



# Oregon

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**To:** Oregon Energy Facility Siting Council

**From:** Christopher M. Clark, Rules Coordinator

**Date:** August 8, 2019

**Subject:** Agenda Item C (Action Item): Site Certificate Amendment Process Rulemaking for the August 22-23, 2019 EFSC Meeting.

**Attachments:** Attachment 1: Supreme Court Media Release for Aug. 1, 2019 Decisions  
Attachment 2: Supreme Court Decision in Friends of the Gorge v. EFSC

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## SUMMARY

On August 1, 2019, the Oregon Supreme Court invalidated the Energy Facility Siting Council's October 2017 rulemaking, which concerns the process by which the Council reviews requests for amendments to site certificates. At the August 22, 2019 EFSC meeting, staff recommends Council adopt temporary rules to replace the amendment rules. Staff further recommends the Council initiate a rulemaking process to adopt permanent rules for the review of amendments to site certificates. Temporary rules are valid for 180 days. Council may adopt the temporary rules as permanent or may make modifications based on input from stakeholders. Staff recommends Council solicit written advice from stakeholders on potential improvements to the amendment rules prior to issuing a Notice of Proposed Rulemaking.

## BACKGROUND

On October 24, 2017, the Energy Facility Siting Council adopted Permanent Administrative Orders EFSC 4-2017 and EFSC 5-2017, amending a number of rules within OAR 345-015, 345-025 and 345-027. The rules were intended to improve the process by which the Council reviews requests for amendments to site certificates. When Council adopted these Orders, it also repealed OAR 345-027-0070, which had stated the process by which most requests for amendment were reviewed prior to the October 2017 rules.

The Friends of the Columbia Gorge, joined by several other organizations, petitioned the Supreme Court of Oregon to review the validity of the October 2017 rules. The petitioners argued that the rules were not valid because Council failed to satisfy three procedural requirements in adopting the rules, and also raised two substantive objections to the new rules. On August 1, 2019, the Court invalidated the rules, agreeing with the petitioners on one procedural issue and one substantive objection.

Procedurally, the Court agreed that the rules were invalid because the Council failed to substantially comply with ORS 183.335(3)(d) because Council did not provide a written statement identifying how it would later determine whether the proposed rules were accomplishing their objective.

Substantively, the Court held that the Council exceeded its statutory authority by adopting rules that limited the scope of judicial review of an order amending a site certificate under the Type B review process.

Staff's recommendations to address these two issues are discussed further below. Additionally, the Supreme Court's media release summarizing its decision is included as **Attachment 1** to this report, and the full decision is included as **Attachment 2**.

If Council does not take any action, upon the Court's issuing an appellate judgment (which serves to make its decision effective) either there will be no rules in place governing site certificate amendments whatsoever or, at best, the rules would revert to the version that was in effect prior to October 24, 2017. This raises significant questions about how the Department and Council would process requests for amendment and amendment determination requests currently under review and any new such requests received. Taking an affirmative action to replace the invalidated rules would allow Council to resolve this procedural ambiguity and provide stakeholders with continuity of process.

The Council has two options for adopting rules under ORS 183.335. Permanent rules may be adopted following notice of the proposed action, a public comment period, and in many cases, a hearing. This process takes a minimum of 49 days, but usually requires at least 60-90 days to complete.<sup>1</sup> Temporary rules may be adopted immediately if Council finds that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned. No prior hearing notice or hearing is required to adopt temporary rules, although the Council may provide any abbreviated notice and hearing it finds practicable. Temporary rules may only be in effect for 180 days.<sup>2</sup> Staff believes that temporary rules are justified because failing to act promptly would adversely impact the Council's ability to process requests for amendment that were submitted on or after October 24, 2017 for which Council has not yet made a final decision, and would likely result in significant costs and delays to certificate holders. Should the Court's decision mean that no amendment rules are in place whatsoever, temporary rules are also justified to allow the Department and Council to process any new requests for amendment or amendment determination requests.

## TEMPORARY RULEMAKING

Staff recommends adopting temporary rules to replace the October 2017 amendment rules and mitigate costs and delays to certificate holders. Specifically, temporary rules would allow Council to: (1) replace the amendment rules adopted on October 24, 2017; (2) clarify the

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<sup>1</sup> See ORS 183.335(1)

<sup>2</sup> See ORS 183.335(5)

process the Council will use to review requests for amendments and other review processes submitted on or after October 24, 2017 for which Council has not yet made a final decision; and (3) amend provisions which exceeded the Council's statutory authority under the Type B review process, as identified by the Supreme Court. Staff recommends temporary rules be substantially similar to the rules adopted on October 24, 2017; with the following changes:

1. OAR 345-027-0011 should be amended to clarify the applicability of the temporary rules. The rule should clearly state that the Department and Council will process all requests for amendment and amendment determination requests submitted on or after October 24, 2017 for which Council has not made a final decision under the temporary rules, without requiring certificate holders to resubmit a new request.

2. OAR 345-027-0068(3)(e)(E); 345-027-0072(3)(d); and 345-027-0072(5) should be amended to remove provisions that the Supreme Court held exceed the Council's statutory authority, by limiting judicial review under the Type B review process.<sup>3</sup> Staff recommends these sections be replaced with a statement that "Judicial review of the Council's final order either granting or denying an amended site certificate shall be as provided in ORS 469.403."

## **PERMANENT RULEMAKING**

To ensure that permanent rules are in effect within 180 days, staff recommends that Council initiate a permanent rulemaking process concurrently with adoption of temporary rules. Council could propose that the temporary rules be adopted as permanent, or could make additional modifications based on input from stakeholders.

Considering the amount of public input provided during the 2017 rulemaking process, staff does not recommend reconvening a rulemaking advisory committee (RAC) to discuss permanent rules.<sup>4</sup> However, staff does recommend Council solicit written advice from stakeholders on potential improvements to the amendment rules prior to issuing a Notice of Proposed Rulemaking.

If advice is solicited, staff would then present proposed permanent rules for Council to consider at its October meeting. If approved, staff would issue a Notice of Proposed Rulemaking,

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<sup>3</sup> The rules limit judicial review to those persons who provided comments during the council's consideration of an application and only as to issues on which they provided comment. In its decision, the Court explained that ORS 469.405(1) provides, "Judicial review of an amendment to a site certificate shall be as provided in ORS 469.403." The Court further explained that "...ORS 469.403, has a subsection expressly addressing judicial review of RFAs that went through contested case proceedings...The statute, however, does not have a provision addressing [requests] that did not go through contested case proceedings." As a result, the Court found that when a request does not go through a contested case proceeding, judicial review should be allowed for any "person adversely affected or aggrieved by the agency order," without limitation" as provided under ORS 183.482(2).

<sup>4</sup> Before issuing a Notice of Proposed Rulemaking in January 2017, the Department held two public workshops and three RAC meetings. Between issuing the notice and adopting rules in October 2017, the Council issued six public notices about the rulemaking process, extended the comment period four times, held three public hearings, circulated three draft versions of the proposed rules, and considered more than 150 written comments.

initiating a formal public comment period. Staff recommends Council schedule a Rulemaking Hearing for its November or December meeting, and consider adoption of final rules at its December meeting.

The table below provides a potential timeline for permanent rulemaking:

Permanent Rulemaking Steps	Completion Date
<b>Council approves temporary rules and initiates permanent rulemaking process.</b>	<b>Aug. 22, 2019</b>
Staff solicits written advice from stakeholders	Aug. 28 – Sept. 27, 2019
Staff drafts proposed new or amended rules and identifies any rules for proposed repeal	Oct. 10, 2019
Staff prepares Notice of Proposed Rulemaking	Oct. 10, 2019
<b>Council authorizes staff to issue Notice</b>	<b>Oct. 25, 2019</b>
Staff issues Notice	Oct. 30, 2019
Public Comment Period	Oct. 30 – Dec. 1, 2019
<b>Rulemaking Hearing</b>	<b>Nov. 22, 2019</b>
<b>Council and Staff consider all written and oral comments, revise proposed rules as needed</b>	<b>Dec. 5, 2019</b>
<b>Council adopts, amends, or repeals rules</b>	<b>Dec. 20, 2019</b>
Staff submits permanent rule filing to Secretary of State	Dec. 23, 2019
Permanent rules are effective	Jan. 1, 2020
Last date temporary rules could be effective	Feb. 18, 2020

### STAFF RECOMMENDATION

Staff recommends Council adopt temporary rules and initiate a permanent rulemaking process to adopt the temporary rules as permanent, with or without modifications.

Prior to the August 22, 2019 Council meeting, staff will provide Council with draft proposed temporary rules and additional documentation as required by statute.