



Oregon

Kate Brown, Governor



To: Oregon Energy Facility Siting Council
From: Christopher M. Clark, Rules Coordinator
Date: November 7, 2019
Subject: Agenda Item D (Hearing): Site Certificate Amendment Process Rulemaking for the November 21, 2019, EFSC Meeting.
Attachments: Attachment 1: Notice of Proposed Rulemaking

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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 October 25, 2019 the Council approved proposed rules presented by staff and authorized staff to issue a Notice of Proposed Rulemaking. The Notice of Proposed Rulemaking initiated a public comment period on the proposed rules and established a hearing date for the Council to accept oral testimony on the proposed rules. The hearing is scheduled to begin at 5:30 pm on November 21, 2019.

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 When Council adopted these Orders, it also repealed OAR 345-027-0070, which had stated the process by which most requests for amendment were reviewed prior to the October 2017 rules.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.¹ 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 Council considered the advice and draft proposed rules presented by staff at its meeting on October 25, 2019. The Council approved the proposed rules and authorized staff to issue a Notice of Proposed Rulemaking, which was filed with the Secretary of State on the same date.² The Notice is included as Attachment 1.

The proposed rules would permanently adopt the temporary rules governing the site certificate amendment review process adopted on August 22, 2019. The rules contain additional changes to clarify procedures for issuance of contested case notices, provide requirements for property owner notification for a request for amendment, and reduce the number of printed materials that must be submitted by persons requesting to terminate a site certificate or construct a natural-gas testing pipeline. The rules also contain additional grammatical, formatting, and wording changes needed to improve the clarity and consistency of rules in OAR chapter 345.

The Notice of Proposed Rulemaking initiated a public comment period on the proposed rules and established a hearing date for the Council to accept oral testimony on the proposed rules. The hearing is scheduled to begin at 5:30 pm on November 21, 2019. All written comments must be received by November 27, 2019 at 5:00 p.m. to be considered.

The Council must consider fully any written or oral testimony received on the proposed rules prior to adopting permanent rules. Council may make changes to the proposed rules in response to issues raised in testimony received on the rulemaking record. In addition, at the October meeting, staff recommended that the Council commit to initiating a full review of the amendment rules within two years of adoption of permanent rules to evaluate the efficacy of the rules after they have been implemented for a reasonable period of time, and assess the merit of issues raised in advice and testimony during this rulemaking and any other issues that may be raised at that time. This recommendation is reflected in the rulemaking schedule scheduled for consideration at this meeting.

¹ The October 2017 rules were implemented by Council at the conclusion of a comprehensive and thorough public process which included multiple meetings of a Rulemaking Advisory Committee as well as multiple public comment opportunities.

² The Notice was distributed to the persons specified under OAR 345-001-0000(1) on October 28, 2019, and appeared in the Secretary of State's Bulletin on November 1.

NEXT STEPS

The table below provides a potential timeline for permanent rulemaking. Following the hearing, staff will provide a summary of major issues raised in oral and written testimony. Currently, Council final consideration of all comments and testimony provided on the record, and potential adoption of final permanent rules will occur at its December meeting.

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