



Oregon

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To: Oregon Energy Facility Siting Council (EFSC)
From: ODOE Staff
Date: August 14, 2018
Subject: Agenda Item D – Contested Case Thresholds and Requests for Rehearing (Information Item) for the August 23-24th EFSC meeting.

Members of the Council:

Ms. Irene Gilbert has requested an information item be placed on the August Council meeting agenda. In accordance with Council rules (OAR 345-011-0035), any person may request Council discussion of an information item by submitting a written request to the Department, and with the Council chair concurrence, the requested matter shall be placed on the meeting agenda for discussion. The rule requires the request be submitted at least 14 days prior to the meeting. Ms. Gilbert made her request in an email to ODOE Director Benner on July 29. Following receipt of Ms. Gilbert's request, Council Secretary Cornett conferred with Chair Beyeler, and Chair Beyeler concurred to include the item on the August agenda. Ms. Gilbert's email also requested that the email and associated attachments be forwarded to Council members; this was done on July 30th.

As part of the same agenda item, Patrick Rowe, Oregon Department of Justice counsel to EFSC and ODOE, will provide a training item for Council related to the threshold requirements for contested cases in both new site certificate applications and site certificate amendments. The presentation will also include information related to rehearing requests.

While there are differences in process steps and procedures between contested case opportunities for new site certificate applications and site certificate amendments, the core distinction is that the contested case opportunity is automatic for new site certificate applications; whereas, for site certificate amendments, Council must grant a request for contested case based on very specific criteria as described in Council's rules. Mr. Rowe will present on this difference, as well as other required steps in the two processes.

The Council rules concerning contested case requests on site certificate amendments are found at OAR 345-027-0067 and OAR 345-027-0071. Council has not adopted rules regarding requests for rehearing; the procedure is found in statute at ORS 469.403(1).

RULES AND STATUTES ASSOCIATED WITH THE APPLICATION REVIEW

DPO HEARING COMMENT TIMEFRAME AND RAISE IT OR WAIVE IT

- [OAR 345-015-0016](#) REQUESTS FOR PARTY OR LIMITED PARTY STATUS IN CONTESTED CASES ON APPLICATIONS FOR A SITE CERTIFICATE
- [OAR 345-015-0220](#) PUBLIC HEARING ON THE DRAFT PROPOSED ORDER

- [OAR 345-027-0067](#) PUBLIC COMMENT AND HEARING ON THE DRAFT PROPOSED ORDER FOR REQUESTS FOR AMENDMENT UNDER TYPE A REVIEW
- [OAR 345-027-0068](#) PUBLIC WRITTEN COMMENT ON THE DRAFT PROPOSED ORDER FOR REQUESTS FOR AMENDMENT UNDER TYPE B REVIEW
- [OAR 345-027-0071](#) PROPOSED ORDER, REQUESTS FOR CONTESTED CASE AND COUNCIL'S FINAL DECISION ON REQUESTS FOR AMENDMENT UNDER TYPE A REVIEW
- [OAR 345-027-0072](#) PROPOSED ORDER AND COUNCIL'S FINAL DECISION ON REQUESTS FOR AMENDMENT UNDER TYPE B REVIEW

PARTY STATUS REQUEST IN A CONTESTED CASE THRESHOLD

- [OAR 345-015-0016](#) REQUESTS FOR PARTY OR LIMITED PARTY STATUS IN CONTESTED CASES ON APPLICATIONS FOR A SITE CERTIFICATE

HEARING OFFICER DETERMINATION OPTIONS

- [OAR 345-015-0085](#) HEARING OFFICER'S PROPOSED CONTESTED CASE ORDER

INTERLOCUTORY APPEAL

- [OAR 345-015-0057](#) PROHIBITIONS ON INTERLOCUTORY APPEALS TO COUNCIL

REQUEST FOR REHEARING

- [ORS 469.403](#) REHEARING ON APPROVAL OR REJECTION OF APPLICATION FOR SITE CERTIFICATE OR AMENDMENT; APPEAL; JUDICIAL REVIEW VESTED IN SUPREME COURT; STAY OF ORDER.

REQUEST FOR RECONSIDERATION

- [OAR 137-004-0080](#) RECONSIDERATION-ORDERS IN OTHER THAN CONTESTED CASES

RULES AND STATUTES ASSOCIATED WITH THE AMENDMENT REVIEW:

THE ENERGY FACILITY SITING COUNCIL (EFSC OR "THE COUNCIL") 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. PER ORS 469.403(1) "ANY PARTY TO A CONTESTED CASE PROCEEDING MAY APPLY FOR REHEARING WITHIN 30 DAYS FROM THE DATE THE APPROVAL OR REJECTION IS SERVED."

DPO HEARING COMMENT TIMEFRAMD AND RAISE IT OR WAIVE IT.

- [OAR 345-015-0220](#) PUBLIC HEARING ON THE DRAFT PROPOSED ORDER
- [OAR 345-027-0067](#) PUBLIC COMMENT AND HEARING ON THE DRAFT PROPOSED ORDER FOR REQUESTS FOR AMENDMENT UNDER TYPE A REVIEW
- [OAR 345-027-0068](#) PUBLIC WRTTIEN COMMENT ON THE DRAFT PROPOSED ORDER FOR REQUESTS FOR AMENDMENT UNDER TYPE B REVIEW

- [OAR 345-027-0071](#) PROPOSED ORDER, REQUESTS FOR CONTESTED CASE AND COUNCIL’S FINAL DECISION ON REQUESTS FOR AMENDMENT UNDER TYPE A REVIEW
- [OAR 345-027-0072](#) PROPOSED ORDER AND COUNCIL’S FINAL DECISION ON REQUESTS FOR AMENDMENT UNDER TYPE B REVIEW

CONTESTED CASE REQUEST THRESHOLD

- [ORS 469.370](#) DRAFT PROPOSED ORDER FOR HEARING; ISSUES RAISED; FINAL ORDER; EXPEDITED PROCESSING

COUNCIL DETERMINATION OPTIONS

- [OAR 345-027-0075](#) SCOPE OF COUNCIL’S REVIEW

RULES AND STATUTES ASSOCIATED WITH THE CONDUCT OF CONTESTED CASES:

- [OAR 345-015-0014](#) CONTESTED CASE NOTICES
- [OAR 345-015-0016](#) REQUESTS FOR PARTY OR LIMITED PARTY STATUS IN CONTESTED CASES ON APPLICATIONS FOR A SITE CERTIFICATE

APPELLATE PATH

- [ORS 183.482](#) JURISDICTION FOR REVIEW OF CONTESTED CASES
- [ORS 183.484](#) JURISDICTION FOR REVIEW OF ORDERS OTHER THAN CONTESTED CASES
- [ORS 469.403](#) REHEARING ON APPROVAL OR REJECTION OF APPLICATION FOR SITE CERTIFICATE OR AMENDMENT; APPEAL; JUDICIAL REVIEW VESTED IN SUPREME COURT; STAY OF ORDER.

OTHER STATUTES ASSOCIATED WITH CONTESTED CASE HEARINGS

- [ORS 183.310\(2\)](#) DEFINITION OF CONTESTED CASE

OAR 345-015-0220 Public Hearing on the Draft Proposed Order

(1) After the issuance of the draft proposed order described in OAR 345-015-0210, the Council or its hearing officer shall conduct at least one public hearing on the draft proposed order in the vicinity of the site of the proposed facility. The public hearing is not a contested case hearing. If there is more than one public hearing, the “close of the record of the public hearing” means the close of the record of the final public hearing.

(2) The Department of Energy shall, at least 20 days before the hearing:

(a) Submit notice for publication in a newspaper of general circulation available in the vicinity of the proposed facility.

(b) Send 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.

(3) In the notices described in subsections (2)(a) and (2)(b), the Department shall include:

(a) The date, time and location of the public hearing(s).

(b) A description of the facility and the facility’s general location.

(c) The name, address, email address and telephone number of the Department’s project officer to contact for additional information.

(d) The 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.

(e) The website where the draft proposed order can be found.

(f) The deadline for the public to submit written comments to be included in the record of the public hearing and a statement that such comments should be submitted to the presiding officer in care of the Department's project officer.

(g) A statement that to raise an issue on the record of the public hearing, a person must raise the issue in person at the public hearing or in a written comment submitted after the date of the notice and received by the Department before the deadline.

(h) A statement that failure to raise an issue in person or in writing on the record of the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue precludes consideration of the issue in a contested case.

(i) A statement that to raise an issue with sufficient specificity, a person must present facts that support the person's position on the issue.

(j) A statement that the Council will not accept or consider any further public comment on the site certificate application or on the draft proposed order after the close of the record of the public hearing.

(4) During the public hearing, the Department shall explain the application process, including the means and opportunities for the general public to participate in the process. The Department may provide this explanation by a written handout.

(5) At the commencement of the public hearing, the presiding officer shall state that:

(a) A person who intends to raise any issue that may be the basis for a contested case must raise the issue in person at the hearing or in a written comment submitted to the Department of Energy before the deadline stated in the notice of the public hearing.

(b) A person who intends to raise any issue that may be the basis for a contested case must raise the issue with sufficient specificity to afford the Council, the Department of Energy and the applicant an adequate opportunity to respond, including a statement of facts that support the person's position on the issue.

(6) At the public hearing, any person may present information regarding the pending application without administration of an oath. The presiding officer shall record all presentations made during the public hearing. The presentations are part of the decision record for the application and may be rebutted in the contested case proceeding.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 469.370

OAR 345-027-0067 Public Comment and Hearing on the Draft Proposed Order for Requests for Amendment Under Type A Review

(1) After issuance of the draft proposed order as described in OAR 345-027-0065, the Council shall conduct a public hearing on the request for amendment to the site certificate in the vicinity of the facility. The public hearing must be held at least 20 days after the draft proposed order is issued. The public hearing is not a contested case hearing.

(2) Concurrent with the issuance of the draft proposed order as described in OAR 345-027-0065, the Department of Energy shall:

(a) Send the notice described in section (3) of this rule by mail or email to:

(A) Persons on the Council's general mailing list as defined in OAR 345-011-0020;

(B) Persons on any special mailing list established for the facility;

(C) The reviewing agencies as defined in OAR 345-001-0010(52); and

(D) The updated property owner list as described in OAR 345-021-0010(1)(f) Exhibit F,

(b) Post the complete request for amendment, draft proposed order, and the notice of the draft proposed order and public hearing on the Department website, and

(c) Make physical copies of the draft proposed order available to the public for inspection.

(3) Notice of the complete request for amendment, draft proposed order and public hearing shall include:

(a) A description of the facility and the facility's general location.

(b) The date, time and location of the public hearing described in this rule.

(c) The name, address, email address and telephone number of the Department representative to contact for additional information.

(d) Addresses of the physical location(s) and the website where the public may review copies of the complete request for amendment and draft proposed order.

(e) The deadline for the public to submit written comments to be included in the record of the public hearing and how such comments should be submitted.

(f) A statement that:

(A) A complete request for amendment has been received and reviewed by the Department.

(B) The Department has issued a draft proposed order.

(C) To raise an issue on the record of the public hearing, a person must raise the issue in person at the public hearing or in a written comment submitted after the date of the notice of the public hearing and received by the Department before the close of the record of the public hearing.

(D) A person's failure to raise an issue in person or in writing on the record of the public hearing precludes the Council's consideration of whether to grant that person's subsequent contested case request.

(E) Failure to raise an issue with sufficient specificity to afford the Council, the Department, and the certificate holder an opportunity to respond to the issue precludes the Council from considering whether that issue justifies a contested case proceeding.

(F) To raise an issue with sufficient specificity, a person must present facts, on the record of the public hearing, that support the person's position on the issue.

(G) The Council will not accept or consider any further public comment on the request for amendment or on the draft proposed order after the close of the record of the public hearing.

(4) During the public hearing, the Department shall explain the amendment process, including the means and opportunities for the general public to participate in the process. The Department may provide this explanation by a written handout.

(5) At the commencement of the public hearing, the presiding officer shall read aloud the following:

(a) A person who intends to request a contested case on the proposed order for a site certificate amendment must comment in person or in writing on the record of the public hearing.

(b) A person who intends to raise an issue that may be the basis for granting a contested case proceeding must raise that issue on the record of the public hearing with sufficient specificity to afford the Council, the department and the certificate holder an adequate opportunity to respond to the issue. To raise an issue with sufficient specificity, a person must present facts, on the record of the public hearing, that support the person's position on the issue.

(6) At the public hearing, any person may present information regarding the pending request for amendment without administration of an oath. The presiding officer shall record all presentations made during the public hearing. The presentations are part of the decision record for the request for amendment.

(7) Following the close of the record of the public hearing on the draft proposed order, the Council shall review the draft proposed order, shall consider all comments received on the record of the hearing, and may provide comments to the Department regarding the draft proposed order. When the Council meets to review a draft proposed order, the Council does not permit the certificate holder, reviewing agencies or the public to comment on any issue that may be the basis for a contested case request.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 469.405

OAR 345-027-0068 Public Written Comment on the Draft Proposed Order for Requests for Amendment Under Type B Review

(1) After issuance of the draft proposed order as described in OAR 345-027-0065, the Council shall solicit and receive written public comments on the draft proposed order. The Department of Energy shall specify a written comment deadline at least 20 days after the draft proposed order is issued.

(2) Concurrent with the issuance of the draft proposed order as described in OAR 345-027-0065, the Department shall:

(a) Send the notice described in section (3) of this rule by mail or email to:

(A) Persons on the Council's general mailing list as defined in OAR 345-011-0020;

(B) Persons on any special mailing list established for the facility;

(C) The reviewing agencies as defined in OAR 345-001-0010(52); and

(D) The updated property owner list as described in OAR 345-021-0010(1)(f) Exhibit F,

(a) Post the complete request for amendment, draft proposed order, and the notice of the draft proposed order and written comment deadline on the Department website, and

- (b) Make physical copies of the draft proposed order available to the public for inspection.
- (3) Notice of the complete request for amendment, draft proposed order and written comment deadline shall include:
 - (a) A description of the facility and the facility's general location.
 - (b) The name, address, email address and telephone number of the Department representative to contact for additional information.
 - (c) Addresses of the physical location(s) and the website where the public may review copies of the complete request for amendment and draft proposed order.
 - (d) The deadline for the public to submit written comments to be included in the record of the draft proposed order and how such comments should be submitted.
 - (e) A statement that:
 - (A) A complete request for amendment has been received and reviewed by the Department.
 - (B) The Department has issued a draft proposed order.
 - (C) To raise an issue on the record of the draft proposed order, a person must raise the issue in a written comment submitted after the date of the notice of the draft proposed order and written comment deadline, and received by the Department before the written comment deadline.
 - (D) The Council will not accept or consider any further public comment on the request for amendment or on the draft proposed order after the written comment deadline that closes the record on the draft proposed order.
 - (E) Only those persons, including the site certificate holder, who provided written comment by the written comment deadline may seek judicial review as provided in ORS 469.403 and issues eligible for judicial review are limited to the issues raised in that person's written comments.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 469.405

OAR 345-027-0071 Proposed Order, Requests for Contested Case and Council's Final Decision on Requests for Amendment Under Type A Review

- (1) No later than 30 days after the Council has reviewed the draft proposed order and considered all comments received on the record of the public hearing under 345-027-0067, the Department of Energy shall issue a proposed order recommending approval, modification or denial of the request(s) for amendment to the site certificate. The Department must consider any oral comments made at the public hearing, written comments received before the close of the record of the public hearing, agency consultation, and any Council comments. The Department may issue the proposed order at a later date, but the Department shall, no later than 30 days after the Council has reviewed the draft proposed order and considered all comments received on the record of the public hearing, notify the certificate holder in writing of the reasons for the delay.
- (2) Concurrent with issuing the proposed order, the Department shall issue public notice of the proposed order by posting public notice as an announcement on its website and by sending public notice by mail or email to:
 - (a) Persons on the Council's general mailing list as defined in OAR 345-011-0020,
 - (b) Persons on any special list established for the facility,
 - (c) The reviewing agencies as defined in OAR 345-001-0010(52), and
 - (d) The updated property owner list as described in OAR 345-021-0010(1)(f) Exhibit F.
- (3) Notice of the proposed order shall include:
 - (a) A description of the facility and the facility's general location.
 - (b) A description of the process for requesting a contested case.
 - (c) The physical and website addresses of where the public may review copies of the proposed order.
 - (d) The name, address, email address and telephone number of the Department representative to contact for more information.
- (4) On the same date the notice of proposed order as described in section (2) is issued, the Department shall send a notice of the opportunity to request a contested case 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. The notice shall include the deadline for requesting a contested case and restatements of sections (5), (6), (7), (8) and (9).
- (5) Only those persons, including the site certificate holder, who commented in person or in writing on the record of the public hearing described in OAR 345-027-0067 may request a contested case proceeding on the proposed order for an amendment to the site certificate. To properly raise an issue in a request for a contested case proceeding on the proposed order for an amendment, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing, unless the Department of Energy did

not follow the requirements of OAR 345-027-0067, or unless the action recommended in the proposed order differs materially from the draft proposed order, including any recommended conditions of approval, in which case the person may raise only new issues within the jurisdiction of the Council that are related to such differences. If a person has not raised an issue at the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, the Council shall not grant a contested case proceeding for that issue. To have raised an issue with sufficient specificity, the person must have presented facts at the public hearing that support that person's position on the issue.

(6) Contested case requests must be submitted in writing and must be received by the Department by a specified deadline that is at least 30 days from the date of notice in section (4). Contested case requests must include:

- (a) The person's name, mailing address and email address and any organization the person represents;
- (b) A short and plain statement of the issue or issues the person desires to raise in a contested case proceeding;
- (c) A statement that describes why the Council should find that the requester properly raised each issue, as described in section (7), including a specific reference to the person's prior comments to demonstrate that the person raised the specific issue or issues on the record of the public hearing, if applicable;
- (d) A statement that describes why the Council should determine that each identified issue justifies a contested case, under the evaluation described in section (9);
- (e) A detailed description of the person's interest in the proceeding and how that interest may be affected by the outcome of the proceeding;
- (f) Name and address of the person's attorney, if any;
- (g) A statement of whether the person's request to participate in a contested case is as a party or a limited party, and if as a limited party, the precise area or areas in which participation is sought;
- (h) If the person seeks to protect a personal interest in the outcome of the proceeding, a detailed statement of the person's interest, economic or otherwise, and how such interest may be affected by the results of the proceeding;
- (i) If the person seeks to represent a public interest in the results of the proceeding, a detailed statement of such public interest, the manner in which such public interest will be affected by the results of the proceeding, and the person's qualifications to represent such public interest; and
- (j) A statement of the reasons why others who commented on the record of the public hearing cannot adequately represent the interest identified in subsections (h) or (i).

(7) Before considering whether an issue justifies a contested case proceeding under section (9), the Council must determine that the person requesting a contested case commented in person or in writing on the record of the public hearing and properly raised each issue included in the request. To determine that a person properly raised each issue included in the request, the Council must find that: The person making the contested case request raised the issue on the record of the public hearing described in OAR 345-027-0067 with sufficient specificity to afford the Council, the Department and the certificate holder an adequate opportunity to respond to the issue;

- (a) The Department did not follow the requirements of OAR 345-027-0067; or
- (b) If the action recommended in the proposed order, including any recommended conditions of approval, differs materially from the action recommended in the draft proposed order, the contested case request identified new issues that are related to such material differences.

(8) If the Council finds that the person requesting a contested case failed to comment in person or in writing on the record of the public hearing or failed to properly raise any issue, as described in section (7), the Council must deny that person's contested case request. If the Council finds that the person requesting a contested case commented in person or in writing on the record of the public hearing and properly raised one or more issues, the Council's determination of whether an issue justifies a contested case, as described in section (9), shall be limited to those issues the Council finds were properly raised.

(9) After identifying the issues properly raised the Council shall determine whether any properly raised issue justifies a contested case proceeding on that issue. 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 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. If the Council does not have jurisdiction over the issue raised in the request, the Council must deny the request.

(10) The Council must take one of the following actions when determining if a request identifying one or more properly raised issues justifies a contested case proceeding:

(a) If the Council finds that the request identifies one or more properly raised issues that justify a contested case proceeding, the Council shall conduct a contested case proceeding according to the applicable provisions of OAR 345-015-0012 to -0014 and 345-015-0018 to -0085. The Council shall identify the contested case parties and shall identify the issues each contested case party may participate on. The parties to a contested case proceeding shall be limited to those persons who commented on the record of the public hearing and who properly raised issues in their contested case request that the Council found sufficient to justify a contested case, except that the certificate holder is an automatic party to a contested case. The issues a party to a contested case proceeding may participate on shall be limited to those issues that party properly raised in its contested case request that the Council found sufficient to justify a contested case, except that the certificate holder may participate on any issue the Council found sufficient to justify a contested case proceeding.

(b) If the Council finds that the request identifies one or more properly raised issues that an amendment to the proposed order, including modification to conditions, would settle in a manner satisfactory to the Council, the Council may deny the request as to those issues and direct the Department to amend the proposed order and send a notice of the amended proposed order to the persons described in section (4). Only the certificate holder and those persons who commented on the record of the hearing may, in a writing received by the Department within 30 days after the Department issues the notice of the amended proposed order, request a contested case proceeding limited to issues related to the amendment to the proposed order. As described in section (9), the Council shall determine whether any issue identified in the request for a contested case proceeding justifies a contested case proceeding. A person's contested case request under this subsection shall include:

(A) The person's name, mailing address and email address;

(B) A statement of the contested issues related to the amendment to the proposed order, including facts believed to be at issue; and

(C) A statement that describes why the Council should find an issue justifies a contested case, as described in section (8).

(c) If the Council finds that the request does not identify a properly raised issue that justifies a contested case proceeding, the Council shall deny the request. In a written order denying the request, the Council shall state the basis for the denial. The Council shall then adopt, modify or reject the proposed order based on the considerations described in OAR-345-027-0075. In a written order the Council shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council shall issue an amended site certificate, which is effective upon execution by the Council Chair and by the certificate holder.

(11) If there is no request for a contested case proceeding as described in section (6) or subsection (10)(b), the Council, may adopt, modify or reject the proposed order based on the considerations described in OAR 345-027-0075. In a written order, the Council shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council shall issue an amended site certificate, which is effective upon execution by the Council Chair and by the certificate holder.

(12) Judicial review of the Council's final order either granting or denying an amended site certificate shall be as provided in ORS 469.403.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 469.405

OAR 345-027-0072 Proposed Order and Council's Final Decision on Requests for Amendment Under Type B Review

(1) No later than 21 days after the written comment deadline that closes the record on the draft proposed order, the Department of Energy shall issue a proposed order recommending approval, modification or denial of the request(s) for amendment to the site certificate. The Department must consider any written comments received before the close of the record on the draft proposed order and any agency consultation. The Department may issue the proposed order at a later date, but the Department shall, no later than 21 days after the close of the record on the draft proposed order, notify the certificate holder in writing of the reasons for the delay.

(2) Concurrent with issuing the proposed order, the Department shall issue public notice of the proposed order by posting public notice as an announcement on its website and by sending public notice by mail or email to:

(a) Persons on the Council's general mailing list as defined in OAR 345-011-0020,

(b) Persons on any special list established for the facility,

(c) The reviewing agencies as defined in OAR 345-001-0010(52), and

(d) The updated property owner list as described in OAR 345-021-0010(1)(f) Exhibit F.

(3) Notice of the proposed order shall include:

- (a) A description of the facility and the facility's general location.
 - (b) The physical and website addresses of where the public may review copies of the proposed order.
 - (c) The name, address, email address and telephone number of the Department representative to contact for more information.
 - (d) A statement that only those persons, including the site certificate holder, who provided written comment by the written comment deadline may seek judicial review as provided in ORS 469.403 and issues eligible for judicial review are limited to the issues raised in that person's written comments.
- (4) The Council, may adopt, modify or reject the proposed order based on the considerations described in OAR 345-027-0075. In a written order, the Council shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council shall issue an amended site certificate, which is effective upon execution by the Council Chair and by the certificate holder.
- (5) Judicial review of the Council's final order either granting or denying an amended site certificate shall be as provided in ORS 469.403, provided that only those persons, including the site certificate holder, who provided written comment by the written comment deadline may seek judicial review as provided in ORS 469.403 and issues eligible for judicial review are limited to the issues raised in that person's written comments.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 469.405

OAR 345-027-0075 Scope of Council's Review

- (1) In making a decision to grant or deny issuance of an amended site certificate, the Council shall apply the applicable laws and Council standards required under section (2) and in effect on the dates described in section (3).
- (2) To issue an amended site certificate, the Council shall determine that the preponderance of evidence on the record supports the following conclusions:
- (a) For a request for amendment proposing to add new area to the site boundary, the portion of the facility within the area added to the site by the amendment complies with all laws and Council standards applicable to an original site certificate application.
 - (b) For a request for amendment to extend the deadlines for beginning or completing construction, after considering any changes in facts or law since the date the current site certificate was executed, the facility complies with all laws and Council standards applicable to an original site certificate application. However, for requests to extend completion deadlines, the Council need not find compliance with an applicable law or Council standard if the Council finds that:
 - (A) The certificate holder has spent more than 50 percent of the budgeted costs on construction of the facility;
 - (B) The inability of the certificate holder to complete the construction of the facility by the deadline in effect before the amendment is the result of unforeseen circumstances that are outside the control of the certificate holder;
 - (C) The standard, if applied, would result in an unreasonable financial burden on the certificate holder; and
 - (D) The Council does not need to apply the standard to avoid a significant threat to the public health, safety or the environment;
 - (c) For any other requests for amendment not described above, the facility, with the proposed change, complies with the applicable laws or Council standards that protect a resource or interest that could be affected by the proposed change.
 - (d) For all requests for amendment, the amount of the bond or letter of credit required under OAR 345-022-0050 is adequate.
- (3) In making the findings required to grant an amendment under section (2), the Council shall apply the applicable law and Council standards in effect on the following dates:
- (a) For the applicable substantive criteria under the Council's land use standard, as described in OAR 345-022-0030, the date the certificate holder submitted the request for amendment, and
 - (b) For all other applicable laws and Council standards, the date the Council issues the amended site certificate.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 469.405

OAR 345-015-0016 Requests for Party or Limited Party Status in Contested Cases on Applications for a Site Certificate

(1) Notwithstanding OAR 137-003-0005(2), a person requesting to participate as a party or limited party in a contested case proceeding shall submit a petition to the hearing officer by the date specified in the Department of Energy's contested case notice issued under OAR 345-015-0014.

(2) Persons who have an interest in the outcome of the Council's contested case proceeding or who represent a public interest in such result may request to participate as parties or limited parties.

(3) Except as described in section (4), only those persons who have commented in person or in writing on the record of the public hearing described in OAR 345-015-0220 may request to participate as a party or limited party in a contested case proceeding. To raise an issue in a contested case proceeding, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing, unless the Department of Energy did not follow the requirements of ORS 469.370(2) or (3) or unless the action recommended in the proposed order described in OAR 345-015-230, including any recommended conditions of approval, differs materially from the action recommended in the draft proposed order, in which case the person may raise only new issues within the jurisdiction of the Council that are related to such differences. If a person has not raised an issue at the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, the hearing officer shall not consider the issue in the contested case proceeding. To have raised an issue with sufficient specificity, the person must have presented facts at the public hearing that support the person's position on the issue.

(4) Following a Council decision to grant a contested case hearing under OAR 345-015-0310, only those persons who have commented in person or in writing on the record of the public hearing described in OAR 345-015-0320 may request to participate as a party or limited party in a contested case proceeding on an application for a site certificate. To raise an issue in a contested case proceeding, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing. If a person has not raised an issue at the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, the hearing officer shall not consider the issue in the contested case proceeding. To have raised an issue with sufficient specificity, the person must have presented facts at the public hearing that support the person's position on the issue.

(5) In a petition to request party or limited party status, the person requesting such status shall include:

(a) The information required under OAR 137-003-0005(3).

(b) A short and plain statement of the issue or issues that the person desires to raise in the contested case proceeding.

(c) A reference to the person's comments at the public hearing showing that the person raised the issue or issues at the public hearing.

(d) A detailed description of the person's interest in the contested case proceeding and how that interest may be affected by the outcome of the proceeding.

(6) The hearing officer's determination on a request to participate as a party or limited party is final unless the requesting person submits an appeal to the Council within seven days after the date of service of the hearing officer's determination.

Stat. Authority: ORS 469.373, ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

OAR 345-015-0085 Hearing Officer's Proposed Contested Case Order

(1) The hearing officer shall allow any party, including any limited party, to propose site certificate conditions that the party believes are necessary or appropriate to implement the policy of ORS 469.310 or to meet the requirements of any other applicable statute, administrative rule or local government ordinance. Parties shall submit proposed site certificate conditions to the hearing officer in writing according to a schedule set by the hearing officer.

(2) In a contested case proceeding on an application for a site certificate or on a proposed site certificate amendment, any party or limited party may present evidence relating to the appropriateness, scope or wording of any other party's proposed site certificate conditions and may present written proposed findings of fact, briefs and other argument concerning proposed conditions.

(3) After the hearing in a contested case proceeding on an application for a site certificate or on a proposed site certificate amendment, the hearing officer shall issue a proposed contested case order stating the hearing officer's findings of fact, conclusions of law, and recommended site certificate conditions on the issues in the contested case.

The hearing officer shall serve the proposed order on all parties and limited parties. In the proposed order, the hearing officer shall include recommended resolutions of objections to the local land use record, if any. The hearing officer's recommendations are part of the decision record for the application but are not part of the Council's order.

(4) After the hearing in a contested case proceeding on any matter other than an application for a site certificate or proposed site certificate amendment, the hearing officer shall issue a proposed order stating the hearing officer's findings of fact and conclusions of law. The hearing officer shall serve the proposed order on all parties and limited parties.

(5) Parties and limited parties may file exceptions to the proposed order within the time set by the hearing officer, not to exceed 30 days after the hearing officer issues the proposed order. A party filing exceptions shall serve a copy of the exceptions on all other parties and limited parties. In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.

(6) Parties and limited parties may file responses to exceptions within the time set by the hearing officer, not to exceed 15 days after the time set for filing exceptions. A party filing responses to exceptions shall serve a copy of the responses to exceptions on all other parties and limited parties.

(7) After the period for filing responses to exceptions, the Council shall issue a final order. The Council may adopt, modify or reject the hearing officer's proposed order.

(8) Following a contested case proceeding on an application for a site certificate, the Council, in its final order, shall either grant or deny issuance of a site certificate. If the Council grants issuance of a site certificate, the Council shall issue a site certificate. The site certificate becomes effective upon execution by the Council and by the applicant. However, for purposes of identification, the Department may refer to a site certificate by the date of the Council action.

(9) Following a contested case proceeding on a proposed site certificate amendment, the Council, in its final order, shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council shall issue an amended site certificate. The amended site certificate becomes effective upon execution by the Council and by the applicant. However, for purposes of identification, the Department may refer to a site certificate by the date of the Council action.

(10) The Council shall issue a site certificate or amended site certificate in duplicate counterpart originals and each counterpart, upon signing, will have the same effect.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

OAR 345-015-0057 Prohibitions on Interlocutory Appeals to Council

(1) Except as otherwise specifically provided for in the rules of this division, a party or limited party may not take an interlocutory appeal to the Council from a ruling of the hearing officer unless such ruling would terminate that party's right to participate in the contested case proceeding.

(2) A party or limited party shall submit an appeal involving that party's right to participate in a contested case proceeding, with supporting arguments and documents, to the Council within seven calendar days after the date of the ruling of the hearing officer.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ORS 469.403 Rehearing on approval or rejection of application for site certificate or amendment; appeal; judicial review vested in Supreme Court; stay of order.

(1) Any party to a contested case proceeding may apply for rehearing within 30 days from the date the approval or rejection is served. The date of service shall be the date on which the Energy Facility Siting Council delivered or mailed its approval or rejection in accordance with ORS 183.470. The application for rehearing shall set forth specifically the ground upon which the application is based. No objection to the council's approval or rejection of an application for a site certificate or a site certificate amendment shall be considered on rehearing without good cause shown unless the basis for the objection is urged with reasonable specificity before the council in the site certificate or amended site certificate process. Upon such application, the council shall have the power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the council acts upon the application for rehearing within 30 days

after the application is filed, the application shall be considered denied. The filing of an application for rehearing shall not, unless specifically ordered by the council, operate as a stay of the site certificate or amended site certificate for the facility.

(2) Any party to a contested case proceeding on a site certificate or amended site certificate application may appeal the council's approval or rejection of the site certificate or amended site certificate application. Issues on appeal shall be limited to those raised by the parties to the contested case proceeding before the council.

(3) Jurisdiction for judicial review of the council's approval or rejection of an application for a site certificate or amended site certificate is conferred upon the Supreme Court. Proceedings for review shall be instituted by filing a petition in the Supreme Court. The petition shall be filed within 60 days after the date of service of the council's final order or within 30 days after the date the petition for rehearing is denied or deemed denied. Date of service shall be the date on which the council delivered or mailed its order in accordance with ORS 183.470.

(4) The filing of a petition for judicial review may not stay the order, except that a party to the contested case may apply to the Supreme Court for a stay upon a showing that there is a colorable claim of error and that:

(a) The petitioner will suffer irreparable injury; or

(b) Construction of the energy facility will result in irreparable harm to resources protected by applicable council standards or applicable agency or local government standards.

(5) If the Supreme Court grants a stay pursuant to subsection (4) of this section, the court:

(a) Shall require the petitioner requesting the stay to give an undertaking in the amount of \$5,000.

(b) May grant a stay in whole or in part.

(c) May impose other reasonable conditions on the stay.

(6) Except as otherwise provided in ORS 469.320 and this section, the review by the Supreme Court shall be the same as the review by the Court of Appeals described in ORS 183.482. The Supreme Court shall give priority on its docket to such a petition for review and shall render a decision within six months of the filing of the petition for review.

(7) The following periods of delay shall be excluded from the six-month period within which the court must render a decision under subsection (6) of this section:

(a) Any period of delay resulting from a motion properly before the court; or

(b) Any reasonable period of delay resulting from a continuance granted by the court on the court's own motion or at the request of one of the parties, if the court granted the continuance on the basis of findings that the ends of justice served by granting the continuance outweigh the best interests of the public and the other parties in having a decision within six months.

(8) No period of delay resulting from a continuance granted by the Supreme Court under subsection (7)(b) of this section shall be excluded from the six-month period unless the court sets forth, in the record, either orally or in writing, its reasons for finding that the ends of justice served by granting the continuance outweigh the best interests of the public and the other parties in having a decision within six months. The factors the court shall consider in determining whether to grant a continuance under subsection (7)(b) of this section are:

(a) Whether the failure to grant a continuance in the proceeding would be likely to make a continuation of the proceeding impossible or result in a miscarriage of justice; or

(b) Whether the case is so unusual or so complex, due to the number of parties involved or the existence of novel questions of fact or law, that it is unreasonable to expect adequate consideration of the issues within the six-month period.

(9) No continuance under subsection (7)(b) of this section shall be granted because of general congestion of the court calendar or lack of diligent preparation or attention to the case by any member of the court or any party. [1993 c.569 §12 (469.401 and 469.403 enacted in lieu of 469.400); 1995 c.505 §13; 1999 c.385 §4; 2001 c.683 §12]

OAR 345-015-0014 Contested Case Notices

(1) The Department shall issue notices for Council contested case proceedings as provided in OAR 137-003-0001.

(a) Contested case notices regarding proposed orders for site certificate applications shall include:

(A) A date by which persons must request party or limited party status.

(B) The date of the pre-hearing conference.

(C) The time and place of the hearing.

(b) Contested case notices regarding proposed orders for site certificate amendments shall include:

(A) The date of the pre-hearing conference.

(B) The time and place of the hearing.

(C) The issues and the parties the Council identified for the contested case as described in OAR 345-027-0071.

(2) In addition to the requirements of section (1), for a contested case notice on a proposed order as described in OAR 345-015-0230 or following a Council decision to grant a contested case hearing under OAR 345-015-0310, the Department shall include in the notice a statement that participation as a party or limited party in the contested case proceeding and the opportunity to raise any issue are subject to the limitations described in OAR 345-015-0016.

(3) The Department shall send a contested case notice by registered or certified mail to the following persons:

(a) For a contested case notice on a proposed order as described in OAR 345-015-0230, to the applicant and to all persons who commented in person or in writing on the record of the public hearing described in OAR 345-015-0220.

(b) Following the Council's decision to grant a contested case proceeding on a proposed order on an application for a site certificate for a special criteria facility, to the applicant and to all persons who commented in person or in writing on the record of the public hearing on the proposed order described in OAR 345-015-0320.

(c) Following a Council decision to grant a contested case proceeding on a proposed site certificate amendment under OAR 345-027-0071 or OAR 345-027-0090, to the certificate holder and to the parties the Council granted contested case party status to.

(d) For Council contested case proceedings described under OAR 345-029-0070, OAR 345-029-0100 or OAR 345-060-0004, to persons who have an interest or represent a public interest in the outcome of the proceeding.

(4) The Department shall request that the applicant notify the hearing officer and the Department, by the date described in subsection (1)(a), of any issues the applicant desires to raise in the contested case proceedings described in subsections (3)(a) and (b).

Stat. Authority: ORS 469.373, ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.085, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

ORS 469.370 Draft proposed order for hearing; issues raised; final order; expedited processing.

(1) Based on its review of the application and the comments and recommendations on the application from state agencies and local governments, the State Department of Energy shall prepare and issue a draft proposed order on the application.

(2) Following issuance of the draft proposed order, the Energy Facility Siting Council shall hold one or more public hearings on the application for a site certificate in the affected area and elsewhere, as the council considers necessary. Notice of the hearing shall be mailed at least 20 days before the hearing. The notice shall, at a minimum:

(a) Comply with the requirements of ORS 197.763 (2), with respect to the persons notified;

(b) Include a description of the facility and the facility's general location;

(c) Include the name of an agency representative to contact and the telephone number where additional information may be obtained;

(d) State that copies of the application and draft proposed order are available for inspection at no cost and will be provided at a reasonable cost; and

(e) State that failure to raise an issue in person or in writing prior to the close of the record of the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue precludes consideration of the issue in a contested case.

(3) Any issue that may be the basis for a contested case shall be raised not later than the close of the record at or following the final public hearing prior to issuance of the department's proposed order. Such issues shall be raised with sufficient specificity to afford the council, the department and the applicant an adequate opportunity to respond to each issue. A statement of this requirement shall be made at the commencement of any public hearing on the application.

(4) After reviewing the application, the draft proposed order and any testimony given at the public hearing and after consulting with other agencies, the department shall issue a proposed order recommending approval or rejection of the application. The department shall issue public notice of the proposed order, that shall include 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.

(5) Following receipt of the proposed order from the department, the council shall conduct a contested case hearing on the application for a site certificate in accordance with the applicable provisions of ORS chapter 183 and any procedures adopted by the council. The applicant shall be a party to the contested case. The council may permit any other person to become a party to the contested case in support of or in opposition to the application only if the person appeared in

person or in writing at the public hearing on the site certificate application. Issues that may be the basis for a contested case shall be limited to those raised on the record of the public hearing under subsection (3) of this section, unless:

(a) The department failed to follow the requirements of subsection (2) or (3) of this section; or

(b) The action recommended in the proposed order, including any recommended conditions of the approval, differs materially from that described in the draft proposed order, in which case only new issues related to such differences may be raised.

(6) If no person requests party status to challenge the department's proposed order, the proposed order shall be forwarded to the council and the contested case hearing shall be concluded.

(7) At the conclusion of the contested case, the council shall issue a final order, either approving or rejecting the application based upon the standards adopted under ORS 469.501 and any additional statutes, rules or local ordinances determined to be applicable to the facility by the project order, as amended. The council shall make its decision by the affirmative vote of at least four members approving or rejecting any application for a site certificate. The council may amend or reject the proposed order, so long as the council provides public notice of its hearing to adopt a final order, and provides an opportunity for the applicant and any party to the contested case to comment on material changes to the proposed order, including material changes to conditions of approval resulting from the council's review. The council's order shall be considered a final order for purposes of appeal.

(8) Rejection or approval of an application, together with any conditions that may be attached to the certificate, shall be subject to judicial review as provided in ORS 469.403.

(9) The council shall either approve or reject an application for a site certificate:

(a) Within 24 months after filing an application for a nuclear installation, or for a thermal power plant, other than that described in paragraph (b) of this subsection, with a nameplate rating of more than 200,000 kilowatts;

(b) Within nine months after filing of an application for a site certificate for a combustion turbine power plant, a geothermal-fueled power plant or an underground storage facility for natural gas;

(c) Within six months after filing an application for a site certificate for an energy facility, if the application is:

(A) To expand an existing industrial facility to include an energy facility;

(B) To expand an existing energy facility to achieve a nominal electric generating capacity of between 25 and 50 megawatts; or

(C) To add injection or withdrawal capacity to an existing underground gas storage facility; or

(d) Within 12 months after filing an application for a site certificate for any other energy facility.

(10) At the request of the applicant, the council shall allow expedited processing of an application for a site certificate for an energy facility with an average electric generating capacity of less than 100 megawatts. No notice of intent shall be required. Following approval of a request for expedited review, the department shall issue a project order, which may be amended at any time. The council shall either approve or reject an application for a site certificate within six months after filing the site certificate application if there are no intervenors in the contested case conducted under subsection (5) of this section. If there are intervenors in the contested case, the council shall either approve or reject an application within nine months after filing the site certificate application. For purposes of this subsection, the generating capacity of a thermal power plant is the nameplate rating of the electrical generator proposed to be installed in the plant.

(11) Failure of the council to comply with the deadlines set forth in subsection (9) or (10) of this section shall not result in the automatic issuance or denial of a site certificate.

(12) The council shall specify in the site certificate a date by which construction of the facility must begin.

(13) For a facility that is subject to and has been or will be reviewed by a federal agency under the National Environmental Policy Act, 42 U.S.C. Section 4321, et seq., the council shall conduct its site certificate review, to the maximum extent feasible, in a manner that is consistent with and does not duplicate the federal agency review. Such coordination shall include, but need not be limited to:

(a) Elimination of duplicative application, study and reporting requirements;

(b) Council use of information generated and documents prepared for the federal agency review;

(c) Development with the federal agency and reliance on a joint record to address applicable council standards;

(d) Whenever feasible, joint hearings and issuance of a site certificate decision in a time frame consistent with the federal agency review; and

(e) To the extent consistent with applicable state standards, establishment of conditions in any site certificate that are consistent with the conditions established by the federal agency. [Formerly 453.365; 1977 c.296 §14; 1977 c.794 §11; 1977 c.895 §1; 1985 c.569 §17; 1993 c.544 §4; 1993 c.569 §8; 1995 c.79 §288; 1995 c.505 §11; 1997 c.428 §2; 2001 c.134 §6]

ORS 137-004-0080 Reconsideration — Orders in Other than Contested Case

- (1) A person entitled to judicial review under ORS 183.484 of a final order in other than a contested case may file a petition for reconsideration of a final order in other than a contested case with the agency within 60 calendar days after the date of the order. A copy of the petition shall also be delivered or mailed to all other persons and agencies required by statute or rule to be notified.
- (2) The petition shall set forth the specific grounds for reconsideration. The petition may be supported by a written argument.
- (3) The petition may include a request for a stay of a final order if the petition complies with the requirements of OAR 137-003-0090(2).
- (4) The petition may be granted or denied by summary order, and, if no action is taken, shall be deemed denied as provided by ORS 183.484(2).
- (5) Within 60 calendar days after the date of the order, the agency may, on its own initiative, reconsider the final order. If a petition for judicial review has been filed, the agency must follow the procedures set forth in ORS 183.484(4) before taking further action on the order. The procedural and substantive effect of granting reconsideration under this subsection shall be identical to the effect of granting a party's petition for reconsideration.
- (6) Reconsideration shall not be granted after the filing of a petition for judicial review, unless permitted by the court.
- (7) A final order remains in effect during reconsideration until stayed or changed.
- (8) Following reconsideration, the agency shall enter a new order, which may be an order affirming the existing order.

Statutory/Other Authority: ORS 183.341

Statutes/Other Implemented: ORS 183.484(2) & OL 1999 & Ch. 113

History: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00, JD 6-1993, f. 11-1-93, cert. ef. 11-4-93, JD 7-1991, f. & cert. ef. 11-4-91, JD 5-1989, f. 10-6-89, cert. ef. 10-15-89

ORS 183.480 Judicial review of agency orders

- (1) Except as provided in ORS 183.417 (Procedure in contested case hearing) (3)(b), any person adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order, whether such order is affirmative or negative in form. A petition for rehearing or reconsideration need not be filed as a condition of judicial review unless specifically otherwise provided by statute or agency rule.
- (2) Judicial review of final orders of agencies shall be solely as provided by ORS 183.482 (Jurisdiction for review of contested cases), 183.484 (Jurisdiction for review of orders other than contested cases), 183.490 (Agency may be compelled to act) and 183.500 (Appeals).
- (3) No action or suit shall be maintained as to the validity of any agency order except a final order as provided in this section and ORS 183.482 (Jurisdiction for review of contested cases), 183.484 (Jurisdiction for review of orders other than contested cases), 183.490 (Agency may be compelled to act) and 183.500 (Appeals) or except upon showing that the agency is proceeding without probable cause, or that the party will suffer substantial and irreparable harm if interlocutory relief is not granted.
- (4) Judicial review of orders issued pursuant to ORS 813.410 (Suspension upon receipt of police report on implied consent test) shall be as provided by ORS 813.410 (Suspension upon receipt of police report on implied consent test). [1957 c.717 §12; 1963 c.449 §1; 1971 c.734 §18; 1975 c.759 §14; 1979 c.593 §23; 1983 c.338 §901; 1985 c.757 §4; 1997 c.837 §5; 2007 c.288 §11]

ORS 183.482 Jurisdiction for review of contested cases

- (1) Jurisdiction for judicial review of contested cases is conferred upon the Court of Appeals. Proceedings for review shall be instituted by filing a petition in the Court of Appeals. The petition shall be filed within 60 days only following the date the order upon which the petition is based is served unless otherwise provided by statute. If a petition for rehearing has been filed, then the petition for review shall be filed within 60 days only following the date the order denying the petition for rehearing is served. If the agency does not otherwise act, a petition for rehearing or reconsideration shall be deemed denied the 60th day following the date the petition was filed, and in such cases, petition for judicial review shall be filed within 60 days only following such date. Date of service shall be the date on which the agency delivered or mailed its order in accordance with ORS 183.470 (Orders in contested cases).
- (2) The petition shall state the nature of the order the petitioner desires reviewed, and shall state whether the petitioner was a party to the administrative proceeding, was denied status as a party or is seeking judicial review as a person adversely affected or aggrieved by the agency order. In the latter case, the petitioner shall, by supporting affidavit, state the facts showing how the petitioner is adversely affected or aggrieved by the agency order. Before deciding the issues

raised by the petition for review, the Court of Appeals shall decide, from facts set forth in the affidavit, whether or not the petitioner is entitled to petition as an adversely affected or an aggrieved person. Copies of the petition shall be served by registered or certified mail upon the agency, and all other parties of record in the agency proceeding.

(3) (a) The filing of the petition shall not stay enforcement of the agency order, but the agency may do so upon a showing of:

(A) Irreparable injury to the petitioner; and

(B) A colorable claim of error in the order.

(b) When a petitioner makes the showing required by paragraph (a) of this subsection, the agency shall grant the stay unless the agency determines that substantial public harm will result if the order is stayed. If the agency denies the stay, the denial shall be in writing and shall specifically state the substantial public harm that would result from the granting of the stay.

(c) When the agency grants a stay, the agency may impose such reasonable conditions as the giving of a bond, irrevocable letter of credit or other undertaking and that the petitioner file all documents necessary to bring the matter to issue before the Court of Appeals within specified reasonable periods of time.

(d) Agency denial of a motion for stay is subject to review by the Court of Appeals under such rules as the court may establish.

(4) Within 30 days after service of the petition, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review, but, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record when deemed desirable. Except as specifically provided in this subsection, the cost of the record shall not be taxed to the petitioner or any intervening party. However, the court may tax such costs and the cost of agency transcription of record to a party filing a frivolous petition for review.

(5) If, on review of a contested case, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good and substantial reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and order by reason of the additional evidence and shall, within a time to be fixed by the court, file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or orders, or its certificate that the agency elects to stand on its original findings and order, as the case may be.

(6) At any time subsequent to the filing of the petition for review and prior to the date set for hearing the agency may withdraw its order for purposes of reconsideration. If an agency withdraws an order for purposes of reconsideration, the agency shall, within such time as the court may allow, affirm, modify or reverse its order. If the petitioner is dissatisfied with the agency action after withdrawal for purposes of reconsideration, the petitioner may refile the petition for review and the review shall proceed upon the revised order. An amended petition for review shall not be required if the agency, on reconsideration, affirms the order or modifies the order with only minor changes. If an agency withdraws an order for purposes of reconsideration and modifies or reverses the order in favor of the petitioner, the court shall allow the petitioner costs, but not attorney fees, to be paid from funds available to the agency.

(7) Review of a contested case shall be confined to the record, and the court shall not substitute its judgment for that of the agency as to any issue of fact or agency discretion. In the case of disputed allegations of irregularities in procedure before the agency not shown in the record which, if proved, would warrant reversal or remand, the Court of Appeals may refer the allegations to a master appointed by the court to take evidence and make findings of fact upon them. The court shall remand the order for further agency action if the court finds that either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure, including a failure by the presiding officer to comply with the requirements of ORS 183.417 (Procedure in contested case hearing) (8).

(8) (a) The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, the court shall:

(A) Set aside or modify the order; or

(B) Remand the case to the agency for further action under a correct interpretation of the provision of law.

(b) The court shall remand the order to the agency if the court finds the agency's exercise of discretion to be:

- (A) Outside the range of discretion delegated to the agency by law;
- (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or
- (C) Otherwise in violation of a constitutional or statutory provision.

(c) The court shall set aside or remand the order if the court finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. [1975 c.759 §15; 1977 c.798 §4; 1979 c.593 §24; 1985 c.757 §2; 1989 c.453 §1; 1991 c.331 §44; 2007 c.659 §§2,5]

ORS 183.484 Jurisdiction for review of orders other than contested cases

(1) Jurisdiction for judicial review of orders other than contested cases is conferred upon the Circuit Court for Marion County and upon the circuit court for the county in which the petitioner resides or has a principal business office. Proceedings for review under this section shall be instituted by filing a petition in the Circuit Court for Marion County or the circuit court for the county in which the petitioner resides or has a principal business office.

(2) Petitions for review shall be filed within 60 days only following the date the order is served, or if a petition for reconsideration or rehearing has been filed, then within 60 days only following the date the order denying such petition is served. If the agency does not otherwise act, a petition for rehearing or reconsideration shall be deemed denied the 60th day following the date the petition was filed, and in such case petition for judicial review shall be filed within 60 days only following such date. Date of service shall be the date on which the agency delivered or mailed its order in accordance with ORS 183.470 (Orders in contested cases).

(3) The petition shall state the nature of the petitioner's interest, the facts showing how the petitioner is adversely affected or aggrieved by the agency order and the ground or grounds upon which the petitioner contends the order should be reversed or remanded. The review shall proceed and be conducted by the court without a jury.

(4) At any time subsequent to the filing of the petition for review and prior to the date set for hearing, the agency may withdraw its order for purposes of reconsideration. If an agency withdraws an order for purposes of reconsideration, it shall, within such time as the court may allow, affirm, modify or reverse its order. If the petitioner is dissatisfied with the agency action after withdrawal for purposes of reconsideration, the petitioner may refile the petition for review and the review shall proceed upon the revised order. An amended petition for review shall not be required if the agency, on reconsideration, affirms the order or modifies the order with only minor changes. If an agency withdraws an order for purposes of reconsideration and modifies or reverses the order in favor of the petitioner, the court shall allow the petitioner costs, but not attorney fees, to be paid from funds available to the agency.

(5) (a) The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:

(A) Set aside or modify the order; or

(B) Remand the case to the agency for further action under a correct interpretation of the provision of law.

(b) The court shall remand the order to the agency if it finds the agency's exercise of discretion to be:

(A) Outside the range of discretion delegated to the agency by law;

(B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or

(C) Otherwise in violation of a constitutional or statutory provision.

(c) The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.

(6) In the case of reversal the court shall make special findings of fact based upon the evidence in the record and conclusions of law indicating clearly all aspects in which the agency's order is erroneous. [1975 c.759 §16; 1979 c.284 §121; 1979 c.593 §25a; 1985 c.757 §3; 1999 c.113 §1]

ORS 183.310 Definition for chapter.

As used in this chapter:

(1)“Agency” means any state board, commission, department, or division thereof, or officer authorized by law to make rules or to issue orders, except those in the legislative and judicial branches.

(2) (a) “Contested case” means a proceeding before an agency:

(A) In which the individual legal rights, duties or privileges of specific parties are required by statute or Constitution to be determined only after an agency hearing at which such specific parties are entitled to appear and be heard;

(B) Where the agency has discretion to suspend or revoke a right or privilege of a person;

(C) For the suspension, revocation or refusal to renew or issue a license where the licensee or applicant for a license demands such hearing; or

(D) Where the agency by rule or order provides for hearings substantially of the character required by ORS 183.415 (Notice of right to hearing), 183.417 (Procedure in contested case hearing), 183.425 (Depositions or subpoena of material witness), 183.450 (Evidence in contested cases), 183.460 (Examination of evidence by agency) and 183.470 (Orders in contested cases).

(b)“Contested case” does not include proceedings in which an agency decision rests solely on the result of a test.

(3)“Economic effect” means the economic impact on affected businesses by and the costs of compliance, if any, with a rule for businesses, including but not limited to the costs of equipment, supplies, labor and administration.

(4)“Hearing officer” includes an administrative law judge.

(5)“License” includes the whole or part of any agency permit, certificate, approval, registration or similar form of permission required by law to pursue any commercial activity, trade, occupation or profession.

(6) (a) “Order” means any agency action expressed orally or in writing directed to a named person or named persons, other than employees, officers or members of an agency. “Order” includes any agency determination or decision issued in connection with a contested case proceeding. “Order” includes:

(A) Agency action under ORS chapter 657 making determination for purposes of unemployment compensation of employees of the state;

(B) Agency action under ORS chapter 240 which grants, denies, modifies, suspends or revokes any right or privilege of an employee of the state; and

(C) Agency action under ORS 468B.050 (Water quality permit) to issue a permit.

(b)“Final order” means final agency action expressed in writing. “Final order” does not include any tentative or preliminary agency declaration or statement that:

(A) Precedes final agency action; or

(B) Does not preclude further agency consideration of the subject matter of the statement or declaration.

(7)“Party” means:

(a) Each person or agency entitled as of right to a hearing before the agency;

(b) Each person or agency named by the agency to be a party; or

(c) Any person requesting to participate before the agency as a party or in a limited party status which the agency determines either has an interest in the outcome of the agency’s proceeding or represents a public interest in such result. The agency’s determination is subject to judicial review in the manner provided by ORS 183.482 (Jurisdiction for review of contested cases) after the agency has issued its final order in the proceedings.

(8)“Person” means any individual, partnership, corporation, association, governmental subdivision or public or private organization of any character other than an agency.

(9)“Rule” means any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:

(a) Unless a hearing is required by statute, internal management directives, regulations or statements which do not substantially affect the interests of the public:

(A) Between agencies, or their officers or their employees; or

(B) Within an agency, between its officers or between employees.

(b) Action by agencies directed to other agencies or other units of government which do not substantially affect the interests of the public.

(c) Declaratory rulings issued pursuant to ORS 183.410 (Agency determination of applicability of rule or statute to petitioner) or 305.105 (Declaratory rulings by department).

(d) Intra-agency memoranda.

(e) Executive orders of the Governor.

(f) Rules of conduct for persons committed to the physical and legal custody of the Department of Corrections, the violation of which will not result in:

(A) Placement in segregation or isolation status in excess of seven days.

(B) Institutional transfer or other transfer to secure confinement status for disciplinary reasons.

(C) Disciplinary procedures adopted pursuant to ORS 421.180 (Disciplinary procedures).

(10)“Small business” means a corporation, partnership, sole proprietorship or other legal entity formed for the purpose of making a profit, which is independently owned and operated from all other businesses and which has 50 or fewer employees. [1957 c.717 §1; 1965 c.285 §78a; 1967 c.419 §32; 1969 c.80 §37a; 1971 c.734 §1; 1973 c.386 §4; 1973 c.621 §1a; 1977 c.374 §1; 1977 c.798 §1; 1979 c.593 §6; 1981 c.755 §1; 1987 c.320 §141; 1987 c.861 §1; 2003 c.75 §71; 2005 c.523 §8; 2007 c.288 §9]