



Oregon

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To: Oregon Energy Facility Siting Council

From: Thomas L. Jackman, Rules Coordinator

Date: January 3, 2025

Subject: Agenda Item E (Action Item) – 2025-2027 Rulemaking Update for the January 17, 2025 Council Meeting

Attachment: Attachment 1 – Proposed 2025-2027 Rulemaking Schedule
Attachment 2 – Proposed 2025 rulemaking schedule in greater detail

2025 RECOMMENDATIONS

For 2025, staff recommends the following rulemaking schedule:

- Completion of the following rulemakings:
 - Site Certificate Amendment
 - Timely Communication with Tribal Governments
 - Application Process Phase 2
 - Radioactive Material Transport Fees
- Initiation of the following rulemakings:
 - Modernization Rulemaking
 - Exemptions
 - General Compliance
 - Application Process Review – Phase 3
 - Application Process Review – Phase 3

BACKGROUND AND SUMMARY

When a Council member, stakeholder, or staff member raises an issue related to a rule, policy, or procedure under the Council's jurisdiction, staff documents the issue and evaluates whether a rulemaking is needed to address it. Unlike issues in a contested case or other formal proceedings, rulemaking issues may be raised at any time, such as during a Council meeting, in public comments, or in written advice to the Council's Rules Coordinator. When several related

issues are identified, they may be combined to form a rulemaking project for the Council's consideration. Each year, the Council prioritizes previously approved and newly proposed rulemaking projects based on factors including urgency, level of public interest, and complexity.

This staff report provides an overview of the rulemaking process, describes current and recently completed rulemaking activities, and provides staff's recommendations for the prioritization of previously approved and newly proposed rulemaking projects for the next three years. For each previously approved or newly proposed rulemaking project the Council may:

- Authorize staff to conduct preliminary work on the project as part of the rulemaking schedule;
- Reprioritize or postpone development of the rulemaking project; or
- Remove the project from the rulemaking schedule.

For each rulemaking project, staff have also identified a recommended method for engaging with stakeholders in the development of proposed rules. Methods include soliciting written advice, holding one or more public workshops, or convening a Rulemaking Advisory Committee (RAC). While staff will seek final approval of the method for stakeholder engagement at the initiation of a rulemaking project, if the Council does not concur with the method identified for a project in this report, it may direct staff to pursue an alternate method for that project.

This draft rulemaking schedule describes all ongoing and potential rulemaking projects which staff could work on in the 20242025-2026-2027 period. Additional rulemaking projects or rulemaking activities may be proposed before the next update in response to stakeholder petition, statutory changes, or emerging issues of concern. Staff may also propose other corrections or housekeeping changes for Council's consideration during regular Council meetings and may periodically file minor corrections described under ORS 183.335(7) as authorized by OAR 345-011-0005(4).

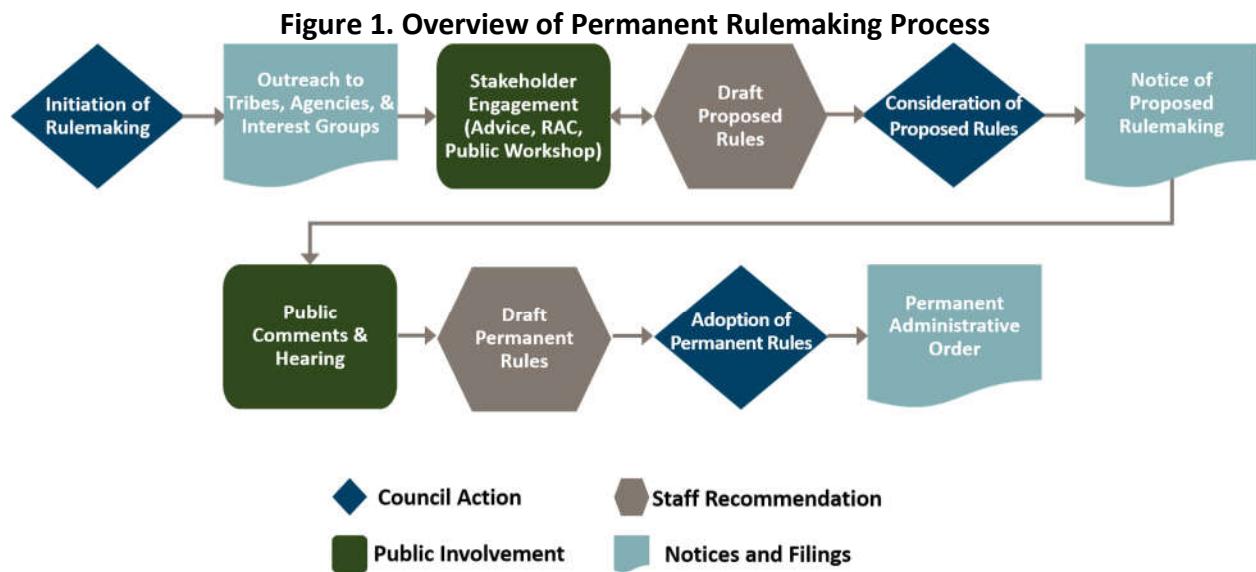
RULEMAKING PROCESS OVERVIEW

A rule is any directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency.¹ The Council must conduct rulemaking for several reasons, including to meet statutory obligation; to interpret broad statutory authority delegated by the legislature; or to amend, suspend or repeal existing rules.

ORS 469.470 requires Council to "adopt standards and rules to perform the functions vested by law in the council including the adoption of standards and rules for the siting of energy facilities pursuant to ORS 469.501, and implementation of the energy policy of the State of Oregon set forth in ORS 469.010 and 469.310." Several other sections of ORS chapter 469 supplement this broad rulemaking mandate with specific rulemaking requirements.

¹ ORS 183.310(9).

The rulemaking process is governed by ORS chapter 183, the Administrative Procedures Act (APA). Among other things, the APA requires each agency that adopts rules to appoint a rules coordinator, provide notice of permanent rulemaking, and to give interested persons a reasonable opportunity to submit data or views on proposed rulemaking actions.² For the purposes of this statute, Council has sole jurisdiction over the rules in OAR 345 and therefore functions as state agency. Figure 1 provides an overview of the typical permanent rulemaking process used by the Council.



Generally, the rulemaking process takes between three and twelve months to complete. The amount of time needed depends on the complexity of issues, the level of public interest and involvement, and the availability of staff resources.

While not required, the APA encourages agencies to involve the public in the development of proposed rules and to seek public input to the maximum extent possible before giving notice of intent to adopt a rule. After the Council initiates a rulemaking project, staff may conduct preliminary outreach to local and tribal governments, agencies with jurisdiction of the rulemaking subject, and other interest groups and stakeholders that are likely to be interested in the proposed rule. After this preliminary outreach, staff will engage with stakeholders to discuss policy issues and obtain advice on what alternatives should be considered in the development of draft proposed rules.

Common methods for stakeholder engagement include soliciting written advice on rulemaking issues from interested parties, appointing a rulemaking advisory committee (RAC), or hosting one or more public workshops.³ More than one of these methods may be used during the course of a rulemaking.

² ORS 183.330(2), ORS 183.335(1), and ORS 183.335(3).

³ ORS 183.333.

Appointing a RAC may increase the amount of time needed to develop proposed rules, but the RAC's input may improve the quality of the proposed language and may help the agency identify and address concerns and potential issues with proposed rules before the public comment period. If the Council determines that a RAC is appropriate for a rulemaking project, staff will provide a list of potential organizations and individuals that may be interested in participating so that Council may appoint RAC members. Each RAC should have enough members to ensure appropriate representation of the varied interests associated with the particular rulemaking, but not so many that the efficiency of establishing meetings and completing tasks is compromised. Staff will also ask Council for input on the number and location of any RAC meetings. For rulemaking projects where the Council has included public workshops in the rulemaking process, staff will ask Council for its input on the number and location of any public workshops before any workshop is convened.

Staff will consider all advice provided by the Council and stakeholders when preparing draft proposed rules and may solicit additional informal advice on draft rule language before making its final recommendations to the Council. In reviewing staff's recommendations, the Council may direct staff to make any revisions to the draft proposed rules or any associated statements of need and fiscal impact it sees fit.

Once the proposed rules are approved, staff will file the Notice of Proposed Rulemaking with the Secretary of State. The notice initiates the formal public comment period on the proposed rules and can include notice of a rulemaking hearing. A rulemaking hearing is not always required but will generally be scheduled to be held during a Council meeting near the end of the public comment period. After fully considering comments and oral testimony received during the public comment period, the Council may adopt permanent rules. Council may also suspend a rulemaking project at any time during the process.

RULEMAKING ACTIVITY IN 2024

At its meeting on January 26, 2024, the Council approved its rulemaking priorities for 2024 to 2026. Since that date, the Council has completed 4 rulemaking projects as well as an additional rulemaking in partnership with the Department of Environmental Quality. It also initiated work on several others.

Completed

Standby Generators (R223)

On January 26, 2024, Council authorized staff to amend its standby generator rules.

The legislature enacted HB 2063 in 2021, which prohibits the Council from requiring a person proposing to construct a standby generation facility to submit an exemption request to the

Council. The rulemaking implemented HB 2063 by removing requirements for a person proposing to construct a standby generator to request an exemption.

Contested Cases

On September 20, 2024, Council authorized staff to amend its contested case rules found in OAR 345, division 015.

Interest and participation in the contested case process has increased in recent years, and several high-profile contested cases have raised issues regarding the Council's rules for contested cases. Changes to the contested case rules made as part of this rulemaking project can be divided into roughly five categories:

1. Reordered and reorganized the rules to better match the flow of the contested case process.
2. Updated the rules to reflect a proposed adoption of the Office of Administrative Hearing's model rules for contested cases.
3. Improved the consistency of the rules, both internally and to ensure they properly match Oregon laws and other administrative rules.
4. Improved the clarity of the rules by providing or enhancing definitions where appropriate.
5. Improved the efficiency of the contested case process by providing additional guidance to all parties and prospective parties who are affected by these rules.

Research Reactors (R202)

On October 25, 2024, the Council approved an update to its research reactor rules found in OAR chapter 345, division 030.

Oregon State University and Reed College both operate Training, Research, Isotopes and General Atomic (TRIGA) Class nuclear research reactors. Like other nuclear installations, the research reactors operate under licenses issued by the Nuclear Regulatory Commission, and the Council provides state level monitoring and oversight of the facilities as provided by their site certificates and the administrative rules in OAR chapter 345, division 030. This rulemaking project made modest updates to division 030 to ensure consistency with federal reporting and notification requirements for research reactor operators.

2024 Carbon Offset

On October 25, 2024, the Council approved an update to its monetary carbon offset.

The monetary carbon offset rate is set by OAR 345-024-0580. Per Oregon statute (ORS 469.503(2)(c)(C)) the Council is directed to ensure this cost is proportional to industry offset costs. The rate may be increased by up to 50% every two years and this is what was done in this rulemaking, taking the rate from \$4.27 to \$6.40 per ton of carbon dioxide emissions.

Department of Environmental Quality's Noise Rules for Solar Development

On October 17, 2024 and after a year of collaboration with the Department of Energy, the Department of Environmental Quality filed permanent rules to update their noise rules as they relate to solar development. As of that date, solar developers can now:

1. Forego onsite testing for the ambient background sound levels and assume a 26dba sound level; and
2. If testing of project impacts shows a greater than 10dba increase over ambient, but sound levels remain below the maximum allowed, developers can now have affected landowners sign a waiver allowing development to move forward without additional mitigation.

Ongoing

2024 Site Certificate Amendment Rulemaking

On February 23, 2024, Council initiated rulemaking to develop proposed revisions to the rules governing the expiration, amendment, and termination of site certificates under OAR chapter 345, division 027.

The 2024 Amendment rulemaking is intended to evaluate and update the amendment process to achieve three main goals:

1. Improve the clarity of the rules by resolving ambiguities that have revealed themselves in the application of the rules as written.
2. Make substantive changes to improve Council's amendment process based on lessons learned since the last revision of the amendment rules.
3. Update the rules to ensure compliance with new statutes, revised rules, and recent direction of the courts

This rulemaking is still in the draft rule development stage and is expected to be completed by mid-to-late 2025.

Application Process Review – Phase 2

On April 19, 2024, Council initiated the application process review phase 2 rulemaking.

The Application Process Phase 2 rulemaking is intended to achieve one main goal: reorganize the rules so that the rules containing the Council's standards (found in OAR 345, divisions 022 through 024) also contain the information an applicant is required to submit to Council for those standards, currently located in division 21. As discussed below, updates to the standards themselves are expected to be done by way of a large, multi-pronged effort that is collectively being referred to as "phase 3".

It is expected that the application process review phase 2 rulemaking will be completed in March 2025.

Timely Communication with Tribal Governments

On September 20, 2024, Council initiated a rulemaking to improve timely communication with tribal governments.

OAR 345-022-0090 requires Council to find that the construction and operation of a facility, taking into account mitigation, are not likely to result in significant adverse impacts to certain historic, cultural or archaeological resources.

Staff often recommends that applicants coordinate with tribal cultural resource specialists early in the application process to better identify historic, cultural or archaeological resources under OAR 345-022-0090. This rulemaking project is evaluating additional options to encourage communication and cooperation between the Department, applicants and tribal governments to identify historic, cultural, and archaeological resources early in the application process.

Staff anticipates this rulemaking to complete mid-2025.

Radioactive Material Transport Fees (and Div 60 Review)

On October 25, 2024, the Council initiated a rulemaking to update the radioactive material transport fees.

In accordance with the rules in Oregon Administrative Rules chapter 345, division 060, any person who wishes to transport certain radioactive materials identified in federal code through Oregon must first obtain an Oregon Radioactive Materials Transport Permit. On average, around 400 permitted shipments travel through Oregon each year. Statutory direction authority for the program comes from Oregon Revised Statutes 469.605 et seq.

The permit fee amounts are currently set at \$70 for most shipments and \$500 annually for some medical and industrial shipments. These amounts have not been updated since 1986. The fees are primarily used to provide training to first responders and other emergency personnel along the State's transport corridors.

During this rulemaking project staff will evaluate:

- Whether the current radioactive transport fee amounts are adequate to fund programs to prevent, prepare for, and respond to potential accidents involving the transport of radioactive material in Oregon.
- Whether additional updates to the rules found in OAR 345-060 are needed to incorporate changes to federal safety standards that have occurred since the rules were last updated.

The Nuclear Safety and Emergency Preparedness Division staff is heading up this project and providing the substantive work for this rulemaking, while Siting Division staff is taking care of the procedural work.

A rulemaking advisory committee for this rulemaking is still being selected and the anticipated time of completion is the end of 2025.

FUTURE RULEMAKING PROJECTS

Staff has identified rulemaking projects that it believes can be reasonably expected to begin and—at least in some cases—finished in 2025. Staff has also further identified additional projects which it recommends for consideration in 2026 and 2027. Staff welcomes any additional input from the Council on the timing or sequencing of any of the potential projects discussed below. There will also be a public comment opportunity during this agenda item at Council's January meeting to specifically allow feedback on the rulemaking agenda.

Note that you will find placeholders in the schedule below for the “phase 3” rulemaking projects to update Council’s standards. Staff requests Council’s guidance on which standards should be prioritized over the coming years. The suggested groupings for these placeholders is as follows:

Possible PHASE 3 Rulemakings for Council Standards	
Proposed Grouping of Standards	OAR
Financial Assurance + Organizational Expertise	345-022-0010 + 345-022-0050
Structural Standard + Soil Protection	345-022-0020 + 345-022-0022
Protected Areas + Scenic Resources + Recreation	345-022-0040 + 345-022-0080 + 345-022-0100
Fish and Wildlife Habitat + Threatened and Endangered Species	345-022-0060 + 345-022-0070
Waste Minimization + Public Services + Land Use	345-022-0120 + 345-022-0110 + 345-022-0030
Historic, Cultural and Archaeological Resources	345-022-0090

PROPOSED FOR 2025

Modernization Rulemaking

This rulemaking would consider options to modernize the Council and Department’s application process, including an examination of hard copy submission requirements, notice requirements—including for the Department of Defense—and also the possibility of requiring applicants and certificate holders to submit geographic information system (GIS) data for energy facilities. This rulemaking is intended to be an efficient use of the rulemaking process to do a handful of rulemaking updates that should be done, but make little sense to do by themselves. Staff suggests a RAC would not be needed for this rulemaking.

Exemptions

Certain energy facilities are exempt from the requirement to obtain a site certificate under ORS 469.320. Depending on the type of facility, the person who wishes to claim an exemption may be required to submit an exemption request subject to Council's review and approval. The Council's rules for exemption requests are currently located under OAR 345-015-0350 to 345-015-0380. This rulemaking project would evaluate several outstanding policy questions related to exemptions, including whether the Council may impose conditions on an exemption, ongoing monitoring and reporting requirements for exempt facilities, and the process for loss of an exemption.

General Compliance

This project would consist of a review of the rules for construction and operation of energy facilities under OAR 345-026-0005 to 345-026-0170. Generally, the rulemaking would focus on improving the clarity and consistency of requirements and providing additional specificity for monitoring and reporting requirements and timeframes.

Council previously approved this project to begin in 2018 and appointed a RAC to begin development of proposed rules for the project, however due to staffing issues within the Department, the rulemaking did not move forward at that time. Staff recommends that Council reprioritize this project and move forward with it in 2025.

Application Process Review – Phase 3 (No 1 of 6)

This rulemaking would evaluate options to better align the application submission requirements and standards in OAR 345-022. See the chart above for possible options.

Application Process Review – Phase 3 (No 2 of 6)

This rulemaking would evaluate options to better align the application submission requirements and standards in OAR 345-022. See the chart above for possible options.

Rulemaking Projects Proposed for 2026

Mandatory Conditions

This project would review rules in OAR 345-025 to ensure that the mandatory conditions specified by rule are clear, complete, and necessary to be included in each site certificate and would consider options for allow greater flexibility to address site specific conditions and circumstances.

Due to the technical nature of the subject matter, and the potential for fiscal or economic impacts on certificate holders, staff recommends the Council appoint a RAC to assist in the development of proposed rules for this project.

Natural Hazards Mitigation

Oregon's Natural Hazards Mitigation Plan (NHMP) provides statewide and regional information on the natural hazards most likely to occur in the state. The NHMP also reports on the potential impacts of natural hazards on people, property, and the environment, and establishes a

mitigation strategy to reduce those impacts. Oregon's latest NHMP was approved on September 24, 2020 and is expected to be updated in 2025.

This rulemaking project would evaluate whether and how the siting review process can support the goals of the NHMP and implement natural hazard mitigation strategies either by amending the Land Use or Structural Standards and associated information requirements or adopting a new standard. Due to the technical nature of the subject matter, and the potential for fiscal or economic impacts on certificate holders, staff recommends the Council appoint a RAC to assist in the development of proposed rules for this project.

Application Process Review – Phase 3 (No 3 of 6)

This rulemaking would evaluate options to better align the application submission requirements and standards in OAR 345-022. See the chart above for possible options.

Application Process Review – Phase 3 (No 4 of 6)

This rulemaking would evaluate options to better align the application submission requirements and standards in OAR 345-022. See the chart above for possible options.

Rulemaking Projects Proposed for 2027

Application Process Review – Phase 3 (No 5 of 6)

This rulemaking would evaluate options to better align the application submission requirements and standards in OAR 345-022. See the chart above for possible options.

Application Process Review – Phase 3 (No 6 of 6)

This rulemaking would evaluate options to better align the application submission requirements and standards in OAR 345-022. See the chart above for possible options.

5-YEAR REVIEWS

Within five years after adopting a new rule, the Council must conduct a review 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; and
- What impacts the rule has on small businesses.

After the review, the Council must submit its findings to the Secretary of State, the Small Business Rules Advisory Committee, and any RAC appointed by the Council to assist in the development of proposed rules.

Due For Review Now:

OAR 345-027-0311 to 345-027-0400 – Amendment of Site Certificates

Following the Oregon Supreme Court's finding that rules governing the process for review of site certificate amendment requests adopted by the Council in 2017 were invalid, the Council

conducted rulemaking to repeal the invalidated rules and adopted new permanent rules in their place. While these new rules are substantively similar to the previous rules, a 5-year review is still required to be completed by January 28, 2025. During the proceedings to adopt the new rules, the Council committed to initiating a new rulemaking project to review any outstanding substantive issues related to the new rules within two years after their adoption.

Staff's Proposed Findings:

Given that this rulemaking was in reality an amendment of the amendment rules, and the new rules are only “new” in terms of the numbering, it is fair to say that the impacts of these rules are fairly minor as far as the purpose of the 5-year review goes. Staff recommends Council find the following:

- The new rules have had the intended effect;
- The anticipated fiscal impact of the rule was that there would be a minor impact, if any, and that this assessment has proven to be true;
- There are no subsequent changes in the law require that the rules be repealed or amended;
- There is a continued need for these amendment rules; and
- There are no impacts of these rules on small businesses.

The last finding, regarding small businesses, is true both because the “new” amendment rules are similar to what was in place previously and also because the siting process is, by its very nature, not something that small businesses are involved in.

Upcoming Reviews:

OAR 345-001-0250 – Solar Photovoltaic Power Generation Facilities

As part of the Solar PV Facilities Rulemaking Project, the Council adopted a new rule explaining the criteria and process for determining when a proposed solar photovoltaic power generation project is an expansion of an existing or proposed solar photovoltaic power generation facility. The 5-year review of this new rule must be completed by June 26, 2025.

OAR 345-015-0003 – Remote and Electronic Public Meeting and Hearings

At its meeting on October 23, 2020, the Council adopted a new rule authorizing the Council or Chair to waive specific rule provisions requiring that a public meeting or public hearing be held in person or in a specific geographical area, if the Council or Chair 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, unless those provisions of rule are in statute. The 5-year review of this rule must be completed by October 23, 2025.

OAR 345-029-0503 to 345-029-0560 – Radioactive Materials Enforcement (R195-029)

On February 26, 2021, the Council adopted permanent rules for the enforcement of regulations governing the transport and disposal of radioactive materials and wastes. This rulemaking resulted in the adoption of a new series of rules under OAR chapter 345, division 029, and as such, a five-year review under ORS 183.405 is required to be completed by February 26, 2026.

OAR 345-024-0503 – Carbon Standards

On July 22, 2022, the Council adopted permanent rules implementing new restrictions on the siting of fossil-fueled power plants under HB 2021 (2021) and updating existing carbon dioxide standards adopted under ORS 469.503. The rules were filed, and became effective, on July 25, 2022. One new rule, OAR 345-024-0503, was adopted as part of this rulemaking and as such a five-year review under ORS 183.405 is required to be completed by July 25, 2027.

OAR 345-022-0115 – Wildfire Prevention and Risk Mitigation

On July 22, 2022, the Council adopted a new siting standard for Wildfire Prevention and Risk Mitigation that is applicable to all types of energy facilities. The rules were filed and became effective on July 29, 2022. A five-year review under ORS 183.405 is required to be completed by July 25, 2027.