



# Oregon

Kate Brown, Governor



550 Capitol St. NE  
Salem, OR 97301  
Phone: 503-378-4040  
Toll Free: 1-800-221-8035  
FAX: 503-373-7806  
[www.oregon.gov/energy](http://www.oregon.gov/energy)

**To:** Energy Facility Siting Council

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

**Date:** August 13, 2021

**Subject:** Agenda Item I (Action Item): Initiation of Application Process Review Rulemaking – Phase 1 for the August 27, 2021 EFSC Meeting

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## STAFF REQUEST

Staff requests that the Council initiate informal proceedings on Phase 1 of the Application Process Review Rulemaking, which was approved in the 2021-2023 Rulemaking Schedule. During informal proceedings staff proposes to prepare and distribute an initial scoping survey to stakeholders. Staff will return to Council with a summary of the survey results, staff's preliminary recommendations for draft proposed rules, and recommendations for appointment of a Rulemaking Advisory Committee.

## BACKGROUND

The Council authorized staff to begin preliminary work on a multi-phase rulemaking project to update, clarify, and simplify its rules for the site certificate application review process as part of its 2021 to 2023 Rulemaking Schedule. Phase 1 of the project would reorganize rules in divisions 015 to 026 to create clear separation of procedural and substantive provisions in rules. While this phase would primarily be organizational, it would also seek to clarify and simplify existing procedures for the application review process where practicable.

Staff has completed its preliminary review and provides recommendations for the conduct of Phase 1 in this report. Specifically, this report provides an overview of:

- The need and authority to adopt rules
- The recommended scope and objectives for Phase 1
- The potential fiscal and economic impacts on stakeholders
- The recommended method for obtaining stakeholder input
- The projected timeline for the rulemaking process

The report concludes with staff's request for Council to initiate the rulemaking process. Please note that the Council is not being asked to consider proposed rule amendments or the adoption of permanent rules at this time.

## **NEED AND AUTHORITY TO ADOPT RULES**

The legislature established the Energy Facility Siting Council to oversee a comprehensive program for the siting, monitoring and regulation of energy facilities in Oregon. To fulfill this purpose, the legislature authorized the Council to establish standards and rules to ensure that the siting, construction and operation of energy facilities is accomplished in a manner consistent with the protection of public health and safety and in compliance with Oregon's energy, land use, and environmental protection policies.

To fulfill this purpose, the Council has adopted 14 General Standards that are applicable to all proposed facilities as well as additional standards applicable to specific types of energy facilities. The Council's rules describe all the information that must be provided as part of a Notice of Intent, Application for Site Certificate and Request for Site Certificate Amendment in order to demonstrate compliance with the standards. Over time, the Council has separately amended standards and application requirements and, in some cases, the relationship between the application requirements and applicable standard is not clear.

This project is intended to clarify and simplify application requirements to reduce the need for requests for additional information during the application review process, improve consistency and standardization in the review process, and make the process clearer and more understandable for applicants, reviewing agencies, and interested members of the public. The Council approved this project to be completed in three phases:

- Phase 1: Reorganize rules in divisions 015 to 026 to create clear separation of procedural and substantive provisions in rules and simplify or clarify procedures for review where practicable.
- Phase 2: Review application information and procedural requirements currently located in division 020 and 021 to ensure that requirements align with what is needed to demonstrate compliance with the Council's standards.
- Phase 3: Evaluate standards and substantive requirements to determine if requirements should be adjusted for different types of energy facilities, including facilities which generate energy from renewable resources.

## **RECOMMENDED SCOPE AND OBJECTIVES OF PHASE 1**

As described above, Phase 1 would reorganize rules in divisions 015 to 026 to create clear separation of procedural and substantive provisions in rules. While the rule changes associated with this phase are expected to be primarily organizational in nature, staff would also seek to clarify and simplify existing procedures for the application review process where practicable.

### Separating Procedural and Substantive Rules

Staff has developed the following definitions to assist in creating more clear separation between procedural and substantive rules.

A **substantive rule** establishes a right, duty, or obligation for an applicant or certificate holder. Examples of substantive rules include:

An **information requirement** that establishes the information or evidence that must be provided for the Council to evaluate compliance with a standard.

A **standard** that establishes the “yardstick by which the evidence will be evaluated.”

A **condition** or **obligation** that describes specific rights, duties, and obligations for a certificate holder

A **procedural rule** prescribes the steps or that must be taken and methods that must be used to implement a substantive rule. Examples of procedural rules include submission and noticing requirements, deadlines and timing considerations, and evidentiary rules.

Rules also often contain **definitions** which provide specific meanings for words and terms that may otherwise be ambiguous. Generally speaking, definitions should not include either substantive or procedural requirements.

Currently, the Council’s rules related to the application review process contain a mix of substantive and procedural rules.

Division 015 primarily consists of procedural rules for the conduct of contested cases and the procedures the Department must follow during the application review process. Division 015 also contains procedural and substantive rules related to site certificate exemptions.

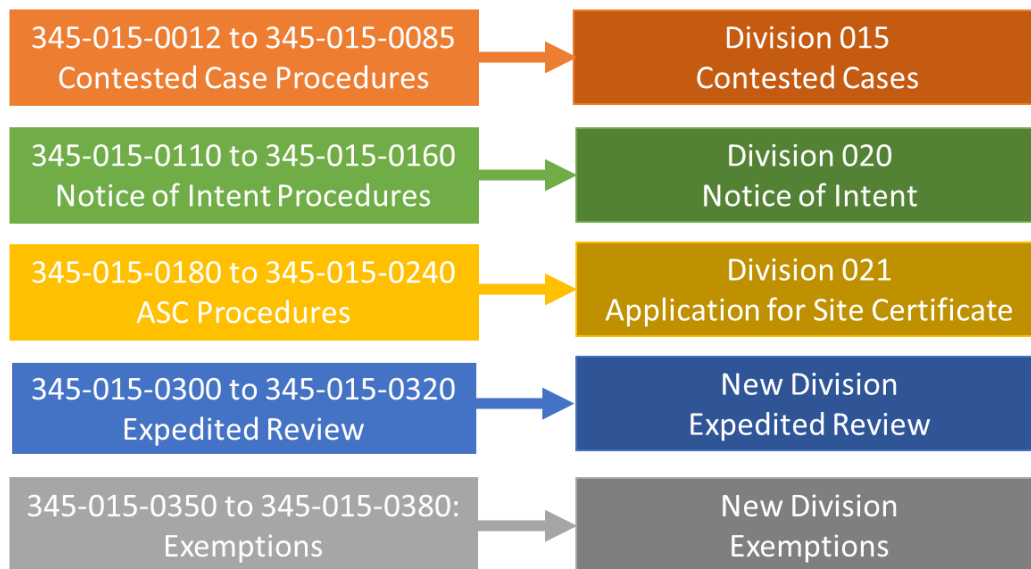
Division 020 and 021 primarily consists of procedural rules for the applicant related to the submission of a Notice of Intent and Application, respectively. OAR 345-020-0011 and 345-021-0010 also contain substantive information requirements that the applicant must satisfy before a project order may be issued.

Division 022 primarily consists of the substantive standards that the Council must determine have been met in order for a site certificate to be issued. It also contains some procedural rules regarding the process by which the Council will review evidence and apply standards. For example, OAR 345-022-0000, the Council’s General Standard of Review, contains both substantive requirements the Council must satisfy when issuing a site certificate and the describes the procedural steps the Council will use to make these findings.

Two other divisions of rules contain specific standards that are only applicable to certain types of facilities. Division 023 contains the need standard for non-generating facilities. Division 024 contains the substantive and procedural rules related to implementation of the Carbon Standard.

The current rules appear to be organized primarily by responsible party. Division 015 applies primarily to the Department, Divisions 020 and 021 to the Applicant or Certificate Holder, and Division 022 to 024 to the Council. While there is nothing inherently wrong with this approach, it has resulted in the rules becoming somewhat disjointed because requirements that are applicable to multiple parties are not always repeated in each division.

There are several options that could make the rules clearer and more cohesive. For example, the Council could move all procedural rules in Division 015 associated with different phases of the application process review, or different types of proceedings, to their own divisions.



### Simplifying Procedural Rules

During Phase 1 of this rulemaking project, staff will attempt to simplify, clarify, and consolidate procedural rules where possible. This may include eliminating rules with duplicative requirements, combining rules that establish similar procedural requirements for multiple points in the review process, or establishing new rules clarifying procedures that are part of existing processes but not clearly explained by rule.

While staff will minimize changes that create new procedures or change existing requirements, if staff, stakeholders, or the Council identifies issues that could be resolved during this rulemaking staff will present these issues to Council for consideration.

### **POTENTIAL FISCAL AND ECONOMIC IMPACTS**

Because Phase 1 is not expected to create any new substantive or procedural requirements, staff does not expect for this project to create any new costs of compliance for new applicants or existing certificate holders. While this rulemaking project is generally intended to reduce the overall cost of the siting review process by reducing time and administrative burdens associated with the siting review process, some individual changes may increase the amount of information required to demonstrate compliance with individual standards, or may enhance opportunities for public participation and engagement. Staff will identify rule changes that could increase costs of compliance in the fiscal and economic impact statements associated with each phase of the rulemaking.

### **METHODS FOR OBTAINING STAKEHOLDER INPUT**

In its proposed 2021-2023 rulemaking schedule, staff recommended that a Rulemaking Advisory Committee (RAC) be appointed to assist in the development of proposed rules and the associated fiscal and economic impact statements. Staff believes this recommendation is still

appropriate because the level of interest from energy developers, public interest groups, and the general public is expected to be high given the scope of potential changes, and the potential for fiscal and economic impacts on stakeholders. However, prior to the appointment of a RAC, staff believes it would be appropriate to conduct a scoping survey to get general feedback on issues and alternatives for consideration by the RAC, and to gauge and solicit interest from stakeholder groups. Staff believes this additional scoping process will also help identify alternatives for consideration in future phases of this project, and ensure that changes made in Phase 1 do not conflict with the overall objectives of the project.

Staff requests authorization from council to develop and distribute this initial scoping survey to stakeholders this fall and return to Council in early 2022 with a summary of the survey results, staff's preliminary recommendations for draft proposed rules, and recommendations for appointment of a Rulemaking Advisory Committee.

**PROJECTED RULEMAKING TIMELINE**

The table below provides staff's projected timeline for Phase 1 of this rulemaking project.

Projected Rulemaking Timeline	
Council initiates rulemaking	August 2021
Staff distributes scoping survey	October-November 2021
Staff presents preliminary recommendations to Council Council Appoints RAC	January 2022
RAC meetings & development of draft proposed rules	January - March 2022
Council considers draft proposed rules & issues Notice of Proposed Rulemaking	April 2022
Public Comment Period on Proposed Rules	May – June 2022
Rulemaking Hearing & Consideration of Permanent Rules	June /July 2022