



Oregon

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To: Oregon Energy Siting Council

From: Christopher Clark, Siting Policy Analyst & Rules Coordinator

Date: January 9, 2020

Subject: Agenda Item D (Action Item): 2019 Amendment Rulemaking — Council Review of Comments for the January 23-24, 2020 Council Meeting

Attachments: Attachment 1: Public Comments
Attachment 2: Staff Evaluation of Issues

STAFF RECOMMENDATION

Based on staff's evaluation provided in Attachment 2, staff recommends Council make the following changes to the proposed rules based on comments from stakeholders:

- Amend references to “Council standards” in proposed OAR 345-027-0350(4)(a) and 345-027-0380(2)(e) and (6)(f) to include “applicable laws.”
- Delete requirement for a contested case request to include “a detailed description of the person's interest in the proceeding” in proposed OAR 345-027-0371(6)(e) and 345-015-0016(5)(d)
- Amend proposed OAR 345-027-0371(10)(a) to provide Council with discretion in whether or not it will limit issues on which a party may participate in a contested case for a type A amendment.

Staff also recommends Council provide direction on what, if any, additional provisions for early public notice should be included in proposed OAR 345-027-0360, 345-027-0363, and 345-027-0365. Staff further recommends the Council consider additional amendments to rules in rulemaking scheduled to begin in 2022.

BACKGROUND

On October 25, 2019, the Council approved proposed permanent rules governing the site certificate amendment review process. The rules would replace temporary rules adopted on August 22, 2019 and contain additional changes to: (1) clarify procedures for issuance of contested case notices; (2) provide requirements for property owner notification for a request for amendment; and (3) reduce the number of printed materials that must be submitted by

persons requesting to terminate a site certificate or construct a natural-gas testing pipeline. The rules also contain additional grammatical, formatting, and wording changes needed to improve the clarity and consistency of rules in OAR chapter 345.

The Notice of Proposed Rulemaking, filed with the Secretary of State on October 25, 2019, 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.¹ As discussed further below, at its November 21, 2019 meeting in The Dalles, Oregon, the Council extended the deadline for public comment included in the notice in response to a timely request made under ORS 183.335(4). The close of the public comment period is now 5:00 pm on December 18, 2019.

The Council must consider fully any written or oral testimony received on the proposed rules prior to the close of the public comment period and may make changes to the proposed rules in response to issues raised in that testimony.

SUMMARY OF PUBLIC COMMENTS TO DATE

On November 15, 2019, the Department received a written comment from Mr. Gary Kahn, on behalf of several nonprofit public interest organizations, containing two procedural requests related to the rulemaking process. First, the commenters 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 under ORS 183.335(3)(d). Second the commenters requested that the Council postpone the rulemaking process by at least 21 days to allow additional opportunity to submit data, views, or arguments concerning the proposed permanent rules.

The Council discussed these requests at its meeting on November 21, 2019 in The Dalles, Oregon. In response to the first request, the Council provided a written statement of objective that explained the Council intended to evaluate the proposed rules by committing 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. In response to the second request, the Council agreed to postpone the final decision on the proposed rules until its January meeting, and extended the public comment period by 21 days to allow the commenters, and other interested persons additional opportunity to submit data, views, or arguments concerning the proposed rules. The hearing on the proposed rules was also held at the Council meeting on November 21, 2019. One person, Ms. Irene Gilbert, provided Oral testimony at the hearing.

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

The Council received approximately 209 additional written comments from individuals and organizations before the public comment period ended on December 18, 2019 at 5:00 pm. Attachment 1 to this report contains an indexed record of all comments received before that deadline. The comments raise numerous procedural and substantive issues and concerns with the proposed rules. Staff's evaluation of major substantive issues raised in the comments is included as Attachment 2.

RECOMMENDATION

Because the primary purpose of this rulemaking project is to provide regulatory certainty and continuity in the processing of requests for site certificate amendments following the Oregon Supreme Court Decision in *Friends of the Columbia Gorge v. EFSC*, staff recommends that Council defer action on many issues until they can be fully vetted and discussed by a Rules Advisory Committee in rulemaking scheduled to begin in 2022. However, staff does recommend Council make several changes to the proposed rules in response to issues raised in the comments.

First, in response to a comment from Mr. Kahn, on behalf of the Friends of the Columbia Gorge and other organizations², that references to "Council standards" in rules should be modified to also refer to any other "applicable laws" staff recommends Council amend the proposed OAR 345-027-0350(4)(a) and 345-027-0380(2)(e) and (6)(f) as follows:

OAR 345-027-0350

"* * * an amendment to a site certificate is required to * * *

(4) Design, construct, or operate a facility in a manner different from the description in the site certificate, if the proposed change:

(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 an applicable law or Council standard;"

OAR 345-027-0380(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."

² The other organizations include 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.

“(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 applicable laws or ~~the Council’s standards.~~”

Second, in response to comments from Ms. Gilbert and Mr. Kahn that the requirement for a provide a description of their interest in a proceeding on a request for contested case on an amendment should be removed, staff recommends Council delete the proposed OAR 345-027-0371(6)(e) and OAR 345-015-0016(5)(d) because those subsections duplicate requirements in OAR 345-027-0371(6)(h) and (i) and the Attorney General’s model rules, respectively.

Third, in response to a recommendation in comments from Mr. Kahn that Council should reject language in the proposed OAR 345-027-0371(10)(a) 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,” staff recommends Council amend the rule to provide Council with additional discretion:

“OAR 345-027-0371(10)(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~~and the certificate holder may participate on any issue the Council found sufficient to justify a contested case proceeding;”

Finally, during initial consideration of the public comments at the December meeting, the Council directed staff to bring draft rule language that would require public notice of an amendment request before issuance of the draft proposed order. Council also requested draft language to reinstate the provisions for optional informational meeting that was included in OAR 345-027-0070(3) (eff. 5/18/15.) Staff has provided draft language in Attachment 2 (p. 8-10) and recommends Council provide direction on what, if any, additional provisions for early public notice should be included in the final rules.

ATTACHMENTS:

- Attachment 1: Public Comments
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