

**Agenda Item D: 2019 Amendment Rulemaking  
Council Review of Comments for December 19-20, 2019 Council Meeting  
Attachment A: Public Comments**

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## **CLARK Christopher \* ODOE**

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**From:** Beverly Bunker <beverly@rke-law.com>  
**Sent:** Friday, November 15, 2019 2:32 PM  
**To:** EFSC Rulemaking \* ODOE  
**Cc:** patrick.g.rowe@doj.state.or.us; CORNETT Todd \* ODOE; Gary Kahn  
**Subject:** EFSC Proposed Rulemaking – 2019 Permanent Rules for Site Certificate Amendment Process  
**Attachments:** Letter Oregon Energy Facility Siting Council.pdf

Dear Chair Beyeler and Council Members:

Please see the attached letter from Gary Kahn. The original is being sent to you today.

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*VIA FIRST-CLASS MAIL AND E-MAIL*

November 15, 2019

Oregon Energy Facility Siting Council  
c/o EFSC Rules Coordinator  
Oregon Department of Energy  
550 Capitol St. NE  
Salem, OR 97301  
*EFSC.rulemaking@oregon.gov*

**Re: EFSC Proposed Rulemaking – 2019 Permanent Rules for Site Certificate  
Amendment Process**

Dear Chair Beyeler and Council Members:

This office represents Friends of the Columbia Gorge, Northwest Environmental Defense Center, Oregon Natural Desert Association, Oregon Wild, Thrive Hood River, Columbia Riverkeeper, WildLands Defense, Greater Hells Canyon Council, Oregon Coast Alliance, Central Oregon LandWatch, Audubon Society of Portland, and East Cascades Audubon Society (collectively, “Commenters”) with respect to the above-referenced proposed permanent rulemaking. Commenters are nonprofit public interest organizations, with more than 60,000 collective members and supporters, with strong interests in responsible energy generation and the proper implementation of state law governing the approval, construction, and modification of large energy facilities in Oregon.

Commenters are currently reviewing the proposed permanent rules and intend to submit substantive comments on these rules at a later date. At this time, Commenters write to make two requests authorized by the Oregon Administrative Procedures Act (“APA”), and thereby invoke the APA’s mandatory procedural requirements.

First, pursuant to ORS 183.335(3)(d), Commenters request a statement that identifies the objective(s) of the proposed rules and a statement of how the Council and/or ODOE will subsequently determine whether the rules are in fact accomplishing such objective(s). As decided by the Oregon Supreme Court in *Friends of the Columbia Gorge v. EFSC*, this statement must be provided in written form. 365 Or 371, 389–90 & n 7, 446 P3d 53 (2019). In addition, pursuant to OAR 137-001-0095(2) (which applies to EFSC’s rulemaking proceedings via OAR 345-001-0005(1)), EFSC and/or ODOE must provide the requested statement within ten days of receiving this request.

Second, pursuant to ORS 183.335(4), Commenters request that EFSC and ODOE postpone the rulemaking process by at least 21 days to allow Commenters and other interested persons a sufficient opportunity to submit data, views, or arguments concerning the proposed permanent rules. Specifically, Commenters request that the Council postpone the November 27, 2019 deadline for written comments on this proposed rulemaking by at least 21 days, and also postpone the December 20, 2019 date (the scheduled date when the Council intends to decide whether to adopt the proposed permanent rules) by at least 21 days.

Although ORS 183.335(4) does not require Commenters to state a reason for the requested postponement, Commenters do have several reasons. First, Commenters, EFSC, ODOE, and the public at large are all currently awaiting a decision by the Oregon Supreme Court in the pending case *Friends of the Columbia Gorge v. EFSC*, SC No. S066993. The Court's decision in this pending case is very likely to affect several issues involving the proposed permanent rules, including which set of rules provides the status quo (and thus the starting point that might be revised by any new permanent rules). The Court's decision may also address disputed questions about the status of applications that were pending at the time the Supreme Court declared certain rules invalid in the prior case, *Friends v. EFSC*, 365 Or 371. Additional time is needed to allow interested persons and the agencies to review the Oregon Supreme Court's forthcoming decision and respond appropriately.

Second, the proposed permanent rules are proposed to be retroactive, going back more than two years, to applications submitted on or after October 24, 2017. *See* Proposed Rules 345-027-0311. The Supreme Court may offer guidance in its forthcoming decision on retroactive rules. Furthermore, Commenters need additional time to research retroactive rules generally and determine whether the proposed retroactive nature of the proposed rules would be lawful and appropriate.

Finally, the current deadline for written comments is November 27, 2019, one day before Thanksgiving. The public interest would be served by extending this deadline at least 21 days. Commenters and other stakeholders simply need more time to prepare and submit their comments, given the upcoming Thanksgiving holiday.

Finally, Commenters note that the two requests made in this letter are timely under ORS 183.335(3)(d) and 183.335(4) because they are made before the earliest date that the rules could become effective pursuant to ORS 183.335(1). Assuming that all types of notice under ORS 183.335(1) were given on the same day (October 25, 2019), then the earliest date the proposed rules could become effective would be December 14, 2019 (50 days after notice was given pursuant to ORS 183.335(1)(d)), and the deadline for requests under ORS 183.335(3)(d) and 183.335(4) would be December 13, 2019 (one day before the earliest date the rules could become effective). *See* also Oregon Attorney General's Administrative Law Manual (2019) at 38, 43-44. This letter is submitted 28 days before the December 13, 2019 deadline, and the requests therein are therefore timely.

EFSC  
November 15, 2019  
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Commenters look forward to the Council's response to this letter, and to our continuing cooperative efforts to facilitate meaningful comments from the public regarding the proposed permanent rules. Thank you for your time and consideration.

Sincerely,

REEVES, KAHN, HENNESSY & ELKINS



Gary K. Kahn

GKK/blb

cc (via email only): Clients  
Patrick Rowe, Oregon Department of Justice  
Todd Cornett, Oregon Department of Energy



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November 22, 2019

Gary Kahn

Reeves, Kahn, Hennessy & Elkins

PO Box 86100

Portland, OR 97286

Sent via email to: [gkahn@rke-law.com](mailto:gkahn@rke-law.com)

Dear Mr. Kahn,

Thank you for your comments on the proposed rule for the 2019 Permanent Rules for Site Certificate Amendment Process. The department received the comments on November 15, 2019. The comments contain two requests authorized by ORS 183.335: a request for a statement that identifies the objectives of the proposed rules and a statement of how the Council will subsequently determine whether the rules are in fact accomplishing such objectives under ORS 183.335(3)(d); and a request for Council and the Department to postpone the rulemaking process by at least 21 days under ORS 183.335(4).

The Council acknowledges that these requests were made on behalf of more than five persons, and were made before the earliest date that the rule could become effective after the Council's rulemaking notices were issued under ORS 183.335(1).<sup>1</sup> This letter provides the Council's responses to your requests.

## Statement of Objective

You requested a statement that identifies the objectives of the proposed rules and a statement of how the Council will subsequently determine whether the rules are in fact accomplishing such objectives. The following statements are intended to respond to this request as required by ORS 183.335(3)(d) and OAR 137-001-0095.

The proposed rules are intended to accomplish several objectives. First, the proposed rules are intended to replace rules governing the site certificate amendment review process that were declared invalid by the Oregon Supreme Court in a manner that provides regulatory certainty and continuity in the processing of requests for site certificate amendments. Second, the proposed changes intend to reduce the costs of compliance to applicants and certificate holders by clarifying procedures for issuance of contested case notices and other public notices (see proposed OAR 345-015-0014, 345-015-0016, 345-015-0080, 345-015-0083, 345-015-0230, and 345-027-0371), and reducing the number of printed materials that must be submitted by persons requesting to terminate a site certificate or construct a natural-gas testing pipeline (see proposed OAR 345-027-0110 and 345-027-0220). Third, the rules intend

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<sup>1</sup> The Council notes that notices under 183.335(1)(a), (c) and (d) were issued on October 28, 2019. By the Department's calculation, the earliest date the rules could be effective after giving notice is December 17, 2019.

to improve consistency between the Council's rules and local government practice regarding property owner notification requirements (see proposed OAR 345-027-0110 and OAR 345-027-0360). Finally, the rules contain a number of additional grammatical and wording changes which are intended to improve the clarity and consistency of the rules.

To determine whether the rules are accomplishing the first objective, the Council has committed to appointing a Rules Advisory Committee (RAC) to begin review of the newly adopted rules in OAR 345-027 within two years after adoption of permanent rules. The RAC will be asked to provide advice on any outstanding issues on the amendment rules that are not addressed during this rulemaking, and any new issues that are raised during or after their adoption. The Council will also consider any suggestions to enhance opportunities for public participation in the amendment review process while minimizing adverse economic impacts on certificate holders.

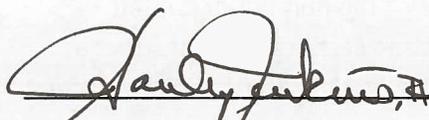
For the remaining objectives, the Council will continue to track any issues related to contested case notices, electronic submission of application materials, property owner notification, and general consistency and clarity of the rules raised by stakeholders and staff to determine whether additional rules changes are needed.

#### **Request for Postponement**

Second, you request that Council postpone the rulemaking process by at least 21 days to allow you, the organizations you represent, and other persons a sufficient opportunity to submit data, views, or arguments concerning the proposed permanent rules. Specifically, you request that the Council postpone the November 27, 2019 deadline for written comments by at least 21 days, and also postpone by at least 21 days the December 20, 2019 date on which Council intends to decide whether to adopt the proposed permanent rules.

Under ORS 183.335(4), "Upon request of an interested person \* \* \* the agency shall postpone the date of its intended action no less than 21 nor more than 90 days in order to allow the requesting person an opportunity to submit data, views or arguments concerning the proposed action. \* \* \*" Because this request was made timely, as described above, the Council will extend the public comment period to allow you, the organizations you represent, and other persons, to provide additional opportunity to submit data, views, or arguments concerning the proposed rules by 21 days, to December 18, 2019. The Department will also defer its final decision on adoption of the permanent rules until its January meeting; however, Council may begin review and discussion of any issues raised in testimony provided on the proposed rules at its December meeting.

Thank you again for your interest and participation in this rulemaking project,



Hanley Jenkins II  
Energy Facility Siting Council Chair

## BEFORE THE ENERGY FACILITY SITING COUNCIL

### RULEMAKING HEARING

In the matter of proposed amendments to  
OAR 345-015, 345-025, 345-027

HEARING OFFICER'S REPORT

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 was scheduled to begin at 5:30 pm on November 21, 2019 at the Council's meeting in The Dalles, Oregon. Christopher M. Clark, the Council's Rules Coordinator was named as Hearing Officer. Notice of the hearing also appeared in the Oregon Bulletin for November 2019.

Mr. Clark provided a brief summary of the rulemaking project, the proposed rules, and written testimony received on the rulemaking record prior to the hearing from Mr. Gary Kahn on behalf of multiple parties. The written testimony contained a request for 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 under ORS 183.335(3)(d), and a request to postpone the rulemaking process by 21 days to allow additional time for the requestors to submit data, views, or arguments concerning the proposed rules. The Council granted both requests. In response to the second request, the Council extended the public comment period by 21 days to 5:00 pm on December 18, 2019, and extended the schedule for when it will consider adopting the rules to the January 23-24, 2020 EFSC meeting.

Mr. Clark also provided an overview of how the hearing would be conducted and asked anyone who wished to provide oral comment to fill out and return a comment card. Mr. Clark opened the hearing at 6:26 pm.

### SUMMARY OF PROCEEDINGS

One person, Ms. Irene Gilbert of La Grande Oregon, signed up to provide comment. Ms. Gilbert thanked the Council for extending the public comment period and stated that she had also intended to ask for an extension.

Ms. Gilbert then raised several concerns related to the proposed rules. An audio recording of the proceedings, including Ms. Gilbert's exact testimony, is available from the Department's website. An approximate transcription of Ms. Gilbert's testimony follows:

"I have some concerns about the comment regarding how these rules are going to be evaluated [through] the use of a RAC. I served on the initial RAC for these rules in 2014 and...I felt that I was apparently very inadequate in representing the public. The other

person who to represent the public didn't attend any meetings after the first one because his sense was that none of the information he was providing was going...to appear in any rules. And so, none of the information I provided also appeared in those rules. I feel like it would be good if the Council would give some specific information about how this [evaluation] is actually going to occur."

"...I have asked the Council on several different occasions to include comments that I made at these Council meetings in the evaluation of the previous invalidated rules and my sense is that those comments were not saved in any formal way that would be available to anyone evaluating the rules...and also using a RAC really cuts the public out of any opportunity to have any input into whether or not these rules are working for the public at large..."

"I have several concerns about the use of these rules and my understanding is that they are actually changing the original rules from October of 2017 since the Court did determine that the rules after that were not validly promulgated..."

"I have concerns about these rules being active for more than two years because of the fact that there were no valid rules from the last two years...I will try to sort out that issue and see if I can find what the statute would say about the use of...rules being applied for that period of time retroactively."

"One of the...requirements [for a request for a contested case] is that the person specifically and in detail define how they are personally impacted by a rule as part of their request for a contested case. I do not believe that that is an issue that should be required to request a contested case, [because] it really doesn't impact the decision about whether or not the request for an issue is valid, and I feel that is just a requirement that does nothing other than confuse the issue of what it is the person is asking to have a contested case on."

"...I was of the understanding that at the last Energy Facility Siting Council meeting it was determined that if the Council was going to change the word "shall" to "will," or anything else, that that change would be consistently applied...and it was not. There are two places that I noticed already in the division 015 where they changed "shall" to "may," and clearly "may" is not a requirement so that is a pretty significant change that applied in one instance to the department, in terms of their actions, and in another it applied to the developer in terms of their actions."

"[I]n [OAR] 345-027-0230(5), it says 'notwithstanding this division the department...' [the proposed rules] changed 'shall' to 'may not review proposed pipeline for compliance with other state statutes or standards.' ...[T]hat's not an issue that is of concern to me, the concern is that "shall" was changed to "may," and I am sure that people who are concerned with pipeline issues would probably not appreciate that kind of change because it is leaving it optional."

“...One significant concern that I have is how...the statutes are not being followed when it comes to these rules. As one example, when it comes to changes exempt from requiring an amendment, ORS 469.320 specifically dictates when there is not a required amendment and the rule language in [OAR] 345-027-0353 left out a bunch of the language from that statute. And it’s pretty critical language because... the statute says that a site certificate is required, absolutely, with the following exceptions, and then it lists what those exceptions are specifically...[the statute] talks about things like, ‘it’s an exception unless there’s an increase in the property of a facility.’ Now, the Oregon Department of Energy has utilized the new rules that they promulgated to allow, without an amendment request, a developer to add property to their site. So, that clearly is not consistent with what the statute says...and it’s my [strongly-held] belief...and it is also in the statute and in EFSC rules, that they can’t overrule a state statute, but that is in-fact being done in these rules.”

“[T]he statute says that “there will be a site certificate.” It talks about an amended site certificate also in terms of the actions and yet...the Department of Energy is recommending that you promulgate rules that are allowing them either not to require a site certificate at all, or do it in a way that is not consistent with the statute. The statute says, if the developer wants to have an exception for instance, there’s a 60-day period where that request for exception must go to the [Energy Facility] Siting Council and so, that’s not what’s happening, and the Siting Council must approve that exception, if their asking for an exception that is allowed under the state statute. So that’s just kind of one example of several things that have come to my mind that are problems with these amendment rules and I really encourage the Energy Facility Siting Council to carefully look at what the statute is demanding and what you are being asked to approve in terms of these changes to the amendment rules, because there are several different areas of conflict and a bunch of them start out with [ORS 469.320].”

“I am concerned with...the fact that they are limiting the areas that a public person can disagree with and ask for a contested case to just division 22, 23, and 24. I believe when the Council initially suggested these rules that Councilor Jenkins suggested that that limitation might not be wise, and yet it appeared in the amendment rules, so [I am] just kind of encouraging you to really consider language that says “except as provided in section (2) and (5) of this section, no facility shall be constructed or expanded unless a site certificate has been issued for the site in the manner provided in ORS 469.300, lists the rules...no facility shall be constructed or operated except in conformity with the requirements and it lists the same rules...and clearly it’s a lot bigger issue than just what’s listed as exceptions to site certificates in this amendment.”

Mr. Clark thanked Ms. Gilbert for her testimony and asked if there was anyone on the phone or in the room who wished to provide testimony. There being no further testimony, Mr. Clark adjourned the hearing at 6:39 p.m.