

**THE ENERGY FACILITY SITING COUNCIL
OF THE STATE OF OREGON**

FINAL ORDER REGARDING APPLICATION OF OAR 345-027-0371(9)

I. INTRODUCTION

OAR 345-027-0371 sets forth the requirements that must be met for Council to consider a request for a contested case regarding a proposed order on a site certificate amendment.¹ For example, pursuant to OAR 345-027-0371(5), only persons who commented in person or in writing on the record of the draft proposed order may request a contested case. OAR 345-027-0371(6) requires (among other items) that the requests include a statement of the issue or issues the person desires to raise in a contested case proceeding and an explanation why the Council should determine that each identified issue justifies a contested case, under the evaluation described in section (9) of the rule. OAR 345-027-0371(9) states:

After identifying the issues properly raised the Council shall determine whether any properly raised issue justifies a contested case proceeding on that issue. 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. . . . [Emphasis added].

Persons interested in Council proceedings have questioned the meaning of this rule and the standard the Council applies when determining whether to grant a request to hold a contested case on a proposed order for a site certificate amendment. The purpose of this document is to clarify the meaning of the word "may" as it is used in OAR 345-027-0371(9), and that in order to grant a request for a contested case on a proposed order for a site certificate amendment, Council must find that the person requesting the contested case has raised an issue that *is in some degree likely to* affect the Council's determination as to whether the facility complies with applicable laws and Council standards. Put another way, Council will not automatically grant a request for a contested case regarding a proposed order on a site certificate amendment simply because a person has raised an issue that "might," or "could" affect its determination regarding the facility's compliance. Rather, the issue raised must be in some degree likely to affect the Council's determination – a higher threshold than "might" or "could," but lower than certainty. Per OAR 345-027-0371(10)(b), it is noted that Council maintains the option to deny a request for contested case on a properly-raised issue, if the Council finds that an amendment to the proposed order would settle the issue in a manner satisfactory to Council.

¹ The Council adopted OAR 345-027-0371 on January 24, 2020. The requirements for contested case requests in the rule are substantially similar to the temporary OAR 345-027-0371 adopted by Council on August 22, 2019, and the former OAR 345-027-0071 which was suspended on the same date and later repealed.

II. ANALYSIS

Council authority regarding applications for site certificates vs. applications for site certificate amendments

ORS 469.370(5) requires the Council to hold a contested case hearing following receipt of a proposed order on an application for a site certificate, in accordance with ORS chapter 183 and any procedures adopted by Council. Per this statute, the applicant is automatically a party to the contested case, and Council may permit other persons to participate if “the person appeared in person or in writing at the public hearing on the site certificate application.”

Conversely, Oregon law leaves Council great latitude for the handling of applications for site certificate amendments and leaves it to the Council’s discretion to determine when a contested case regarding a site certificate amendment will be held. ORS 469.405(1) states: “A site certificate may be amended with the approval of the Energy Facility Siting Council. The council may establish by rule the type of amendment that must be considered in a contested case proceeding. . .”

The Supreme Court of Oregon recently addressed the significance of this statute, stating:

“By imposing virtually no statutory procedural requirements on the RFA [request for amendment] process, the legislature has allowed the council to develop that process largely as it sees fit. . . .

And, whereas the statutes governing the certificate application process require a public hearing and an opportunity to request a contested case proceeding, the statutes governing the RFA process do not. The most those statutes say on those topics is that the council “*may* establish by rule the *type* of amendment” that will require a contested case proceeding. ORS 469.405(1) (emphasis added by Supreme Court). At this point, the council has not adopted rules *requiring* any types of RFAS to be subject to contested case proceedings. 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 steps available on limited terms . . .”²

Therefore, the legislature has not imposed any procedural requirements on the Council’s handling of site certificate amendments and, as acknowledged by the Supreme Court, the Council has not adopted any rules (including OAR 345-027-0371(9)) that require it to hold a contested case on an amendment. Accordingly, it is appropriate for Council, when applying OAR 345-027-0371(9), to deny a request for a contested case on a proposed order for a site certificate amendment, if Council does not find that the person requesting the contested case

² *Friends of the Columbia Gorge v. Energy Facility Siting Council*, 365 Or. 371, 393-394, 446 P.3d 53, 66 (2019) (emphasis in original).

has raised an issue that is in some degree likely to affect the Council's determination as to whether the facility complies with applicable laws and Council standards.

Council application of OAR 345-027-0371(9).

The analysis above is consistent with the Council's past application of the rule and the normal dictionary meaning of the word "may." When considering requests for contested case regarding a proposed order on a site certificate amendment subject to Type A review, Council's practice is to consider whether the request is reasonably likely to affect the Council's determination as to whether the facility complies with applicable laws and Council standards.³ Council also believes this is an appropriate approach given the common or normal dictionary meaning of the word "may." Webster's dictionary defines "may," in relevant part, as to "*be in some degree likely to.*"⁴

We note that, even in circumstances where Council finds an issue raised in a request for contested case is likely to affect its determination regarding compliance with applicable laws and Council standards, Council is not obliged to grant a request for a contested case, if (as set forth in OAR 345-027-0371(10)(b)) the Council finds that an amendment to the proposed order would settle the issue in a manner satisfactory to Council.

Accordingly, when reviewing a request for a contested case regarding a proposed order on a site certificate amendment subject to Type A review, the Council will not grant a request for case unless:

- The request complies with the requirements set forth in OAR 345-027-0371(5) and (6), and
- The Council finds, consistent with OAR 345-027-0371(9) and (10) that: a) the issue(s) raised in the request *are in some degree likely to* affect the Council's determination as to whether the facility, with the change proposed by the amendment, meets applicable laws and Council standards, and b) an amendment to the proposed order would not settle the issue(s) in a manner satisfactory to Council.

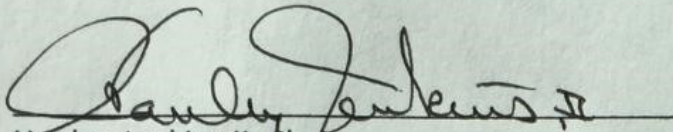
³ By rule, Council has established three "types" of review processes for site certificate amendment requests. Type A, B and C; Type A has the option for a person to request a contested case. Type B does not have an option for a contested case request. Type C is specific to construction-related issues and is not the subject of this order.

⁴ "*May*" Webster's Third New International Dictionary (unabridged ed. 2002).

III. CONCLUSION

Consistent with the Council's past practice and the common dictionary meaning of the term "may", in order for Council to grant a request for a contested case on a proposed order for a site certificate amendment subject to Type A review, Council must find that the person requesting the contested case has raised an issue that is *in some degree likely to affect* the Council's determination as to whether the facility complies with applicable laws and Council standards. Even under those circumstances, Council is not obliged to grant a request for a contested case if, as set forth in OAR 345-027-371(10)(b), the Council finds that an amendment to the proposed order would settle the issue in a manner satisfactory to Council. Council unanimously approved this Order at its January 24, 2020 meeting in Hood River.

Issued this 14th day of February, 2020

A handwritten signature in black ink, appearing to read "Hanley Jenkins II", written over a horizontal line.

Hanley Jenkins II, Chair
Oregon Energy Facility Siting Council