

# 2019 Housekeeping Rulemaking Project

## Issues Analysis Document

April 19, 2019

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This document provides a summary of the Department’s analysis and recommendations for issues included in the 2019 Housekeeping Rulemaking Project. The document and associated draft rules are for information only, and are not notice of rulemaking action by the Energy Facility Siting Council. The analysis and recommendations within are subject to change based on input from the Energy Facility Siting Council, staff, and stakeholders.

### Issue 1019 – Rulemaking Notice Requirements

**Affected rules:** OAR 345-001-0000

**Issue description:** Amendments to rulemaking notice rule may improve consistency with ORS chapter 183 and current practice.

**Background:** Before an agency may permanently adopt, amend, or repeal a rule, ORS 183.335(1) requires the agency to give notice of its proposed action in the manner established by rule adopted by the agency under ORS 183.341(4). The notice must provide a reasonable opportunity for interested persons to be notified of the agency’s proposed action. The Council adopted OAR 345-001-0000 to meet this requirement. Staff have identified several areas where Council could update the rule to reflect changes in statute, technology, and department practice.

#### Issue 1019.1 – Notice by email

**Affected rules:** OAR 345-001-0000(1)

**Issue description:** The rule does not specify that Council may send notice by email.

**Background:** OAR 345-001-0000 provides the Council will satisfy ORS 183.335(1) by giving notice:

(b) “...by mailing a copy of the notice to the Council's mailing list of persons who have requested notice of rulemaking at least 28 days before the effective date of the rule and to certain legislators at least 49 days before the effective date of the rule, and

(c) By mailing or furnishing a copy of the notice to the Associated Press and the Capitol Press Room.”

The rule provides that Council will mail notice, but unless a person has requested a paper copy, the Department generally sends the notices by email through the GovDelivery system. The rule also provides that the notice will be mailed to certain legislators, but ORS 183.335 requires agencies to send the notice to legislators only by electronic mail (see 2011 Oregon Laws ch. 380 §2).

#### Alternatives:

1. Make no changes.
2. Amend the rule to provide the Council may give notice by email.

**Staff recommendation:** Alternative 2. To be consistent with the requirements of ORS 183.335 and ORS 183.341 and current practice, staff specifically recommends Council amend the rule to specify that

Council will provide notice to persons on the mailing list “by mail or email;” to certain legislators “by email;” and to the organizations listed under subsection (c) by “mail, email, or hand delivery.”

**Issue 1019.2 – Procedures for updating rulemaking mailing lists**

**Affected rules:** OAR 345-001-0000(NEW)

**Issue description:** The rules do not establish procedures for updating mailing lists.

**Background:** ORS 183.335(8) requires the Council to establish and maintain a list of persons who have requested notice of proposed rulemaking actions. The law provides that agencies may establish procedures for keeping the mailing lists current. The Attorney General recommends that agencies adopt these procedures by rule (Attorney General’s Administrative Law Manual, 2014, p. 12.)

**Alternatives:**

1. Make no changes.
2. Establish procedures for updating the mailing list without rule.
3. Establish procedures for updating the mailing by rule.

**Staff recommendation:** Alternative 3. Staff recommends using language consistent with the sample rule provided in the Attorney General’s Administrative Law Manual.

**Issue 1007 – Definition of “Office of Energy”**

**Affected rules:** OAR 345-001-0010(42)

**Issue description:** The rules contain an outdated definition of the “Office of Energy”

**Background:** OAR 345-001-0010(42) defines “Office of Energy” and “Office” as the “Oregon Office of Energy and the Oregon Department of Energy.” The name of the agency was changed from the “Office of Energy” to the “Department of Energy” by SB 478 (2003), and the older definition is no longer needed. Note, ORS 183.335(7) allows for a rule to be amended without notice to reflect changes to an agency name, but it is not clear if an entire definition could be deleted through this process.

**Alternatives:**

1. Make no changes.
2. Delete definition of “Office of Energy.”

**Staff recommendations:** Alternative 2. Making this change now will simplify the process for future name changes in the rules if SB 928 (2019) passes.

**Issue 1108 – Definition of “related or supporting facilities”**

**Affected rules:** OAR 345-001-0010(51)

**Issue description:** Definition of related or supporting facilities is inconsistent with statutory language.

**Background:** Under ORS 469.300(24), “Related or supporting facilities” means any structure, proposed by the applicant, *to be constructed or substantially modified in connection with* the construction of an energy facility...” (Emphasis added.)

OAR 345-001-0010(51) provides that the term “related or supporting facilities” has the meaning:

“as defined in ORS 469.300. The Council interprets the terms “proposed to be built in connection with” as meaning that a structure is a related or supporting facility if it would not be built but for construction or operation of the energy facility. “Related or supporting facilities” does not include any structure existing prior to construction of the energy facility, unless such structure must be significantly modified solely to serve the energy facility.

There are minor differences between the terms used in statute and the terms used in the interpretive guidance provided by the rule. In particular, the statute uses the terms “constructed or substantially modified,” where the rules uses “built” and “significantly modified”. The terms used in the rule appear to be related to a prior definition that was replaced by the reference to ORS 469.300 in 2007.

**Alternatives:**

1. Amend rule to retain interpretive guidance and use statutory language.
2. Amend rule to delete interpretive guidance and rely solely on statutory language.

**Staff recommendation:** Alternative 1. Amending the rule to use the same terms as statute will clarify its applicability without a substantive change in meaning. Alternative 2 may also be viable if Council determines the interpretive guidance is no longer accurate or relevant.

**Issue 1032 – Department of Aviation not in definition of “reviewing agency”**

**Affected rules:** OAR 345-001-0010(53)

**Issue description:** The Department of Aviation is a reviewing agency by statute, but is not listed in rule.

**Background:** ORS 469.350(2) requires copies of the notice of intent and the application to be sent to specified reviewing agencies. SB 171 (2009) expanded the list of reviewing agencies to include the Oregon Department of Aviation, but the rule was not updated.

**Alternatives:**

1. Make no changes.
2. Include Department of Aviation in the definition of “reviewing agency.”

**Staff recommendations:** Alternative 2.

**Issue 1103 – Contested Case Notices**

**Affected rules:** OAR 345-015-0014; 345-015-0016; 345-015-0080; 345-015-0230; 345-027-0071

**Issue description:** The rules contain noticing requirements that may be inconsistent with statutory requirements for contested case notices.

**Background:** A “contested case notice” is a statutorily required notice of the rights of each party in a contested case. ORS 183.413 and 183.415 specify the requirements for contested case notices. OAR 345-015-0014 describes the department’s procedures for issuing contested case notices, and states that

the Department will issue the notice as provided in OAR 137-003-0001, the Attorney General’s Model Rule of Procedure for Contested Case Notices adopted by Council under OAR 345-001-0005.

OAR 345-015-0230 and 345-027-0071 require the department to issue notices which include information about contested cases, but are not the contested case notice required by ORS 183.413 and 183.415. Both of these rules interact with OAR 345-015-0014 in ways that may be inconsistent with the statutory requirements for contested case notices.

### **Issue 1103.1 – Notice of proposed order on an application for site certificate**

**Affected rules:** OAR 345-015-0230

**Issue Description:** The rule contains noticing requirements that appear to be inconsistent with ORS 469.370(4).

**Background:** ORS 469.370 requires the Department to issue a public notice of proposed order on an application for a site certificate that includes a “notice of a contested case hearing specifying a deadline for requests to participate as a party or limited party and a date for the prehearing conference.” The law then requires the Council to conduct a contested case hearing on the application. ORS 469.370(4) & (5).

The department has implemented these requirements largely through the procedural rules in OAR 345-015. OAR 345-015-0230(3) provides:

“Following issuance of the proposed order, the Department shall issue a contested case notice, as described in OAR 345-015-0014. In addition, as required under ORS 469.370(4), the Department shall issue a public notice of the proposed order and shall send the notice by mail or email to persons on the Council's general mailing list as defined in OAR 345-011-0020 and to any special mailing list set up for the proposed project, including a mailing list made up of those persons listed in Exhibit F of the site certificate application as updated by the applicant upon the request of the Department.”

The rule, as currently written, requires the Department to issue two separate notices following issuance of a proposed order: a “contested case notice, as described in OAR 345-015-0014” and, in addition, a “public notice of the proposed order.” This may conflict with ORS 469.370(4), which appears to contemplate a single “public notice of the proposed order, that shall include notice of a contested case hearing...”

OAR 345-015-0014(3)(a) specifies that, “For a contested case notice on a proposed order as described in OAR 345-015-0230, [the department shall send a contested case notice by registered or certified mail] to the applicant and to all persons who commented in person or in writing on the record of the public hearing [on the draft proposed order.]” While commenting on the record of the hearing on the draft proposed order is necessary to preserve a person’s right to participate in the contested case, it does not automatically grant party status to that person. To be granted party status, a person must petition the Council for party or limited party status as described under OAR 345-015-0016 and 137-003-0005. The notice under ORS 469.370(4) appears to be intended to inform persons who have preserved their right to participate in the contested case of this requirement. Sending the contested case notice to persons who have not requested party status to the contested case could be confusing and potentially inappropriate.

**Alternatives:**

1. Make no changes.
2. Amend OAR 345-015-0230(3) to remove the reference to OAR 345-015-0014 and specify that the notice of proposed order will include a notice of a contested case hearing specifying a deadline for requests to participate as a party or limited party and a date for the prehearing conference.
3. Amend rules to create a separate notice of a contested case hearing which is only sent to persons who commented in person or in writing on the record of the public hearing.

**Staff recommendation:** Alternative 2 to be consistent with the requirements of ORS 469.370. To implement this alternative, staff recommends that Council:

- Amend OAR 345-015-0230(3) to specify that the notice of proposed order will contain the information currently required under OAR 345-015-0014 and will be sent, by mail or email, to all persons who commented in person or in writing on the record of the public hearing on the proposed order in addition to its current recipients.
- Move the reference to the contested case notice under OAR 345-015-0014 to a separate section that specifies a contested case notice will be issued following the deadline for requests to participate as a party or limited party.
- Delete OAR 345-015-0014(1)(a), (2), and (4), and amend (3) to specify that the contested case notice will be sent to all parties.

Note that while the manner of service would change, all persons who receive notice under the current rule would still receive notice of the proposed order, notice of the contested case hearing and information about how to request party or limited party status. In addition, all persons the Council grants contested case party status to would still receive an additional contested case notice by regular or certified mail under OAR 345-015-0014.

**Issue 1103.2 – Notice of proposed order on a request for amendment**

**Affected rules:** OAR 345-027-0071

**Issue description:** Rules are unclear about process and manner of service for notice of opportunity to request a contested case.

**Background:** Under OAR 345-027-0071, persons who commented in person or in writing on the record of the public hearing on the draft proposed order described in OAR 345-027-0067 may request a contested case proceeding on the proposed order for an amendment to the site certificate under the Type A review process.

Following review of the draft proposed order and consideration of the comments received, the rule (OAR 345-027-0071(2)) specifies that the Department will issue a notice of the proposed order to persons on the Council’s general mailing list, persons on any special list established for the facility, the reviewing agencies, and property owners listed under the updated property owner list. The notice of the proposed order provides a description of the facility and the facility’s general location; a description of

the process for requesting a contested case; and the addresses where the public may review copies of the proposed order.

The rule (OAR 345-027-0071(4)) requires the department to send a separate notice of the opportunity to request a contested case to the certificate holder, and to all persons who commented on the record of the hearing on the draft proposed order. The notice of the opportunity to request a contested case includes “the deadline for requesting a contested case and restatements of [OAR 345-027-0071(5) through (9)].”

Both of the notices require a description of the process for requesting a contested case, although in different formats. It is not clear that both notices are necessary to inform persons who may wish to request a contested case of the steps they must take to do so. In addition, because the rule does not specify how the notice of the opportunity to request a contested case will be sent, the department has, out of caution, sent it by registered or certified mail as required for the contested case notice required under OAR 345-015-0014.

**Alternatives:**

1. Make no changes.
2. Amend rules to combine the notice of opportunity to request a contested case with the notice of proposed order, and specify that the notice will be sent, by mail or email, to the certificate holder and to all persons who commented in person or in writing on the record of the public hearing as described in OAR 345-027-0067.
3. Specify that the notice of the opportunity to request a contested case will be sent by mail or email.

**Staff recommendation:** Alternative 2. This would provide for a single notice to be sent, consistent with the recommended process for site certificate applications. To implement this alternative staff recommends Council:

- Amend OAR 345-027-0071 to delete section (4) and to specify that the notice under section (2) will include all information currently required by both notices and will be sent by mail or email to all persons who commented in person or in writing on the record of the public hearing on the proposed order, in addition to its current recipients.
- Amend OAR 345-015-0080(1) to replace the reference to the “notice of the opportunity to request a contested case” with “notice of the proposed order.”
- Delete OAR 345-015-0014(1)(b), (2), and (4), and amend (3) to specify that the contested case notice will be sent to the applicant and all parties.

Note that while the manner of service would change, all persons who receive notice under the current rule would still receive notice of the proposed order and would receive notice of how to request a contested case. In addition, all persons the Council grants contested case party status to would still receive an additional contested case notice by regular or certified mail under OAR 345-015-0014.

**Issue 1103.3 – Contested Case Notices**

**Affected rules:** OAR 345-015-0014

**Issue description:** The contested case notices rule is not consistent with the requirements of ORS 183.413 and 183.415.

**Background:** As discussed above, OAR 345-015-0014 contains noticing requirements which appear to be intended to implement noticing requirements under ORS chapter 469 that are related to the contested case, but occur before the parties or issues in the contested case have been identified. As a result, the rule contains provisions that are not consistent with the requirements of ORS 183.413 and 183.415.

ORS 183.413 and 183.415 require an agency to provide a written notice, personally or by mail, to each party of a contested case hearing that informs the party of the hearing and the hearing procedures. Under OAR 345-001-0005, the Council adopted OAR 137-003-0001, the Attorney General’s model rule for contested case notices, to implement these statutes. The rule includes several mandatory and optional items for inclusion in the contested case. Since the last revision of the model rules, the legislature amended ORS 183.413 and 183.415 to require contested case notices to include an additional statement that active duty servicemembers have a right to stay proceedings under the federal Servicemembers Civil Relief Act and may contact the Oregon State Bar or the Oregon Military Department for more information.

**Alternatives:**

1. Make no changes.
2. Amend OAR 345-015-0014 to be consistent with ORS 183.413 and 183.415 or OAR 137-003-0001.

**Staff recommendation:** If Council adopts the staff recommendations in 1103.1 and 1103.2, staff recommends Alternative 2. Specifically, staff recommends incorporating the required elements for a contested case notice under OAR 137-003-0001 and the servicemember statement required under ORS 183.413 and 183.415 into OAR 345-015-0014(1). Staff also recommends amending OAR 345-015-0014(3) to specify that the Department will send all contested case notices to the applicant and each party to the contested case.

**Issue 1014 – “Project Officers”**

**Affected rules:** OAR 345-015-0110(2)(h); 345-015-0190(8)(f); 345-015-0220(3)(c) and (f)

**Issue description:** The rules contain several outdated references to “project officers.”

**Background:** The rules state that the Department will include the name and contact of a project officer in several notices. “Project officer” is the former name for the position of siting analyst.

**Alternatives:**

1. Update rule to provide contact information for “siting analyst.”
2. Update rule to provide contact information for a department representative.

**Staff recommendations:** Change “project officer” to “representative” in rule as described in Alternative 2. There is no need to include a position title, and representative is more consistent with the language used in ORS 469.370(2)(c) and 469.373(7)(b), which, while not directly applicable, contain similar requirements.

**Issue 1091 – Requirements for submission and distribution of application materials**

**Affected rules:** OAR 345-015-0310(5), 345-020-0011(3), 345-020-0016, 345-021-0000(8), 345-021-0010(3), 345-021-0055(1), 345-021-0090(5), 345-027-0110(4), 345-027-0220(3)

**Issue description:** Availability of electronic transmission has reduced the number of printed copies of applications and other materials the Department needs for review.

**Background:** The rules require an applicant for a site certificate or amendment to provide one original and two printed copies of most project materials, including the notice of intent, application for a site certificate, application for amendments, and application for termination of a site certificate. Initially, the Department retained the original to satisfy public records requirements; provided one copy to the siting analyst as a working draft, and made one copy available for public inspection at Council meetings, or at a remote location such as a library or post office. Changes in technology have made it easier to transmit and access these documents electronically, reducing the need for paper copies to be made available for review at remote locations.

**Alternatives:**

1. Make no changes.
2. Amend rules to require one original and one copy of application materials.
3. Amend rules to only require an original of application materials.

**Staff recommendation:** Alternative 2. This would allow the Department to retain the original at its Salem headquarters, and to provide one copy to the siting analyst for use in the review process and at any public meetings on the project. Reducing the number of copies available should result in a small reduction in printing costs incurred by applicants and certificate holders. Alternative 3 may also be feasible, but staff believes the costs associated with having a “working copy” is justified. Staff discussed an alternative to make the process entirely paperless and determined it is not feasible at this time because there is still a need to make hard copies available for public inspection. Staff has proposed some additional rule changes to improve the consistency of these requirements throughout the rule, including clarifying the existing requirement that an applicant must provide additional printed copies of application materials to the department upon a request.

**Issue 1012 – Website to review documents**

**Affected rules:** OAR 345-015-0220(3)(d)

**Issue description:** The rule indicates that a website address will be included in the application if the application is available online, but the application is always available online.

**Background:** OAR 345-015-0220(3)(d) provides that a notice of public hearing on a draft proposed order will include “[t]he addresses of locations where the public may inspect copies of the complete application and, if the application is available online, the website where the application can be found.” The clause “if the application is available online” is unnecessary because the Department always posts the complete application to the website.

**Alternatives:**

1. Make no changes.
2. Delete clause “if the application is available online.”

**Staff recommendation:** Alternative 2.



## **Issue 1062 – Property owner notice rules are inconsistent with procedures in county land use proceedings**

**Affected rules:** OAR 345-020-0011(1)(f); 345-021-0010(1)(f); 345-027-0060(1)(f); 345-027-0110(5)

**Issue description:** The method Council uses to develop property owner notification lists is inconsistent with local government processes.

**Background:** OAR 345-020-0011(1)(f) and 345-021-0010(1)(f) require an applicant to provide a list of the names and addresses of the owners of record of property “located within or adjacent to the site boundary.” Property “adjacent to the site boundary” is further defined by property that is within 100, 250, or 500 feet of the site boundary, depending on the zoning of the land upon which the facility is proposed to be sited. These rules implement ORS 469.370(2)(a), which requires the notice of a hearing on a draft proposed order to “comply with the requirements of ORS 197.763(2), with respect to the persons notified.”

Several stakeholders have commented that this rule is not consistent with the way local governments determine what property owners to notice under ORS 197.763(2). Under the local process, the list is determined based on the boundary of the property upon which the facility is proposed to be sited, not on the site boundary itself.

Where the site boundary and the property boundary are the same, these two approaches would result in identical property owner lists, however; when a facility uses only a portion of a property, measuring from the site boundary could potentially omit some property owners that would have been included under the county approach.

### **Alternatives:**

1. Make no changes.
2. Amend rules to require applicants to provide list of property owners within specified distance of “property upon which the facility is proposed to be located.”

**Staff recommendation:** Alternative 2. This would make the Council’s process more consistent with local processes and could result in notification of additional property owners who may have an interest in the Council’s proceedings. While a rule change could potentially increase costs associated with mailing notices during the application process for some projects, we believe these costs would not impose an undue burden on applicants and would be proportionate to the size of the project.

## **Issue 1106 – Distribution of application materials submitted to reviewing agencies.**

**Affected rules:** OAR 345-020-0020(2), 345-021-0050(2), and 345-021-00055(3)

**Issue description:** Rules contain an outdated requirement for an applicant to obtain written consent to provide electronic copies of application materials to reviewing agencies.

**Background:** The current rules require an applicant to obtain written consent from a reviewing agency to provide copies of application materials to the reviewing agency in an electronic format. Most reviewing agencies have provided this consent directly to the department, making the rule requirement unnecessary.

**Alternatives:**

1. Make no changes.
2. Amend rules to provide an applicant must send electronic copies of application materials to reviewing agencies, and must provide printed copies of all or part of the application materials upon request.

**Staff recommendation:** Alternative 2. Allowing an applicant to distribute electronic copies unless a reviewing agency requests a printed copy would help facilitate electronic transmission of documents and better align the rules with current practice.

**Issue 1107 – Clarification of “complete application”**

**Affected rules:** OAR 345-021-0055

**Issue description:** The intent of rule, which alternates between requirements to distribute a “supplement” and a “complete application,” is not clear.

**Background:** The rule describes the distribution requirements for a complete application. The rule explains that a “complete application” consists of a preliminary application, together with a supplement that includes all amendments to the preliminary application. The rule requires the applicant to provide copies of the supplement, and explains that the supplement may consist of a total revision of the application when necessary to provide a clear presentation of the new information. Sections (5) and (6) of the rule discuss submission of a complete application, which consists of the preliminary application and the supplement. The rule appears to be intended to not require an applicant to resubmit application materials that were unchanged, but allow the department the discretion to require a complete revision of the preliminary application when needed. Some minor changes may help clarify this intent.

**Alternatives:**

1. Make no changes
2. Delete definition of “complete application” and clarify that the Department may require the applicant to provide a complete revision of the preliminary application in place of the application supplement under section (2) and (3) of this rule.

**Staff recommendation:** Alternative 2.