

# Attachment 2

February 27, 2026

*via online comment portal*



Thomas Jackman  
EFSC Rule Coordinator  
Oregon Department of Energy  
550 Capitol St. NE  
Salem, OR 97301

**Re: Comments on Rulemaking to Modernize Oregon’s Siting Requirements**

## **I. INTRODUCTION**

Obsidian Solar Center, LLC (“Obsidian”) submits these comments to the Energy Facility Siting Council (“EFSC” or “Council”) in support of the agency’s efforts to modernize Oregon’s permitting rules. Obsidian appreciates the Council’s persistence in working to remove outdated or unnecessary requirements from Oregon Administrative Rules (“OAR”) chapter 345, including the proposed removal of the preconstruction limitation from OAR 345-025-0006<sup>1</sup> in the Draft Proposed Rules.

Obsidian also supports the Council’s clarification that the revised rule applies retroactively to existing site certificates, as this approach promotes regulatory certainty and ensures consistency between Council rules and longstanding agency practice.

However, Obsidian strongly recommends that EFSC also remove the remaining language currently set forth in subsections (a) and (b) of OAR 345-025-0006(5). As explained below, retaining those provisions would undermine the Council’s intent to eliminate the preconstruction limitation and would create ambiguity and potential compliance issues for certificate holders.

## **II. BACKGROUND**

### **A. Rule Language Currently in Effect**

The plain reading of the Council’s rules requires certain certificate holders to obtain construction rights on *all* parts of their site before beginning construction on *any* part of the site. Pursuant to OAR 345-025-0006(5):

(5) Except as necessary for the initial survey or as otherwise allowed for wind energy facilities, transmission lines or pipelines under this section, **the certificate holder may not begin construction**, as defined in OAR 345-001-0010, or create a

---

<sup>1</sup> OAR 345-025-0006 provides mandatory conditions that EFSC must require in each site certificate.

clearing on any part of the site **until the certificate holder has construction rights on all parts of the site**. For the purpose of this rule, “construction rights” means the legal right to engage in construction activities. For wind energy facilities, transmission lines or pipelines, if the certificate holder does not have construction rights on all parts of the site, the certificate holder may nevertheless begin construction, as defined in OAR 345-001-0010, or create a clearing on a part of the site if the certificate holder has construction rights on that part of the site and:

(a) The certificate holder would construct and operate part of the facility on that part of the site even if a change in the planned route of a transmission line or pipeline occurs during the certificate holder's negotiations to acquire construction rights on another part of the site; or

(b) The certificate holder would construct and operate part of a wind energy facility on that part of the site even if other parts of the facility were modified by amendment of the site certificate or were not built.

## **B. Modernization Rulemaking**

Oregon Department of Energy (“Staff”) has unequivocally recommended removing the preconstruction limitation from OAR 345-025-0006(5) as part of this modernization rulemaking; however, although the Draft Proposed Rules remove the principal limitation, they retain subsections (a) and (b), which function as residual limitations.

Council initiated the rulemaking in 2025 to review its siting rules for minor corrections or updates that would not otherwise merit a standalone rulemaking process. As explained by Staff, the effort was intended to streamline Oregon’s siting program by correcting outdated provisions, clarifying requirements that have become confusing over time, and eliminating legacy procedural burdens that no longer reflect current agency practice.<sup>2</sup> Staff describes the overall purpose of the rulemaking as largely administrative—improving clarity, efficiency, and consistency—while ensuring the rules remain aligned with evolving technologies and the Council’s implementation practices.

Upon reviewing OAR 345-025-0006(5), Staff found the preconstruction limitation arbitrary in its application, unnecessary, and inconsistent with longstanding agency practice. As explained by Staff:

This proposed change would allow all energy facilities to begin preconstruction even if they lack the construction rights to all parts of the site. Access rights would still be needed for the locations to be constructed. This construction allowance currently applies to wind facilities, transmission lines and pipelines, but not to other types of energy facilities. It is not clear why this rule should only apply to

---

<sup>2</sup> See Oregon Department of Energy, *Staff Report to EFSC re: Modernization Rulemaking* (Dec. 5, 2025).

wind facilities, transmission lines and pipelines and so staff proposes removing this restriction. The language in the Draft Proposed Rule increases clarity and efficiency while also ensuring there is no conflict with how the Department already implements these provisions as they relate to any conditions that apply to pre-construction.<sup>3</sup>

### C. Proposed Rule Language

To remove the preconstruction limitation from OAR 345-025-0006(5), Staff proposes the following revisions in the current Draft Proposed Rules:

(5) ~~Except as necessary for the initial survey or as otherwise allowed for wind energy facilities, transmission lines or pipelines under this section, the certificate holder may not begin~~ **For the purpose of this rule, “construction rights” means the legal right to engage in construction, as defined in OAR 345-001-0010, or create a clearing on any part of the site until activities (i.e., the certificate holder has construction rights on all parts of the site. For the purpose of this rule, “construction rights” means the legal right to engage in construction activities authority to construct in the area, e.g., in the form of a deed, lease or court-approved condemnation right). For wind all energy facilities, transmission lines or pipelines, if regardless of whether the certificate holder does not have has construction rights on all parts of the site, the certificate holder may nevertheless begin construction, as defined in OAR 345-001-0010, or create a clearing on a part of the site if the certificate holder has construction rights on that part of the site, is in compliance with the site certificate conditions applicable to that part of the site and:**

(a) The certificate holder would construct and operate part of the facility on that part of the site even if a change in the planned route of a transmission line or pipeline occurs during the certificate holder's negotiations to acquire construction rights on another part of the site; **or**

(b) The certificate holder would construct and operate part of a wind energy facility on that part of the site even if other parts of the facility were modified by amendment of the site certificate or were not built.

As briefly noted above, Staff also proposes to add section (6) to OAR 345-025-0006 to clarify that section (5) applies retroactively to all site certificates previously approved by Council.<sup>4</sup>

---

<sup>3</sup> See Energy Facility Siting Council, *Second NOPR re: Modernization Rulemaking* (Dec. 30, 2025).

<sup>4</sup> *Id.*

### III. COMMENTS

#### A. The Preconstruction Limitation Should be Removed from Council Rules

Obsidian agrees that outdated, unnecessary requirements should be removed from EFSC's rules—including the preconstruction limitation that Staff has acknowledged has not been applied as an absolute prohibition in practice.

In addition to being arbitrary and unnecessary, the preconstruction limitation could complicate what might otherwise be routine due diligence associated with project financing. For example, out-of-state financiers that are not familiar with how EFSC's rules are enforced in practice may raise concerns about a project's ability to begin construction in time to obtain federal tax credits.

As proposed, the Draft Proposed Rules remove the general requirement that a certificate holder must have construction rights on all parts of a site before beginning construction on any part of the site. This change appropriately aligns the rule with longstanding agency interpretation and practice permitting phased construction where a certificate holder has secured the necessary rights for the portion of the site on which it intends to build.

The Draft Proposed Rules also clarify that this revised framework applies retroactively to existing site certificates. Obsidian supports that clarification.

#### B. Removing the Preconstruction Limitation Requires the Removal of Subsections (a) and (b)

Although the core preconstruction limitation has been removed from section (5), subsections (a) and (b) remain in the Draft Proposed Rules. Those subsections were originally embedded within the structure of the preconstruction limitation and do not function coherently once that broader limitation is stricken. Retaining subsections (a) and (b) effectively leaves behind a modified version of the preconstruction limitation, which is inconsistent with the agency's recommendation to remove that limitation entirely.

As currently drafted, section (5) states:

(5) For the purpose of this rule, "construction rights" means the legal right to engage in construction activities . . . . **For all energy facilities** regardless of whether the certificate holder has construction rights on all parts of the site, **the certificate holder may nevertheless begin construction ... on a part of the site if the certificate holder has construction rights on that part of the site ... and:**

**(a) The certificate holder would construct and operate part of the facility on that part of the site even if a change in the planned route of a**

**transmission line or pipeline occurs during the certificate holder's negotiations to acquire construction rights on another part of the site; or**

**(b) The certificate holder would construct and operate part of an energy facility on that part of the site even if other parts of the facility were modified by amendment of the site certificate or were not built.**

Subsections (a) and (b) appear to have been drafted as conditional qualifiers within the prior regulatory framework. Once the primary restriction is eliminated, these provisions become grammatically and substantively disconnected from the rule's operative standard. Stated differently, the revised section (5) confirms that certificate holders *can* begin construction, but then subsections (a) and (b) reintroduce speculative conditions that effectively operate as a continued limitation on phased construction.

As currently drafted, subsection (a) permits a certificate holder to engage in preconstruction activities if—*and only if*—they would construct and operate part of their facility on the part of the site they intend to begin construction on irrespective of any future changes to their planned transmission. Similarly, subsection (b) permits a certificate holder to engage in preconstruction activities if—*and only if*—they would construct and operate part of their facility on that part of the site irrespective of any potential future amendments or portions not being built.

If the Council's intent is to confirm that certificate holders may begin phased construction on portions of a site for which they have secured construction rights—consistent with longstanding agency interpretation—then retaining subsections (a) and (b) introduces conditions that are neither necessary nor logically tied to that goal. Removing subsections (a) and (b) is therefore not a substantive expansion of the proposal; rather, it is a necessary step to fully effectuate the Council's decision to eliminate the preconstruction limitation.

### **C. Retaining Subsections (a) and (b) Would Leave EFSC's Rules Unclear and Unworkable**

If subsections (a) and (b) are retained, the rule would effectively condition phased construction on speculative determinations about future events—such as whether changes to a transmission line might later change the project or whether any portions of a facility might later be modified or not built.

It is difficult to conceive how a certificate holder could meaningfully demonstrate compliance with these provisions at the time construction begins. A certificate holder can demonstrate that it has construction rights for a defined portion of a site and that it is complying with applicable site certificate conditions for that portion. It cannot, however, definitively demonstrate how hypothetical future amendments or route modifications might unfold.

In practice, retaining subsections (a) and (b) would:

- Reintroduce uncertainty into a rule the Council is seeking to clarify;
- Create a compliance standard that is difficult, if not impossible, to administer;
- Undermine financing certainty for projects relying on clear regulatory standards; and
- Risk inconsistent application across different facility types.

The Council’s modernization effort is intended to streamline and clarify its rules. Maintaining language that no longer fits within the revised structure would have the opposite effect.

#### **D. Removal of Subsections (a) and (b) Is Within the Scope of the Proposed Rulemaking and Consistent with the Governor’s Direction**

Because subsections (a) and (b) appear to be remnants of the prior regulatory structure and are inconsistent with the stated objective of eliminating the preconstruction limitation, their removal should be understood as a clarifying revision—essentially a scrivener’s correction—rather than a substantive expansion of the proposal.

Importantly, removing the subsections would not constitute a substantial or fundamental change to the proposal. The current Notice of Proposed Rulemaking purports to remove the preconstruction limitation and the Draft Proposed Rules already remove the preconstruction limitation. Striking subsections (a) and (b):

- Clarifies the rule’s operative standard;
- Narrows, rather than expands, regulatory obligations; and
- Ensures the rule functions as intended.

In this context, removal of the remaining subsections is best understood as a necessary cleanup to avoid an internally inconsistent rule.

This modernization effort is consistent with the Governor’s recent Executive Order directing state agencies to accelerate renewable energy development and reduce unnecessary regulatory delay in order to support Oregon’s economic competitiveness.<sup>5</sup> The Governor has emphasized that timely development of renewable energy facilities is critical not only to meeting Oregon’s clean energy and reliability goals, but also to expanding business opportunities, supporting local employment, and promoting long-term prosperity—particularly in rural communities that host energy infrastructure.<sup>6</sup> By clarifying and modernizing outdated

---

<sup>5</sup> *Executive Order No. 25-25, Accelerating Wind and Solar Energy Development in Advance of Elimination of Federal Clean Energy Tax Credits* (Oct. 6, 2025), Office of the Governor, State of Oregon.

<sup>6</sup> *See H.B. 4084, 83<sup>rd</sup> Or. Leg., Reg. Sess. (2026)* (establishing a Joint Permitting Council to run a fast-track permitting process); *Oregon’s Prosperity Roadmap: A Strategic Vision for Economic Growth 1* (Dec. 2025), Office of the Governor, State of Oregon (directing agencies to streamline/accelerate permitting and expedite infrastructure).

siting requirements, EFSC's proposed amendments advance these statewide policy directives by increasing regulatory certainty and reducing avoidable barriers to investment and construction.

#### **IV. CONCLUSION**

Obsidian strongly supports the Council's effort to modernize OAR chapter 345 and appreciates the removal of the preconstruction limitation from OAR 345-025-0006(5), including its retroactive application.

To fully effectuate the Council's objective and Staff's recommendation, and to ensure the rule is clear, administrable, and aligned with longstanding agency practice, Obsidian respectfully requests the Council also remove subsections (a) and (b) from OAR 345-025-0006(5) without opening another notice and comment period.

We appreciate the opportunity to comment and would welcome the opportunity to discuss these comments further if helpful.

Respectfully submitted,

A handwritten signature in black ink that reads "Sidney Villanueva". The signature is written in a cursive, flowing style.

Sidney Villanueva  
Blue Skies Law, LLC  
sidney@blueskieslaw.com