

**Agenda Item D: 2019 Amendment Rulemaking  
Council Review of Comments for December 19-20, 2019 Council Meeting  
Attachment B: Staff Evaluation of Public Comments  
December 5, 2019**

This document summarizes the significant data, views, and arguments contained in the hearing record. The purpose of this summary is to create a record of the agency’s conclusions about the major issues raised. Exact copies of the written testimony are included in Attachment A. The Department will provide an updated version of this document to the Council following the close of the public comment period at 5:00 pm on Dec. 18, 2019.

**1. Statement of objective**

**Ex. 2, 3**

**Issue Summary:** In its response to the request for a statement of how the Council would evaluate whether or not the rules achieve their objectives from Mr. Kahn, the Council 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 Council specified that 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.

In her oral testimony (see Exhibit 1), Ms. Gilbert raised several concerns with using a RAC to evaluate the rules, stating that she felt that she was “apparently very inadequate in representing the public” because none of the information she provided appeared in the rules. Ms. Gilbert also raised concerns that “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...” Ms. Gilbert recommended that the Council “give some specific information about how this [evaluation] is actually going to occur.”

**Staff Recommendation:** Council has committed to appointing a RAC and initiating a new rulemaking process. While the Council may provide additional information about the scope of issues to be considered by this RAC or direction regarding its conduct, staff does not believe this is necessary to fulfill the requirements of ORS 183.335(3)(d). In addition, as with all rulemaking projects, Council may solicit additional input from the public, and any changes proposed by the RAC and approved by the Council would be subject to a public comment period and opportunity for hearing before the Council takes any rulemaking action.

**2. Rules used to prepare notice of proposed rulemaking**

**Ex. 1, 3**

**Issue Summary:** In written comments, Mr. Kahn stated that the outcome of the Oregon Supreme Court’s review of temporary rules filed under Administrative Order EFSC 9-2019 may

affect which set of rules provides the “starting point that might be revised by any new permanent rules.” Ms. Gilbert raised similar concerns in her oral testimony.

**Staff Recommendation:** Under ORS 183.335(2)(d), when providing a notice of proposed rulemaking, an agency must “provide a copy of the rule that the agency proposes to adopt, amend or repeal, or an explanation of how the person may acquire a copy of the rule.” The copy of an amended rule must “show all changes to the rule by striking through material to be deleted and underlining all new material, or by any other method that clearly shows all new and deleted material.”

While the Council would comply with any direction provided by the Court on this matter, staff believes that the notice of the proposed rulemaking is substantially in compliance with this requirement because it clearly shows the rule language that the agency proposes to adopt. To further avoid confusion over which “set of rules provides the status quo,” the Council has proposed to repeal all rules in OAR 345-027 amended by Administrative Order EFSC 5-2017 and adopt a new set of rules. Because staff believes the rules were adopted substantially in compliance with ORS chapter 183, no further action is recommended.

### **3. Applicability of Rules**

**Ex. 1, 3**

**Issue Summary:** In written comments dated November 15, 2019, Mr. Kahn stated his belief that the proposed permanent rules are “proposed to be retroactive, going back more than two years, to application submitted on or after October 24, 2017,” adding that “The Supreme Court may offer guidance in its forthcoming decision on retroactive rules” and that he needed additional time to research the whether the “whether the proposed retroactive nature of the proposed rules would be lawful and appropriate.” Ms. Gilbert raised similar concerns in her oral testimony.

**Staff Recommendation:** Staff maintains that the rules are not retroactive but, if adopted, would apply prospectively to Council’s continuing review of requests for amendment that were subject to the rules adopted under Administrative Order EFSC 5-2017, and new requests for amendment received after the effective date of the proposed rules. However, because commenters have stated that they intend to provide additional comment on this subject, staff does not make any recommendation at this time.

### **4. OAR 345-027-0371(6)(e)**

**Ex. 3**

**Issue Summary:** In her oral testimony, Ms. Gilbert recommended that the Council remove the requirement for a person to provide a description of their interest in a proceeding on a request for amendment because it “doesn’t impact the decision about whether or not the request for

an issue is valid” and “does nothing other than confuse the issue of what it is the person is asking to have a contested case on.”

Under the proposed OAR 345-027-0371(6)(e), a contested case request on a Type A amendment must include “a detailed description of the person's interest in the proceeding and how that interest may be affected by the outcome of the proceeding.” This language mirrors the information a person must include when submitting a petition to request party or limited party status in a contested case on an application for a site certificate under OAR 345-015-0016(4)(d).

These rules implement ORS 183.310(7)(c), which provides that the parties to a contested case includes “any person requesting to participate before the agency as a party or in a limited party status *which the agency determines either has an interest in the outcome of the agency's proceeding or represents a public interest in such result...*” (emphasis added.)

In addition to the Council's rules discussed above, this statute is also implemented under the Attorney General's Model Rule OAR 137-003-0005(3) which requires a petitioner for party or limited party status to provide either a detailed statement of the petitioner's interest, or of the public interest, and how those interests may be affected by the results of the proceedings. These requirements also appear under the proposed OAR 345-027-0371(6)(h) and (i), which provide that a contested case request must include:

(h) If the person seeks to protect a personal interest in the outcome of the proceeding, a detailed statement of the person's interest, economic or otherwise, and how such interest may be affected by the results of the proceeding;

(i) If the person seeks to represent a public interest in the results of the proceeding, a detailed statement of such public interest, the manner in which such public interest will be affected by the results of the proceeding, and the person's qualifications to represent such public interest; and

While staff believes that statute requires some statement of interest to be provided to allow the Council to determine whether or not a person may participate as a party to a contested case, however, it is not clear why a person should be required to provide separate statements of interest under (6)(e) and (6)(h) or (i). Because these provisions appear to be duplicative, Council could likely delete the requirements of (6)(e) without affecting its ability to determine whether or not a person may qualify as a party. If Council prefers to maintain the current language of the rules, this issue could also be addressed in a future rulemaking. Similarly, OAR 345-015-0016(5)(d) could be deleted because OAR 137-003-0005(3) requires a person to submit similar information.

**Staff Recommendation:** Staff recommends deleting the proposed OAR 345-027-0371(6)(e) and existing OAR 345-015-0016(5)(d) because these sections appear to duplicate requirements which in OAR 345-027-0371(6)(h) and (i) and the Attorney General’s model rules, respectively.

**5. Some instances of “shall” changed to “may”** **Ex. 3**

**Issue Summary:** In her oral testimony, Ms. Gilbert commented that several instances of “shall” were inappropriately changed to “may,” specifically citing that “shall not” was changed to “may not”...in the proposed OAR 345-027-0230(5).

In drafting the proposed rules, the term “shall” was replaced by the term “must” to impose an obligation to act, consistent with modern English usage and guidance on implementing Oregon’s plain language law. The term “shall not” was replaced with the term “may not” for similar reasons. Staff further notes that while statutory drafting principals do not explicitly apply to rules, “shall not” and “may not” are equivalent expressions of an absolute prohibition under ORS 174.100

Staff reviewed the proposed rules and, excluding instances where “shall not” was changed to “may not,” was not able to identify any instances where “shall” was changed to “may” or “will.”

**Staff Recommendation:** If Ms. Gilbert or other commenters identify any specific instances where “shall” was inappropriately changed to “may” or another term, staff recommends correcting the error.

**6. OAR 345-027-0353 is not consistent with ORS 469.320** **Ex. 3**

**Issue Summary:** In her oral testimony, Ms. Gilbert raised several concerns that the rules are not consistent with statute. In particular, Ms. Gilbert stated that she believes that the proposed OAR 345-027-0353 is inconsistent with statute because the list of changes to a facility which are exempt from requiring an amendment in that rule do not include all of the exceptions to the requirement for a site certificate under ORS 469.320. Ms. Gilbert states that she believes the rules are inconsistent with statute because the proposed rules allow a certificate holder to add property to the site boundary for a facility without an amendment request.

Staff notes that ORS 469.320 requires persons who wish to construct or expand a facility to obtain a site certificate and provides specific exemptions from this requirement. The statute does not apply to a facility for which a site certificate has been granted, except in that subsection (5) provides that a certificate holder will not be required to obtain a separate site certificate for:

“(a) Transmission lines, storage facilities, pipelines or similar related or supporting facilities, if such related or supporting facilities are addressed in and are subject to a site certificate for another energy facility;

(b) Expansion within the site or within the energy generation area of a facility for which a site certificate has been issued, if the existing site certificate has been amended to authorize expansion; or

(c) Expansion, either within the site or outside the site, of an existing council certified surface facility related to an underground gas storage reservoir, if the existing site certificate is amended to authorize expansion.”

Where ORS 469.320 specifies when a new site certificate is required, the proposed rules under division 027 specify when an existing site certificate must be amended. The amendment of a site certificate is governed by ORS 469.405, which provides that a site certificate may be amended with the approval of the Energy Facility Siting Council. That statute does not contain any additional obligations, limitations, or procedural requirements for the amendment of site certificates except to allow an additional exemption under ORS 469.405(3). See *Friends of the Columbia Gorge v. EFSC*, 365 Or 371, 393 (Or. 2019) (“By imposing virtually no statutory procedural requirements on the RFA process, the legislature has allowed the council to develop that process largely as it sees fit”).

Ms. Gilbert points out that the proposed rules allow a certificate holder to expand the site boundary for a facility without an amendment; this is true, but only under very limited circumstances.

Under the proposed OAR 345-027-357(1), a certificate holder must either submit a request for amendment or an amendment determination request for any proposed change that would add area to the site boundary. If an amendment determination request is submitted, the Department will make a written determination of whether the proposed change requires an amendment under OAR 345-027-0350 and is not exempt under OAR 345-027-0353.

Under OAR 345-027-0350, an amendment is required for any change to design, construct or operate a facility in a manner different from the description in the site certificate that could (a) result in a significant adverse impact that the Council has not addressed in an earlier order and the impact affects a resource or interest protected by a Council standard; (b) impair the certificate holder's ability to comply with a site certificate condition; or (c) require a new condition or a change to a condition in the site certificate. A change that includes a significant expansion of the site boundary would likely trigger at least one of these criteria. If the site boundary expansion did not trigger one of these criteria, the rules would not require an amendment solely due to the change in the site boundary.

The exemptions under OAR 345-027-0353(1) to (3) are not applicable to changes that would change or enlarge the site boundary. The exemptions under (4) and (5) apply specifically to changes to related and supporting facilities which are unrelated to the operation of the energy facility. The exemption under (6) is specifically provided for under ORS 469.405(3). All of these exemptions were in place prior to the adoption of the 2017 amendment rules. While there may be some ways in which the Council could further restrict what changes may be allowed without an amendment, these changes would likely be outside of the scope of the fiscal impact statement for this rulemaking project.

**Staff Recommendation:** Staff believes that the rules are consistent with statute, and does not recommend changes to the proposed rules at this time. Staff recommends Council review this issue further in future rulemaking.

**7. Issues on a contested case should not be limited to division 22, 23, and 24 **Ex. 3****

**Issue Summary:** In her oral testimony, Ms. Gilbert stated that she is concerned that contested case issues are limited to division 22, 23, and 24.

Under the proposed OAR 345-027-0371(9), to determine that an issue justifies a contested case proceeding, the Council must find that the request raises a significant issue of fact or law that may affect the Council's determination that the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 24. Those divisions contain the Council's standards, which are the basis for Council review and decision making. It is not clear to staff how or why the Council would consider a contested case issue that has no potential to affect the outcome of the Council's decision.

**Staff Recommendation:** Barring additional comment on this subject, staff does not recommend action at this time; however, staff recommends Council review this issue further in future rulemaking.