



Oregon

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To: Oregon Energy Facility Siting Council

From: Christopher M. Clark, Rules Coordinator

Date: September 12, 2019

Subject: Agenda Item H: Council Deliberation of Adoption of Permanent Rules Associated with the 2019 Housekeeping Rulemaking Project for the August 22-23, 2019 EFSC Meeting.

Attachments: Attachment 1: Comment letter from Gary K. Kahn et. al., dated Aug. 22, 2019
Attachment 2: Comment letter from Jim and Fuji Kreider, dated Aug. 23, 2019

SUMMARY

This staff report summarizes the significant data, views, and arguments contained in the hearing record for the 2019 Housekeeping Rulemaking Project, and contains staff's recommended responses to major issues raised. Exact copies of the written testimony are included as **Attachments 1 and 2**.

BACKGROUND

At its May 17, 2019 meeting, the Council authorized staff to issue a Notice of Proposed Rulemaking for rule changes associated with the 2019 Housekeeping Rulemaking Project. The proposed rules included changes to OAR 345-001, 345-015, 345-020, and 345-021, 345-027 that are intended to facilitate electronic transmission of application materials, improve the consistency of noticing requirements with statute and local government processes, and reduce administrative and reporting costs to applicants and certificate holders. Specific changes included:

- Specifying that rulemaking notices may be sent electronically and adopting procedures to update the Council's rulemaking mailing lists.
- Updating definitions and procedural rules to be more consistent with statute.

- Reducing the number of printed copies of project materials an applicant or certificate holder must submit and facilitating electronic distribution of materials to reviewing agencies.
- Aligning property owner listing requirements with local government practices.

Staff filed the Notice of Proposed Rulemaking with the Secretary of State on June 12, 2019. The Notice appeared in the Oregon Bulletin for July, 2019. On June 17, 2019, the Department posted the Notice to the Department website and sent the Notice to the persons on the Council's Rulemaking Mailing List, and the legislators described in ORS 183.335(15).

The Notice initiated a public comment period on the proposed rule changes that ended on August 23, 2019 at 9:30 a.m. A hearing was held at the Council's August 23, 2019 meeting in Boardman, OR. No oral comments were provided at the hearing. The Council received a written comment letter from staff, and two comment letters from the public prior to the close of the public record. Council also received a presentation from staff at the August 23, 2019 meeting. Council did not take action at that time, and requested staff provide additional analysis of comments and return the matter to Council at the September 26-27, 2019 meeting.

ISSUES RAISED IN PUBLIC COMMENTS

This section summarizes major issues and raised in public comments. Exact copies of the written testimony are included as **Attachments 1 and 2**.

Issue: Request for Statement of Objective

Testimony: “* * *Commenters request ‘a statement that identifies the objective of the rule and a statement of how the agency will subsequently determine whether the rule is in fact accomplishing that objective.’ ORS 183.335(3)(d).” (See Attachment 1 & 2.)

Staff Recommendation: The Department provided a written response to the commenters on September 11, 2019. In the response, the Department explains that because the request was not timely, the Department and Council are under no statutory obligation to provide the statement. Nevertheless, the Department recommends Council consider methods for determining whether or not the new rules are accomplishing the objectives, and provide a statement as requested.

As stated in the Notice of Proposed Rulemaking, the primary objective of the rule changes are: (1) to facilitate electronic transmission of application materials, (2) to improve the consistency of noticing requirements with statute and local government processes, and (3) reduce administrative and reporting costs to applicants and certificate holders. The Rulemaking also has a secondary objective of improving the clarity, consistency, and readability of the rules.

There are a number of approaches the Council could use to determine whether or not the new rules are accomplishing the objectives. Given the administrative nature of the changes, the

Council could rely upon feedback from stakeholders, such as suggestions made during public comment sessions, or rulemaking advice submitted to the Department, to determine if the rules have met the objectives of the rulemaking or if additional improvements could be made. This feedback could be actively solicited from stakeholders, or could be passively collected and evaluated in preparation of a future rulemaking project.

The Council could also specify a more formal evaluation of the rulemaking. For example, to determine whether the new rules are accomplishing Objectives 1 and 3, the Department could conduct a review of application processes under revised OAR 345-015, 345-020, and 345-021, to determine whether or not the rule changes increased electronic transmission of application materials and what additional barriers to electronic transmission should be addressed. Staff could also review applications submitted to the Department to estimate changes in administrative and reporting costs to applicants and certificate holders that result from the rule changes.

To determine whether the new rules are accomplishing Objective 2, the Department could review Exhibit F submissions for any identifiable changes in the number of property owners being noticed, or could seek additional input from County governments to ensure that OAR 345-020-0011(1)(f) and 345-021-0010(1)(f) are being implemented consistently with local government practice. The Department could also review changes in the number of persons subscribed to the Council's rulemaking mailing lists, including the number of persons affected by the provisions of the proposed OAR 345-001-0000(3).

The department will document the method Council specifies in the summary of testimony and responses for this rulemaking, which will be posted to the department's website and provided to the commenters. If Council decides to take the more formal approach, the Department also recommends that the Council set a time to consider the findings of the reviews no sooner than mid-2021.

Issue: Recommendation to remove or reject all rule changes that would revise rules held invalid by the Oregon Supreme Court.

Testimony: “* * * The proposed rules accompanying the rulemaking notice include several proposed revisions to rules that have been held invalid by the Oregon Supreme Court * * * Because these rules are invalid in the first place, they cannot be further revised * * * Remove or reject all rule changes that would revise rules held invalid by the Oregon Supreme Court.” (See Attachment 1 & 2.)

Staff Recommendation: At the August 23, 2019 Council meeting, the Department recommended that the Council not proceed with proposed revisions to rules that were held invalid by the Oregon Supreme Court in its decision in *Friends of the Columbia Gorge v. EFSC* as part of this rulemaking project, and has excluded these rules from the rulemaking project.

Issue: The numerous proposed substantive changes of the words “shall” to “will” would result in fundamental, substantive changes to numerous duties and requirements under the Council’s rules, and should be rejected.

Testimony: “* * * By changing more than one hundred instances of “shall” to “will,” the proposed rulemaking would have the effect of transforming mandatory requirements currently in the rules to mere predictions of future action. The ultimate effect would be to abdicate or thwart accountability or judicial oversight if and when the Council or the Department fails to comply with the Council’s rules. * * * Retain the word “shall” to denote and maintain all current obligations in the Council’s rules. Avoid using the word “must” to denote a duty or obligation, and instead use “shall.” Avoid using the word “will,” except where a prediction or expectation of future action, short of a binding obligation, is clearly intended. Avoid systematic use of different words (e.g., “will” versus “shall” or “must”) for the agencies as distinguished from other parties as the effect could be to enact different standards. Check all existing and proposed rules to ensure consistency with these drafting principles.” (See Attachment 1 & 2.)

Staff Recommendation: The Department recommended these changes as part of its ongoing effort to comply with Oregon’s plain language law (ORS 183.750) applicable to state agency public writings, which include agency rules. A state agency plain language stylebook recommends use of the terms “must” or “will” rather than shall. Contrary to the commenter’s assertions, the Department did not intend to create a substantive change in duties or requirements, nor to hold itself to a different standard than applicants and other parties. Nevertheless, to address these concerns, staff recommends Council consistently use either the word “must” or “shall” in these rules whenever the intention is to impose an obligation on a party – be it the Council, Department, applicant, certificate holder, or other party. Whichever term Council approves, the Department will use that term when drafting future siting rules until, or unless further direction is provided by the Council.

Issue: Use of “Rule summaries”

Testimony: “* * * both the electronic rulemaking notice and the accompanying notice delivered to the Secretary of State for publication in the Oregon Bulletin fail to include “[a]n objective, simple and understandable statement summarizing the subject matter and purpose of the intended action in sufficient detail to inform a person that the person’s interests may be affected,” as required by ORS 183.335(2)(a)(B). The notice published in the Bulletin does meet other requirements of the APA by including a caption, a statement of need, a statement of fiscal and economic impact, and a request for public comment on whether other options should be considered, but it does not contain the statement required by ORS 183.335(2)(a)(B). Instead, the notice contains 25 separate “Rule Summaries”—one at the beginning of each rule section—but does not include a simple and understandable summary of the intended action as a whole.” (See Attachment 1 & 2.)

Staff Recommendation: The Department recommends no action on this comment. The “rule summaries” that precede the proposed rule language for each rule section are intended to provide an objective, simple and understandable statement summarizing the subject matter and purpose of the proposed rulemaking actions associated with each rule. The Oregon Secretary of State requires the statement described in ORS 183.335(2)(a)(b) to be provided in this format for all rulemaking notices.

Issue: Recommendation to provide notices “by mail and email.”

Testimony: “In several places, the proposed rulemaking would change the requirements to allow service of important agency public notices “by mail or email.” There is no explanation of what is intended by this phrase. * * * Ultimately, the best approach is to require service by both mail and email. In other words, email service should occur on all persons subscribed to the email list, and service by mail should occur on all persons subscribed to the mailing list. These are standard governmental agency practices to ensure proper notice to persons who desire notice.”

“In fact, the proposal to amend OAR 345-001-0000(1) to use the vague phrase “by mail or email” likely violates ORS 183.335. That statute effectively gives each interested person the choice of which method by which they wish to receive notice. * * * Perhaps the intent of the proposed rule was in fact to allow interested persons to choose the method of service, but that is not at all clear with the vague phrase “by mail or email,” because it implies, for example, that ODOE staff could choose on their own to solely send notice to an agency email list and not a mailing list, or vice versa.”

“Commenters recognize that the phrase ‘by mail or email’ is already used in some places in the current rules. This rulemaking provides an opportunity to revise and clarify these existing instances of ‘mail or email’ as well.”

“Recommendation: Rather than using the vague phrase “by mail or email,” revise all existing and proposed rules to expressly require service by mail to all persons subscribed to the agency mailing list, as well as service by email to all persons subscribed to the agency email list.”

Staff Recommendation: For rulemaking notices, the commenters correctly note that ORS 183.335(8) provides subscribers to the Council’s rulemaking list with the option to receive notice by mail or email, and agencies are required to send notice by mail when service by mail is requested. Because the method for selecting the manner of service is clearly described in statute, the Department recommends that there is no need to further elaborate in rule.

The commenters correctly note that provisions for non-rulemaking public notices to be provided by mail or email are included in current rules, including rules that are not included in this rulemaking project, and rules in OAR 345-015 and 345-027 that were removed from this

rulemaking project as recommended by the commenters. Because many of the rules specifying notices will be sent by mail or email are outside of the scope of the current rulemaking, we do not recommend Council make additional changes at this time. However, if Council believes further clarification or revision of these provisions is needed, staff will evaluate options and present them to Council in a future rulemaking proceeding.

The proposed rules contain several new instances of the phrase “by mail or email;” however, these rules (OAR 345-020-0040; 345-021-0050; and 345-021-0055) are for distribution of application materials to reviewing agencies. The proposed amendments are intended to default to the electronic distribution of application materials to these agencies; however the rules retain the right of any person on the distribution list to obtain printed materials upon request. Because these rules do not affect requirements for public notices, the Department does not recommend any additional action on this request.

STAFF RECOMMENDATION

Staff recommends Council adopt rules included in the Notice of Proposed Rulemaking filed with the Secretary of state on June 12, 2019, with the changes recommended by staff in Attachment 1 to the Staff Report for Agenda Item H of the August 22-23 Council Meeting, and exclusively using either the term “shall” or “must” to denote an obligation of Council, the Department, applicant or certificate holder, or other persons who are subject to the rules. Staff also recommends Council specify the methods for evaluating whether or not the rules achieve their stated objectives as described in this report.

Agenda Item H Staff Report - Attachment 1:
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