



Oregon

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To: Oregon Energy Facility Siting Council

From: Christopher M. Clark, Rules Coordinator

Date: October 11, 2019 (Corrected October 23, 2019)

Subject: Agenda Item C (Action Item): Site Certificate Amendment Process Rulemaking for the October 25, 2019 EFSC Meeting.

Attachments: Attachment 1: Stakeholder Advice
Attachment 2: Issues Document
Attachment 3: Draft Proposed Rules

SUMMARY

On August 1, 2019, the Oregon Supreme Court held that rules approved by the Energy Facility Siting Council's October 2017 rulemaking, which concerns the process by which the Council reviews requests for amendments to site certificates, are invalid. At the August 22, 2019 Council meeting, the Council adopted temporary rules to replace the amendment rules and initiated a rulemaking process to adopt permanent rules for the review of amendments to site certificates.

On August 30, 2019 staff solicited written advice from stakeholders, and received three individual submittals, all from Ms. Irene Gilbert. The submittals are included in **Attachment 1** to this staff report. The issues raised in the advice have been incorporated into the issues document provided as **Attachment 2**, along with issues identified by staff. The issues document also contains analysis and recommendations for each issue identified.

To initiate the formal rulemaking process, Council must issue a Notice of Proposed Rulemaking including a Statement of Need and Fiscal Impact Statement, as well as the proposed rule language. Staff recommends Council authorize staff to issue a Notice of Proposed Rulemaking, and has included draft notice language and proposed rules as **Attachment 3**.

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 When Council adopted these Orders, it also repealed OAR 345-027-0070, which had stated the process by which most requests for amendment were reviewed prior to the October 2017 rules.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. On August 1, 2019, the Court held the rules are invalid, agreeing with the petitioners on one procedural issue and one substantive objection.

TEMPORARY RULEMAKING

On August 22, 2019, the Council adopted temporary rules to replace the October 2017 amendment rules and mitigate costs and delays to certificate holders. Specifically, the temporary rules: (1) replaced the amendment rules adopted on October 24, 2017; (2) clarified the 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) removed provisions in the Type B review process rules that the Supreme Court held exceeded the Council's statutory authority.

PERMANENT RULEMAKING

Also on August 22, 2019, the Council initiated a permanent rulemaking process to permanently replace the rules for the amendment review process. Staff solicited written advice from stakeholders on what changes to the temporary rules should be included in permanent rules. The advice the department received is provided as **Attachment 1**.¹The major issues raised in the advice have been incorporated into the issues document provided as **Attachment 2**, along with several additional issues identified by staff. The issues document also contains analysis and recommendations for each issue identified.

To initiate the formal rulemaking process, Council must issue a Notice of Proposed Rulemaking including a Statement of Need and Fiscal Impact Statement, as well as the proposed rule language. Staff recommends Council authorize staff to issue a Notice of Proposed Rulemaking, and has included draft notice language and proposed rules as **Attachment 3** to this staff report. The department's proposed permanent rules would make no substantive changes to the temporary rules adopted by Council on August 22, 2019, aside from the inclusion of the recommendations proposed as part of the 2019 Housekeeping Rulemaking described below. The department notes that the temporary rules adopted by Council are broadly similar to the amendment rules adopted by Council in October 2017 that were the result of extensive outreach and coordination with a Rulemaking Advisory Committee (RAC) as well as multiple opportunities for public comment. The department believes the October 2017 rules and the August 2019 temporary rules are functioning as intended. As explained in Attachment 2, the Department has reviewed the issues raised in the advice received, and does not recommend additional rulemaking at this time. Nevertheless, the department recommends that the Council reconvene a RAC within two years from adoption of the permanent rules with the intent of

¹ In advice dated September 1, 2019, Ms. Irene Gilbert requested that her comments submitted as part of the previous rulemaking process be "included in the comments regarding your proposed amendment rules." Written comments received on the record of the 2017 Amendment Rulemaking Project are included in Attachment M to the [Staff Report for Agenda Item B of the October 19, 2017 Council Meeting](#). Minutes and other materials related to Rules Advisory Committee's for that project are available from: <https://www.oregon.gov/energy/Get-Involved/Pages/Energy-Facility-Siting-Council-Rulemaking.aspx>

evaluating the effectiveness of the amendment rules, evaluating outstanding issues, and assessing at that time if any substantive changes should be recommended to Council.

The draft proposed rules include several rule changes that were initially proposed as part of the 2019 Housekeeping rulemaking project, but were not adopted to avoid confusion regarding the temporary rules.² These changes propose to:

- Amend OAR 345-015-0014; 345-015-0016; 345-015-0080; 345-015-0230; and 345-027-0371 to establish separate procedural requirements for contested case notices and public notices on a proposed order.
- Amend OAR 345-027-0110(4) and 345-027-0220(3) to reduce the number of paper copies required for a request for termination or request for approval to construct, operate and retire a gas storage testing pipeline.
- Amend OAR 345-027-0360(1)(f) and 345-027-0110(5) to adopt language that better aligns property owner notification requirements with local government practice.

Issues raised in advice by Ms. Gilbert include a recommendation to allow an opportunity for early public review and comment before issuance of the draft proposed order on a site certificate amendment request. Staff recommends this issue be considered further during future rulemaking which allows for a more comprehensive review; however, in the interim, the Department has identified an option that may address at least some of the concerns related to opportunities for early review of a request for amendment. The option would require the Department provide public notice of receipt of a preliminary request for amendment. Under the current temporary rule, the department is only required to post an announcement of receipt of a preliminary request for amendment on the ODOE webpage for the facility. The rule option would require that at the time of receipt of a preliminary request for amendment, the department issue public notice to the EFSC general distribution list, the facility specific special mailing list, and the adjacent property owner list. Staff has included this option, with possible rule language, for Council's consideration in the issues document, but makes no recommendation on its adoption.

Other issues raised by Ms. Gilbert include a recommendation to use the same procedural rules for a contested case proceeding on a request for amendment as is used for a site certificate application, and a recommendation to remove limitations on the public's ability to request a contested case. The Department does not recommend additional rule changes to address these issues at this time; but does recommend they be considered in future rulemaking on the amendment review process.

The department further recommends Council commit to initiate a full review of the amendment rules within two years of adoption of permanent rules. This would allow the department to convene a RAC to fully evaluate the efficacy of the rules after they have been

² Council approved the Housekeeping rulemaking project at its September 27, 2019 meeting, but as noted, excluded any housekeeping changes from OAR 345, Division 15 and Division 27 that were related to site certificate amendments or the temporary rules.

implemented for a reasonable period of time and assess the merit of these issues and other issues that may be raised at that time.

Because the draft proposed permanent rules continue current processes and administrative procedures established by the 2017 and 2019 Amendment Rules, staff recommends that the proposed rules are not likely to have a significant fiscal impact on the Department, applicants or certificate holders, or other stakeholders. The department also recommends that the proposed changes to the noticing requirements in OAR 345-015-0014, 345-015-0230, and 345-027-371, may slightly reduce mailing costs to applicants and certificate holder associated with issuing notices. The proposed changes to OAR 345-027-0110(4) and 345-027-0220(3) may slightly reduce reporting and administrative costs by reducing the printed copies associated with certain requests. The changes to OAR 345-027-0360(1)(f) and 345-027-0110(5) may increase or decrease costs associated with issuing notices to property owners, depending on the location of the project and nature of the action for which notice must be issued. Overall, these changes are not expected to have a significant economic effect on any state agencies, units of local government, or members of the public. These rules are not expected to directly impact any small businesses.

NEXT STEPS

The table below provides a potential timeline for permanent rulemaking. If Council authorizes staff to issue its notice at this meeting; staff recommends Council schedule a public hearing on the proposed rules at its November meeting. This would allow for Council to consider all comments and testimony provided on the record and consider adoption of final permanent rules at its meeting scheduled for Dec. 20, 2019.

Permanent Rulemaking Steps	Completion Date
Council approves temporary rules and initiates permanent rulemaking process.	Aug. 22, 2019
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
Council authorizes staff to issue Notice	Oct. 25, 2019
Staff issues Notice	Oct. 25, 2019
Public Comment Period	Oct. 25 – Nov. 27, 2019
Rulemaking Hearing	Nov. 22, 2019
Staff prepares draft final rules for Council	Nov. 27, 2019 – Dec. 5, 2019
Council considers public comments and testimony and adopts, amends, or repeals permanent rules	Dec. 20, 2019
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 convene RAC to evaluate effectiveness of the amendment rules	Jan. 1, 2022

STAFF RECOMMENDATION

Staff recommends Council authorize staff to issue a notice of proposed rulemaking as provided in **Attachment 3**, with or without modifications.

ATTACHMENT 1: STAKEHOLDER ADVICE

ATTACHMENT 2: ISSUES DOCUMENT

ATTACHMENT 3: DRAFT PROPOSED RULES