to the existing expedited process because in order for an RFA to be reviewed through the new expedited process, the Council must first approve the certificate holder's request for expedited review in a preliminary step. Staff has written provisions for this preliminary step into the Amendment Determination Request process found in proposed rule OAR 345-027-0057.

Therefore, the procedural steps of the proposed rules would provide both a new standard review process that would function quite differently than the steps of the existing standard amendment process, and a new expedited review process that would function quite

similarly to the existing standard review process, with the new expedited review process comprised of many of the same steps as the new standard review process. This new standard review process borrows some steps from the existing review process for site certificate applications, including adding steps for completeness determination, a draft proposed order, and a public hearing on the draft proposed order. Ultimately, the proposed rules amount to a wholesale re-write of the existing rules governing the Council's processes for reviewing RFAs.

The Council's existing rules for reviewing requests for amendment do not include a list of the specific types of changes that must be reviewed through the existing standard process and do not include a list of the specific types of changes that must be reviewed through the existing extended review process. Rather, under existing rules, the standard, shorter review process is the default, and the extended, longer review process must be justified by staff or requested by a certificate holder.

In recent years, staff has reviewed nearly all RFAs under the extended review process. Extended review has been required due to the complexity of the changes proposed in RFAs and the incompleteness of RFAs. Therefore, the proposed rules would flip the concept employed under the existing rules. Rather than having the shorter process set as the default review process (as it is under existing rules), the proposed rules would set the default review process as being the process with the most steps. Under the proposed rules, this default process would still be called the standard process, but where the new standard process is the review process with the most steps. Under the proposed rules, the shorter review process with less steps (the expedited review process) would apply to an RFA only after the Council approves a certificate holder's request for expedited review under proposed rule 345-027-0057.

The new standard process would be applicable to the same types of changes that the existing standard amendment process applies to under existing rules. In other words, all types of proposed changes that require an RFA under existing rules would also require an RFA under the proposed rules, and transfers of site certificate holders or transfers in ownership of site certificate holders would continue to be reviewed through the transfer review rules of 345-027-0100.

In addition to the new steps being proposed, the proposed rules also require an amendment to the site certificate for changes proposing to add any quantity of area to the site boundary. This differs from the existing amendment process, where existing rules only require an amendment for a proposed change that adds area to the site boundary if adding area, or if some other change proposed in the same request for amendment to add area, triggers any of the thresholds under existing rule 345-027-0050(1). Staff's rationale for requiring an amendment to the site certificate for changes proposing to add area to the site boundary is that adding new area carries a relatively high likelihood of impacts to the resources the Council's rules and standards are designed to protect. Also, compared to other types of proposed changes, adding area to the site boundary increases the likelihood that new neighboring property owners could be affected by the proposed change.

Based on direction staff received from the Council after the first rulemaking hearing it held on February 24, 2017, staff revised the proposed rules to include a new option under the Amendment Determination Request (ADR) process to give the Council discretion in deciding, on a case by case basis, whether a certificate holder's proposal to add area to its site boundary would require a request for amendment. The ADR process in the proposed rules is the functional equivalent of the change request process in existing rules. Similar to the existing change request process, the proposed ADR process allows the certificate holder to request authorization to add area to the site boundary that does not trigger the need for an amendment under proposed rule 345-027-0050(5). However, rather than the optional Council review under the existing change request process, Council review is mandatory under the proposed ADR process. Under the proposed ADR process, staff is required to refer its determination of whether the proposed addition of area requires an amendment to the Council for concurrence or rejection.

The 9 major steps of the new standard amendment process being proposed in this rulemaking are summarized briefly in the following 9 paragraphs:

Pre-Amendment Conference (PAC)

Proposed rules codify how a voluntary PAC is available to certificate holders for most types of proposed changes. Council staff has always been available for consultation to assist a certificate holder before submission of a request for amendment, but people may not have been aware of this option due to it not being written in rule. One exception to the voluntary nature of the PAC is that the proposed rules would require the certificate holder to participate in a mandatory PAC with staff before submitting an RFA for a change proposing to add area to the site boundary. For all other types of proposed changes, the PAC is voluntary.

Preliminary Amendment Request (pRFA)

Proposed rules require all RFAs be deemed a preliminary request for amendment (pRFA) until staff determines that the certificate holder has submitted all the information necessary for staff to complete its review of the RFA.

Determination of Completeness (DOC)

Proposed rules add an explicit stage in the amendment review process for staff to determine whether the pRFA contains adequate information for the Council to make findings or impose conditions on all applicable Council standards. This step is consistent with how staff currently processes RFAs, but officially codifying staff's practice in rule would ensure staff has a sufficient period of time to

determine whether it needs additional information from the certificate holder in order to prepare a draft proposed order (DPO) (see next paragraph for more discussion on the DPO).

Draft Proposed Order (DPO)

The proposed rules require staff to issue a DPO containing staff's written analysis of how the certificate holder's RFA demonstrated compliance with all applicable laws and Council standards. The DPO would be the first written document reflecting staff's analysis and draft recommendations issued to the public. In contrast, under the existing process, the first written document reflecting staff's analysis and recommendations issued to the public is a proposed order (PO). Adding this step would allow the Council more flexibility to make changes in response to comments received during the public comment period.

Public Comment and Hearing on the DPO

In the existing amendment process, upon receipt of an RFA, staff solicits comments on the RFA from the public and reviewing agencies. These comments are received before staff issues a document containing staff's analysis of how the RFA complies with all applicable siting standards. After receiving comments on the RFA, staff reviews all the timely comments it receives on the record of the DPO, then completes its analysis of the RFA, and then issues a PO. Once a PO is issued, staff solicits comments and requests for contested case on the PO.

The proposed rules consolidate comments into a single round after the issuance of the DPO. This allows for comments to be based on the complete RFA and staff's initial analysis and conclusions of facts and law as to whether the certificate holder has demonstrated it will meet all applicable laws and Council standards.

The proposed rules also provide for a mandatory public hearing on the DPO. The hearing would increase the public's opportunity to meaningfully participate in the review of an RFA by instituting an automatic time and place for people to provide oral comments. The DPO hearing for an RFA must be conducted by the Council itself rather than by an appointed hearing's officer to ensure they hear all testimony directly.

A feature of the proposed DPO hearing and comment period is for it to function as a "raise it or waive it" opportunity for people to engage in the amendment review process. As such, any person who does not properly raise an issue in a comment on the record of the DPO would not be eligible to raise new issues later in the process and would not be able to participate in a contested case on any issues. In the existing amendment review process, after the PO is issued, any person can provide comment on any issue and any person can request a contested case on any issue.

Proposed Order (PO)

Before issuing a Proposed Order (PO), staff would consider all oral and written comments received on the record of the DPO. Because the recommendations in the DPO may change in response to comments received on the DPO, the PO may or may not include the same recommendations to the Council that were made in the DPO.

As discussed above, the proposed rules do not include a comment period on the PO. However, with the addition of the DPO and the mandatory public hearing on the DPO, the public and the certificate holder would have more opportunity for meaningful participation than what the existing amendment review process provides.

Requests for Contested Case (CC)

Proposed rules require requests for CC on the PO be limited to those persons who previously commented on the record of the DPO hearing and limited to only those issues a prior commenter previously raised on the record of the DPO hearing. The public comment period and the public hearing on the DPO, therefore, would function as a "raise it or waive it" opportunity for the public and the certificate holder to raise issues and preserve their ability to participate further in the review process.

Council Considers CC Requests

Proposed rules do not make any changes to how the Council considers and evaluates CC requests to determine whether to grant a CC for a RFA. The existing amendment process does not include an automatic contested case. Instead, any person may request a CC proceeding on the PO for an RFA. Requests for CC are then considered by the Council to determine if any requests meet the threshold criteria necessary for the Council to grant a CC. To grant a request for a CC, the Council must find that the request raises a significant issue of fact or law that may affect the Council's determination that the facility, with the change proposed by the amendment, meets the applicable laws or Council standards. Proposed rules clarify the language describing this Council's CC determination process, but proposed rules make no substantive changes to how this process functions in existing rules.

Under proposed rules, if the Council finds that the contested case request was properly raised on the record of the DPO hearing, and the contested case request meets the threshold determination described above, a contested case would be conducted as described in the existing Council rules. Proposed rules do not make any substantive changes to how the contested case would be conducted. If the Council finds that the contested case request was not properly raised on the record of the DPO hearing, or if the contested case request does not meet the threshold determination described above, the Council would review the proposed order and make a final decision on

the amendment request. Proposed rule do not make any substantive changes to how the Council makes its final decision when there is not a contested case.

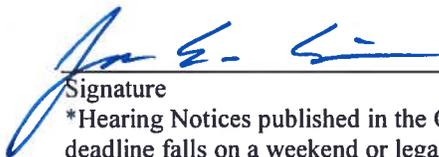
Council’s Final Decision and Scope of Review

Proposed rules clarify the existing rules stating how the Council makes its final decision and what the Council’s scope of review is for the various types of amendments (i.e. under existing rules, the Council’s scope of review for RFA’s proposing to add new area to a site boundary differs from the scope of review for an RFA proposing to extend construction deadlines). These changes are necessary to clarify existing rule language, and to ensure consistency and compatibility with the other rule changes being proposed.

The Council requests public comment on these proposed rules. The Council also requests public comment on whether other options should be considered for achieving the substantive goals of the proposed rules while reducing the negative economic impact of the proposed rules on business. A call-in number is available for the public hearing. Please see the Oregon Department of Energy website for hearing details, proposed rule language, and other materials: <https://www.oregon.gov/energy/Get-Involved/Pages/Energy-Facility-Siting-Council-Rulemaking.aspx>

07-28-17, End of Rulemaking Hearing

Last Day for Public Comment (Last day to submit written comments)



Jason Sierman

06-13-17

Signature

Printed name

Date

*Hearing Notices published in the Oregon Bulletin must be submitted by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a weekend or legal holiday, upon which the deadline is 5:00 pm the preceding workday. ARC 920-2005