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To: Oregon Energy Facility Siting Council (EFSC or “The Council”)

From: Jason Sierman, Policy Analyst
Todd Cornett, ODOE Assistant Director / Council Secretary

Date: July XX, 2017 (DRAFT ONLY)

Subject: Information Item H: Receive an overview of the Amendment Processes rulemaking from staff (Thursday, 7/27)
Information Item J: Receive comments during the hearing for the Amendment Processes rulemaking (Friday, 7/28)
Action Item K: Deliberate and decide on next steps for the Amendment Processes rulemaking (Friday, 7/28)

Rulemaking Authority and Scope of Rulemaking

EFSC has general rulemaking authority to develop standards and rules for the siting of energy facilities under ORS 469.470, and specific rulemaking authority to establish the type of amendment that must be considered in a contested case proceeding under ORS 469.405.

In addition to the proposed changes to Division 27, the scope of the Amendment Processes rulemaking includes proposed changes to Div. 15, the addition of a new Div. 25 into which the Council rules related to the conditions it imposes on site certificates may be relocated, and any other changes necessary to update existing cross-references throughout the Council’s Chapter 345 rules.

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.

Historical Background and Council’s Past Direction to Staff

More information on the background of this rulemaking and on the Council’s prior direction to staff can be found in the meeting materials for past EFSC meetings. A list of the key EFSC meetings at which the Council addressed this rulemaking prior to its May 25-26, 2017 meeting, and links to the associated meeting material, is located under the April 21 posting under the current rulemaking titled “Site Certificate Amendment Process” on the [EFSC rulemaking webpage](#). The meeting material for the May 25-26, 2017 and the July 27-28, 2017 EFSC meetings are located on the [EFSC meetings webpage](#). The key EFSC meeting dates are:

2012: Feb. 3; May 10-11; Aug. 24; Nov. 2

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2013: Jan. 25; Mar. 15; May 3; June 21; Sept. 27

2014: May 9; Nov. 21;

2016: June 17; Aug. 18-19; Nov. 3

2017: February 23-24; April 28; May 25-26; July 27-28

Other critical information about this rulemaking, including: official public notices, proposed rule language, visual process charts, a crosswalk document comparing existing rules to proposed rules, copies of official filing forms, and more information on the Public Workshops and the Rulemaking Advisory Committee (RAC) meetings that were held to gather public input on this rulemaking, can be found under the current rulemaking titled "Site Certificate Amendment Process" on the [EFSC rulemaking webpage](#) under the following posting dates:

2013: Feb. 19; July 2

2014: Apr. 8; Apr. 16; June 6; June 19; Oct. 7; Nov. 25

2017: Jan. 19; Mar. 1; April 21; May 8; June 20

Council's Latest Direction to Staff

At its May 25-26, 2017 meeting, the Council heard staff reiterate the scope of this rulemaking, heard staff explain the historical background of this rulemaking, and heard staff explain the major changes the proposed rules would make to the existing rules. The major changes the Council reviewed at its May 25-26, 2017 meeting were largely the same major changes the Council reviewed during its Feb. 23-24, 2017 meeting and its November 2, 2016 meeting. These changes include: a new standard review process for requests for amendments (RFAs); expansion of the rule stating what types of proposed changes require an amendment to include proposed changes that would add any quantity of area to the site boundary; changes to the rules governing RFAs to extend construction deadlines; and the elimination of the existing expedited review process, replacing it instead with a new proposed expedited review process.

After the presentation from staff, a rulemaking hearing was held and the Council heard public comments on the proposed rules. Summaries of the oral comments received during the hearing can be found in the May 25-26, 2017 meeting minutes. The Council also received all written comments that were received by staff before the close of the rulemaking hearing.

After considering all oral and written comments received before the close of the rulemaking hearing, the Council had a discussion with staff about whether to extend the comment period and whether to hold a third rulemaking hearing that would function as a work session amongst the Council, staff, and any interested persons from the public.

After deliberating, the Council directed staff to extend the comment period and to hold a third rulemaking hearing at the July 27-28, 2017 Council meeting.

Proposed Rules and Supplemental Documentation

Staff has prepared proposed rule language and several supplemental documents for this rulemaking. The following documents can be found under the “Site Certificate Amendment Process” subject on the [EFSC rulemaking webpage](#) and are attachments to this staff report:

	Description
<i>Attachment A</i>	List of Acronyms used in this staff report and supplemental documents.
<i>Attachment B</i>	Process Charts reflecting the review processes under existing rules and showing the review processes under staff’s proposed rules.
<i>Attachment C</i>	Redline Div. 27 Proposed Rules - Rev2 (revised proposed rules including an expedited process and additional ADR options. A redline of Attachment H, the clean original proposed by staff at the Feb. 24, 2017 EFSC Meeting)
<i>Attachment D</i>	Redline Div. 15 Proposed Rules (no changes from original proposed by staff at the Feb. 24, 2017 EFSC Meeting)
<i>Attachment E</i>	Redline Div. 25 Proposed Rules (no changes from original proposed by staff at the Feb. 24, 2017 EFSC Meeting)
<i>Attachment F</i>	Clean Div. 27 Proposed Rules - Original (original version proposed by staff at the Feb. 24, 2017 EFSC Meeting)
<i>Attachment G</i>	Redline Div. 27 Proposed Rules - Original (original version proposed by staff at the Feb. 24, 2017 EFSC Meeting)
<i>Attachment H</i>	Written Comments
<i>Attachment I</i>	Historical Data on Amendments

Written Comments Received

As of the date of this staff report, staff has received XX emails and letters from interested persons with written comments on this rulemaking. **Attachment H** provides an index table showing the complete record of emails and letters received as of July XX, 2017. Complete copies of all these emails and letters are located after the index table in **Attachment H**. Any written comments received by staff after July XX, 2017 will be provided to all Council members separately from this staff report for the Council’s review and consideration. Staff encourages the Council to review and consider all the written comments received on the record of this rulemaking.

The issues below represent those that staff has identified as having the greatest interest or concern by Council and stakeholders. Council members are encouraged to add any other issues of interest or concern that are not included below. The public may also address issues not included below following the conclusion of the Council's and public's discussion of the listed issues.

General Issues

1) Applicability of Any New Rules

Staff Proposal

- Requests for Amendment (RFA's) already in process at the time of the effective date of the new amendment rules will be reviewed under existing amendment rules. RFA's submitted after the effective date of the new amendment rules will be reviewed under the new rules.

Other Options

- RFA's already in process at the time of the effective date of the new amendment rules will convert to being reviewed under the new rules.

2) Construction Deadlines

Existing Rule

- Council can currently only extend the construction commencement and completion deadlines by a maximum of two years and there is no limit on the number of times the extensions can be granted.

Staff Proposal

- Approvals to extend beginning or completion deadlines are for three years from the original deadlines. However, a site certificate holder (CH) may only request two beginning construction extension requests. There are no limits to the number of requests that may be made for completion deadlines.

Other Options

- Firm time limits to beginning and or completion deadlines different than those proposed by staff.
- Maximum or minimum time limits for beginning and completion deadlines but otherwise at Council's discretion.
- Council's discretion in the timing of how it sets new beginning or completion deadlines.

3) Adding Area to the Site Boundary

Existing Rule

- Certificate holders (CH) are not required to receive Council or staff approval for proposed changes to add area to the site boundary in all circumstances. A proposed change to add area to the site boundary only requires an RFA if the addition of area triggers any of the “3 could’s” under 345-027-0050.
- A CH may utilize the change request option under 345-027-0050 to ask staff or the Council to determine whether an addition of area to the site boundary requires an RFA by evaluating the “3 could’s” test. Staff has the authority to make this determination on its own, but the CH or a Council member can require the Council to make this determination.
- If an RFA is required for a CH to add area to the site boundary because of the “3 could’s” test, it is reviewed and processed the same way as RFAs that do not add area to the site boundary.

Staff Proposal

- By default, any addition of area to the site boundary requires an RFA and is evaluated through the review process with more steps.
- However, the certificate holder (CH) may use the Amendment Determination Request (ADR) mechanism to ask Council whether its addition of area requires an RFA. Staff makes a recommendation to the Council but Council must make the final determination.
- The CH also may use the ADR mechanism to ask staff and the Council whether its addition of area requiring an RFA may be reviewed through the review process with fewer steps. Staff then makes a recommendation to the Council and the Council must either approve or deny staff’s recommendation.

Other Options

- Require every site boundary expansion to be evaluated through either the review process with more steps or the review process with fewer steps. Determination of which process could either be at the discretion of staff or Council.
- Retain existing process whereby a CH may utilize the ADR (currently change request) to determine whether any addition of area to its site boundary requires an RFA by evaluating the “3 could’s” test under 345-027-0050.

Review Process with More Steps

4) Pre-Amendment Conference

Existing Rule

- The pre-amendment conference is not identified or required in existing rules, though in practice it typically occurs voluntarily for proposed changes that are more complex.

Staff Proposal

- Required for proposed additions of area to the site boundary because of the potential for the analysis area distances to change, but optional for all other types of proposed changes that require an RFA under 345-027-0050.

Other Options

- Require a pre-amendment conference for a list of specific types of proposed changes. Any specific types of proposed changes requiring a pre-amendment conference would be added to the list of proposed changes requiring an RFA under 345-027-0050.
- Require a pre-amendment conference for all types of proposed changes that require an RFA under 345-027-0050.
- Allow a pre-amendment conference to be optional for all types of proposed changes that require an RFA under 345-027-0050.

5) Unofficial Notice of Receipt of RFA to Reviewing Agencies

Existing Rule

- Within 15 days of receipt of RFA, the Department must provide all reviewing agencies notice and opportunity to comment on the RFA.

Staff Proposal

- Occurs during the Draft Proposed Order step. It is at staff's discretion to determine which reviewing agencies receive unofficial notice based on the specific types of changes proposed in the RFA.

Other Options

- Retain the status quo. Mandatory notice to all agencies after receipt of an RFA.

6) No Notice of Receipt of RFA to Public

Existing Rule

- Within 15 days of receipt of the RFA, the Department must provide public notice and opportunity to comment on the RFA.

Staff Proposal

- As proposed, the first step of the review process requires the CH to submit a preliminary RFA. There is no notice to the public that a preliminary RFA has been received at this stage of the review process. Rather, the proposed rules wait to provide public notice of the complete RFA until the time staff has completed the DPO, when notice of both the RFA and the DPO is provided at the same time. This gives the public the opportunity to review the complete RFA alongside the complete DPO.

Other Options

- Retain the status quo. Provide public notice when the preliminary RFA is received.
- Do not provide public notice when the preliminary RFA is received, but require the preliminary RFA to be posted on the Department's website.
- Provide notification after the RFA is complete but before the DPO is issued.

7) Determination of Completeness (DOC)

Existing Rule

- There is no official determination of completeness step in existing rule. However, in practice, during the 60 or 180 day period of time that staff conducts its analysis and writes the proposed order, staff conducts a completeness review in the same fashion as with new applications for site certificates.

Staff Proposal

- Add an official DOC step to replace the unofficial DOC step that occurs now.

Other Options

- Retain the status quo. No official DOC step. Determination of completeness is made within the step and timeframe that staff completes its analysis and writes the proposed order.
- Make the Pre-Amendment Conference step mandatory for all amendments to increase the likelihood for a CH to submit a complete RFA at the outset.
- Add a Notice of Intent (NOI) and Project Order step to potentially increase the ability for a CH to submit a complete RFA at the outset.

8) Draft Proposed Order (DPO)

Existing Rule

- Existing rules do not have a DPO step in the review process for RFAs.

Staff Proposal

- Add a DPO step to allow the public the opportunity to comment on the RFA before the proposed order (PO) is issued. This gives staff the ability to address public comments between a DPO and a proposed order. This is the step where reviewing agencies and the public would receive formal public notice with an established comment period that likely ends at the conclusion of the public hearing.

Other Options

- Retain the status quo. No DPO step. Without a DPO step, staff recommends retaining the early comment period on the RFA that is in place under existing rules. Staff's review would then proceed from receiving a complete RFA to considering comments to issuing a PO.

9) Mandatory Public Hearing

Existing Rule

- OAR 345-027-0070 allows the option of “one or more public meetings during the review of a request for amendment of the site certificate” but the timing and the purpose of these “public meetings” are not clear.

Staff Proposal

- Add a mandatory public hearing in the presence of the Council to give the public an opportunity to address the Council in person with oral comments.

Other Options

- Retain the status quo. No opportunity for a public hearing.
- Hold a public hearing at the discretion of staff or the Council
- Hold a public hearing upon request from any person.

10) “Raise It or Waive It” Requirement for Comments and Contested Case Requests

Existing Rule

- Existing rules do not have a raise it or waive it requirement in the review process for RFAs.

Staff Proposal

- Add a raise it or waive it requirement that would require anyone interested in making a request for a contested case to have raised the same issue on the record of the DPO comment period.

Other Options

- Retain the status quo. No raise it or waive it requirement.

11) Council Discretion on Contested Case Requests

Existing Rule

- If a contested case is requested during the review of an RFA, the Council may grant a request for a contested case if 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 an applicable standard.”

Staff Proposal

- Retain status quo, but rephrase the threshold test quoted above to “...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 and Council standards included in chapter 345 divisions 22, 23 and 24.”

Other Options

- Change the language quoted above that creates the threshold test Council applies in exercising its discretion on whether to grant a contested case.
- Rather than have the Council determine whether a contested case request raises an issue that justifies a contested case, have a hearing officer make that determination.
- Provide an automatic contested case for every RFA.
- Provide an automatic contested case for any RFA proposing a change of such magnitude that the change in and of itself would constitute an “energy facility” as that term is defined under ORS 469.300(11)(a).
- Remove the opportunity for a contested case.

Review Process with Fewer Steps

12) Should there be a review process with fewer steps? If so, what should those steps be?

Existing Rule

- Under existing rule 345-027-0070, the standard and extended review processes apply to any change triggering the “3 could’s.” These two review processes are each comprised of the same exact steps, but they each have different timing requirements for the step in which staff completes its analysis and issues the proposed order.

Staff Proposal

- Yes, a review process with fewer steps should be added. Steps include:
 - Determination of Completeness (DOC)
 - Draft Proposed Order (DPO)
 - Notice of RFA and DPO to Reviewing Agencies and public at time of DPO
 - Comment Period
 - Proposed Order
 - Final Order
 - No Opportunity for a Contested Case

Other Options

- Add steps to or subtract steps from the secondary review process with fewer steps proposed by staff.
- Eliminate the secondary review process with fewer steps proposed by staff.
- Retain the existing standard process with the 60 day timeline from notice of RFA to Proposed Order. Steps include:
 - Notice of RFA to the public and reviewing agencies with a comment period
 - Proposed Order (PO)
 - Notice of PO to the public and reviewing agencies with a comment period and opportunity to request a contested case
 - Evaluation and decisions on contested case requests, if any
 - Final Order

13) How should the review process with fewer steps be exercised?

Existing Rule

- Existing rules do not contain a review process with fewer steps.

Staff Proposal

- The review process with more steps is the default. CH has to request the process with fewer steps through the Amendment Determination Request (ADR) mechanism and the Council has to approve the request.

Other Options

- Have the process with more steps as the default, but allow staff the discretion to determine the appropriate review process. If the CH disagrees with staff's determination, then the Council will review and make a final determination.
- Have the process with fewer steps as the default and staff has to justify why the process with more steps is appropriate for the types of changes proposed in the RFA. If the CH disagrees with staff's determination, the Council will review and make a final determination.
- Don't set a default process. Allow the CH to select the review process. If staff disagrees with the CH's selection of review process, then the Council will review and make a final determination.

14) Should there be an expedited review process in addition to a review process with fewer steps?

Existing Rule

- Existing rules have an expedited review process with different steps and different timelines than the existing non-expedited review processes.

Staff Proposal

- No expedited review is included in the staff proposed rules.

Other Options

- Establish an expedited review process with compressed timelines that still allows adequate time for staff review without compromising the Council's statutory duties to protect public health, safety and environment and without compromising any necessary participation of the public and the reviewing agencies. An example might be to limit any expedited review of proposed changes to only those proposed changes that have had some kind of preliminary programmatic review and evaluation in the site certificate or amended site certificate and were specifically allowed by condition(s) in the site certificate or amended site certificate.

15) Should there be an emergency review process in addition to a review process with fewer steps?

Existing Rule

- Existing rules do not contain an emergency review process.

Staff Proposal

- No emergency review is included in the staff proposed rules.

Other Options

- See “Other Options” in 14) above.

16) Other issues of interest or concern to the Council that are not included above.

17) Other issues of interest or concern to commenters that are not included above and/or closing comments.

Action Item K: Deliberate and decide on next steps for the Amendment Processes rulemaking (Friday, 7/28)

The Council may choose to:

1. Review the list of issues sequentially and direct staff to make specific modifications to the proposed rules without extending the comment period.
 - Under this option, staff would modify the proposed rules in accordance with the Council’s direction, and then return to the Council with the modified rules at a future Council meeting so the Council may review and consider the modified rules before final adoption.
2. Direct staff in any other manner consistent with the scope of this rulemaking.