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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 345
DEPARTMENT OF ENERGY
ENERGY FACILITY SITING COUNCIL

FILED
05/05/2020 1:12 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Clarification of standard for issue to justify a Contested Case in Type A Amendment Review

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 06/25/2020 5:30 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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Filed By:
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HEARING(S)

Auxilary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 06/25/2020
TIME: 5:00 PM
OFFICER: Christopher M. Clark
ADDRESS: Virtual Hearing
See Special Instructions
Salem, OR 97301
SPECIAL INSTRUCTIONS:
Join Webinar at:
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Access code: 717 948 663

NEED FOR THE RULE(S):

Rules are needed to clarify the Council's standard for an issue to justify a Contested Case Proceeding in the Type A Amendment Review process.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Final Order Regarding Application of OAR 345-027-0371(9) dated February 14, 2020.
Meeting Materials and Minutes for Agenda Item D of the January 23-24. 2020 EFSC Meeting.
Meeting Materials and Minutes for Agenda Item I of the March 13, 2020 EFSC Meeting.
All materials are available from the Oregon Department of Energy

FISCAL AND ECONOMIC IMPACT:

Because the proposed rule is intended to clarify language of an existing rule, no fiscal or economic impacts are anticipated.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

Because the proposed rule is intended to clarify the language of an existing rule, it is not expected to economically affect state agencies, units of local government, or other members of the public. The rule does not specifically apply to small businesses, and is not expected to change any costs associated with reporting, recordkeeping or administrative activities required to comply with the rules.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Because these proposed procedural rules do not specifically apply to small businesses, no small businesses were consulted in the development of the rules.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

The proposed rule is intended to clarify the language of an existing rule consistent with the Council's current interpretation and application of the rule. Because there is no expected fiscal or economic impact and the changes to agency practice and procedure are limited, the agency believes there would have been limited benefit in consulting an advisory committee.

AMEND: 345-027-0371

RULE SUMMARY: The purpose of the rule amendment is to clarify the Council's standard for determining whether an issue raised in a Type A Amendment Review justifies a Contested Case proceeding. The Council interprets the term "may" in section (9) of this rule to mean that a person must raise 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. To be consistent with the Council's interpretation and past application of the rule, and to be consistent with other rules that convey a similar standard of proof for Council findings, the term "may" in section (9) of the rule is replaced with the term "is reasonably likely to."

CHANGES TO RULE:

345-027-0371
Proposed Order, Requests for Contested Case and Council's Final Decision on Requests for Amendment Under Type A Review
(1) No later than 30 days after the Council has reviewed the draft proposed order and considered all comments received on the record of the public hearing under 345-027-0367, the Department must issue a proposed order recommending approval, modification or denial of the request for amendment to the site certificate. The Department must consider any oral comments made at the public hearing, written comments received before the close of the record of the public hearing, agency consultation, and any Council comments. The Department may issue the proposed order at a later date, but the Department must, no later than 30 days after the Council has reviewed the draft proposed order and considered all comments received on the record of the public hearing, notify the certificate holder in writing of the reasons for the delay.¶
(2) Concurrent with issuing the proposed order, the Department must issue public notice of the proposed order

by:¶
(a) Sending public notice of the proposed order 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 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); and¶
(b) Posting an announcement of the proposed order on the Department's website. ¶
(3) Notice of the proposed order must include:¶
(a) A description of the facility and the facility's general location;¶
(b) A description of the process for requesting a contested case;¶
(c) The physical address and website where the public may review copies of the proposed order; and¶
(d) The name, address, email address and telephone number of the Department representative to contact for more information.¶
(4) On the same date the notice of proposed order as described in section (2) is issued, the Department must send a notice of the opportunity to request a contested case by mail or email to the certificate holder, and to all persons who commented in person or in writing on the record of the public hearing as described in OAR 345-027-0367. The notice must include the deadline for requesting a contested case and restatements of sections (5) through (9) of this rule.¶
(5) Only those persons, including the site certificate holder, who commented in person or in writing on the record of the public hearing described in OAR 345-027-0367 may request a contested case proceeding on the proposed order for an amendment to the site certificate. To properly raise an issue in a request for a contested case proceeding on the proposed order for an amendment, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing, unless the Department did not follow the requirements of OAR 345-027-0367, or unless the action recommended in the proposed order differs materially from the draft proposed order, including any recommended conditions of approval, in which case the person may raise only new issues within the jurisdiction of the Council that are related to such differences. If a person has not raised an issue at the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, the Council may not grant a contested case proceeding for that issue. To have raised an issue with sufficient specificity, the person must have presented facts at the public hearing that support that person's position on the issue.¶
(6) Contested case requests must be submitted in writing and must be received by the Department by a specified deadline that is at least 30 days from the date of notice in section (4) of this rule. Contested case requests must include:¶
(a) The person's name, mailing address and email address and any organization the person represents;¶
(b) A short and plain statement of the issue or issues the person desires to raise in a contested case proceeding;¶
(c) A statement that describes why the Council should find that the requester properly raised each issue, as described in section (7) of this rule, including a specific reference to the person's prior comments to demonstrate that the person raised the specific issue or issues on the record of the public hearing, if applicable;¶
(d) A statement that describes why the Council should determine that each identified issue justifies a contested case, under the evaluation described in section (9) of this rule;¶
(e) Name and address of the person's attorney, if any;¶
(f) A statement of whether the person's request to participate in a contested case is as a party or a limited party, and if as a limited party, the precise area or areas in which participation is sought;¶
(g) 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;¶
(h) 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¶

(i) A statement of the reasons why others who commented on the record of the public hearing cannot adequately represent the interest identified in subsections (h) or (i) of this section.¶
(7) Before considering whether an issue justifies a contested case proceeding under section (9) of this rule, the Council must determine that the person requesting a contested case commented in person or in writing on the record of the public hearing and properly raised each issue included in the request. To determine that a person properly raised each issue included in the request, the Council must find that:¶
(a) The person making the contested case request raised the issue on the record of the public hearing described in OAR 345-027-0367 with sufficient specificity to afford the Council, the Department, and the certificate holder an adequate opportunity to respond to the issue;¶
(b) The Department did not follow the requirements of OAR 345-027-0367; or¶
(c) If the action recommended in the proposed order, including any recommended conditions of approval, differs materially from the action recommended in the draft proposed order, the contested case request identified new issues that are related to such material differences.¶
(8) If the Council finds that the person requesting a contested case failed to comment in person or in writing on the record of the public hearing or failed to properly raise any issue, as described in section (7) of this rule, the Council must deny that person's contested case request. If the Council finds that the person requesting a contested case commented in person or in writing on the record of the public hearing and properly raised one or more issues, the Council's determination of whether an issue justifies a contested case, as described in section (9) of this rule, must be limited to those issues the Council finds were properly raised.¶
(9) After identifying the issues properly raised the Council must 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~~is reasonably likely to 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. If the Council does not have jurisdiction over the issue raised in the request, the Council must deny the request.¶
(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 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;¶
(b) If the Council finds that the request identifies one or more properly raised issues that an amendment to the proposed order, including modification to conditions, would settle in a manner satisfactory to the Council, the Council may deny the request as to those issues and direct the Department to amend the proposed order and send a notice of the amended proposed order to the persons described in section (4) of this rule. Only the certificate holder and those persons who commented on the record of the hearing may, in a writing received by the Department within 30 days after the Department issues the notice of the amended proposed order, request a contested case proceeding limited to issues related to the amendment to the proposed order. As described in section (9) of this rule, the Council must determine whether any issue identified in the request for a contested case proceeding justifies a contested case proceeding. A person's contested case request under this subsection must include:¶
(A) The person's name, mailing address and email address;¶
(B) A statement of the contested issues related to the amendment to the proposed order, including facts believed

to be at issue; and¶
(C) A statement that describes why the Council should find an issue justifies a contested case, as described in section (8) of this rule; and¶
(c) If the Council finds that the request does not identify a properly raised issue that justifies a contested case proceeding, the Council must deny the request. In a written order denying the request, the Council must state the basis for the denial. The Council must then adopt, modify or reject the proposed order based on the considerations described in OAR-345-027-0375. In a written order the Council must either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council must issue an amended site certificate, which is effective upon execution by the Council Chair and by the certificate holder.¶
(11) If there is no request for a contested case proceeding as described in section (6) or subsection (10)(b) of this rule, the Council, may adopt, modify or reject the proposed order based on the considerations described in OAR 345-027-0375. In a written order, the Council must either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council must issue an amended site certificate, which is effective upon execution by the Council Chair and by the certificate holder.¶
(12) Judicial review of the Council's final order either granting or denying an amended site certificate is as provided in ORS 469.403.
Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.405