

**2019 Amendment Rulemaking Project  
Issues Analysis Document  
October 10, 2019**

This document provides a summary of the Department’s analysis and recommendations for issues related to the 2019 Amendment Rulemaking Project. The document and associated draft rules are for information only, and are not notice of rulemaking action by the Energy Facility Siting Council. The analysis and recommendations within are subject to change based on input from the Energy Facility Siting Council, staff, and stakeholders.

**Issue 1103 – Contested Case Notices**

**Affected rules:** OAR 345-015-0014; 345-015-0016; 345-015-0080; 345-015-0230; 345-027-0071

**Issue Description:** Rules do not clearly distinguish between contested case notices under ORS chapter 183 and other public notices under ORS chapter 469.

**Background:** The administrative procedures act contains two distinct noticing requirements for contested case hearings.<sup>1</sup> First, ORS 183.415 requires all parties to a contested case to be given notice of an agencies proposed action and or the parties right to request a contested case hearing. Second, ORS 183.413 requires all parties to a contested case proceeding to be given a statement of their rights. The “contested case notice” described in OAR 345-015-0014 is intended to satisfy the requirements of ORS 183.415; however, the rule appears to contain provisions which implement public noticing requirements in ORS chapter 469 which are not part of formal contested case proceedings. These include the public notice of a proposed order on a site certificate application required under ORS 469.370 and the similar public notice required for the proposed order on a request for amendment under type A review required under OAR 345-027-0071. Due to the procedural importance of the contested case notice in a contested case proceeding, and the additional requirements it is subject to, we recommend relocating these provisions to the procedural rules which govern their respective review processes. Each notice, and specific recommendations are discussed in the sections that follow.

**Notice of proposed order on an application for site certificate**

An applicant is automatically a party to a contested case proceeding on an application for a site certificate. Other persons may be granted party or limited party status in the contested case proceeding if they appeared in person or in writing at the public hearing on the application and the council determines that the person has an interest, or represents a public interest, in the outcome of the contested case proceeding.<sup>2</sup>

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<sup>1</sup> For the purpose of this document, we will use the term “contested case” to refer to any proceeding before the Council which may include a “contested case hearing.” This includes, but is not limited to, review of an application for site certificate, type A review of a request for amendment, or assessment of sanctions or civil penalties. The term “contested case hearing” or “contested case proceeding” is used to refer to the administrative review of an order or decision in a contested case, in which specific parties have the opportunity to present evidence and argument on specific issues before a hearings officer. Procedures for contested case proceedings are found in ORS 183.310 to 183.550; OAR 137-003; and OAR 345-015-0012 to 345-015-0085.

<sup>2</sup> See ORS 183.310(7); 469.470(5) and OAR 345-015-0016.

Under ORS 469.370(4), after issuing a proposed order on an application for site certificate, the department must 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.” This notice appears to be intended to provide information about how a member of the public that has preserved standing by commenting on the record may request to participate in a contested case proceeding. As such, this notice appears to be intended to supplement the formal notice to parties of their right to hearing under ORS 183.415, not replace or modify it.

OAR 345-015-0230, as currently written, requires the Department to issue two separate notices following issuance of a proposed order on a site certificate application: (1) a “contested case notice, as described in OAR 345-015-0014” and (2) a “public notice of the proposed order.” Based on the analysis above, the Department recommends that issuing a single public notice of the proposed order, which includes the information specified by ORS 469.370(4), may be more aligned with the intent of the statute.

The Department recommends that notice include the information currently required by OAR 345-015-0014(1)(a) and (2), and be sent to by mail or email to all persons on the Council's general mailing list, on the special mailing list for the proposed project, the property owners listed in Exhibit F of the application, and to all persons who commented in writing on the record of the public hearing [on the draft proposed order.] Changing the rules in this manner would not decrease the number of persons who receive notice of the proposed order or alter the right of any person to participate or request to participate in the contested case. The proposed rule amendment may alter the manner of service for some notices because it would allow the Department to issue notice to persons who commented on the record of the draft proposed order by mail email, rather than by registered or certified mail, as currently required under OAR 345-015-0014. This could potentially reduce administrative costs for applicants.

The proposed rule change would not relieve the Department or Council of the obligation to issue the contested case notice under to the applicant and other parties to the contested case. To clarify, the Council could specify that the contested case notice be sent to parties after the deadline to request party status specified in the public notice on the proposed order.

#### **Notice of proposed order on a request for amendment (type A review)**

Unlike in the review process for site certificate applications, a request for amendment is not automatically considered in a contested case proceeding. Under the type A review process, persons who commented in person or in writing on the record of the public hearing on the draft proposed order on a request for amendment under the type A review process may request a contested case proceeding. OAR 345-027-0371. Contested cases are not allowed on a request for amendment under the type B review process.

Under OAR 345-027-0371, concurrent with issuing a proposed order on a request for amendment under type A review, the department must issue a public notice of the proposed order and a notice of opportunity to request a contested case. The notice of the opportunity to

request a contested case includes the deadline for requesting a contested case and establishes the procedures for requests for party or limited party status in contested cases on a request for amendment.

Due to the similarities between the “notice of opportunity to request a contested case” and the “contested case notice” described under the current OAR 345-015-0230(3), the department has issued the former by registered or certified mail, as required under OAR 345-015-0014; however, because this notice appears to be intended to supplement, not replace or modify, the contested case notice required under ORS 183.415, the department believes this practice may not be necessary. To clarify the requirements for service of a notice of opportunity to request a contested case, the department recommends the council specify that it will be sent by mail or email. The department also recommends the Council consider consolidating the notice of proposed order and the notice of opportunity to request a contested case in future rulemaking.

Note that while the manner of service would change for some recipients, all persons who receive notice under the current rule would continue to receive the same notices. In addition, all persons the Council grants contested case party status to would still receive an additional contested case notice by regular or certified mail under OAR 345-015-0014.

### **Contested Case Notices**

Under OAR 345-001-0005 and OAR 345-015-0014, the Council adopted the Attorney General’s model rule for contested case notices, OAR 137-003-0001, to implement ORS 183.415. The rule includes several mandatory and optional items for inclusion in the contested case. Since the last revision of the model rules, the legislature amended ORS 183.415 to require contested case notices to include an additional statement that active duty servicemembers have a right to stay proceedings under the federal Servicemembers Civil Relief Act. In addition to the changes described in the sections above, staff recommends Council amend OAR 345-015-0014 to specify what information the information that will be included in the notice, including the notice to active duty service members.

### **Staff recommendation:**

- Amend OAR 345-015-0014 to:
  - Delete sections (1)(a) and (b), (2), and (4).
  - Amend section (1) to specify the information that must be included in a contested case notice, including the notice to active duty service members.
  - Amend section (3) to specify that the contested case notice will be sent to “all parties.”
- Amend OAR 345-015-0230(3) to
  - Specify that the notice of proposed order will contain the information currently required under OAR 345-015-0014 and will be sent, by mail or email, to all persons who commented in person or in writing on the record of the public hearing on the proposed order in addition to its current recipients; and
  - Remove the reference to the contested case notice under OAR 345-015-0014.

- Amend OAR 345-027-0071(4) to specify that the notice of opportunity to request a contested case will be sent by mail or email to all persons who commented in person or in writing on the record of the public hearing on the proposed order.
- Amend OAR 345-015-0080(1) to replace the reference to the “notice of the opportunity to request a contested case” with “notice of the proposed order.”

### **Issue 1091 – Requirements for submission and distribution of application materials**

**Affected rules:** OAR 345-027-0110(4), 345-027-0220(3)

**Issue Description:** Availability of electronic transmission has reduced the number of printed copies of applications and other materials the Department needs for review.

**Background:** The rules require an applicant for a site certificate or amendment to provide one original and two printed copies of most project materials, including the notice of intent, application for a site certificate, application for amendments, and application for termination of a site certificate. Initially, the Department retained the original to satisfy public records requirements; provided one copy to the siting analyst as a working draft, and made one copy available for public inspection at Council meetings, or at a remote location such as a library or post office. Changes in technology have made it easier to transmit and access these documents electronically, reducing the need for paper copies to be made available for review at remote locations.

**Staff recommendation:** Reduce the number of paper copies required from one original and two copies, to just two copies.

### **Issue 1062 – Property owner lists**

**Affected rules:** OAR 345-027-0360(1)(f); 345-027-0410(5)

**Issue Description:** The Council recently adopted rules in OAR 345-020 and 345-021 to better align property owner listing requirements with local government practice.

**Background:** ORS 469.370(2)(a) which requires the notice of a hearing on a draft proposed order on a site certificate application to “comply with the requirements of ORS 197.763(2), with respect to the persons notified.”

The council recently adopted changes to OAR 345-020-0011(1)(f) and 345-021-0010(1)(f) to better align the property owner listed requirements with local government practices. Staff recommends adopting similar language applicable to requests for amendment. In particular, staff recommends basing the property owner lists on property located from the distances specified in ORS 197.763 from property which is the subject of the request for amendment.

Note that where the site boundary and the property boundary are the same, the amended rule would result in an identical property owner list to the current rule, however; when a site boundary uses only a portion of a property, the amended rule could capture additional property owners by measuring from the property boundary. The amended rule would also allow for a limited property owner list to be developed if an amendment request was specific to a portion of a facility, or a facility component.

**Staff recommendation:**

- Amend OAR 345-027-0360(1)(f) to require a list of the names and mailing addresses of all owners of record, as shown on the most recent property tax assessment roll, of property located:
  - Within 100 feet of property which the subject of the request for amendment, where the subject property is wholly or in part within an urban growth boundary;
  - Within 250 feet of property which is the subject of the request for amendment, where the subject property is outside an urban growth boundary and not within a farm or forest zone; or
  - Within 500 feet of property which is the subject of the request for amendment, where the subject property is within a farm or forest zone; and
- Amend all references to OAR 345-021-0010(1)(f) in Division 27 to OAR 345-027-0360(1)(f).

**Issue 1116 – Limitation on Contested Case Requests**

**Affected Rules:** OAR 345-015-0016; 345-027-0371

**Issue Description:** A stakeholder recommends there should be no limit on contested case requests that exclude rules used in issuing site certificates, or amendments to site certificates.

**Background:** In advice dated September 27, 2019, Ms. Irene Gilbert recommended:

“There should be no limit on contested case requests that exclude rules used in issuing site certificates, or amendments to site certificates. For example, Division 21 which defines what must be included in an application or amendment request should be contestable if the Oregon Department of Energy determines a site certificate application is complete which does not document the statements being made by a developer.”

The limitations on what issues may be raised in a contested case request during the site certificate application process are contained in OAR 345-015-0016. Limitations on issues that may be raised in a contested case request during the site certificate amendment process are contained in OAR 345-027-0371(5) to (9). Generally, to be considered in a contested case an issue must have been properly raised on the record of the public hearing for the application or request and the Department’s draft proposed order, must be within the Council’s jurisdiction,

and must raise a significant issue of fact or law that may affect the Council's determination that the facility meets the applicable laws and Council standards included in OAR chapter 345 divisions 22, 23 and 24.

**Staff recommendation:** Staff recommends this issue be considered in future rulemaking.

### **Issue 1117 – Public Comment on preliminary Request for Amendment**

**Affected Rules:** OAR 345-027-0360

**Issue Description:** A stakeholder recommends that the public should be provided an opportunity to review and comment on an application for amendment prior to the development of the Draft Proposed Order.

**Background:** In advice dated September 27, 2019, Ms. Irene Gilbert recommended:

“The public should be provided an opportunity to review and comment on the application for amendment prior to the development of the Draft Proposed Order. Contrary to the statements from ODOE, allowing the public to review what is being proposed and comment prior to issuance of a draft proposed order would likely reduce the need for some contested cases due to alerting the developers and EFSC of areas of conflict. Addressing issues early in the process is far less time consuming than dealing with them through ODOE's formal processes. I personally have had success in talking through concerns with developers and identifying solutions without involving ODOE or EFSC, but that is no longer occurring due to the short timeframes between when the information is made available through a draft proposed order and the deadline for submitting comments.”

OAR 345-027-0360(2) requires the Department to post an announcement on its website to notify the public that a preliminary request for amendment has been received. This announcement does not contain a request for public comment.

In the pre-October 2017 version of the rules, public comments were requested in the notice of a preliminary application, prior to issuance of a proposed order. See OAR 345-027-0070(1)(b) eff. May 15, 2015. The department was required to consider any comments received in the development of the proposed order. Issuance of the proposed order then initiated a second public comment period.

In the rules adopted in 2017, the early comment period was removed in favor of a consolidated comment period during the draft proposed order phase of the review. This was intended, in part, to encourage public comment on the complete application, and in part to avoid the need to recirculate a proposed order when substantive changes to the order are made.

Council could reinstate the early review period; however, further clarification of how those comments are processed and whether an early comment would preserve an issue in a contested case proceeding would likely be needed. As such, staff recommends this issue be considered further during future rulemaking which allows for a more comprehensive review. In the interim, if Council desires to increase opportunities for public review of proposed

amendments at this point in the review process, one option would be to issue a public notice of receipt of the preliminary request, in addition to making the announcement on the website. If council elects to require a public notice of the preliminary amendment, staff recommends council amend OAR 345-027-0360 to provide:

(2) After receiving a preliminary request for amendment, the Department shall post an announcement on its website to notify the public that a preliminary request for amendment has been received. The announcement shall include a copy of the preliminary request for amendment.

(3) On the same date the Department posts the announcement under section (2) of this rule, the Department must issue a public notice of receipt of the preliminary request for amendment, subject to the following:

(a) The notice must include:

(A) The addresses of locations where the public may inspect copies of the preliminary request for amendment and the website where the preliminary request for amendment may be found;

(B) The name, address, email address, and telephone number of the Department's representative to contact for additional information;

(C) A description of the requested amendment; and

(D) The location of the site of the requested amendment

(b) The notice must be sent 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 set up for the proposed project; and

(C) The property owners listed under subsection (1)(f) of this rule.

**Staff recommendation:** Staff recommends Council consider reinstating the early review and comment period in future rulemaking; staff makes no recommendation regarding including the early public notice of receipt of a preliminary request for amendment.

**Issue 1118 – Inclusion of rule references and documents in public comments.**

**Affected Rules:** OAR 345-015-0016 and 345-027-0367

**Issue Description:** A stakeholder recommends that rule references and documents are not needed to preserve an issue for contested case.

**Background:** In advice dated September 27, 2019, Ms. Irene Gilbert recommended:

“ODOE needs to quit trying to implement an interpretation that requires the public to include all rule references and documents they will use in a contested case request during the public comments. The statute and rules do not support their interpretation.

The rules relate only to the opportunity to submit additional documents or identify related statutes for inclusion in the public comments. The comments are intended to identify the issue of concern in a concise manner with some sort of documentation. A contested case request must address the issue identified in the public comments, but there is no restriction in statute or rule which would preclude the identification of additional rules that cover the identified issue or documents supporting the need to resolve the conflict or supporting the fact that a conflict exists.”

Under ORS 469.370(3) and OAR 345-015-0016(3) for site certificate applications and 345-027-0367(5)(b) for requests for amendment, 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.

**Staff recommendation:** Because this issue is primarily concerned with rule interpretation and application, staff does not recommend any rulemaking action.

#### **Issue 1119 – Use of Model Rules for Contested Cases**

**Affected Rules:** OAR 345-015-0012 to 345-015-0085, 345-027-0371

**Issue Description:** A stakeholder recommends the Council rely on Model Rules to conduct contested cases.

**Background:** In advice dated September 27, 2019, Ms. Irene Gilbert recommended:

“The contested case rules should use the Model Rules, unless there is a demonstrated critical need to add something. The contested case rules should use the same procedure for a new application as are used for an amendment to an existing site certificate. No time is saved by having two different sets of requirements for applications and amendments, and since the court decision requiring the opportunity to allow contested case requests, there is no time saving by using different procedures.”

In OAR 345-001-0005, the Council has adopted the Attorney General’s Model Rules for Contested Cases in OAR 137-001 through 137-003-0092, with several modifications found in OAR 345-015-0012 to 345-015-0085 to address the specific requirements of the site certificate application review process. OAR 345-027-0371 contains similar procedures for the review of requests for a contested case under the type A amendment review process. If directed by Council, Staff could review the provisions and provide recommendations to harmonize the procedures in a future rulemaking.

**Staff recommendation:** Staff recommends this issue be considered in future rulemaking.

#### **Issue 1120 – Hearings Officer Selection**

**Affected Rules:** N/A



**Issue Description:** A stakeholder recommends the Council use hearings officers from the Oregon Department of Justice to conduct contested cases.

**Background:** In advice dated September 27, 2019, Ms. Irene Gilbert recommended that the Council use hearings officers from the Oregon Department of Justice:

“Hearings referees should come from the Oregon Department of Justice and they should be the ones making an unbiased decision regarding whether the issues being brought forward in a contested case request should be heard...”

Certain agencies are required to use an Administrative Law Judge (ALJ) from the Office of Administrative Hearings (an independent agency) to conduct a contested case. Per 183.635(2)(k), the Council is not subject to this requirement. However, under OAR 345-015-0023(1), the Council may choose to appoint an ALJ to conduct a contested case proceeding under the rules adopted by the Council.

**Staff recommendation:** Because Ms. Gilbert does not recommend rule revisions, and because the issue is primarily concerned with Council policy, staff does not recommend any rulemaking action.

#### **Issue 1121 – Evaluation of Contested Case Requests**

**Affected Rules:** OAR 345-027-0371(9)

**Issue Description:** A stakeholder recommends that contested case should be granted on interpretation or application of rule.

**Background:** In advice dated September 27, 2019, Ms. Irene Gilbert recommended:

“The determination regarding whether or not a contested case is allowed should rest with determining that there is a conflict between the interpretation or application of the rules as defined by ODOE and EFSC and the interpretation or application of the rules as is perceived by the public. No decision should be based upon a determination by the council that they do not agree with the petitioner, or making a determination based upon the contested case request that the petitioner would [lose] the contested case.”

**Staff recommendation:** Because this issue is primarily concerned with rule interpretation and application, staff does not recommend any rulemaking action.