



Oregon

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To: Oregon Energy Facility Siting Council

From: Thomas L. Jackman, Rules Coordinator

Date: June 4, 2025

Subject: Agenda Item H (Action Item) – Initiation of Formal Rulemaking for Council’s Amendment Rules for the June 13, 2025 EFSC Meeting

Attachments: Attachment 1 – Draft Rules

STAFF RECOMMENDATION

Staff requests the Council’s authorization for staff to issue a Notice of Proposed Rulemaking based on proposed amendments to its amendment rules as shown in Attachment 1.

BACKGROUND

On February 23, 2024, Council initiated rulemaking to develop proposed revisions to the rules governing the amendment of site certificates under OAR chapter 345, division 027. At this meeting, the Council approved staff’s recommended scope and directed staff to form a Rules Advisory Committee (RAC) to assist in the preparation of draft proposed rules.

Staff established a RAC consisting of the following:

Energy Provider or Investor-Owned Utility

- Lenna Cope – Portland General Electric
- Andrew Bauer – NW Natural
- Patrick Collins / Chad Campfield – Umatilla Electric Cooperative
- David Lawlor – Next Era Energy

Energy Advocacy or Trade

- Alyssa Forest / Angela Crowley-Koch – OSSIA
- Paul Hicks – Tetra Tech
- Emily Griffith – Renewable Northwest

Agency / Government

- Branden Pursinger – Oregon Counties
- Jon Jinings – DLCD
- Georgia Macnab – Sherman County

Public Interest

- Irene Gilbert – Public
- Don Hilderbrand – Public
- Scott Scott – Public
- Jessica Bernardini – Public

Resource Interest

- Rudy Salakory – Friends of the Gorge

Staff convened the first RAC meeting on June 26, 2024. After a discussion of the amendment process, RAC members were invited to provide feedback and comments on the current rules.

The RAC met again on September 26, 2024 to discuss the preliminary feedback from members as well as staff's proposal for solutions to various issues identified by the RAC. After this meeting, staff developed a draft set of amended rules and distributed them to the RAC for their review.

On April 29, 2025, the RAC met a third time and final time and at this meeting discussed feedback regarding staff's draft of the rules. The RAC was generally satisfied with the proposed rules. RAC member Irene Gilbert expressed concerns regarding the removal of the contested case possibility for requests for amendments by a site certificate holder, but she was hopeful that staff's proposed changes would achieve their goal of providing a superior public comment experience. Additional feedback was provided by David Lawlor, of NextEra Energy, regarding a proposed documentation requirement for site certificate holders. Upon further review, staff determined that the proposed rule related more to compliance issues, and the proposed change was withdrawn, to be introduced at a future rulemaking.

This report contains:

- A summary of staff's draft proposed changes (as shown in draft redline in Attachment 1) to the Council's amendment rules located in Division 27 of OAR 345
- A discussion of HB 3681 and the impact it has had on the draft proposed rules

SUMMARY OF PROPOSED AMENDED AMENDMENT RULES

The proposed changes to the Council's amendment rules—found in Division 17 of OAR 345, from Rule—can be divided into roughly three categories:

1. Improve the clarity of the rules by resolving ambiguities that have revealed themselves in the application of the rules as written.
2. Make changes to improve Council's amendment process based on lessons learned since the last revision of the amendment rules.
3. Update the rules to ensure compliance with new statutes, revised rules, and recent direction of the courts

These changes can be thought of in three categories:

1. Minor changes
2. Modest changes
3. Significant changes

The category of minor changes includes things like the following:

- Removal of outdated printed copy requirements (OAR 345-027-0110(4))
- Rule language throughout modified to improve the readability of the rule (various)
- Updated rule language to reflect recent rulemakings, such as the addition of the Council's Wildfire Prevention and Risk Mitigation standard (OAR 345-027-0210(g))

- Modifying the name of “Type C” amendments to “a pre-operational request for amendment” to reflect the proposed loss of the A/B amendment types (OAR 345-027-0380)
- Removed duplicative rule language in OAR 345-027-0375(2)(e) (Council’s Scope of Review), as this rule language is incorporated in OAR 345-027-0375(2)(b)

The second category of more modest changes consists of the following:

- A new documentation requirement to help the Department track compliance with the Council-approved final retirement plan (OAR 345-027-0110(7))
- New direction that explains how a certificate holder may apply to Council to release a portion of the site from the terms and conditions of the site certificate (OAR 345-027-0110(10))
- Clarifying how request for amendment analysis areas (“RFA analysis areas”) are to be determined (OAR 345-027-0360)
- Adding new requirements for how previously submitted evidence may be utilized in a pending amendment request (OAR 345-027-0360(4))
- Providing the Council with additional flexibility on the location of the public hearing on the amendment based on limited public interest or conditions like inclement weather (OAR 345-027-0367(2))
- Modifying the public comment period to ensure that it does not end until at least one week after the public hearing on the amendment (OAR 345-027-0367(3))
- Removing the requirement for site certificate holders to demonstrate a need for extension requests as Council has no need standard for purposes of seeking an extension (OAR 345-027-0385(1))
- Removing no longer relevant rule language directing what portion of the construction extension deadline rules apply based on when the request was submitted as it relates to previously amended rules OAR 345-027-0385(5)

The third group of changes are more significant and less self-evident in their objectives.

Removal of Type A/B Amendment Determination (OAR 345-027-0351/0367/0368)

Staff spent a lot of time examining the utility of the type A/B amendment determination. It was a process that was designed to move basic amendment applications through the amendment process more swiftly. The main differences between these two amendment types is that type A has a public hearing on the draft proposed order and the possibility of a contested case while type B has neither of these things.

Staff analyzed whether the time spent making the type A/B determination was worth the time savings of being certified as a type B. This analysis became somewhat mooted as staff proposed removing the possibility of a contested case for all amendment requests as well as providing a public hearing for all amendment requests, with increased flexibility on the “near location” requirement for the in-person public hearing if interest in the amendment is relatively low.

These proposed changes should result in a quicker start to amendments, as there is no need to go through the type A/B determination process, while still reducing the burden (and related expense) of near location public hearings for amendments that are relatively simple and/or lack meaningful public interest. This does mean that a public hearing will be held even for the most basic amendments, but staff believes that the proposed changes responsibly error on the side of public participation.

Removal of Contested Case / Addition of New Public Comment Process (OAR 345-027-0367/0371)

A review of the council's amendment process as it relates to the contested case process reveals that public commentators rarely provide comments that meet the higher burden for initiating contested cases on an amendment, which is as follows (from OAR 345-027-0371(9)(emphasis added)):

*"To determine that an issue justifies a contested case proceeding, the Council must find that the request raises a significant issue of fact or law that is **reasonably likely to affect the Council's determination** whether the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 2."*

This is a significant burden, as it effectively requires the Council to only grant contested cases on an amendment where it finds that evidence and arguments raised would have changed its mind on an issue. But of course, if the evidence and arguments were compelling to the Council, then the Council likely would have changed its mind the first time it saw the evidence. The fact that the Council previously reviewed the evidence and did not find it compelling is thus a strong basis for not granting a contested case on an amendment.

In reviewing this dilemma – including the expense in simply performing the contested case request analysis despite it rarely leading to a contested case for amendment requests – staff reviewed one of the key functions of public participation in the siting process: identifying significant issues of fact or law in the Department's proposed order.

To improve the likelihood of the public understanding what is expected of public participation in the siting process on an amendment and to ensure that any relevant evidence in possession of members of the public impact the siting process in a timely (i.e., as early as possible) manner, staff has created an enhanced commenting process that should help to accomplish these goals.

The process that staff developed is not novel or unique and almost serves as a 1:1 copy of how motion arguments are made in legal proceedings. In typical legal proceedings, a party raises a concern via a motion, the other party has a chance to file a response, the initial party has a chance to address issues raised in the response via a reply, and finally the responding party gets the final say with a sur-reply. That is exactly what staff is proposing to do with public participation on an amendment request.

The value of the proposed public participation process is that it provides immediate feedback to concerned members of the public on the nature of their comments, who will now have an opportunity to remedy issues with their own comments prior to review of these issues by

Council. This dramatically increases the likelihood of a public comment meeting the Council's sufficient specificity standard and ensures that the impacts of public participation occur earlier in the amendment process, when it is less expensive for a site certificate holder to make corrections.

Staff is hopeful that the proposed changes will significantly streamline the siting process for amendments while simultaneously making public participation less of a "black box" experience that persons new to the process often struggle to understand, which is only natural given the depth and breadth of issues that Council is required to consider before granting an amendment.

HB 3681 Impacts

NOTE: As of the date of this report, HB 3681 awaits the Governor's signature. The deadline for signing this bill is prior to the Council meeting to discuss staff's draft proposed rules. The draft rules and this staff report are written with the assumption that this bill will be signed. Either way, we will know if the bill is signed prior to review by Council of these proposed rules.

Time Extension Requests – OAR 345-027-0385(3) and (4)

The current practice of Council is to allow for a three-year construction commencement deadline in the site certificate and then allow for up to two, three-year extensions, totaling nine years. HB 3681 requires that the initial period be at least six years, but does not specify a maximum time period. The proposed changes clarify Council's standard practice of allowing for up to nine years in total to begin construction from the date of approval, while staying true to what HB 3681 will require when it becomes law on January 1, 2026.

The result is that the proposed rules work regardless of what Council initially allowed for in terms of deadlines (be it three years or some other number) or when an applicant received a site certificate or applied for an amendment to extend the construction deadlines (either before or after the law becomes into effect). In all cases, the proposed rules allow for any extension request as long as the total time does not exceed nine years.

Site Boundary Increase and Mandatory Amendments – OAR 345-027-0350

Staff initially proposed changes to comply with the Supreme Court's mandate that under existing law, any change to a site boundary would require an amendment request.

HB 3681 formalizes the existing rules, which is that some changes to the site boundary do not require the site certificate holder to go through the amendment process and that the Council can create rules to this effect. While HB 3681 does not go into effect until Jan 1, 2026, staff recommends leaving the existing rules related to proposed site boundary increases in place and then following the guidance of the Supreme Court until Jan 1, 2026, at which time the existing rules would once again apply.