



Oregon

Tina Kotek, 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

To: Oregon Energy Facility Siting Council

From: Thomas L. Jackman, Rules Coordinator

Date: June 9, 2023

Subject: Agenda Item B (Action Item) – Application Process Review – Phase 1 Rulemaking Initiation Request for the June 23, 2023 EFSC Meeting

Attachments: Attachment 1: Draft Rules
Attachment 2: Summary of Draft Rule Changes
Attachment 3: Comments submitted by RAC
Attachment 4: Draft Notice of Proposed Rulemaking (to be provided in supplemental packet)

STAFF RECOMMENDATION

Staff requests Council's authorization to issue a Notice of Proposed Rulemaking and initiate formal proceedings to adopt the proposed amendments to the application process rules as shown in Attachment 1.

BACKGROUND AND SUMMARY

The Council authorized staff to begin 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 2021-2023 Rulemaking Schedule. The first phase of this three-phase project is intended to reorganize rules in divisions 015 to 026 to create clear separation of procedural and substantive provisions in the rules, while also clarifying what the applicant's responsibilities are and what staff's responsibilities are in the siting process.

As part of the 2023-2025 Rulemaking Schedule, the Council indicated that Phase 1 of the project should be the top priority for 2023.

Staff presented preliminary recommendations for Phase 1 to the Council at its March 24, 2023 meeting. At this meeting, the Council approved the scope and direction of the rulemaking as presented by staff and directed staff to form a Rules Advisory Committee (RAC) to assist in the preparation of draft proposed rules.

The following month, staff invited a diversity of stakeholders to join a RAC and convened a meeting on April 27, 2023. After a discussion of the draft rules, RAC members were invited to provide feedback and comments. Three members of the RAC did so, and these comments are included as Attachment 3.

This report contains:

- A review of the proposed draft of the Application Process Review - Phase 1 rulemaking.
- A review of the RAC comments.

APPLICATION PROCESS REVIEW – PHASE 1 – SCOPE AND OBJECTIVES

Phase 1 of the Application Process Review is intended to review and reorganize the rules in divisions 015 to 026 to create a clear separation of the various procedural and substantive provisions in the rules. While this phase will primarily be organizational, it seeks to clarify and simplify existing procedures for the application review process where practicable, consistent with the intent and objectives described above. As you will see in the draft of the rules, discussed below, the proposed changes currently include relocating language, making minor modifications to the rules for clarity, or to conform rules to longstanding practices.

The bulk of this rulemaking effort deals with separating the rules governing the applicant's and staff's responsibilities as they relate to the process for seeking a site certificate. The purpose behind this separation is to make it easier for an applicant or a member of the public to understand what the applicant must do compared to what staff must do throughout the siting process.

Phase 1 is not intended to create or remove duties or responsibilities, to substantively alter any existing process, nor to modify the standards applied by the Council in determining whether to grant a site certificate. It is intended to optimize the layout of the siting rules in OAR 345 to make them easier for applicants and the public to follow. Again, the goal is to reduce confusion, not to raise or lower the bar for an applicant seeking to obtain a site certificate.

For reference, here is a brief overview of the other two phases of this Application Process Review, which should help provide a greater understanding of the limited scope of Phase 1.

Application Process Review – Phase 2

Phase 2 will include a review of application information and procedural requirements currently located in divisions 021, 022 and 024 to ensure that the requirements align with what is needed to demonstrate compliance with the Council's standards. If any requirements that do not align with an existing standard are identified, staff will evaluate whether the requirements should be removed, or modified. This project is expected to incorporate recommendations produced by the siting program evaluation being conducted as part of the Department's implementation of Executive Order (EO) 20-04, along with any applicable advice provided during Phase 1 of the project.

Application Process Review – Phase 3

Phase 3 will substantively evaluate the Council's standards and application requirements. This phase will likely consist of numerous, smaller rulemakings, rather than one large one. As these rulemakings have the potential to alter the standards used by the Council in granting site certificates, they will likely generate the most scrutiny from all interested parties and the makeup of each RAC will likely be different based on the standard or standards being reviewed.

APPLICATION PROCESS REVIEW – PHASE 1 – OVERVIEW OF INITIAL DRAFT

The proposed draft of the Application Process Review - Phase 1 has changes in four divisions: 15, 20, 21, and 22, with most of the changes taking place in Division 15. These changes are summarized in Attachment 2 and can be divided roughly into three categories:

- 1) consolidating references to Department responsibilities into Division 15;
- 2) modifying the structure of division 15 to be consistent across the different stages of the siting process; and
- 3) tweaking rule language throughout 15, 20, and 21 to improve clarity and consistency.

Each of the three categories of changes in the draft rules is discussed in more detail below.

Consolidating References to Department Responsibilities into Division 15

As it currently stands, the most significant changes in Phase 1 involve moving language from Divisions 20 and 21 directed at the Department into Division 15. The goal of these changes is that Division 15 will contain substantially all the procedural requirements the Department is responsible for in the siting process. See, for example, OAR 345-020-0016(2), stating that “The Department must issue public notice . . . of any amendment . . .”), which was moved to a subsection of 345-015-0110, the OAR that pertains to the Department’s responsibilities regarding the public notice of a Notice of Intent.

Another example of this type of change is the language pulled from OAR 345-021-0050, which pertains to the distribution by the Department of a preliminary application and the accompanying memorandum and combining this rule language with OAR 345-015-0180, which pertains to the content of the agency’s memorandum on the preliminary application. Whereas before a reader had to go to two different divisions to understand the Department’s responsibilities regarding the preliminary application and related documentation, in the draft rules all this information is located within one rule.

Modifying the Structure of Division 15 to be Internally Consistent Across the Siting Process

The second set of changes deals with internal consistency. The siting process consists of several stages, including the notice of intent, the project order, the preliminary application, and so on. The current version of the rules goes through these stages, but it treats each stage slightly differently, with a different set of rules for each. The goal with the draft rules is to unify this process so—where it makes sense—each stage follows the same rule structure.

One example of this pertains to public notice. Currently there is a rule, OAR 345-0110, which details the process for public notice of a Notice of Intent. While the rules also require public notice for a Preliminary Application and a Complete Application, no corresponding rules currently exist, at least not in the same form. The current draft fixes this disparity, creating new notice rules for the various stages by pulling out the existing notice language and placing it into their own sections, in the same manner as OAR 345-0110. The hope is that that the reader will be able to follow the siting process with the assistance of the rule headers and structure. As it stands now, a reader glancing through the headers may incorrectly conclude that notice requirements exist for each stage of the siting process, not just at the Notice of Intent.

As another example, the draft rules move existing language around so there is no longer one stage of the siting process with a separate rule for the informational meeting, but another stage with a corresponding informational meeting tucked inside a different rule. Each of the stages in the siting process covered by Division 15 should now match in structure and format to the extent practicable.

Modifying Rule Language to Improve Clarity / Consistency

The last set of changes are relatively minor ones, with small edits consisting of both the removal and addition of words to improve the readability and clarity of Divisions 15, 20, and 21. It bears repeating that the intent of these edits is not to alter the rules in any meaningful way.¹

Examples of these smaller edits include the removal of now redundant references to rules that have been combined with the rules they used to reference (e.g., deleting the reference “under OAR 345-021-0055” from rule language that has been combined with OAR 345-021-0055) or modifying language to be internally consistent (e.g., modifying OAR 345-015-0120(3) to add the word “time” and remove the

¹ It should be noted that proposed changes to Divisions 21 and 22 outside the scope of Phase 1 are being tabled until Phase 2, where these two divisions will be the focus.

word “agenda” to match corresponding language used in OAR 015-0110(2)(f)). Where the rules contemplate similar situations, it does not make sense to have two different versions of these rules absent a rational basis for the differences to exist.

One modification the public may assert as being outside the scope of this rulemaking, and for which one RAC member raised as a concern, relates to a change in the rules that was made to conform them to current practices. The change is a removal of the phrase “in coordination with the applicant” in the draft version of OAR 345-015-0180(2). This language refers to work done by the Department to determine a distribution date and compile a distribution list for the agency memorandum on the preliminary application. Staff indicates that this task has been done without the assistance of an applicant for as long as anyone can remember. At this time, staff recommends leaving this change in, subject to additional concerns raised via written comment or during the public rulemaking hearing.

APPLICATION PROCESS REVIEW – PHASE 1 – Review of RAC Comments

Staff received three sets of comments and feedback after the RAC met in April. Staff greatly appreciates the efforts made by those who accepted an invitation to join the RAC, participated in the April meeting, and especially those who took the time to provide written comments. These comments are included in their entirety as Attachment 3 and are summarized below.

Overview of Comments from Jim Kreider

Jim Kreider was invited to speak as a member of the public.

Mr. Kreider proposed moving rules within Divisions 1, 11, 24, and 27. Staff does not recommend adopting these changes as they are outside the scope of this rulemaking, which is focused on clarifying the process responsibilities for the Department as compared to the applicant as found in Divisions 15, 20, 21, and 22.

Mr. Kreider also proposed possibly merging Division 25 with Division 27. Staff does not recommend adopting this proposal as it likewise outside the scope of this rulemaking.

Finally, Mr. Kreider proposed renaming Divisions 15 and Division 27. Staff does not recommend adopting this proposal as renaming Division 27 is beyond the scope of this rulemaking and renaming Division 15 is not necessary given the subheadings already include the information Mr. Kreider is proposing to add.

Overview of Comments from Renewable Northwest (RNW)

RNW supported the idea of a table summarizing the notice requirements and suggesting the use of similar summary tables for other divisions. While staff agrees with the value of this recommendation, including tables in Oregon Administrative Rules typically results in the tables not being imbedded within the rule language, but rather being located separately, requiring the reader to navigate to a different location in the rules. Staff therefore recommends Council not approve the use of a table in the rules themselves, but instead direct staff to make a notice summary table available via EFSC’s website, which should result in the same value.

RNW seeks to confirm where notice is now required to be sent to land management agencies. In

addition to OAR 345-015-0110(1)(c), that requirement is now found in the following places: OAR 345-015-0194(1)(d) and 345-015-0230(3)(b)(E).

RNW recommends making it clearer as to whether applicants are required to appear at any or all informational meetings on a complete application. Staff agrees this could be clearer and has added rule language to this effect. See the addition at 345-015-198(3), which reads: “The applicant or the applicant’s representative must attend all public informational meetings described in (1)-(2).”

RNW recommends adding internal references about where language has been moved to. Staff appreciates that this might be useful initially for those who are familiar with the current rules but intends for these streamlined rules to be understood on their own and considers additional references to ultimately be more confusing. However, to assist those who are familiar with the current rules, staff recommends that Council direct staff to make Attachment 2 to this report available on the EFSC website. This document can provide a similar function as internal references as it serves as a cross reference to the numerous changes being made with this rulemaking.

Comments from Oregon Solar + Solar Industries Association (OSSIA)

OSSIA states they are happy with the changes as presented to them, but that they are concerned that the “in coordination with the applicant” removed from OAR 345-015-0180(2), discussed above, is outside the scope of the of this rulemaking. Staff believes this change is technically within the scope of this rulemaking, as it streamlines the rule language without changing existing practices but understands that this change can arguably be viewed as outside the scope. As no other members of the RAC raised concerns about this change, staff suggests leaving this in unless further concerns are raised at the public hearing or during the public comment period.

NEXT STEPS AND PROJECTED RULEMAKING TIMELINE

If Council is satisfied with the draft proposed rules, staff requests authorization to issue a Notice of Proposed Rulemaking and initiate formal proceedings to adopt the proposed amendments to Divisions 15, 20, 21, and 22. Staff also recommends that Council hold a rulemaking hearing as part of the formal public comment period. The table below presents the procedural history and projected timeline for the remainder of this project based on these recommendations.

Procedural History and Projected Rulemaking Timeline

Council initiates rulemaking	March 24, 2023
Staff holds a Rules Advisory Committee meeting and solicits feedback.	April 27, 2023
Council approves proposed rules and authorizes Notice of Proposed Rulemaking	June 23, 2023
Issue Notice of Proposed Rulemaking	June 29, 2023
Rulemaking hearing	July 19, 2023 ²
Public comment deadline	August 16, 2023
Council adoption of permanent rules	August 25, 2023

² This is a tentative date, and this item may be pushed back to Council’s August meeting.

ATTACHMENTS:

Attachment 1: Draft Rules

Attachment 2: Summary of Draft Rule Changes

Attachment 3: Comments submitted by RAC

Attachment 4: Draft Notice of Proposed Rulemaking