**Agenda Item D: 2019 Amendment Rulemaking**
**Attachment 2: Staff Evaluation of Public Comments**
**UPDATED January 9, 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 1.

**Procedures: Opposition to proposed revisions to OAR 345-027 Ex. 4-167, 169-211**

**Issue Summary:** Numerous commenters expressed opposition to the proposed revisions to OAR 345-027. Commenters, relying on the argument that the rules are in fact amending rules in place before October 2017, argue that "[t]hese revisions, if adopted, would dramatically change EFSC's review procedures, amounting to what EFSC and ODOE have previously described as a "wholesale re-write" of Division 27. The proposed rule revisions would reduce transparency, diminish or eliminate opportunities for public participation, and impose unreasonable barriers and burdens for stakeholders if and when they want to request contested case proceedings on specific energy projects." Ex. 4-158, 160-167, 169-209.

**Staff Recommendation:** Staff includes this issue for Council's consideration without recommendation.

**Procedures: Statement of Objective Ex. 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, 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.

**Procedures: Fiscal Impacts of Proposed Rules** **Ex. 168**

**Issue Summary:** Ms. Gilbert raises several concerns over potential financial burdens associated with the proposed rules:

> "The rule fails to provide opportunity for the public to actively participate in the development of the site certificates for energy developments in the state. In addition, these rules place a significant financial burden upon any private party adversely impacted by decisions of the council in the Type B process due to the requirement to take any objections directly to the Oregon Supreme Court rather than being able to resolve them through a contested case process. There is also a significant financial burden in the Type A process due to the complicated procedure required to request a contested case and the subjective decision process that is utilized by the Oregon Department of Energy and the Energy Facility Siting Council which results in denials of all requests for a contested case." Ex 168.

**Staff Recommendation:** Staff includes this issue for Council's consideration without recommendation.

**Procedures: Rules Used to Prepare Notice** **Ex. 1, 3-158, 160-167, 169-210**

**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." Several other commenters, including Ms. Gilbert and the Stop B2H Coalition raise similar arguments that the Supreme Court's August 1, 2019, decision in Friends of the Columbia Gorge v. EFSC reverts the permanent rules to their status before October 2017.

**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.

**Multiple Rules: No concerns with proposed revisions to OAR 345-015, 345-025** **Ex. 210**

**Issue Summary:** Commenters have no concerns with the proposed revisions to OAR Chapter 345, Divisions 15 and 25.

**Staff Recommendation:** Staff includes this issue for Council's consideration without recommendation.

**Multiple Rules: Some instances of "shall" changed to "may" Ex. 3, 159**

**Issue Summary:** In her oral testimony, Ms. Gilbert commented that several instances of "shall" were inappropriately changed to "may," specifically siting that "shall not" was changed to "may not"…in the proposed OAR 345-027-0230(5). In later comments Ms. Gilbert also referenced OAR 345-025-0006 as an example.

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, per 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:** Staff does not recommend any changes to the proposed rules.

**Multiple Rules: References to Council Standards Ex. 210**

**Issue Summary:** Commenters recommend that references to "Council standards" in OAR 345-027-0350(4)(a); OAR 345-027-0360(3); OAR 345-027-0380(2)(e); OAR 345-027-0380(6)(f) be modified to also refer to any other "applicable laws." Commenters accurately identify other proposed rules which refer to applicable laws and Council standards, including proposed OAR 345-027-0360(1)(e) and 345-027-0375.

The Proposed OAR 345-027-0360(1)(e) requires a preliminary request for amendment to include:

> *"A list of all Council standards and other laws, including statutes, rules and ordinances, applicable to the proposed change, and an analysis of whether the facility, with the proposed change, would comply with those applicable laws and Council standards. For the purpose of this rule, a law or Council standard is "applicable" if the Council would apply or consider the law or Council standard under OAR 345-027-0375(2);"*

The proposed OAR 345-027-0375(2), specifies which laws or Council standards are applicable to an amendment request:

> *"(2) To issue an amended site certificate, the Council must determine that the preponderance of evidence on the record supports the following conclusions:*
>
> *(a) For a request for amendment proposing to add new area to the site boundary, the portion of the facility within the area added to the site by the amendment complies with all laws and Council standards applicable to an original site certificate application;*
>
> *(b) For a request for amendment to extend the deadlines for beginning or completing construction, after considering any changes in facts or law since the date the current site certificate was executed, the facility complies with all laws and Council standards applicable to an original site certificate application. However, for requests to extend*

*completion deadlines, the Council need not find compliance with an applicable law or Council standard if the Council finds that:*

*(A) The certificate holder has spent more than 50 percent of the budgeted costs on construction of the facility;*

*(B) The inability of the certificate holder to complete the construction of the facility by the deadline in effect before the amendment is the result of unforeseen circumstances that are outside the control of the certificate holder;*

*(C) The standard, if applied, would result in an unreasonable financial burden on the certificate holder; and*

*(D) The Council does not need to apply the standard to avoid a significant threat to the public health, safety or the environment;*

*(c) For any other requests for amendment not described above, the facility, with the proposed change, complies with the applicable laws or Council standards that protect a resource or interest that could be affected by the proposed change; and*

*(d) For all requests for amendment, the amount of the bond or letter of credit required under OAR 345-022-0050 is adequate.*

In addition to these rules, the Council's General Standard of Review adopted under OAR 345-022-0000 requires the Council to make findings of compliance with Standards, the Siting Act, and other state laws and rules to amend a site certificate:

*"(1)To issue a site certificate for a proposed facility or to amend a site certificate, the Council shall determine that the preponderance of evidence on the record supports the following conclusions:*

*(a) The facility complies with the requirements of the Oregon Energy Facility Siting statutes, ORS 469.300 to 469.570 and 469.590 to 469.619, and the standards adopted by the Council pursuant to 469.501 or the overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by the applicable standards the facility does not meet as described in section (2);*

*(b) Except as provided in OAR 345-022-0030 for land use compliance and except for those statutes and rules for which the decision on compliance has been delegated by the federal government to a state agency other than the Council, the facility complies with all other Oregon statutes and administrative rules identified in the project order, as amended, as applicable to the issuance of a site certificate for the proposed facility. If the Council finds that applicable Oregon statutes and rules, other than those involving federally delegated programs, would impose conflicting requirements, the Council shall resolve the conflict consistent with the public interest. In resolving the conflict, the Council cannot waive any applicable state statute."*

While staff agrees that rules should be consistent on the criteria and standards which much be met, in some cases a rule may be specific to the Council Standards. To ensure that inclusion of "applicable laws" is appropriate for the rules listed by the commenters, it is necessary to evaluate each individually.

*1. OAR 345-027-0350(4)(a)*

The proposed OAR 345-027-0350(4)(a) "[An amendment to a site certificate is required to] * * * Design, construct, or operate a facility in a manner different from the description in the site certificate, if the proposed change * * * [c]ould 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."

The proposed OAR 345-027-0375(2)(c) similarly provides that for any requests for amendment other than a request to add new area to the site boundary or extend construction deadlines, the Council must find that "the facility, with the proposed change, complies with the applicable laws or Council standards that protect a resource or interest that could be affected by the proposed change."

**Staff Recommendation:** Because OAR 345-027-0350(4) describes changes that require findings of compliance with "applicable laws or Council standards," staff recommends that the proposed OAR 345-027-0350(4)(a) be amended to provide that an amendment is required if a proposed change to design construct, or operate a facility in a manner different from the description in the site certificate:

> *"(a) Could 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**n applicable law or** Council standard;*

*2. OAR 345-027-0360(3)*

The proposed OAR 345-027-0360(3) defines the analysis areas for impacts associated with Council standards:

> *"For any Council standard that requires evaluation of impacts within an analysis area, the analysis area is the larger of either the study areas, as defined in OAR 345-001-0010(59), or the analysis areas described in the project order for the application for site certificate, unless otherwise approved in writing by the Department following a pre-amendment conference."*

Under OAR 345-001-0010(2), "analysis area" means

> "Analysis area" means the area or areas specifically described in the project order issued under OAR 345-015-0160(1), containing resources that the proposed facility may significantly affect. The analysis area is the area for which the applicant must describe the proposed facility's impacts in the application for a site certificate. A proposed facility might have different analysis areas for different types of resources. * * *"

**Staff Recommendation:** Because this rule provides an informational requirement that is specific to Council Standards, and Council rules do not establish analysis areas or study areas for other applicable laws, staff does not recommend that Council amend the rule as suggested.

*3. OAR 345-027-0380(2)(e) and (6)(f)*

OAR 345-027-0380 provides the procedures for requesting the Type C review process for a change to a facility that is approved for construction but not yet in operation. Under the proposed OAR 345-027-

0380(2)(e) a request for Type C review must include a description of the "[r]easons why the type C review is adequate to prevent significant adverse impacts to the resources and interests protected by Council standards."

Under the proposed OAR 345-027-0380(6)(f), to grant a request for Type C review, the Department or the Council must similarly find that "Type C review is adequate to prevent significant adverse impacts to the resources and interests protected by the Council's standards." The proposed OAR 345-027-0380(9) provides that the Council must base its decision to adopt, modify, or reject a temporary order under Type C review on findings that the facility will comply with the applicable laws and Council standards described under OAR 345-027-0375.

**Staff Recommendation:** Because Type C review requires Council to make findings that a facility, with a proposed change complies with "applicable laws or Council standards," staff recommends that the proposed OAR 345-027-0380(2)(e) and (6)(f) be amended as suggested:

> "(2) Requests under section (1) must be submitted in writing to the Department of Energy and must include * * * (e) Reasons why the type C review is adequate to prevent significant adverse impacts to the resources and interests protected by **applicable laws or** Council standards."
>
> "(6) To grant a request under section (1), the Department or the Council must find * * * (f) Type C review is adequate to prevent significant adverse impacts to the resources and interests protected by ~~the~~ **applicable laws or** Council~~'s~~ standards."

**Multiple Rules: Materials posted to website without notice** **Ex. 210**

**Issue Summary:** Commenters recommend that "for any materials posted on the website, the rules should also ensure notice through the Council's standard public notification procedures, and should allow for public comment." Commenters state that posting the materials to the website "fails to ensure adequate notice to the public" and that notice should be given through the Council's standard public notification procedures. Commenters list the following examples of proposed rules which require materials to be posted to the website without notice (emphasis added in all):

> **OAR 345-027-0357(5)** After receiving an amendment determination request, *the Department must post an announcement on the Department's website to notify the public that an amendment determination request has been received.* The announcement must include a copy of the amendment determination request.
>
> **(6)** Upon receiving a request for a written determination described in section (1) or (2) of this rule, the Department must, as promptly as possible, issue a written determination to the certificate holder. *After the Department issues its written determination, the Department must, as promptly as possible, provide the request and the written determination to the Council and post the written determination to its website.* At the first Council meeting after the Department issues its written determination, the Department must provide verbal notice of the request and the written determination to the Council during the consent calendar agenda item.

**OAR 345-027-0360(2)** *After receiving a preliminary request for amendment, the Department must post an announcement on its website to notify the public that a preliminary request for amendment has been received.* The announcement must include a copy of the preliminary request for amendment.

**OAR 345-027-0365(1)** Within 7 days after a request for amendment to the site certificate described in OAR 345-027-0350(3) or (4), or a request for amendment to apply later-adopted laws described in OAR 345-027-0390, is determined to be complete, the Department must:

* * * *(b) Post an announcement on the Department's website to notify the public that a complete request for amendment has been received. The announcement shall include:*

*(A) A copy of the complete request for amendment;*

*(B) The date the draft proposed order will be issued, as specified in the notice required by subsection (1)(a); and*

*(C) A statement that the public comment period begins upon issuance of the draft proposed order.*

**OAR 345-027-0380(3)** *Upon receiving a request [for type C review] * * *, the Department must post the request and the request for amendment on the Department's website.*
**(4)** Within 3 business days after receiving a request [for type C review] * * *, the Department must issue a written determination either granting or denying type C review. *Upon issuance, the Department must post the written determination on its website.*
**(7)** Within 7 days after a request under section (1) of this rule is granted, the Department must:

(a) Issue a draft temporary order approving or denying the request for amendment, including a recommendation to the Council on whether Council review should be completed through the type A or type B review process; and
*(b) Post the draft temporary order on the Department's website.*

The rules are intended to keep the public appraised of progress in the siting process and allow interested parties to obtain information about requests for amendments under review but are not intended to provide formal public notice. Staff notes that, under both Type A and Type B review, public notice is sent at the time of issuance of the draft proposed order, and proposed order. The rules in place before October 2017 did not include a draft proposed order, and as discussed under the issue associated with establishing early notice and public comment period below, provided notice at the time the Department received the request for amendment.

Commenters correctly point out that the rules do not require written public notice of or public comment on an amendment determination or, but verbal notice is required to be provided at the first Council meeting after the Department issues its determination to the certificate holder. Similarly, public notice of a type C request and determination is not required.

**Staff Recommendation:** Staff believes the proposed rules are sufficient to provide public notice and obtain comment where it is allowed under the amendment review process, and that the rules provide for information about the amendment review process to be made available to interested persons in a

reasonable manner. Other than changes Council may wish to make to establish early notice and public comment period which are discussed below, staff does not recommend additional rule changes at this time. Staff recommends Council consider whether or not to provide additional notice and opportunities for comment in rulemaking scheduled for 2022.

**Multiple Rules: Early Notice and Public Comment Period** **Ex. 4-167, 169-210**

**Issue Summary:** Numerous commenters raise concerns that the proposed changes to the rules would "eliminate the public's rights to comment on requested amendments to site certificates early in the process," resulting in "one-sided recommendations from ODOE staff, who will hear only from energy developers in preparing draft proposed orders."

In comments dated December 18, 2019, Mr. Kahn, recommends that Council retain the existing early public participation opportunities in OAR 345-027-0070(1)(a), (b) (2017) and OAR 345-027-0070(3)(2017), which allow the public to comment on, and authorize ODOE to hold one or more public meetings on, requests for amendments to site certificates.

The pre-October 2017 rules provided for a notice establishing a first comment period to be provided within 15 days after the Department received a request for amendment, and a second 30 day public comment period after the issuance of the proposed order. See OAR 345-027-0070(1) and (5) (2017). The Council removed these provisions in 2017, and established a consolidated comment period after issuance of the draft proposed order. Staff notes that although the opportunities for early public comment were eliminated, staff is not aware of evidence to suggest that overall public participation in the amendment review process has diminished. Staff also notes that the process for public comment on amendments is now better aligned with the public comment opportunities on new site certificate applications, where there is similarly no public comment opportunity on a preliminary application for site certificate, and only once the draft proposed order is released is a public comment opportunity available.

The pre-October 2017 rules also provided that the Department could hold one or more public meetings during the review of a request for amendment of the site certificate. The Council removed this provision because the timing and purpose of the meetings were not clear. In its place, Council established a mandatory public hearing in front of Council on the draft proposed order for amendments under Type A review.

Council could re-establish an early public comment period in the rules, although additional delays in the process should be weighed against the added benefit of receiving additional comments at this stage in the process when requests for amendment are undergoing completeness review.

As an alternative Council could consider options to allow greater access to information, such as additional noticing or optional informational meetings early in the process, such as after receipt of a preliminary request for amendment, or after the determination of completeness. During deliberation of this issue at the Dec. 20, 2019, meeting, Council requested staff present draft rule language to implement these options. The draft rule language would apply to amendments under either type A or

type B review, but the Council could make additional modifications to limit any additional notification requirements to the more extensive type A process.

*1. OAR 345-027-0360(2)*

If Council wanted to send notice to the public as early in the process it could amend OAR 345-027-0360 to require a mailing be sent after the preliminary request for amendment is received. Note that in the site certificate application review process there is no corresponding notice sent upon receipt of a preliminary application, however, that process does require public notice to be sent following receipt of the Notice of Intent, which is not required for requests for amendment.

**OAR 345-027-0360(2):** After receiving a preliminary request for amendment, the Department must **notify the public that a preliminary request for amendment has been received by:**

**(a) Sending notice by mail or email to:**

**(A) All persons on the Council's general mailing list as defined in OAR 345-011-0020;¶**

**(B) All persons on any special mailing list established for the facility;¶**

**(C) The reviewing agencies for the facility, as defined in OAR 345-001-0010(52); and¶**

**(D) The property owners on the list provided under OAR 345-027-0360(1)(f);**

**(b)** ~~p~~**P**ost**ing** an announcement on ~~its~~**the Department's** website ~~to notify the public that a preliminary request for amendment has been received~~. The announcement must include a copy of the preliminary request for amendment."

*2. OAR 345-027-0365*

If the Council wanted to send notice at the point when a complete request is available for review in preparation of the public comment period, the Council could amend OAR 345-027-0365 to require a mailing be sent following the determination of completeness:

**(1)** Within 7 days after a request for amendment to the site certificate described in OAR 345-027-0350(3) or (4), or a request for amendment to apply later-adopted laws described in OAR 345-027-0390, is determined to be complete, the Department must~~:~~

(a) Send notice to the certificate holder specifying a date for issuance of a draft proposed order. The date of issuance of a draft proposed order for a type A request for amendment must be no later than 120 days after the date of the notice. The date of issuance of a draft proposed order for a type B request for amendment must be no later than 60 days after the date of the notice.

(b) Post an announcement on the Department's website to notify the public that a complete request for amendment has been received. The announcement must include:

(A) A copy of the complete request for amendment;

(B) The date the draft proposed order will be issued, as specified in the notice required by section (1)(a) of this rule; and

(C) A statement that the public comment period begins upon issuance of the draft proposed order**.**

**(2) If the date of issuance specified under subsection (1)(a) of this rule is more than 7 days after the date the request is determined to be complete, the department must send a notice containing the information under paragraph (a)(B) and (C) of this section by mail or email to:**

**(a) All persons on the Council's general mailing list as defined in OAR 345-011-0020;¶**

**(b) All persons on any special mailing list established for the facility;¶**

**(c) The reviewing agencies for the facility, as defined in OAR 345-001-0010(52); and¶**

**(d) The property owners on the list provided under OAR 345-027-0360(1)(f);**

*3. OAR 345-027-0363*

If Council wanted to re-establish the provision for optional public meetings that was included in rules in effect before October 2017, Council could amend OAR 345-027-0363 that specifies that the department may hold one or more meetings. To reduce the ambiguity in the previous rule, Staff recommends that such a rule specify that the meeting is for informational purposes and is not a public hearing.

(1) Until the Department determines a request for amendment to the site certificate is complete, it is a preliminary request for amendment.

**(2)** After receiving a preliminary request for amendment, the Department may**:**

**(a)** ~~.~~**S**eek comments from reviewing agencies to determine whether that request is complete~~.~~**; and**

**(b) Hold one or more informational meetings on the preliminary request in the vicinity of the site of the facility. The informational meeting is not a public hearing.**

**Staff Recommendation:** Staff does not recommend action at this time; however, staff recommends Council provide direction on inclusion of one or more of the rule changes described above.

**OAR 345-027-0311: Retroactive Applicability of Rules Ex. 3-210**

**Issue Summary:** In written comments dated December 18, 2019, Mr. Kahn states that his clients oppose the proposed OAR 345-027-0311 because "it would be unreasonable and unfair to concerned stakeholders and the public at large, and because it would violate the Administrative Procedures Act." Commenters add "Applications to amend site certificates should be subject to valid and properly adopted rules in effect at the time applications were submitted. It would be unreasonable, unfair, unlawful and contrary to the public interest to retroactively change rules years later." Ex. 210. Numerous other commenters raised similar concerns.

**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.

**OAR 345-027-0350(4)(a): Consistency with ORS 469.320 Ex. 168**

**Issue Summary:** In written comments dated December 16, 2019, Ms. Irene Gilbert commented that the proposed OAR 345-027-0350(4)(a) conflicts with ORS 469.320. The rule provides that an amendment to a site certificate is required to design, construct, or operate a facility in a manner different from the description in the site certificate, if the proposed change could 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. Ms. Gilbert asserts that this is not allowed by ORS 469.320(1) because that statute does not allow a facility to be constructed or expanded "unless a site certificate has been issued." Staff notes that this statute provides when a site certificate is required, and that any certificate holder who wishes to amend a site certificate will have already complied with this requirement.

**Staff Recommendation:** Because ORS 469.320 is not implemented by rules prescribing the procedures to change a site certificate that has already been issued, staff recommends no additional rule changes.

**OAR-027-0350: Limits on changes that can be processed as amendment Ex. 159**

**Issue Summary:** Ms. Gilbert recommends that any change in the type of energy generation proposed must be processed as a new application, not an amendment. No additional explanation or analysis is provided.

The Council has approved several amendments which add electric generating facility components that generate electricity from a different source than what was originally approved including the addition of solar arrays to the Carty Generating Station and the Montague Wind Power Facility. Under ORS 469.300(11)(a)(A), any electric power generating plant with a nominal electric generating capacity of 25 megawatts or more is considered to be an "energy facility." Staff does not believe that this statute requires a plant to use a single source of electric generation to qualify as an "energy facility." While the definition of energy facility treats solar and wind generation differently for the purpose of determining what constitutes an "energy facility", staff believes that these types of facilities may be similarly be combined. See ORS 469.300(11)(a)(D) and (J).

**Staff Recommendation:** Because staff finds no statutory prohibition on combination of different energy generation types that can be included in a single site certificate, Staff recommends that the rules are consistent with statute and does not recommend additional changes at this time. Staff recommends that Council consider whether additional limitations on combining different types of energy generation should be included in rules in the rulemaking scheduled for 2022.

**OAR 345-027-0351: Consistency with ORS 469.370 Ex. 168**

**Issue Summary:** In written comments dated December 16, 2019, Ms. Gilbert comments that OAR 345-027-0351 conflicts with ORS 469.370(10) because the rule allows for three different processes for Amendment Applications where the statute only provides for two. ORS 469.370 provides procedures for review of a draft proposed order on an application for a site certificate.

**Staff Recommendation:** Staff recommends no further action on this issue because the procedures for review of a draft proposed order on an application for a site certificate under ORS 469.370 are not directly applicable to the amendment review process.

**OAR 345-027-0353: Changes that would add area to the site boundary Ex. 3, 159, 168, 210, 211**

**Issue Summary:** In several pieces of testimony, 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. Mr. Kahn raises similar concerns in testimony dated Dec. 18, 2019.

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").

The commenters point out that the proposed rules allow a certificate holder to expand the site boundary for a facility without 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 a certificate holder to undergo the full amendment review process solely due to the change in the site boundary, but would require the certificate holder to amend its site certificate through the facility modification report described under OAR 345-026-0080. In addition, the proposed OAR 345-027-0355 requires that a certificate holder submit a written evaluation of why the change does not require an amendment before implementing the change.

**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 consider what restrictions should be placed on changes to a facility that may be allowed without an amendment in the rulemaking scheduled for 2022.

**OAR 345-027-0357(6): Amendment Determinations Ex. 4-158, 160-167, 169-210**

**Issue Summary:** Commenters raise concerns that the proposed revisions would "interfere with" or "eliminate" the Council's discretion to decide whether the public should be allowed a public hearing and the opportunity to request a contested case for specific proposed certificate amendments, and would instead delegate to ODOE staff the authority to make these important decisions. The commenters raise concerns that this delegation "would reduce transparency and give too much power to agency staff, thus likely leading to arbitrary and capricious decisions that will shut the public out of the process." Ex. 210.

In its decision in *Friends of the Columbia Gorge v. EFSC*, the Oregon Supreme Court provided direction to the parties for any future rulemaking regarding the site certificate amendment process. The Court found that: "the statutes governing the amendment process require the council itself to approve an amendment, thus precluding the council from delegating that final decision-making authority to staff. ORS 469.405(1). But, unlike the certificate application process, the statutes do not otherwise dictate the allocation of authority between the council and staff."

The Court further discusses the statutory requirements of ORS 469.405(1), and concludes:

> *"Ultimately, because the council is not required to provide a public hearing and opportunity to request contested case proceedings in the first place, petitioners cannot complain when the council makes those steps available on limited terms—namely, when staff determines that an RFA should get a type A review rather than a type B review. We therefore conclude that the council did not exceed its authority when it permitted its staff to determine whether an RFA gets type A or type B review." (p 394)*

While the Court established that the Council has the discretion to delegate the amendment determination to staff, the Court's conclusions do not imply that Council is precluded from adopting rules which provide that Council will make any amendment determinations itself.

In response to comments that the proposed rules "eliminate" Council's discretion over amendment determinations staff notes that, in both the existing and proposed rules, the Council has retained ultimate decision-making authority over amendment determinations. Under the proposed OAR 345-027-0357(6), at the request of the certificate holder or a Council member, the Department must refer its determination to the Council for concurrence, modification or rejection. As an alternative to amending rules that require Council to make every amendment determination, Council could expand the provisions for referral of staff determinations.

**Staff Recommendation:** Council could amend the proposed rules to provide that all amendment determinations will be a Council decision, or to expand the provisions for referral of staff determinations; however, because the Court has affirmed Council's authority to delegate this decision to staff, and because proposed rules explicitly provide Council with the ability to review any staff determinations, staff does not recommend changes to the proposed rules at this time. Staff recommends Council review this issue further in future rulemaking.

**OAR 345-027-0360(3): Analysis area for requests for amendment** **Ex. 159**

**Issue Summary:** Ms. Gilbert raises concerns that the proposed rule allows the Department to amend the analysis areas for an amendment request following a pre-amendment conference:

> "This rule change reduces the area that must be included in the analysis of impacts of the development. The area previously was the larger of the study area or the area described in the project order. Now the area can be reduced by the department following a conference. This change removes the requirement that a reasonable area be surveyed to identify habitat, Threatened and Endangered Species, wetlands and other areas requiring protection be identified and reported in the application and included in the analysis of impacts of the development." Ex. 159.

Ms. Gilbert is correct that the proposed rule allows the Department to amend the analysis areas for a project; however, staff notes that this rule change is intended to provide flexibility and to improve consistency between current rules and project orders which may contain outdated requirements, as well as flexibility to appropriately address issues related to an amendment that may be different from the issues addressed in an original site certificate application.

**Staff Recommendation:** Staff recommends this issue be considered during rulemaking scheduled for 2022.

**OAR 345-027-0363(1): Special Advisory Groups** **Ex. 159**

**Issue Summary:** In comments submitted on December 14, Ms. Gilbert makes the following comment:

> "[Sic] All special advisory groups in the notice of an opportunity to review an Amendment request. The special advisory groups are in the best position to determine if they have relevant input to provide regarding the amendment. Since the public is not allowed to comment on the completeness of the application, they are the only ones allowed to do a third party review of the application. It is important to maintain the broadest possible pool of groups doing this review." Ex. 159.

The proposed OAR 345-027-0363 provides that, after receiving a preliminary request for amendment, the Department may seek comments from reviewing agencies to determine whether that request is complete. Staff believes that Ms. Gilbert may be recommending that the department be required to seek comments from the special advisory groups for the facility.

**Staff Recommendation:** Staff recommends this issue be considered during rulemaking scheduled for 2022.

**OAR 345-027-0371(6): Description of "interest" in request for contested case Ex. 3, 159, 210**

**Issue Summary:** Ms. Gilbert recommends that the Council remove the requirement for a person to provide a description of their interest in a proceeding on a request for contested case on an 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." Ex. 3. In comments dated December 18, 2019, Mr. Kahn also comments that this information is "largely unnecessary and duplicative of information required later in the process, when the same person or entity would file requests for party status in a contested case." Ex. 210.

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

Staff agrees that these requirements are the same information that the requestor would need to provide in a request for party or limited party status, however, under the contested process described in the proposed OAR 345-027-0371, the request for contested case also serves as a request for party or limited party status. It is not clear, however, 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 in OAR 345-027-0371(6)(h) and (i) and the Attorney General's model rules, respectively. Staff recommends Council consider additional revisions in the rulemaking scheduled for 2022.

**OAR 345-027-0371: Refer all contested case requests to OJD** **Ex. 159**

**Issue Summary:** Ms. Gilbert recommends that Council defer the decision process regarding who is allowed a contested case over to the Oregon Department of Justice because "there is a need for a neutral decision maker regarding the legitimacy of requests." Ms. Gilbert cites "the historical data showing all but one of the public requests for contested cases on amendment issues have been denied" in support of need for the recommendation.

Under the proposed rules, if the Council determines that a request for a contested case on a type A amendment identifies one or more properly raised issues that justify a contested case proceeding, the Council must conduct a contested case proceeding according to the applicable provisions of OAR 345-015-0012 to 345-015-0014 and 345-015-0018 to 345-015-0085. Unlike the procedures for a contested case on a site certificate application, the proposed rules also establish that the Council must identify the issues and parties to the contested case when one is granted.

When conducting a contested case, certain agencies are required to use an Administrative Law Judge (ALJ) from the Office of Administrative Hearings (an independent agency). Per 183.635(2)(k), the Council is not subject to this requirement. However, under OAR 345-015-0023(1), the Council may choose to appoint an ALJ to conduct a contested case proceeding under the rules adopted by the Council.

**Staff Recommendation:** Because Council is not required to use an independent hearing officer to evaluate contested case requests, staff believes that the rules are consistent with statute, and does not recommend changes to the proposed rules at this time. Staff recommends Council consider what additional revisions to the contested case process for amendments should be made in the rulemaking scheduled for 2022.

**OAR 345-027-0371(9): Issues on a contested case limited to division 22, 23, and 24 Ex. 3, 159, 211**

**Issue Summary:** In her testimony, Ms. Gilbert stated that she is concerned that contested case issues are limited to division 22, 23, and 24. Ms. Gilbert recommends that "[a]ny rule that is used in making a decision regarding an amendment should be a rule that could be the subject of a contested case…" Ex. 159.

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. A version of this standard of review for contested case issues has been in place since 2000. The standard does allow a person to raise an issue related to interpretation or implementation of a rule outside of OAR 345-022, 345-023, or 345-024 if that issue is likely to affect the Council's ultimate decision, which is based on findings of compliance with applicable law or Council standards.

**Staff Recommendation:** Staff recommends Council review this issue further, and consider whether changes to the standard of review for issues that justify a contested case should be made in rulemaking scheduled for 2022.

**OAR 345-027-0371(10): Notice on denial of request for contested case Ex. 159**

**Issue Summary:** Ms. Gilbert recommends that the "requirement that notice be sent to those requesting a contested case when they are denied standing including their legal recourse" should be reinstated. Ms. Gilbert adds that "citizens need to receive legal notice of the outcome of their contested case request and their legal options."

The proposed OAR 345-027-0371(10)(c) provides, in part:

> "If the Council finds that the request does not identify a properly raised issue that justifies a contested case proceeding, the Council shall deny the request. In a written order denying the request, the Council shall state the basis for the denial."

The proposed rule language is identical to the language that appeared in OAR 345-027-0070(8)(c), which was repealed in 2017. Council could amend the rule to include a statement of how or if the decision may be appealed, but such a new provision should only be adopted after consultation with legal counsel.

**Staff Recommendation:** Staff does not recommend changes to the proposed rules at this time.

**OAR 345-027-0371(10)(a): Limitations on Issues in a Contested Case Ex. 210**

**Issue Summary:** Commenters recommend that Council should reject the language in the proposed OAR 345-027-0371(10)(a) that would "require the Council, once it decides to allow a contested case proceeding, to decide 'the issues each contested case party may participate on' and that would limit '[t]he issues a party to a contested case proceeding may participate on . . . to those issues that party properly raised in its contested case request."

The proposed OAR 345-027-0371(10)(a) provides:

> "(a) If the Council finds that the request identifies one or more properly raised issues that justify a contested case proceeding, the Council must conduct a contested case proceeding according to the applicable provisions of OAR 345-015-0012 to 345-015-0014 and 345-015-0018 to 345-015-0085. The Council must identify the contested case parties and shall identify the issues each contested case party may participate on. The parties to a contested case proceeding must be limited to those persons who commented on the record of the public hearing and who properly raised issues in their contested case request that the Council found sufficient to justify a contested case, except that the certificate holder is an automatic party to a contested case. *The issues a party to a contested case proceeding may participate on must be limited to those issues that party properly raised in its contested case request that the Council found sufficient to justify a contested case, except that the certificate holder may participate on any issue the Council found sufficient to justify a contested case proceeding*;" (Emphasis added.)

Commenters assert that the last sentence in this section violates ORS 183.471(1), which provides that, "[i]n a contested case proceeding, the parties may * * * present evidence and argument on *all issues* properly [sic] before the presiding officer in the proceeding. (Emphasis added.) Commenters also assert that the language limiting participation on issues that were raised by other parties is inconsistent with ORS 469.403(2), which provides, in part, that when a party to a contested case proceeding on a site certificate or amended site certificate appeals the Council's decision, the "[i]ssues on appeal shall be limited to those raised by *the parties* to the contested case proceeding before the council." (Emphasis Added.)

Siting the Supreme Court's decision in *Marbet v. PGE*, 277 OR 447 (1971), commenters argue that the statutory scheme is intended to allow parties to a contested case to "respond to each other's properly raised issues with evidence and argument of their own" and to "appeal to the Oregon Supreme Court on issues raised by other parties." This scheme, the commenters assert, is intended to allow "issues to be fully vetted at the administrative level, prior to any judicial review."

Staff agrees that it is reasonable to assume that, when a party has an interest in an issue, the party should be allowed to participate on such an issue; however, parties other than the certificate holder do not necessarily have an interest in all issues and the statute and rules explicitly allow the Council or its Hearing Officer to determine whether a person should be granted party status, or limited party status.

**Staff Recommendation:** Based on the analysis above, staff recommends that the mandatory limitation to issues raised by a party may be inappropriate. Staff recommends Council amend OAR 345-027-0371(10)(a) to make this limitation optional for persons granted limited party status:

(10) The Council must take one of the following actions when determining if a request identifying one or more properly raised issues justifies a contested case proceeding:

> (a) If the Council finds that the request identifies one or more properly raised issues that justify a contested case proceeding, the Council must conduct a contested case proceeding according to the applicable provisions of OAR 345-015-0012 to 345-015-0014 and 345-015-0018 to 345-

015-0085. The Council must identify the contested case parties and shall identify the issues each contested case party may participate on. The parties to a contested case proceeding must be limited to those persons who commented on the record of the public hearing and who properly raised issues in their contested case request that the Council found sufficient to justify a contested case, except that the certificate holder is an automatic party to a contested case. The **Council may limit the** issues a **limited** party to a contested case proceeding may participate on ~~must be limited~~ to those issues that party properly raised in its contested case request **and** that the Council found sufficient to justify a contested case~~,.~~ ~~except that t~~**T**he certificate holder may participate on any issue the Council found sufficient to justify a contested case proceeding;

**OAR 345-027-0372: Notice of Final Order on Requests Under Type B Review Ex. 168**

**Issue summary:** In comments dated Dec. 16, 2019, Ms. Irene Gilbert comments that OAR 345-027-0372 "fails to provide notice to those commenting that a final order has been issued, findings of fact and conclusions of law that form the basis of their decision, and a response to the comments provided." Ms. Gilbert adds that commenters are not notified of appeal rights, making it "nearly impossible for the public to object to the final order as they are unable to determine why the order was issued, the decision process that was used, or their appeal rights."

The proposed OAR 345-027-0372(2) requires the department to issue a public notice of a proposed order on a request for amendment to:

"(a) All persons on the Council's general mailing list as defined in OAR 345-011-0020;

(b) All persons on any special list established for the facility;

(c) The reviewing agencies for the facility, as defined in OAR 345-001-0010(52); and

(d) The property owners on the updated list provided under OAR 345-027-0360(1)(f)."

Under subsection (3)(d) of the proposed rule, that notice must include a statement that judicial review of the Council's final order either granting or denying an amended site certificate shall be as provided in ORS 469.403.

Neither the proposed rules or the existing rules require the Council or Department to issue a public notice of a Final Order. There was also no such requirement in OAR 345-027-0070 prior to October of 2017. The Department has, however, issued a courtesy notice when a Final Order is issued and published all Final Orders to its website.

In its decision in *Friends of the Columbia Gorge v. EFSC*, the Oregon Supreme Court found that when a request for amendment does not go through a contested case proceeding, judicial review "shall be the same as the review by the Court of Appeals described in ORS 183.482. See ORS 469.403(6). Under ORS 183.482, in addition to the parties that is subject to the order, any "person adversely affected or aggrieved by the agency order" may petition for judicial review within "60 days only following the date the order upon which the petition is based is served." Date of service is the date on which the agency delivered or mailed its order to the parties under ORS 183.470.

While the order itself may be required to contain a notice of appeal rights, staff have not identified any statute or model rule of procedure which requires a public notice on a final order. In addition, no such notice is required for a non-party petitioner (i.e. a person adversely affected or aggrieved by the order) to ascertain the date of service since this information would likely be published to the Department's website, and even in the case that is was not, the date of service would likely be obtainable through a public records request.

**Staff Recommendation:** Based on the analysis above, staff does not recommend changes to the proposed rules at this time. Staff recommends Council review this issue further in future rulemaking.

**OAR 345-027-0375(2)(a): Scope of Review for Request to Expand Site Ex. 159, 168**

**Issue Summary:** Ms. Gilbert raises two statutory concerns with the scope of Council's review of a request for amendment to expand a facility site.

First, Ms. Gilbert asserts that "amendments need to require review of the entire development as part of an amendment request to increase the size of a development." Adding that "ORS 469.300(14) and ORS 469.407 state that an increased capacity requires the enlarged facility meets all council standards. There is no statute supporting a review of only the area added."

ORS 469.300(4) provides the definition for a "facility" and ORS 469.407 provides the standards approval of an amendment to increase the capacity of a base-load gas plant which was granted a 500-megawatt exemption.

Second, Ms. Gilbert asserts that OAR 345-027-0375(2)(a) cannot limit the review of changes adding land to the site to only the area added because this provision conflicts with ORS 469.503.

ORS 469.503 provides the standards for approval for a site certificate.

**Staff Recommendation:** Staff recommends no further action on this issue because the provisions of ORS 469.407 and 469.503 are not directly applicable to the amendment review process or approval of an amended site certificate.

**OAR 345-027-0385(3): Amended Construction Deadlines Ex. 4-158, 161-167,169-186, 188-197**

**Issue Summary:** Numerous commenters raise concerns that the proposed rules "eliminate the Council's discretion, when deciding whether to extend deadlines for beginning or completing construction of energy projects, to establish new construction periods shorter than the maximum lengths prescribed by rule. There is no valid reason for eliminating this discretionary authority."

In rules adopted through Administrative Order EFSC 5-2017, the Council amended OAR 345-027-0085 to provide that if the council grants an amendment to extend construction deadlines, it would specify new deadlines that are the later of:

> "(a) Three years from the deadlines in effect before the Council grants the amendment; or
>
> (b) Following a contested case proceeding conducted pursuant to OAR 345-027-0071, two years from the date the Council grants the amendment."

Before the adoption of this rule, the rule provided that Council could specify deadlines "not more than two years from the deadlines in effect before the Council grants the amendment." In addition to eliminating discretion to set shorter limits, the Council also amended the rules to provide that it would not grant more than two requests to extend deadlines for any facility.

**Staff Recommendation:** Staff recommends Council consider this issue further in the rulemaking scheduled for 2022.