



# Oregon

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**To:** Oregon Energy Facility Siting Council

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

**Date:** November 7, 2019

**Subject:** Agenda Item L (Action Item) – 2020-2022 Rulemaking Schedule for November 22, 2019 Council Meeting

Attachment 1: 2020-2022 Proposed Rulemaking Schedule

Attachment 2: Rulemaking Project Summaries

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## Background and summary

Staff tracks rulemaking issues raised by Council, stakeholders, and staff on an ongoing basis. These concepts are used to develop a potential rulemaking projects for the Council's consideration. Each year, staff recommends rulemaking projects for the coming year prioritized by urgency, level of public interest, and complexity. For each rulemaking project, staff also recommends a method for seeking public input in developing proposed rules.

Please note that additional rulemaking projects may be proposed before the next regular update of the rulemaking schedule in response to stakeholder petition, statutory changes, or issues of serious prejudice to the public interest. Staff may also file statutory minor corrections described under ORS 183.335(7) as allowed by OAR 345-011-0005(4) as needed. Other corrections or issues may be presented for Council's consideration during regular Council meetings.

## Rulemaking Process Overview

A rule is any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency.<sup>1</sup> An agency, including Council, must adopt rules for several reasons, including to meet a statutory obligation to adopt rules; to interpret broad statutory authority delegated by the legislature; or to amend, suspend or repeal existing rules.

ORS 469.470 requires Council to "adopt standards and rules to perform the functions vested by law in the council including the adoption of standards and rules for the siting of energy facilities pursuant to ORS 469.501, and implementation of the energy policy of the State of Oregon set

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<sup>1</sup> ORS 183.310(9).

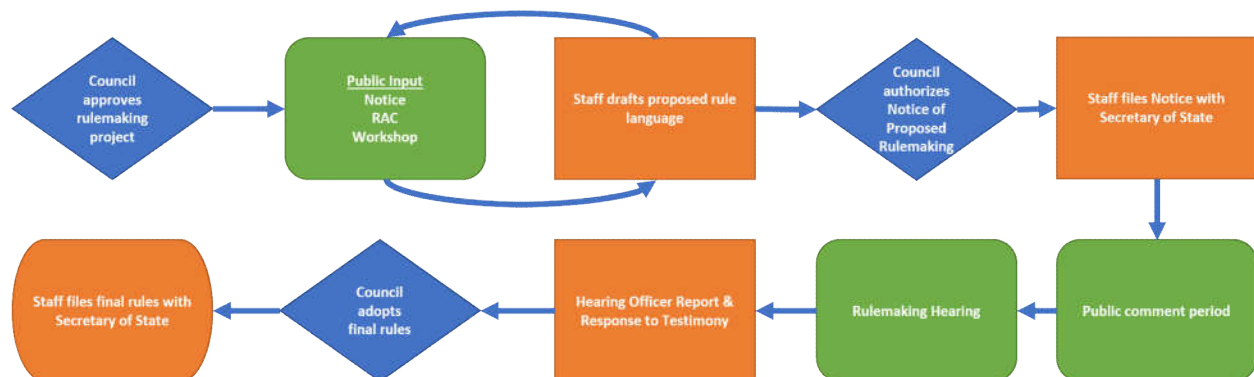
forth in ORS 469.010 and 469.310.” Several other sections of ORS chapter 469 supplement this broad rulemaking mandate with specific rulemaking requirements.

The rulemaking process is governed by ORS chapter 183, the Administrative Procedures Act (APA). Among other things, the APA requires each agency that adopts rules to appoint a rules coordinator, provide notice of permanent rulemaking, and to give interested persons a reasonable opportunity to submit data or views on proposed rulemaking actions.<sup>2</sup>

Generally, the rulemaking process takes between three and twelve months to complete. The amount of time needed to complete a rulemaking project depends on the complexity of issues and the level of public interest and involvement. The APA encourages agencies to involve the public in the development of public policy by agencies and in the drafting of rules and seek public input to the maximum extent possible before giving notice of intent to adopt a rule. Options for involving the public include appointing a rulemaking advisory committee (RAC), inviting interested parties to provide advice on a rulemaking issue, or other means of obtaining public views such as workshops and public forums.<sup>3</sup> Appointing a RAC to provide input may increase the amount of time needed to develop proposed rules, but the RAC’s input may improve the quality of the proposed language and may help the agency identify and address concerns and potential issues with proposed rules before the public comment period.

In most cases, the rules coordinator is responsible for facilitating the rulemaking process and keeping Council informed of its progress. As shown in the figure below, Council will be asked to provide staff with direction and approval for proceedings to continue at several points in the rulemaking process.

**Figure 1. Overview of EFSC Rulemaking Process**



For rulemaking projects where the Council has included public workshops in the rulemaking process, staff will ask Council for its input on the number and location of any public workshops before any workshop is convened.

<sup>2</sup> ORS 183.330(2), ORS 183.335(1), and ORS 183.335(3).

<sup>3</sup> ORS 183.333.

For rulemaking projects where Council has included the appointment of a RAC as early public participation in the rulemaking process, staff will provide a list of entities interested in participating in the RAC for that rulemaking so that Council may appoint RAC members. Staff will also ask Council for input on the number and location of any RAC meetings.

Staff will consider advice provided by the Council, any rules advisory committee, and the general public when drafting proposed rules, and may seek additional advice on specific rule language or issues. Council will consider proposed rules and will either direct staff to issue a Notice or Proposed Rulemaking or direct staff to make additional changes to the proposed rules. Once the proposed rules and notice are approved, staff will file the notice with the Secretary of State. A rulemaking hearing is not always required but will generally be held before Council near the end of the public comment period. After fully considering comments and oral testimony received during the public comment period Council may adopt, amend, or repeal rules. Council may also suspend a rulemaking project at any time during the process.

**Status of 2019 Rulemaking Priorities**

At its Feb. 22, 2019, meeting, the Council approved the list of priority rulemaking projects shown in Table 1. Over the past year, staff completed work on the 2019 Housekeeping Rulemaking Project, and made significant progress on several other projects. Due to an active legislative session, staffing issues within the siting division, and ongoing litigation involving the amendment rulemaking, several other projects scheduled for 2019 were put on hold. Table 1 provides a description of each approved project and its current status.

**Table 1. Status of 2019 Rulemaking Projects**

<b>Project ID</b>	<b>Subject Matter</b>	<b>Description</b>	<b>Status</b>
N/A	Statutory Minor Corrections	Correct references and errors as allowed under ORS 183.335(7).	<b>Complete.</b> All outstanding corrections have been resolved.
R183	Single Solar PV Facilities	Evaluate if rulemaking is required to clarify: (1) What is considered to be a “solar photovoltaic power generation facility” as that term is used in the definition of “energy facility” under ORS 469.300(11); and (2) whether there are issues unique to solar PV facilities that require development of specific siting standards.	<b>In progress.</b> Three RAC meetings have been held.
R191	Trojan ISFSI Compliance (NEW)	Review standards and rules for decommissioning of the Trojan Independent Spent Fuel Storage Installation (ISFSI) to ensure	<b>In progress.</b> Pending finalization of Staff Report on New ISFSI license.

		compliance with federal law and regulations.	
R192	Administrative Housekeeping	Review rules for clarity and consistency and amend as needed.	<b>Complete.</b> Permanent rules filed on Oct. 4, 2019 under AO EFSC 10-2019.
R182	General Compliance	Update rules tools to better support ongoing compliance activities.	<b>On hold.</b>
R184	Scenic Resources, Protected Areas, & Property Owner Notification	Administrative updates to the Council’s Scenic Resources standard, Protected Areas standard, and property owner notification requirements.	<b>Partially Complete.</b> Issue related to property owner notification resolved as part of the housekeeping rulemaking project.
R185	Exemptions from Site Certificate	Evaluate potential updates to the site certificate exemption process, including clarification of Council’s discretion in setting conditions and provisions for ensuring ongoing compliance and termination of an exemption.	<b>On hold.</b>
R193	Noise Standard	Evaluate if Council should adopt a noise standard in addition to, or in lieu of, OAR 340-035-0035.	<b>On hold.</b>
R194	Historic, Cultural and Archaeological Resources	Evaluate options to encourage early communication between applicants and tribal governments to identify historic, cultural, and archaeological resources early in the application process.	<b>On hold.</b>
R196*	Amendments 2019	Adopt rules to replace amendment rules held invalid by Oregon Supreme Court in <i>Friends of the Columbia Gorge v. EFSC</i> .	<b>In Progress.</b> Temporary Rules Filed on August 22, 2019. Notice of Permanent Rulemaking filed October 25, 2019.
*Added after approval of 2019 Rulemaking Schedule			

A brief description of the projects that were completed or are currently in progress follows. Staff’s recommended approach to addressing the remaining projects, as well as newly identified projects, is included in the following section.

### R192 – 2019 Housekeeping Rulemaking Project

The 2019 Housekeeping Rulemaking Project, which implemented several rule changes intended to facilitate electronic communication and improve consistency of noticing requirements. Permanent rules were filed on October 4, 2019. An issue related to property owner notification proposed as part of Project R184 was also resolved as part of this rulemaking.

### R183 – Solar PV Rulemaking Project

The Council approved a revised scope for the Solar PV rulemaking project in February. Staff facilitated two RAC meetings for the Solar PV rulemaking project in early 2019. The Department has reviewed input provided by stakeholders and expects to hold one additional RAC meeting and present proposed rules to the Council in early 2020. In addition to issues related to the scope of this project, staff proposes to include technical changes to OAR 345-020-0006(3) and 345-021-0000(2) to implement changes to the types of facilities which may “elect” to obtain a site certificate enacted by HB 2329 (2019).

### R191 – Trojan ISFSI Compliance

Staff is currently evaluating the safety evaluation report, technical specifications, and environmental assessment associated with the renewed Special Nuclear Materials license for the operation of the ISFSI issued to PGE by the US Nuclear Regulatory Commission in August. The evaluation will recommend rule changes to maintain compliance with federal laws and regulations and the terms of the renewed license. The department expects to finalize its evaluation and rule recommendations in late 2019.

### R196 – Amendments

On August 1, 2019, the Oregon Supreme Court released its decision in *Friends of the Columbia Gorge v. EFSC*, finding that the rules governing the site certificate amendment process adopted in October 2017 were invalid due to a procedural error. The Court also found that certain provisions of the rules exceeded the Council’s statutory authority. On August 22, 2019, the Council adopted temporary rules to clarify the process for review of pending and new requests for site certificate amendments until new permanent rules could be adopted. Council approved proposed permanent rules at its October meeting. A rulemaking hearing is scheduled to be held at the November meeting. The Council expects to adopt permanent rules before February 2019.

### **Proposed Rulemaking Priorities for 2020-2022**

To set more realistic expectations about rulemaking timelines, this report provides a proposed schedule of rulemaking projects for Council to address over the next three years and identifies projects which are under development for the future. Projects that are time sensitive, have clearly defined issues, or have issues raised by stakeholders in earlier years have been prioritized earlier in the schedule. Projects that are in development, or that may require additional legal review or data collection have been prioritized for later years. **Attachment 1**

provides a proposed schedule of proposed rulemaking projects for 2020-2022, their prioritization, and staff's recommended method for obtaining advice on proposed rules.<sup>4</sup> This rulemaking schedule will continue to be updated annually, and the prioritization of projects may be reevaluated to reflect changing priorities and incorporate emerging issues. **Attachment 2** provides a more detailed summary of each project included in the proposed schedule.

### 2020 Rulemaking Projects

Table 2 provides an overview of the proposed rulemaking priorities for 2020. Staff proposes to first complete the three rulemaking projects that are currently in progress: Solar PV Facilities (R183), Trojan ISFSI (R191), and the Permanent Amendment rulemaking for 2019 (R196). Staff then proposes to focus on addressing the remaining issues in the Protected Areas and Scenic Resources Project (R184) which was approved last year. Staff proposes to also include review of the Recreation Standard in this project because of its related subject matter.

The broad scope of the Compliance Rulemaking Project (R182) has contributed to the delays in its completion. Staff recommends that addressing the issues included in the project in phases may allow those issues that are more well defined to move forward while preliminary work on other issues is completed. To accomplish this goal, staff recommends that the scope of the General Compliance Rulemaking Project (R182) be revised to be limited to issues related to OAR 345-026-0005 to 345-026-0170, and that Council approve two new projects with more targeted scopes related to use and collection of geospatial data and resources (R201) and reporting requirements for research reactors (R202).

The council's rules regarding radioactive waste materials were last updated 2007. Since then, several other states have revised laws and rules related to the disposal of NORM and TENORM, and new studies on the risks associated with exposure to these materials have been published. Staff recommends Council approve a new project (R195) to evaluate the current regulatory landscape and body of evidence related to the disposal of NORM and TENORM to determine if updates to the Council's rules are needed. The project would be completed in coordination with technical staff from the Department's Nuclear Safety & Emergency Preparedness Division.

Finally, staff recommends Council initiate rulemaking in mid-2020 to increase the Carbon Monetary Offset Rate in OAR 345-024-0580 by the maximum amount allowed under ORS 469.503 (R203). The timing of this project is linked to the 2020 legislative session, because the rulemaking project will not be necessary if legislation which eliminates the Carbon Standard is passed.

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<sup>4</sup> Note that the prioritization of projects in Attachment 1 reflects the anticipated timeline for council action and; if approved, staff may begin preliminary work on future projects to identify issues and collect data and analyze alternatives.

**Table 2. 2020 Rulemaking Priorities**

<b>Project ID</b>	<b>Subject Matter</b>	<b>Purpose</b>	<b>Method for Obtaining Advice<sup>5</sup></b>
R184	Protected Areas, Scenic Resources, and Recreation	Review the Protected Areas, Scenic Resources, and Recreation standards and associated rules to ensure that the areas, designations, and resources protected by rules are up to date and that rules are clear and consistent with the Council's review process.	RAC
R183	General Compliance	Update OAR 345-026-0005 to 345-026-0170 and related rules to better support ongoing compliance activities.	RAC
R195	Radioactive Waste Materials	Evaluate the current regulatory landscape and body of evidence related to the disposal of materials containing naturally occurring radioactive materials and identify potential updates to the Council's rules under OAR 345-050.	RAC
R201	Geospatial Resources (NEW)	Consider options to improve Council and Department's collection and use of geospatial data and resources, including but not limited to, requiring applicants and certificate holders to submit GIS data for energy facilities. In evaluating options, the Department will consider potential costs to applicants and considerations for proprietary information or critical energy infrastructure information.	RAC
R202	Research Reactors (NEW)	Update OAR 345-030 to ensure consistency with federal reporting requirements and deadlines. Clarify the process for notification of incidents or conditions relating to the safe operation of a reactor.	Request for Written Advice
R203	Carbon Offset Rate Update (New)	Update the Monetary Carbon Offset Rate under OAR 345-024-0580 to be address historic increases in offset costs. The rate may be increased by up to 50% as allowed by ORS 469.503(2)(c)(C). Note, the rulemaking may not be required if legislation is passed during the 2020 session that eliminates the EFSC Carbon Standard.	Fiscal Advisory Committee

### Procedural Rulemaking and Administrative Updates

In addition to developing rulemaking projects which affect multiple rules or address issues related to a common subject matter, staff and stakeholders often identify administrative and procedural issues which affect a single or limited number of rules, such as references to

<sup>5</sup> Note that regardless of what method is used to obtain advice on proposed rules, a formal public comment period will take place after issuance of the Notice of Proposed Rulemaking.

standards or laws which are out of date, minor discrepancies between rules, or procedural requirements which are unnecessary or unclear. In previous years, the Council has addressed these types of issues by combining them into general administrative or “housekeeping” projects. While there may be some efficiencies created by packaging administrative issues together in a single process, it also can prevent Staff and Council from addressing issues in a timely manner.

In place of creating a separate project for administrative and procedural updates in 2020, staff proposes to present procedural and administrative rule changes to Council on a quarterly basis, or in conjunction with other rulemaking updates. Staff believes addressing these types of issues on a more regular basis will improve the Council’s ability to keep the rules up to date and to respond to emerging issues or stakeholder concerns.

If Council approves this approach, staff also requests that Council provide direction on the method it will use to solicit public input on these issues. Similar to past administrative or housekeeping rulemaking projects, the Council could solicit written advice on proposed rule changes or provide a public comment period during the Council meeting at which the changes are presented. A second option would be to appoint a standing RAC to provide advice on these issues, and other projects which are of interest to the Council’s stakeholders but may not affect a specific stakeholder group. Council could also choose to rely solely upon public comments and testimony provided after the Notice of Proposed Rulemaking has been issued, although staff does not recommend this approach.

Regardless of the method used to obtain advice, Staff also recommends that Council schedule a consolidated rulemaking hearing for any proposed rule changes approved during a quarterly rulemaking update. Depending on Council interest, this hearing could be scheduled in advance of, or in conjunction with, the following quarterly update.

Staff will bring a more detailed plan based on Council’s feedback for review and approval in early 2020.

#### 2021-2022 Rulemaking Priorities

Looking beyond 2020, the schedule in **Attachment 1** recommends that other rulemaking projects included in the 2019 calendar be addressed in 2020 or 2021 as time allows. Then, staff recommends council commit to initiating two new projects to review rules adopted under the 2019 Amendment Rulemaking Project (R196) in 2022. These projects would satisfy the requirement to review new rules within five years after adoption under ORS 183.405, and would provide an opportunity for the Council to determine if the rules are accomplishing their objectives. In the longer-term, Staff believes a review of options to better align the application requirements in OAR 345-020 and 021 with the standards in OAR 345-022 to 345-024 may improve the consistency of rules and the application process.



The schedule will be updated annually as established projects are completed, the scope of projects in development are refined, and new projects are identified.

### **Recommendations**

1. Staff recommends that Council approve the 2020-2022 schedule of rulemaking projects included in Attachment 1, with or without modifications. By approving the schedule, the Council acknowledges that staff may begin preliminary work on any of the approved projects needed to prepare them for Council review.
2. Staff requests that Council direct staff to either: (1) present a detailed plan for quarterly rulemaking to address administrative or procedural issues; or (2) present a new rulemaking project to address outstanding administrative or procedural issues to be added to the 2020-2022 rulemaking schedule.