



# Oregon

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**To:** Energy Facility Siting Council

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

**Date:** September 18, 2020

**Subject:** Agenda Item C (Action Item): Initiation of Rulemaking to Ensure Safe Public Meetings and Hearings, for September 25, 2020 EFSC Meeting

**Attachments:** Attachment 1: Draft Notice of Proposed Rulemaking

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## STAFF RECOMMENDATION

Staff recommends Council initiate formal rulemaking proceedings to allow the Council to waive any provision of rule requiring that a public meeting or public hearing be held in person or in a specific geographical area, if the Council finds that in-person attendance at the meeting or hearing would present a risk to public health or safety or the health and safety of the participants.

## BACKGROUND

The Council may currently hold most regular meetings by telephone or other electronic means as long as the Council provides a means for the public to listen to the meeting at the time it occurs;<sup>1</sup> however, certain informational meetings or public hearings must be held in the area affected by a notice of intent, application for site certificate, or request for amendment.<sup>2</sup> The uncertainty surrounding the potential duration of the COVID-19 pandemic, recent wildfires as well as prior flooding and winter storms that have affected communities across the state have underscored the need to maintain the ability to hold public meetings and hearings remotely when needed.

While Council may not waive any requirements or obligations imposed by ORS chapter 469, staff recommends that it would be appropriate to undertake rulemaking to authorize the Council or the Council Chair to waive rules which require a public meeting or hearing to be held in-person or in a specified geographic area, when holding or traveling to an in-person meeting or hearing could present a risk to public health and safety, or to the health and safety of the meeting participants, including Council members and staff.

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<sup>1</sup> See OAR 345-011-0015(3) and ORS 192.670

<sup>2</sup> See ORS 469.370(2) and 469.373(7); OAR 345-015-0130(1); 345-015-0220(1); 345-015-0310(22); OAR 345-027-0367(1).

This report will further discuss the need and authority for Council to conduct such rulemaking, potential impacts on stakeholders, and staff's recommendation to initiate formal rulemaking proceedings by authorizing issuance of the Draft Notice of Proposed Rulemaking included in **Attachment 1**.

### Need and Authority for Rules

On April 15, 2020, the Governor issued Executive Order (EO) 20-16, ordering the governing bodies of state and local public bodies to hold public meetings and hearing by telephone, video, or other electronic or virtual means whenever possible during the COVID-19 emergency period. EO 20-16 also waived “[a]ny requirements by law or policy that testimony during a public meeting or hearing be taken in person” when the public body provides “an opportunity for submission of testimony by telephone, video, or through some other electronic or virtual means, or provides a means of submitting written testimony, including by email or other electronic methods, that the public body may consider in a timely manner.”<sup>3</sup>

The Department understood EO 20-16 to waive requirements in the Council’s rules which required public meetings or hearings to be held in the vicinity of a proposed or approved energy facility. On September 1, 2020, the Governor issued EO 20-38, which extended the COVID-19 emergency period and also rescinded EO 20-16, finding that the earlier EO was no longer necessary because the legislature had enacted several of its provisions through HB 4212.<sup>4</sup> The language of EO 20-16 that waived in-person meeting requirements was included in the bill, but as enacted, it only applies to meetings or hearings held by local governments, and does not apply to the Council’s meetings and hearings.<sup>5</sup>

The COVID-19 pandemic continues to threaten public health and safety in Oregon, and remains a statewide emergency. In addition, recent wildfires and past flooding and winter storms have resulted in hazardous conditions affecting health and safety across the state. While certain hearings, such as the public hearing on a Draft Proposed Order in proceedings on an Application for Site Certificate, are required to be held in proximity to a proposed facility by statute<sup>6</sup>, informational meetings or public hearings in the Site Certificate Amendment review process are only required to be held in-person under the Council’s rules. Staff recommends that rulemaking is needed to allow the waiver of in-person meeting requirements imposed upon Council by its own rules, when in-person attendance at a meeting or hearing could place the public or meeting participants at risk.

### Potential Impacts on Stakeholders

Staff recognizes that some stakeholders prefer attending meetings or providing testimony in-person, and that meeting in-person has many intangible benefits; however, in-person meetings may not be necessary when adequate opportunities for public attendance and participation are provided by telephone or electronic means as required by ORS 192.670. Because this rule is

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<sup>3</sup> Section 2.c.

<sup>4</sup> Chapter 12, Oregon Laws, 2020 1<sup>st</sup> Special Session

<sup>5</sup> Ibid., Section 1. “As used in the section \* \* \* ‘public body’ excludes the state or any board, department, commission, council, bureau, committee, subcommittee, advisory group or other agency of the state.”

<sup>6</sup> ORS 469.370(2)

only expected to apply under extraordinary circumstances, and the rules would not result in fewer opportunities for public participation we believe the rule would result in minimal impacts to stakeholders. This rulemaking is also not expected to result in any fiscal or economic impacts to stakeholders aside from some small cost savings associated with travel costs.

Due to the minimal nature of impacts, and the narrow scope of the proposed rulemaking, we do not recommend appointing a Rules Advisory Committee to assist in the further development of proposed rules, however, we do recommend that Council accept public comment on the draft proposed rules prior to taking action to initiate rulemaking.

#### **RECOMMENDED COUNCIL ACTION**

Draft proposed rule language is included in the draft Notice of Proposed Rulemaking attached to this staff report. Due to the relatively narrow scope of the draft proposed rules and the urgency of the issue, staff recommends that Council initiate formal rulemaking proceedings and authorize staff to issue the Notice of Proposed Rulemaking after considering any advice provided during this agenda item.