

PUBLIC NOTICE

Extended Written Comment Period

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

Summary

Date Issued: August 10, 2017

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

Extended Written Comment Period:

There is no opportunity to provide oral comments during the extended written comment period. All comments must be received in writing before 5 p.m. PST on September 29, 2017.

Availability of Revised Rules:

Revised Division 27 rules (“Division 27 Proposed Rules – Rev3”) are not complete and are not available for review at this time. Complete revised rules will be posted to the EFSC rulemaking webpage on September 8, 2017. Please go to:

<http://www.oregon.gov/energy/Get-Involved/Pages/Energy-Facility-Siting-Council-Rulemaking.aspx>

Council Direction from its July Meeting

At its July 27-28, 2017 meeting, the Council directed its staff to extend the comment period on this rulemaking to receive written comments only, and to make the following revisions to the proposed rules:

- Include a third review process for truly expedited situations. The third review process would be in addition to the standard (default) review process with more steps and the expedited review process with less steps that are currently proposed in the “Division 27 Proposed Rules – Rev2” that the Council reviewed at its meetings on April 28, May 25, and July 27-28.
- Require the certificate holder (CH) to submit an Amendment Determination Request (ADR) for any proposed addition of area to the site

boundary. Staff would determine if a request for amendment is necessary, and the CH may appeal staff’s determination to the Council. A CH may directly submit a request for amendment for a proposed addition of area, bypassing the need to submit an ADR.

- The CH may submit an ADR to ask staff whether its proposed change(s) can be reviewed through a process other than the default process with more steps. Staff would determine which review process applies, and the CH may appeal staff’s determination to the Council.
- Refine the factors staff and the Council may consider when determining whether a proposed addition of area to the site boundary requires a request for amendment.
- Refine the factors staff and the Council may consider when determining whether the change(s) proposed by a CH may be reviewed through a process other than the default review process with more steps.
- Require the Preliminary RFA to be posted to the EFSC website.

Introduction

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.

Description of Rulemaking Activity

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 proposed rules provide for two processes: a standard, one-size-fits-most process and a transfer process. Ultimately, the proposed rules amount to a wholesale re-write of the existing rules governing the Council's processes for reviewing RFAs.

The procedural steps of the proposed rules would provide a new standard amendment process that would function quite differently than the steps of the existing standard amendment process. This new standard amendment 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.

The new standard process would be applicable to the same types of changes that are proposed by site certificate holders under the 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.

During the public comment period for this rulemaking, EFSC staff anticipates it may receive comments that raise questions and ideas about how the proposed rules could possibly be revised to allow certificate holders to add area to site boundaries without going through the standard review process. EFSC staff also anticipates it may receive comments that raise questions and ideas about how the proposed rules could possibly be revised to allow EFSC to review, under special circumstances, an RFA in an expedited and/or emergency manner rather than the standard review process being proposed. Because EFSC staff considers these two issues (how rules allow for area to be added to site boundaries and how RFA's can receive expedited/emergency reviews) to be within the scope of this rulemaking notice, EFSC could revise the proposed rules and/or adopt new rules to address these issues as part of this rulemaking.

The major steps of the new standard amendment process being proposed in this rulemaking are summarized briefly in the following 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. After receiving comments on the RFA, staff reviews all the timely comments it receives, completes its analysis of how the RFA complies with all applicable laws and Council standards, and then issues its analysis and recommendations in a PO. Once a PO is issued, staff solicits a second round of comments and solicits requests for contested case on the PO.

The proposed rules consolidate the two existing comment periods into a single round of comments after the issuance of the DPO. Rather than taking comments on a potentially incomplete RFA and in the absence of staff's analysis and recommendations, taking comments after a DPO allows for comments to be based on a complete RFA and staff's initial analysis and conclusions of facts and law as to whether the certificate holder has demonstrated compliance with 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 participate in the review of an RFA by instituting an automatic time and place for people to provide oral comments. To ensure the Council hears all testimony directly, the DPO hearing for an RFA

would always be conducted by the Council itself rather than by an appointed hearing's officer.

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, anyone can provide comment on any issue and anyone 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 would 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 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 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 would 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 CC. 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 CC request was properly raised on the record of the DPO hearing, and the CC request meets the threshold determination described above, a CC would be conducted as described in the existing Council rules. Proposed rules would not make any substantive changes to how the CC would be conducted. If the Council finds that the CC request was not properly raised on the record of the DPO hearing, or if the CC 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 rules would not make any substantive changes to how the Council makes its final decision when there is not a CC.

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.

EFSC Decision Process

EFSC relies upon its authority under ORS 469.470 and ORS 469.501 to conduct rulemaking. EFSC will make all decisions on the proposed rule amendments at a public meeting and will provide public notice of the date, time, and location of all EFSC meetings.

The Council received written comments and heard oral comments on the proposed rules during the first rulemaking hearing at its February 23-24, 2017 meeting.

In response to the Council's direction to staff at that meeting, staff revised the originally proposed rules to include: a second, more expedited, review process; an option for the certificate holder to ask the Council whether a proposed change to add area to the site boundary requires an amendment; and to include an option for the certificate holder to ask the Council whether a proposed change can be reviewed under the proposed new standard process or the proposed new expedited process. Staff presented the second, more expedited, review process to the Council at its April 28, 2017 meeting.

A second rulemaking hearing was held with two comment sessions at the Council's May 25-26, 2017 meeting. After considering all oral and written comments received before the close of that rulemaking hearing, the Council directed its staff to extend the comment period and hold a third rulemaking hearing at the July 27-28, 2017 Council meeting that would function as a work session amongst the Council, staff, and any interested persons from the public.

At the July 27-28, 2017 Council meeting, the Council held a third rulemaking hearing and heard extensive public comment. After considering all oral and written comments received before the close of that rulemaking hearing, the Council directed its staff to extend the comment period to receive written comments only and to revise the proposed rules as indicated on page 1 of this notice. To comment on the record of the extended comment period, comments must be in writing and must be received by staff before 5 p.m. PST on September 29, 2017. After considering all comments received on the record of this rulemaking, the Council could consider the revised proposed rules and could take action to approve the revised proposed rules at its October 19-20, 2017 meeting (exact dates and times of an October meeting are not finalized).

Comment Period

EFSC requests public comment on these proposed rules. EFSC 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.

The Oregon Department of Energy (ODOE) will accept written comments on the proposed rules until 5 p.m. PST on September 29, 2017.

Any person or agency may send written comments by email to EFSC.rulemaking@oregon.gov, or by mail, hand-delivery or fax to:

EFSC Rules Coordinator
Oregon Department of Energy
550 Capitol St. NE
Salem, OR 97301
Fax: 503-373-7806

More Information

Please contact Jason Sierman at 503-373-2127, by email to jason.sierman@oregon.gov, or at the mailing address listed above with any questions regarding this rulemaking.

Additional information about the proposed rulemaking and updates on the rulemaking review process are available using any of the following options:

1) Oregon Department of Energy's Webpage

Details about this rulemaking, including: proposed rule language; a crosswalk document comparing existing Division 27 rules to proposed rules; process charts showing how EFSC reviews RFAs under existing rules and how RFAs would be reviewed under proposed rules; documents relied upon in preparing the rule; required rulemaking forms that have been filed with the Oregon Secretary of State; and links to EFSC webpages containing prior information relating to this rulemaking are available online at: <https://services.oregon.gov/energy/Get-Involved/Pages/Energy-Facility-Siting-Council-Rulemaking.aspx>

2) Updates by Email/Mail

In order to receive future updates related to this rulemaking project or other rulemaking projects

you must be signed up on either or both of the two lists below. You will not automatically receive future updates simply by providing comments on the rulemaking.

Email

Subscribe to GovDelivery for email updates on EFSC rulemaking activities and other activities related to energy facilities under EFSC jurisdiction. GovDelivery is an automated email system that allows the public to manage subscriptions to receive information on ODOE's projects and events. For more information, please visit: <http://tinyurl.com/EFSC-email>.

Mail

To receive notices of rulemaking activities in paper via U.S. postal mail, please contact Jason Sierman and request to be added to the paper notice list. His contact information is contained in this notice.

3) In Hardcopy

Copies of the proposed rules, and all the information related to this rulemaking that is posted to the EFSC webpage, are available in hardcopy for public inspection at:

Oregon Department of Energy
550 Capitol St. NE
Salem, OR 97301

Accessibility Information

The Oregon Department of Energy is committed to accommodating people with disabilities. If you require any special physical or language accommodations, or need information in an alternate format, please contact Megan Boardman at 503-378-3895, toll-free in Oregon at 800-221-8035, or by email to: Megan.Boardman@oregon.gov.