



Oregon

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To: Energy Facility Siting Council

From: Christopher M. Clark, Siting Policy Analyst and Rules Coordinator

Date: August 7, 2020

Subject: Agenda Item C (Action Item):
Rulemaking to Clarify Standard for Contested Case Requests for Type A
Amendments – Review of Public Comments and Consideration of Permanent
Rules for August 21, 2020 Council Meeting.

Attachments: Attachment 1: Notice of Proposed Rulemaking
Attachment 2: Public Comments
Attachment 3: Staff Summary and Evaluation of Issues raised in Comments

RECOMMENDED COUNCIL ACTION

Staff recommends Council adopt permanent rules after fully considering all written and oral comments provided on the proposed rules and revising as needed to reduce significant adverse economic impact on small businesses, consistent with public health and safety.

BACKGROUND

At its March 13, 2020 meeting, the Council initiated rulemaking to clarify the standard for an issue to justify a contested case under the Type A amendment review process. The proposed rules would amend OAR 345-027-0371(9) to provide that “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 *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.*” (Emphasis added.) The Council authorized Staff to issue a Notice of Proposed Rulemaking at the same meeting.

Staff filed the Notice with the Secretary of State on May 5, 2020. Staff subsequently posted a copy of the notice to its website and provided notice as required by ORS 183.335(1) and OAR 345-001-0000. For reference, the Notice is included as **Attachment 1** to this report. The Notice requested 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.

The Council held a hearing on the proposed rules on June 25, 2020. In response to a request from an interested stakeholder, the hearing officer extended the deadline for public comments on the proposed rules until Thursday July 16, 2020 at 5:30 pm. The Council also deferred its

deliberation of comments and final decision on the proposed rules until its July meeting. However, at the July meeting staff recommended continuing Council's review and possible decision to a later meeting based on the following:

- Prior to the extended comment deadline of July 16th the Department received oral testimony from 3 persons and 178 written comments and needed additional time to thoroughly evaluate them in order to provide an assessment to Council.
- In numerous comments the question was raised whether or not the filing with the Secretary of State was sufficient based on describing the nature of the rulemaking as a "clarification." This issue was still being evaluated.
- The Department felt that based on some of the comments that came up it would also be helpful to once again walk through the steps in the amendment review process, with a specific focus on the contested case phase before the Council makes its final decision, so that Council members have the context of how the language in question fits into the overall review process.

CONSIDERATION OF PUBLIC COMMENTS

The Council must consider fully any written or oral comments provided before the close of the public comment period. Comments submitted after the close of the public comment period may not be considered unless the Council decides to extend the comment period for all interested agencies and persons.

Exact copies of all written public comments received before the close of the public comment period are included in **Attachment 2** to this staff report. The Attachment has been updated to include the approved meeting minutes for the June 25-26 council meeting which provide a summary of testimony made at the June 25 hearing and the Council's previous discussion of this rulemaking project.

STAFF RECOMMENDATION

A document providing staff's summary of and recommended responses to the significant data, views, and arguments contained in the public comment received before the close of the public comment period is included in **Attachment 3** to this staff report.