



Oregon

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To: Energy Facility Siting Council

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

Date: October 14, 2022

Subject: Agenda Item F (Action Item): Initiation of Site Certificate Amendment Rulemaking for the October 28, 2022, EFSC Meeting

Attachments: 1. Draft Request for Comments and RAC Interest

STAFF RECOMMENDATION

Staff recommends Council initiate rulemaking to develop proposed revisions to the rules governing the expiration, amendment, and termination of site certificates under OAR chapter 345, division 027. As the first step in this process, staff requests authorization to issue a notice seeking public comment to assist in the review described under ORS 183.405(1) for permanent rules adopted under Administrative Order EFSC 1-2020.

BACKGROUND

In January 2017, after several years of preliminary work, the council began formal proceedings to modify the rules for site certificate amendments under OAR chapter 345, division 027. As part of the formal proceedings, the Council issued three notices, held three public hearings, and considered more than 150 public comments.

The Council adopted permanent rules at its meeting on October 19, 2017. The rules were filed and became effective on October 24, 2017, under Administrative Orders EFSC 4-2017 and EFSC 5-2017. Before the 2017 rules took effect, the rules in division 027 provided for two procedural paths for reviewing a request for amendment (RFA) a standard process and an expedited process. The standard process could also be extended, which was frequently necessary because of the complexity and public interest in RFAs. In the years leading up the rule changes, about 70 percent of RFAs were reviewed under the extended standard process.

The 2017 rules created three procedural paths for amending a site certificate: the default process (Type A review); the expedited process (Type B review); and a new “truly expedited” process intended for a narrow range of amendments (Type C review).

Both Type A and Type B review include opportunities for the public to review and provide written comment on a Draft Proposed Order on the request for amendment. The primary differences between Type A and Type B review is that the Type A review includes the opportunity for oral comment to be provided at a mandatory public hearing and allows hearing participants to request a contested case proceeding. A contested case proceeding is not available in the Type B review process.

On December 5, 2017, a group of public and environmental interest groups including Friends of the Columbia Gorge, Northwest Environmental Defense Center, Oregon Natural Desert Association, Oregon Wild, Hood River Valley Residents Committee, Columbia Riverkeeper, Wildlands Defense, Greater Hells Canyon Council and the Oregon Coast Alliance filed a Petition for Judicial Review of the rules with the Oregon Supreme Court.

The Petition for Judicial Review challenged the validity of the rules on several procedural grounds. The Petition also alleged that the rules exceeded the Council's statutory authority by delegating the decision to grant or deny a request for Type B review to staff and by limiting the scope of judicial review of an Order granting an amended site certificate.

On August 1, 2019, the Oregon Supreme Court issued a decision in *Friends of the Columbia Gorge. v. Energy Fac. Siting Council* 365 OR 371 finding that the rules adopted under Administrative Orders EFSC 4-2017 and EFSC 5-2017 were invalid. The Court held that the Council had failed to substantially comply with ORS 183.335(3)(d), and that the Council exceeded its statutory authority by adopting rules that limited the scope of judicial review of an order amending a site certificate that did not result from a contested case proceeding. The Court also held that the Council did not exceed its statutory authority when it permitted its staff to determine, with respect to a request to amend a site certificate, whether there would be a public hearing and whether the public could request a contested case hearing.

On August 22, 2019, the Council adopted temporary rules to replace the invalidated rules. The temporary rules were filed under Administrative Order EFSC 9-2019 and became effective on that same day. The same group of petitioners challenged the validity of temporary rules, but the Oregon Supreme Court upheld the rules.

On January 24, 2019, the Council adopted permanent rules to replace the temporary rules. The permanent rules were filed and became effective on January 28, 2020, under Permanent Administrative Order EFSC 1-2020. The new rules were adopted as OAR 345-027-0311 to 345-027-0400. The new rules were substantively similar to the rules adopted under Administrative Orders EFSC 4-2017 and EFSC 5-2017 but included changes to address the substantive issue related to judicial review and to address the applicability of the new rules.

In March 2020, Friends of the Columbia Gorge, Oregon Wild, Central Oregon Landwatch, Wildlands Defense, Thrive Hood River, Greater Hells Canyon Council, Oregon Natural Desert Association, Oregon Coast Alliance, Audubon Society of Portland, and Columbia Riverkeeper, filed a Petition for Judicial Review challenging the validity of OAR 345-015-0083(2), 345-027-0371(10)(a), and 345-027-0357(1). The court agreed with petitioners and declared the challenged rules to be invalid, finding that OAR 345-015-0083(2) and OAR 345-027-0371(10)(a)

improperly limit party participation in contested case proceedings and that OAR 345-027-0357(1) improperly authorizes the expansion of site certificate boundaries without a site certificate amendment.

Need and authority to adopt rules

When the Council adopted the new permanent rules in 2020, it committed to beginning review of the newly adopted rules within two years and to appoint a RAC to provide advice on any outstanding issues on the amendment rules that were not addressed during the 2022 rulemaking, and to address any new issues that have been raised since their adoption.

While the rules adopted under Administrative Order EFSC 1-2020 contained similar language as the previous amendment rules, they were adopted as new rules. Under ORS 183.405, within five years after the adoption of any new rules, agencies are required to review the rules to determine:

- Whether the rule has had the intended effect
- Whether the anticipated fiscal impact of the rule was underestimated or overestimated
- Whether subsequent changes in the law require that the rule be repealed or amended
- Whether there is continued need for the rule
- What impacts the rule has on small businesses.

While the Council is not required to amend its rules based on the results of the five-year report, staff recommends that the Council should consider the findings of the report in determining whether rule amendments may enhance opportunities for public participation or make the amendment review process more efficient. In addition, while we are currently not aware of any statutory changes that affect the Council's rules for site certificate amendments, the Supreme Court's decision in *Friends of Columbia Gorge v. Energy Fac. Siting Coun.* 368 Or 123 (2021) does require amendment of OAR 345-015-0083(2), 345-027-0371(10)(a), and 345-027-0357(1) at a minimum.

Recommended scope and objectives

Like the 2017 and 2020 rulemakings, staff recommends that this rulemaking focus on making the amendment review process more efficient and effective while ensuring adequate opportunities for public participation. In particular, the Department recommends that this rulemaking address outstanding issues on the amendment rules related to when an amendment is required, opportunities for public notice and participation in the different review processes, including provisions for contested case hearings. Staff recommends that Council also address any new issues that are raised during the development of the five-year report.

Potential Fiscal and Economic Impacts on stakeholders

Staff acknowledges the importance of making the amendment process more efficient, timely, and effective as well as the importance of ensuring that members of the public have adequate opportunities to raise concerns about proposed changes to a facility that would result in a request for amendment. While this rulemaking could include some changes that add time and costs associated with processing a request for amendment in some cases, the department

recommends that enhancing opportunities for public participation will make the process more efficient overall.

Stakeholder input

As described above, the Council has committed to appointing a Rulemaking Advisory Committee to assist in the development of proposed rules. Prior to this step, however, staff recommends that Council complete the review required under under ORS 183.405 for the rules adopted in January 2020. Staff recommends that the Council invite public comment to assist in the review, to identify potential issues for the full rulemaking process, and to identify persons who are interested in participating on the advisory committee for the rulemaking.

When soliciting public comment on a review of rules under ORS 183.405, the agency must provide notice to the Council’s rulemaking mailing list, the legislators specified in ORS 183.335(15), the Associated Press, and the Capitol Press Room. The final review is also required to be sent to any advisory committee that was appointed to assist in the development of the rule under review. While no advisory committee was appointed for the 2020 rulemaking, one was appointed during the 2017 rulemaking. That RAC consisted of members representing the businesses, organizations, and agencies shown below:

2017 Amendment Rulemaking Advisory Committee
Public & Environmental Interests
Blue Mountain Alliance Crag Law Center Friends of the Grande Ronde Valley
Renewable Energy Developers and Interest Groups
Renewable Northwest Community Renewable Energy Association Avangrid Renewables Davis Wright Tremaine
Utilities
Portland General Electric (PGE) NW Natural
Local Governments
Sherman County Umatilla County
State Government
Oregon Department of Agriculture Oregon Department of Environmental Quality Oregon Department of Fish and Wildlife
Federal Government
US Department of Navy Northwest Training Range Complex

Because the former RAC members will receive the final review, and because some of the members may be interested in serving on the advisory committee for the current rulemaking, staff recommends the notice be sent to all the former RAC members, as well the Council’s current rulemaking mailing list.

Projected Timeline

Staff recommends that the Council provide a minimum of 30 days for public comments to assist in the review required under ORS 183.405, and to support requests to be included in the rulemaking advisory committee. Staff will then return to the Council with a draft five year review, a preliminary scoping document for the full rulemaking, and recommendations for appointing a RAC.

Projected Rulemaking Timeline	
Council Initiates Rulemaking	October 28, 2022
Staff issues notice requesting comments on 5-year review and soliciting interest in RAC	October 31, 2022
Comment deadline for comments and RAC interest	December 1, 2022
Staff completes 5 year review and recommends RAC for full rulemaking	December 16, 2022 (or later)