



# Oregon

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**To:** Oregon Energy Facility Siting Council (EFSC or “the Council”)  
**From:** Christopher M. Clark, Rules Coordinator  
Todd Cornett, Assistant Director, Siting Division/ Council Secretary

**Date:** February 8, 2019

**Subject:** Agenda Item J (Action Item) – Adoption of 2019 Rulemaking Schedule for February 22, 2019 Council Meeting

**Attachments:** 1-9, Rulemaking project summaries

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## Background and summary

Staff tracks rulemaking concepts raised by Council, stakeholders, and staff on an ongoing basis. These concepts are used to develop a potential rulemaking projects for the Council’s consideration. Each year, staff recommends a schedule of rulemaking projects for the coming year based on criteria including urgency, level of public interest, and complexity. For each rulemaking project, staff also recommends a method for seeking public input in drafting and developing rules, and a target timeframe for initiating rulemaking proceedings.

Please note that additional rulemaking projects may be proposed before the next regular update of the rulemaking schedule in response to stakeholder petition, statutory changes, or issues of serious prejudice to the public interest. Statutory minor corrections described under ORS 183.335(7) and housekeeping issues will be presented to Council for consideration on an ongoing basis.

## Rulemaking Process Overview

A rule is 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.<sup>1</sup> An agency, including Council, must adopt rules for several reasons, including to meet a statutory obligation to adopt rules; to interpret broad statutory authority delegated by the legislature; or to amend, suspend or repeal existing rules.

ORS 469.470 requires Council to “adopt standards and rules to perform the functions vested by law in the council including the adoption of standards and rules for the siting of energy facilities pursuant to ORS 469.501, and implementation of the energy policy of the State of Oregon set

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<sup>1</sup> ORS 183.310(9).

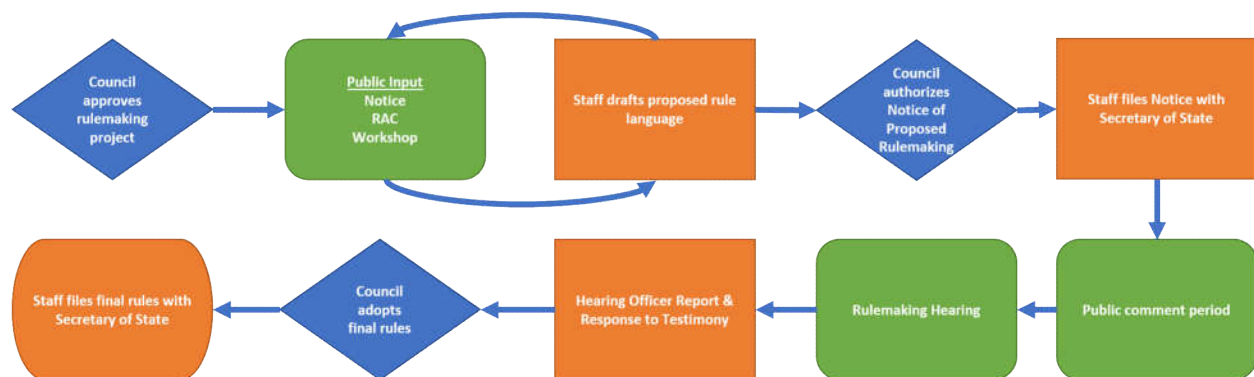
forth in ORS 469.010 and 469.310.” Several other sections of ORS chapter 469 supplement this broad rulemaking mandate with specific rulemaking requirements.

The rulemaking process itself is governed by ORS chapter 183, the Administrative Procedures Act (APA). Among other things, the APA requires each agency that adopts rules to appoint a rules coordinator, to provide notice of permanent rulemaking, and to give interested persons a reasonable opportunity to submit data or views on proposed rulemaking actions.<sup>2</sup>

Generally, the rulemaking process takes between three and twelve months to complete. The amount of time needed to complete a rulemaking project depends on the complexity of issues and the level of public interest and involvement. The APA encourages agencies to involve the public in the development of public policy by agencies and in the drafting of rules and seek public input to the maximum extent possible before giving notice of intent to adopt a rule. Options for involving the public include appointing a rulemaking advisory committee (RAC), inviting interested parties to make comments on a rulemaking issue, or other means of obtaining public views such as workshops and public forums.<sup>3</sup> Appointing a RAC to provide input may increase the amount of time needed to develop proposed rules, but the RAC’s input may improve the quality of the proposed language and may help the agency identify and address concerns and potential issues with proposed rules before the public comment period.

In most cases, the rules coordinator is responsible for facilitating the rulemaking process and keeping Council apprised of its progress. As shown in the figure below, Council will be asked to provide staff with direction and approval at for proceedings to continue at several points in the rulemaking process.

Figure 1. Overview of EFSC Rulemaking Process



For rulemaking projects where the Council has included public workshops in the rulemaking process, staff will ask Council for its input on the quantity and logistics of any public workshop(s) before any workshop is convened.

<sup>2</sup> ORS 183.330(2), ORS 183.335(1), and ORS 183.335(3).

<sup>3</sup> ORS 183.333.

For rulemaking projects where Council has included the appointment of a RAC as early public participation in the rulemaking process, staff will provide a list of entities interested in participating in the RAC for that rulemaking so that Council may appoint RAC members. Staff will also ask Council for input on the quantity and logistics of any RAC meetings.

Staff will consider input provided by Council and the public when drafting proposed rules, and may seek additional input on specific language or amendments. Council will consider proposed rules and will either authorize staff to issue a Notice or Proposed Rulemaking or direct staff to make additional amendments. Once authorized, Staff will file the Notice with the Secretary of State as provided under OAR 345-001-0000. A rulemaking hearing is not always required, but will generally be held before Council near the end of the public comment period. Council may decide to adopt final rules as soon as the public comment period ends, or may wish to postpone its final action in order to consider comments and oral testimony. Council may also decide to suspend the rulemaking project at any time during the process.

**Recommended Rulemaking Schedule for 2019**

At its Dec. 14-15, 2017, meeting, the Council approved a list of priority rulemaking projects as recommended by staff. As shown in Table 1, Phase 2 of the Updates to the Carbon Dioxide Standards was completed with final rules filed on July 18, 2018. Council also appointed RACs for the Solar PV Rulemaking Project and General Compliance projects. Two RAC meetings of the Solar PV RAC were held in 2018, a third meeting was held on January 30, 2019. The General Compliance rulemaking project was temporarily placed on hold while the department addressed staff turnover.

*Table 1. Status of 2018 Rulemaking Priorities.*

<b>Subject Matter</b>	<b>Description</b>	<b>Public Involvement</b>	<b>Status</b>
Administrative Updates	Correct references and errors as allowed under ORS 183.335(7) as needed.	n/a	Ongoing
Periodic Housekeeping	Review rules for clarity and consistency and amend as needed.	Notice	Ongoing
Phase 2 – Updates to Carbon Dioxide Stds.	Update CO <sub>2</sub> emissions standards based on current natural gas-fired energy facility technology.	RAC	Complete
General Compliance	Update rules tools to better support ongoing compliance activities.	RAC	On hold
Solar PV - Single Energy Facility	Evaluate if rulemaking is required to clarify what constitutes a single solar PV power generating facility, and if specific standards for solar PV facilities are needed.	RAC	In progress

Scenic Resources, Protected Areas, & Property Owner Notification	Administrative updates to the Council's Scenic Resources standard, Protected Areas standard, and property owner notification requirements.	Notice	Pending
Exemptions from Site Certificate	Evaluate potential updates to the site certificate exemption process, including clarification of Council's discretion in setting conditions and provisions for ensuring ongoing compliance and termination of an exemption.	RAC	Pending

Staff's recommended rulemaking schedule for 2019 is provided in Table 2. The schedule includes unfinished and pending 2018 projects as well as new proposed projects for Council's consideration. A brief summary of each project is provided in **Attachment A-H**.

*Table 2. Recommended 2019 Rulemaking Schedule*

Subject Matter	Description	Public Involvement	Target Timeframe
1. <a href="#">Statutory Minor Corrections</a>	Correct references and errors as allowed under ORS 183.335(7) as needed.	N/A	Ongoing
2. <a href="#">Single Solar PV Facilities</a>	Evaluate if rulemaking is required to clarify what constitutes a single solar PV power generating facility, and if specific standards for solar PV facilities are needed.	RAC	In progress
3. <a href="#">Trojan ISFSI Compliance (NEW)</a>	Review standards and rules for decommissioning of the Trojan Independent Spent Fuel Storage Installation (ISFSI) to ensure compliance with federal law and regulations.	Notice	Q1-Q2
4. <a href="#">Administrative Housekeeping</a>	Review rules for clarity and consistency and amend as needed.	Notice	Q2-Q3
5. <a href="#">General Compliance</a>	Update rules tools to better support ongoing compliance activities.	RAC	Q2-Q3
6. <a href="#">Scenic Resources, Protected Areas, &amp; Property Owner Notification</a>	Administrative updates to the Council's Scenic Resources standard, Protected Areas standard, and property owner notification requirements.	Notice	Q3-Q4
7. <a href="#">Exemptions from Site Certificate</a>	Evaluate potential updates to the site certificate exemption process, including clarification of Council's discretion in setting conditions and provisions for ensuring ongoing compliance and termination of an exemption.	Notice	Q3-Q4

8. <a href="#">Noise Standard (NEW)</a>	Evaluate if Council should adopt a noise standard in addition to, or in lieu of, OAR 340-035-0035.	RAC	Q3-Q4
9. <a href="#">Historic, Cultural and Archaeological Resources (NEW)</a>	Evaluate options to encourage early communication between applicants and tribal governments to identify historic, cultural, and archaeological resources early in the application process.	RAC/ Workshop	Q4-Q1

**Recommendation**

Staff recommends that the Council approve the schedule of rulemaking projects to be worked on in 2019 as indicated above. In addition, staff recommends Council grant staff the flexibility to work on the identified and approved 2019 rulemaking projects in a sequence other than what is indicated, if a different sequence more effectively utilizes the time and resources of the Council’s staff and the staff of other state agencies.

Finally, staff recommends that Council’s approval of any annual schedule of rulemaking projects also authorizes staff to do preliminary work staff deems necessary to prepare any of the proposed rulemaking projects for further review or approval by council, including, but not limited to, identifying potential RAC members, conducting issues analysis, and drafting proposed language.

**Attachment 1: Statutory Minor Corrections**

**Brief Description:** Changes to rules will be made to correct references and minor errors without the need for prior notice or hearing as permitted under ORS 183.335(7).

**Target Timeframe:** Ongoing

**Estimated Amount of Time Required:** Ongoing

**Recommended Process:** N/A

**Summary:** ORS 183.335(7) authorizes an agency to amend rules without prior notice or hearing if the amendment is solely for the purpose of:

- Changing the name of an agency because of a name change prescribed by law;
- Changing the name of a program, office or division within an agency as long as the change in name does not have a substantive effect on the functions of the program, office or division;
- Correcting spelling;
- Correcting grammatical mistakes in a manner that does not alter the scope, application or meaning of the rule;
- Correcting statutory or rule references; or
- Correcting addresses or telephone numbers referred to in the rules.

The department recommends making the following corrections under ORS 183.335(7):

- **OAR 345-001-0210(2)(a):** “Except as described in subsection (b), any person who intends to construct or expand a small generating plant shall submit a request for exemption to the ~~Office~~ **Department** of Energy, as described in OAR 345-015-0360(6);”
- **OAR 345-011-0055(2):** “The mailing address of the Council is Department of Energy, ~~625 Marion Street, NE~~ **550 Capitol St. NE**, Salem OR, 97301-3742.”
- **OAR 345-015-0110(2)(d):** “A brief description of the Council's review process, including an explanation of the difference between the informational meetings described in OAR 345-015-0130 ~~and 345-015-0190(10)~~ and the public hearing described in 345-015-0220.
- **OAR 345-015-0130(2):** “If the Department holds an informational meeting, the Department shall present an explanation of the notice of intent (NOI) process and the application process, including the means and opportunities for the general public to participate in these processes, and an explanation of the difference between the informational meetings described in OAR 345-015-0130 ~~and 345-015-0190(10)~~ and the public hearing described in 345-015-0220. The Department may present this information orally or by a written handout.”

- OAR 345-015-0180:** “The Department of Energy shall prepare a memorandum to accompany the copies of the preliminary application distributed as described in OAR 345-021-0050. In the memorandum, the Department shall:

  - (1) Request the recipient to return comments or recommendations described in OAR 345-021-0050(~~24~~) to the Department by a specified date;
  - (2) Describe the matters to be covered in the comments or recommendations as set forth in OAR 345-021-0050(~~24~~) and (~~46~~);”
- OAR 345-015-0230:** “Council Review and the ~~Office~~ **Department** of Energy’s Proposed Order”
- OAR 345-021-0010(1)(s):** “Exhibit S. Information about historic, cultural and archaeological resources. Information concerning the location of archaeological sites or objects may be exempt from public disclosure under ORS ~~192.502~~ **192.355**(4) or ORS ~~192.504~~ **192.345**(11).”
- OAR 345-021-0010(1)(y)(O)(iv):** “For each offset project, an explanation of how the applicant quantified its carbon dioxide estimates to a degree of certainty acceptable to the Council ~~through~~ **through** a transparent and replicable calculation methodology.”
- OAR 345-022-0020(1)(b):** “The applicant can design, engineer, and construct the facility to avoid dangers to human safety and the environment presented by seismic hazards affecting the site, as identified in ~~subsection~~ **subsection** (1)(a);”
- OAR 345-022-0030(6):** If the special advisory group recommends applicable substantive criteria for an energy facility described in ORS 469.300(~~4011~~)(a)(C) to (E) \* \* \* the Council shall apply the criteria recommended by the special advisory group. If the special advisory group recommends applicable substantive criteria for an energy facility described in ORS 469.300(~~4011~~)(a)(C) to (E) \* \* \*”
- OAR 345-027-0060(3):** For any Council standard that requires evaluation of impacts within an analysis area, the analysis area shall be the larger of either the study area(s) as defined in OAR 345-001-~~0000~~**0010**(59) or the analysis area(s) described in the project order \* \* \*”
- OAR 345-027-0067(5)(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~~ **Department** and the certificate holder an adequate opportunity to respond to the issue”
- Additional corrections as identified.

**Attachment 2: Solar PV Facilities**

**Brief Description:** This project evaluates whether rulemaking is needed to: (1) clarify what is considered to be a single “solar photovoltaic power generation facility” as that term is used in the definition of “energy facility” under ORS 469.300(11); and (2) whether or not there are issues unique to solar PV facilities that require development of specific siting standards similar to those that govern wind facilities, fossil-fueled facilities, transmission lines, and pipelines.

**Target Timeframe:** In Progress

**Estimated Amount of Time Required:** 6-12 months including staff review and development

**Recommended Process:** RAC

**Summary:** In 2018, Council directed staff to evaluate whether rulemaking was needed to address two issues related to solar photovoltaic power generation facilities. First, whether clarification of what is considered to be a single “solar photovoltaic power generation facility” is needed to interpret the definition of “energy facility” under ORS 469.300. Second, whether or not there are issues unique to solar PV facilities that require development of specific siting standards similar to those that govern wind facilities, fossil-fueled facilities, transmission lines, and pipelines. A RAC made up of interested stakeholders was appointed to discuss to discuss these issues.



### **Attachment 3: Trojan ISFSI Compliance**

**Brief Description:** Review of rules applicable to nuclear installations for consistency with Federal laws and regulations. This rulemaking project is proposed as part of the compliance review process for PGE's application to the U.S. Nuclear Regulatory Commission to renew its license for the Trojan Independent Spent Fuel Storage Installation.

**Target Timeframe:** Q1-Q2

**Estimated Amount of Time Required:** 3-6 months

**Recommended Process:** Notice to interested persons

**Summary:** The Trojan Nuclear Power Plant (Trojan) was a 1,130-megawatt nuclear-fueled power plant operated by Portland General Electric (PGE). Council issued a site certificate for Trojan in 1971. PGE submitted a decommissioning plan for Trojan 1996, which Council approved. The decommissioning was completed in December 2004, and Council found the site met criteria for unrestricted release in April, 2005. The Department continues to monitor compliance with the approved decommissioning plan and spent nuclear fuel storage as required by OAR 345-026-0370(4) and 345-026-0390.

In March 2017, PGE submitted an application to the U.S. Nuclear Regulatory Commission (NRC) for the renewal of its license to receive, possess, transfer, and store spent fuel from Trojan in the Trojan Independent Spent Fuel Storage Installation (ISFSI). The renewed license would authorize PGE to continue to store spent fuel in the ISFSI for an additional 40 years beyond the current license expiration date of March 31, 2019.

This rulemaking project is proposed as part of EFSC's compliance review process for PGE's application to NRC to renew its license for the Trojan Independent Spent Fuel Storage Installation, and would be limited to those rule changes determined to be necessary to ensure consistency with Federal laws and regulations. In particular references to specific dates, publications, standards, rules, and laws in rules applicable to the ISFSI will be updated based on advice from a third-party consultant and input from interested parties.

#### **Attachment 4: Administrative Housekeeping**

**Brief Description:** Staff have identified a list of issues that could be addressed through periodic “housekeeping” rulemakings. These are small changes to improve clarity and consistency of the rules that do not have significant impacts on stakeholders. The list is continually updated with new issues that are similar in nature.

**Target Timeframe:** Q2-Q3

**Estimated Amount of Time Required:** 3-6 months including staff review and development

**Recommended Process:** No early public participation

**Summary:** Housekeeping changes are small changes made to improve clarity of rule language, make rules more consistent with actual practice, or make minor administrative corrections that are not projected to have significant impacts on stakeholders.

Because stakeholder interest in these changes is expected to be minimal, staff does not recommend seeking public input outside of the public comment period. With Council’s authorization, Staff will draft proposed rule language and present it to Council with Staff’s request to authorize filing of the Notice of Proposed Rulemaking.

Staff continually identifies and tracks housekeeping concepts raised by Council, stakeholders, and staff. As a result, Staff may propose additional housekeeping rulemaking projects in the future. For the present project, staff has identified the following concepts:

- Update effective dates of publications, rules, codes, standards and laws referenced in OAR chapter 345.
- Change “officer” and “project officer” to “siting analyst” throughout OAR Chapter 345.
- **OAR 345-001-0000:** Review for consistency with OAR 183.335, update notice requirements to reflect current practices.
- **OAR 345-001-0010(42):** Delete definition of “Office of Energy”
- **OAR 345-001-0010(53):** Include Department of Aviation in the definition of “reviewing agency.”
- **OAR 345-015-0220(3)(d):** Delete clause “if the application is available online.”
- **OAR 345-015-0310(5), 345-020-0011(3), 345-020-0016, 345-021-0010(3), 345-021-0055(1), 345-021-0090(5), 345-027-0110(4), 345-027-0220(3):** Amend rules to reduce number of copies of notice of intent, preliminary application, and application to one original and one copy.
- Other changes identified by staff during the review process.

### Attachment 5: General Compliance

**Brief Description:** This rulemaking will establish improved compliance tools to better support ongoing compliance activities.

**Target Timeframe:** Q2-Q3

**Estimated Amount of Time Required:** 4-6 months including staff review and development

**Recommended Process:** RAC

**Summary:** Compliance rulemaking would establish compliance tools to better support compliance activities. Evaluation and amendments to the following rules may occur:

- **OAR 345-025-0006:** Update rules to require GIS shape files or maps of the final facility design.
- **OAR 345-026-0015:** Evaluate for clarity.
  - Does the title clearly describe the content?
  - Under (2), is it clearer to say "...the latter condition if controlling."
  - Is (3) too vague and far reaching without naming specific federal laws?
- **OAR 345-026-0080:** Update rules to require contact information to address compliance information.
- **OAR 345-030-0010:** Update rules to provide better direction regarding the notification process (notification to whom and how) when there is an incident or condition relating to the operation of a reactor that would prevent the system from performing its safety functions.
- Other relevant compliance issues identified during the staff review process.

**Attachment 6: Scenic Resources, Protected Areas, & Property Owner Notification**

**Brief Description:** This rulemaking would address issues related to the Council's Scenic Resources standard, Protected Areas standard, and property owner notification requirements.

**Target Timeframe:** Q3-Q4

**Estimated Amount of Time Required:** 4-6 months including staff review and development

**Recommended Process:** Notice to interested parties

**Summary:** Staff recommends that the Council consider amending its Scenic Resources standard, Protected Areas standard, and property owner notification requirements as described below:

- **OAR 345-020-0011(1)(f) and 345-021-0010(1)(f):** Amend these two rules to conform with ORS 197.763(2). Replace "the site boundary" with "property upon which the energy facility site and related or supporting facilities site is proposed"
- **OAR 345-022-0040:** Eliminate the date reference that is a part of this standard and review and consider whether all applicable protected areas are specifically listed or whether they need to be specifically listed, particularly any areas designated by the federal government.
- **OAR 345-022-0080:** The Scenic Resources standard includes "local land use plans, tribal land management plans and federal land management plans." Add "state land use or management plans" to the standard.
- Other relevant issues identified during the staff review process.

### **Attachment 7: Exemptions from Site Certificate**

**Brief Description:** This rulemaking would evaluate potential updates to the site certificate exemption process, including clarification of Council’s discretion in setting conditions and provisions for ensuring ongoing compliance and termination of an exemption under OAR 345-015-0350.

**Target Timeframe:** Q3-Q4

**Estimated Amount of Time Required:** 4-6 months including staff review and development

**Recommended Process:** Notice to interested parties

**Summary:** Staff recommends that Council consider a rulemaking process to evaluate the following:

- Can the Council add conditions to an exemption?
- What is the lifespan of an exemption? Should exemptions expire? Should ongoing funding be required to keep exemptions from expiring? Can an exemption be conditioned with construction deadlines that allow for the exemption to expire if deadlines are missed?
- Under what criteria can exemptions be terminated? Would termination require Council action?
- Should the Combined Heat and Power program under ODOE’s Energy Planning and Innovation Division be connected to the Council’s exemption program?
- Should the Title of this section, “Exemptions from Council Jurisdiction” be renamed?

### **Attachment 8: Noise Standard**

**Brief Description:** Evaluate how DEQ noise control standards apply to energy facilities and if Council should consider adoption of its own noise standard in addition to, or in lieu of, OAR 340-035-0035.

**Target Timeframe:** Q3-Q4

**Estimated Amount of Time Required:** 4-6 months, including staff review and development

**Recommended Process:** RAC

**Summary:** The Oregon Department of Environmental Quality (DEQ) has adopted noise control regulations from industrial and commercial sources, including energy facilities, under OAR 340-035-0035. In 1991, the Legislative Assembly withdrew all funding for DEQ's noise program and DEQ suspended the processing of requests for exceptions and variances, reviewing plans, issuing certifications, forming advisory committees, and responding to complaints.<sup>4</sup>

Although DEQ no longer administers the program, the noise control regulations continue to apply to EFSC jurisdictional energy facilities via Council rules. Under OAR 345-021-0010(1)(x), an applicant must provide information about noise generated by construction and operation of the proposed facility, providing evidence to support a finding by the Council that the proposed facility complies with the noise control standards promulgated by the Oregon Department of Environmental Quality (DEQ) under OAR 340-035-0035.

This rulemaking project would review how DEQ noise control standards apply to energy facilities and evaluate if Council should consider adoption of a noise standard in addition to, or in lieu of, OAR 340-035-0035.

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<sup>4</sup> See OAR 340-035-0110

**Attachment 9: Coordination with Tribal Governments**

**Brief Description:** Evaluates options to encourage communication between applicants and tribal governments to identify historic, cultural, and archaeological resources early in the application process.

**Target Timeframe:** Q4, 2019 – Q1, 2020

**Estimated Amount of Time Required:** 4-6 months, including staff review and development

**Recommended Process:** RAC or Public Workshop

**Summary:** OAR 345-022-0090 requires Council to find that the construction and operation of a facility, taking into account mitigation, are not likely to result in significant adverse impacts to certain historic, cultural or archaeological resources. Under OAR 345-021-0010, applicants are required to provide information about significant potential impacts on resources within a proposed facility's analysis area in Exhibit S of the application for a site certificate.

Department staff often recommend that applicants coordinate with tribal cultural resource specialists early in the application process to better identify historic, cultural or archaeological resources under OAR 345-022-0090. This rulemaking project would evaluate additional options to encourage communication between applicants and tribal governments to identify historic, cultural, and archaeological resources early in the application process.

If this project is approved, staff recommends seeking input through a Rules Advisory Committee or by holding one or more public workshops on the issue.