



# Oregon

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**To:** Energy Facility Siting Council

**From:** Tom Jackman, Siting Policy Analyst & Rules Coordinator

**Date:** September 5, 2025

**Subject:** Agenda Item H (Action Item): Amendment Rulemaking Final Consideration for the September 19, 2025 EFSC Meeting

**Attachments:** Attachment 1: Proposed Rules for Final Consideration  
Attachment 2: Comments

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## STAFF RECOMMENDATION

Staff requests Council's authorization for staff to issue a Permanent Rulemaking Order based on proposed amendments to its amendment rules as shown in Attachment 1.

## BACKGROUND

On February 23, 2024, Council initiated a rulemaking to develop proposed revisions to the rules governing the amendment of site certificates under OAR chapter 345, division 027. At this meeting, Council approved staff's recommended scope and directed staff to form a Rules Advisory Committee (RAC) to assist in the preparation of draft proposed rules.

Staff established a RAC consisting of the following:

### Energy Provider or Investor-Owned Utility

- Lenna Cope – Portland General Electric
- Andrew Bauer – NW Natural
- Patrick Collins / Chad Campfield – Umatilla Electric Cooperative
- David Lawlor – Next Era Energy

### Energy Advocacy or Trade

- Alyssa Forest / Angela Crowley-Koch – OSSIA
- Paul Hicks – Tetra Tech
- Emily Griffith – Renewable Northwest

### Agency / Government

- Branden Pursinger – Oregon Counties
- Jon Jinings – DLCD
- Georgia Macnab – Sherman County

### Public Interest

- Irene Gilbert – Public
- Don Hilderbrand – Public
- Yvonne Scott – Public
- Jessica Bernardini – Public

#### **Resource Interest**

- Rudy Salakory – Friends of the Gorge

Staff convened the first RAC meeting on June 26, 2024. After a discussion of the amendment process, RAC members were invited to provide feedback and comments on the current rules.

The RAC met again on September 26, 2024 to discuss the preliminary feedback from members as well as staff's proposal for solutions to various issues identified by the RAC. After this meeting, staff developed a draft set of amended rules and distributed them to the RAC for their review.

On April 29, 2025, the RAC met a third and final time and discussed feedback regarding staff's draft rules. The RAC was generally satisfied with the proposed rules. RAC member Irene Gilbert expressed concerns regarding the removal of the contested case possibility for requests for amendments by a site certificate holder, but she was hopeful that staff's proposed changes would achieve their goal of providing a superior public comment experience. Additional feedback was provided by David Lawlor, of NextEra Energy, regarding a proposed documentation requirement for site certificate holders. Upon further review, staff determined that proposed rule change related more to compliance issues, and the proposed change was withdrawn, to be introduced at a future rulemaking.

On June 13, 2025, Council authorized staff to file a Notice of Proposed rulemaking. The public comment period then ran until August 1, 2025. A public hearing for public comment was held at the July 18, 2025 Council meeting.

This report contains:

- A summary of staff's draft proposed changes (as shown in draft redline in Attachment 1) to the Council's amendment rules located in Division 27 of OAR 345
- A discussion of HB 3681 and the impact it has had on the draft proposed rules
- An overview of the comments submitted during the public comment period and staff's recommendations

#### **SUMMARY OF PROPOSED AMENDED AMENDMENT RULES**

The proposed changes to the Council's amendment rules—found in Division 17 of OAR 345, from Rule—can be divided into roughly three categories:

1. Improve the clarity of the rules by resolving ambiguities that have revealed themselves in the application of the rules as written.
2. Make 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

These changes can be thought of in three categories:

1. Minor changes
2. Modest changes
3. Significant changes

The category of minor changes includes things like the following:

- Removal of outdated printed copy requirements (OAR 345-027-0110(4))
- Rule language throughout modified to improve the readability of the rule (various)
- Updated rule language to reflect recent rulemakings, such as the addition of the Council's Wildfire Prevention and Risk Mitigation standard (OAR 345-027-0210(g))
- Modifying the name of "Type C" amendments to "a pre-operational request for amendment" to reflect the proposed removal of the A/B amendment types (OAR 345-027-0380)
- Removed duplicative rule language in OAR 345-027-0375(2)(e) (Council's Scope of Review), as this rule language is incorporated in OAR 345-027-0375(2)(b)

The second category of more modest changes consists of the following:

- A new documentation requirement to help the Department track compliance with the Council-approved final retirement plan (OAR 345-027-0110(7))
- New direction that explains how a certificate holder may apply to Council to release a portion of the site from the terms and conditions of the site certificate (OAR 345-027-0110(10))
- Clarifying how requests for amendment analysis areas ("RFA analysis areas") are to be determined (OAR 345-027-0360)
- Adding new requirements for how previously submitted evidence may be utilized in a pending amendment request (OAR 345-027-0360(4))
- Providing Council with additional flexibility on the location of the public hearing on the amendment based on limited public interest or conditions like inclement weather (OAR 345-027-0367(2))
- Modifying the public comment period to ensure that it does not end until at least one week after the public hearing on the amendment (OAR 345-027-0367(3))
- Removing the requirement for site certificate holders to demonstrate a need for extension requests as Council has no need standard for purposes of seeking an extension (OAR 345-027-0385(1))
- Removing no longer relevant rule language directing what portion of the construction extension deadline rules apply based on when the request was submitted as it relates to previously amended rules OAR 345-027-0385(5)

The third group of changes are more significant and less self-evident in their objectives.

#### Removal of Type A/B Amendment Determination (OAR 345-027-0351/0367/0368)

Staff spent a lot of time examining the utility of the type A/B amendment determination. It was a process that was designed to move basic amendment applications through the amendment process more swiftly. The main differences between these two amendment types is that type A has a public hearing on the draft proposed order and the possibility of a contested case while type B has neither of these things.

Staff analyzed whether the time spent making the type A/B determination was worth the time savings of being certified as a type B. This analysis became somewhat mooted as staff proposed removing the possibility of a contested case for all amendment requests as well as providing a public hearing for all amendment requests, with increased flexibility on the “near location” requirement for the in-person public hearing if interest in the amendment is relatively low.

These proposed changes should result in a quicker start to amendments, as there is no need to go through the type A/B determination process, while still reducing the burden (and related expense) of near location public hearings for amendments that are relatively simple and/or lack meaningful public interest. This does mean that a public hearing will be held even for the most basic amendments, but staff believes that the proposed changes responsibly err on the side of public participation.

#### Removal of Contested Case / Addition of New Public Comment Process (OAR 345-027-0367/0371)

A review of the council’s amendment process as it relates to the contested case process reveals that public commentators rarely provide comments that meet the higher burden for initiating contested cases on an amendment, which is as follows (from OAR 345-027-0371(9)(emphasis added)):

*“To determine that an issue justifies a contested case proceeding, the Council must find that the request raises a **significant issue** of fact or law that is **reasonably likely to affect the Council’s determination** whether the facility, with the change proposed by the amendment, meets the applicable laws and Council standards included in chapter 345 divisions 22, 23 and 2.”*

This is a significant burden, as it effectively requires the Council to only grant contested cases on an amendment where it finds that not only have issues of fact or law been clearly provided, but that those issues are deemed to be significant and likely to result in a different outcome than previously determined by Council. But of course, if the evidence and arguments were compelling to the Council, then the Council likely would have changed its mind the first time it saw the evidence. The fact that the Council previously reviewed the evidence and did not find it compelling is thus a strong basis for not granting a contested case on an amendment.

In reviewing this dilemma – including the expense in simply performing the contested case request analysis despite it rarely leading to a contested case for amendment requests – staff reviewed one of the key functions of public participation in the siting process: identifying significant issues of fact or law in the Department’s proposed order.

To improve the likelihood of the public understanding what is expected of public participation in the siting process on an amendment and to ensure that any relevant evidence in possession of members of the public impact the siting process in a timely (i.e., as early as possible) manner, staff has created an enhanced commenting process that should help to accomplish these goals.

The process that staff developed is not novel or unique and almost serves as a 1:1 copy of how motion arguments are made in legal proceedings. In typical legal proceedings, a party raises a concern via a motion, the other party has a chance to file a response, the initial party has a chance to address issues raised in the response via a reply, and finally the responding party gets the final say with a sur-reply. That is exactly what staff is proposing to do with public participation on an amendment request.

The value of the proposed public participation process is that it provides immediate feedback to concerned members of the public on the nature of their comments, whether they are initially raised with sufficient specificity or not, who will now have an opportunity to: 1) reply to remedy lacking specificity identified in the certificate holder and/or Department's response; 2) reply to bolster initial comments identified in the certificate holder and/or Department's response not to warrant changes; and 3) reply to existing, new or modified findings of fact or conditions identified in the certificate holder and/or Department's response to warrant changes. This dramatically increases the likelihood of a public comment impacting the siting process and it occurs earlier in the amendment process, when it is less expensive for a site certificate holder to make corrections.

Staff is hopeful that the proposed changes will significantly streamline the siting process for amendments while simultaneously making public participation less of a "black box" experience that persons new to the process often struggle to understand, which is only natural given the depth and breadth of issues that Council is required to consider before granting an amendment.

### HB 3681 Impacts

#### *Time Extension Requests – OAR 345-027-0385(3) and (4)*

The current practice of Council is to allow for a three-year construction commencement deadline in the site certificate and then allow for up to two, three-year extensions, totaling nine years. HB 3681 requires that the initial period be at least six years, but does not specify a maximum time period. The proposed changes clarify Council's standard practice of allowing for up to nine years in total to begin construction from the date of approval, while staying true to what HB 3681 will require when it becomes law on January 1, 2026.

The result is that the proposed rules work regardless of what Council initially allowed for in terms of deadlines (be it three years or some other number) or when an applicant received a site certificate or applied for an amendment to extend the construction deadlines (either before or after the law becomes into effect). In all cases, the proposed rules allow for any extension request as long as the total time does not exceed nine years.

#### *Site Boundary Increase and Mandatory Amendments – OAR 345-027-0350*

Staff initially proposed changes to comply with the Supreme Court’s mandate that under existing law, any change to a site boundary would require an amendment request.

HB 3681 provides statutory authority for the existing rules, which is that some changes to the site boundary do not require the site certificate holder to go through the amendment process and that the Council can create rules to this effect. While HB 3681 does not go into effect until Jan 1, 2026, staff recommends leaving the existing rules related to proposed site boundary increases in place and then following the guidance of the Supreme Court until Jan 1, 2026, at which time the existing rules would once again apply.

## **PUBLIC COMMENTS**

### Oral Comments

At the public hearing held on July 18, 2025, two parties provided comments, Irene Gilbert and Angela Crowley-Koch. The former in opposition to some of the proposed changes and the latter in support of the proposed changes. Ms. Gilbert’s oral comments are restated in her written comments and will be addressed below. Ms. Crowley-Koch, a RAC member, commented that the RAC process was a good one and that the proposed changes are long overdue.

### Written Comments

Written comments were submitted by:

- Nathan Baker, on behalf of the Friends of the Columbia Gorge (Friends)
- Wendy King
- Greg Larkin
- Angela Crowley-Koch, on behalf of the Oregon Solar & Storage Industries Association (OSSIA)
- Irene Gilbert, who submitted multiple comments.

As there was significant overlap in some of the topics covered by the commentors, staff’s response to the submitted comments will be by topic, rather than by commentor.

### *Insufficient Notice (Friends)*

Friends alleges that insufficient notice was provided for the rulemaking as they claim the caption (“Improving EFSC Amendment Process Through Greater Clarity and Enhanced Public Comment Process”) accompanying the notice of proposed rulemaking as well as various sections in the body of the notice were all ambiguous as to what siting amendment process was at issue. Friends request that the rulemaking notice be reissued.

### **Staff Response:**

Oregon’s notice law requires a short caption that “reasonably identifies the subject matter”. The rule text and explanatory materials made the scope clear and commenters demonstrably engaged at length. That fulfills the statute’s purpose. Anyone with even a passing interest in siting issues – certainly among those who would even understand what an “amendment

process” could possibly refer to – would be able to refer to the redline of the rules attached to the notice and determine without issue what the nature of the rulemaking was.

It should also be noted that ORS 183.335(11)(c) specifically states that new or amended rules cannot be subject to challenge based solely on a failure to comply with the statutory requirements of a notice’s caption.

#### *Retention of a Need Showing (Friends)*

Friends requests that the Council reject the removal of the requirement for those seeking a construction extension to “include an explanation of the need for an extension.” Friends argues that, contrary to staff’s assertions, Council does have a need standard and that Certificate holders should not be receive extensions “for no reason whatsoever.”

#### *Staff Response:*

Friends is incorrect in asserting that a need standard associated with a beginning construction extension amendment request exists. A request-content requirement (“include an explanation of need”) is not a separate legal approval standard. It is a completeness requirement which is intended to provide Council with some understanding of the reason for the beginning extension amendment request, and not a substantive standard that requires evidence and a determination of compliance. However, this completeness requirement has frequently been a source of confusion and has resulted in extra time and resources unnecessarily being spent during the amendment review.

Not discussed by Friends is the fact that projects seeking an extension must still comply with all applicable Council standards related to the project at the time of the extension amendment request. Staff recommends rejecting this request.

#### *Public Comment Requirements (Friends)*

Friends is concerned that the language of OAR 345-027-0367(7), which describes how public commentors “must” comment is unfairly restricting. This includes the three required elements of a public comment to be “sufficiently specific.”

#### *Staff Response:*

The more detailed public comment language requirements proposed here were adopted from the recently amended contested case rules, but staff agrees that the proposed language is confusing and too restrictive given that, under the proposed rules, comments will no longer being evaluated for purposes of meeting a threshold to participate in a contested case.

The entire point of the proposed public comment process is to increase the ability of the public to impact the siting process should they be in possession of facts or information that has otherwise escaped the notice of the Department and the certificate holder. The more detailed rule language is intended to address a practical question – what kind of comments are most likely to get the Council to change its views when its decision must be based on the evidentiary record as applied to its own standards? It will be comments that identify new evidence or new conclusions as they relate to the Council’s standards.

Friends raises a good point that comments can have an impact on the process even if they are missing an element specified in 345-027-0367(7) and the rules should not suggest otherwise. Staff recommends changing “must” in 0367(7), (7)(a), and in (7)(b) to “should.” Staff also suggests modifying (8)(c) to clarify that the certificate holder can respond to a public comment that lacks one of these elements by asserting that the comment lacks sufficient information or analysis needed for the certificate holder to substantively respond rather than just saying the comment was not sufficiently specific.

Staff does not recommend altering or “softening” the language further as it is important for would-be commentors to understand that comments submitted which lack one of the three elements may result in the Department lacking the necessary information or analysis needed to justify modifying the draft of the final order.

#### *Applicability of Rules (OSSIA)*

OSSIA raises concerns about the applicability of the rules to pending or future applications and seeks additional clarity in the rules.

#### *Staffs Response:*

The universe of applicants affected by the rule change is limited and known. Staff is working with potentially affected parties to ensure they understand exactly what the changing rules will mean for them based on when various events occur and requests that the Council allow for filing of the proposed rules, if approved, in a time and manner that does not disturb requests for an amendment that are nearing the public comment period, which will be most affected by these rule changes. Staff does not recommend adding additional language that will quickly become obsolete.

#### *Loss of the Contested Case – Due Process (Friends, Irene Gilbert, Greg Larkin, Wendy King)*

All but one of the public comments submitted opposes the removal of the contested case possibility in the proposed rules. The primary basis for this opposition is the argued loss of “due process.”

#### *Staff Response:*

The Legislature gives EFSC discretion to determine which, if any, cases should be considered for a contested case: “A site certificate may be amended with the approval of the Council. The Council may establish by rule the type of amendment that may be considered in a contested case proceeding.” (ORS 469.405.)

Due process is about meaningful notice, meaningful opportunity to be heard before an impartial decisionmaker, with judicial review on the record, and the ability to appeal the final decision. The proposal strengthens that front-end: structured written comments tied to criteria, a public hearing for every amendment, responses to each comment, and an opportunity for participants to correct or clarify their comments, resulting in a clear preservation pathway to appeal a final decision on an amendment by Council to the Oregon Supreme Court.



Today's amendment contested-case screening step consumes time, duplicates written disputes, and rarely results in a contested case under existing standards—yet still delays a final, reviewable order. The proposed changes reflect the intent of the public comment period – if members of the public are aware of evidentiary, legal, or policy issues based on the proposed order drafted by the Department, they should make these issues known during the public comment period. If the applicant has disputes about any assertions by the public, they will be required to provide feedback to the public who will then be given an opportunity to provide further clarification on the record.

The proposed process is not an effort by the Department to “churn out amendments to site certificates as quickly as possible,” as claimed by Friends. (Friends Comment, page 3.) As shown by staff in their presentation to Council on the proposed changes, the new process is expected to take roughly the same amount of time as the existing one. Time previously spent analyzing contested case requests that routinely failed to meet the required threshold will now be replaced under the proposed rules with meaningful feedback and engagement with the public on their comments and an opportunity for them to clarify and provide additional details. The idea is that this expanded comment engagement will result in better comments, with sufficient detail and analysis for the final order to be modified and improved. This new process will potentially require significant effort and resources by site certificate holders, who will need to timely respond to all public comments and who will then potentially need to analyze and respond to follow-up public comments. This is the opposite of “churning” through the process.

Finally, Friends cites *Marbet v. PGE* for the proposition that contested cases are the “procedure” for applying policy to facts. (Friends Comment, page 4.) *Marbet* addressed original site certification under a different posture nearly 50 years ago. Nothing in *Marbet* requires contested cases on every amendment when the Legislature has since codified a distinct amendment framework with discretionary contested cases and direct Oregon Supreme Court review. The proposal respects *Marbet*'s core principle—agency develops the record and decides first—because EFSC will still issue a reasoned final order on a compiled record before there is an opportunity for judicial review.

#### *Review by Court of Appeals (Friends, Irene Gilbert, Greg Larkin)*

Several commentators argued that the possibility of appeal to a Court of Appeals enhances the public's ability to be heard. But recently passed HB 3681 moots this argument. As stated in the newly amended law in ORS 469.405(1) (emphasis added):

“[J]udicial review of the council's approval or rejection of a request for an amendment to a site certificate or decision related to or arising from a contested case on an amendment, regardless of whether a contested case was held prior to the council's decision, is conferred *solely on the Supreme Court.*”

Even if the Council rejects the proposed rule changes, Oregon law now moves all appeals of the EFSC process related to a request for an amendment – including if a contested case were to be held – to the Supreme Court. Staff will thus not address these arguments.

*Site Surveys and Site Boundary Changes (Wendy King)*

Ms. King made a variety of comments and requests regarding private field surveys as well as raising concerns about modifications to site boundaries proceeding without notice.

**Staff Response:**

Division 27 amendment rules govern when a change requires an amendment and how that amendment is processed—they do not regulate the day-to-day logistics of a certificate holder’s private-property access or prescribe survey-workplace practices between a certificate holder and landowners. Those topics are governed by property rights, easements/permissions, and (for cultural/wildlife work) the substantive standards, and coordination with reviewing agencies—not by the procedural amendment rules at issue here. The amendment thresholds, commonly referred to as the “three could,” which are not proposed to be changed and are included below, do ensure that substantive changes, e.g., substantive changes to the site boundary, trigger an amendment with public notice and an opportunity for comment.

- (a) Could result in a significant adverse impact that the Council has not addressed in an earlier order and the impact affects a resource or interest protected by an applicable law or Council standard;*
- (b) Could impair the certificate holder’s ability to comply with a site certificate condition; or*
- (c) Could require a new condition or a change to a condition in the site certificate.*

As stated on pages 5 and 6 above, HB 3681 provides statutory authority for the existing rules that allow some changes to the site boundary without requiring an amendment.

*Notice of ADR Filings / Decisions (Wendy King, Friends, Irene Gilbert)*

Several commentors expressed concerns about inadequate notice of Amendment Determination Request (ADR) filings and decisions and/or the insufficiency of public notice via website updates.

**Staff Response:**

Prior to the current version of the amendment rules, what is now called an ADR was called a Change Request. It was specific to whether a specific change proposed by a certificate holder required an amendment. The table below compares the prior Change Request process to the ADR process. Because the Type A/B ADR was not an option in the prior rules, has a slightly different process than an ADR related to whether an amendment is required, and is proposed to be removed in this rulemaking, it is not evaluated:

<b>Prior Change Request Rules</b>	<b>Current Amendment Determination Request Rules</b>
Certificate holder submits information documenting why a proposed change does not require an amendment	Same
N/A	Department posts announcement on the project page.

Prior Change Request Rules	Current Amendment Determination Request Rules
	<p>While not required by rule, the Department also:</p> <ol style="list-style-type: none"> <li>1) Provides a Courtesy email notice to individuals that have signed up to receive electronic notifications about the project or any Siting related updates via ClickDimensions and to EFSC members.</li> <li>2) Provides an update during the Consent Calendar for Council meetings related to any ADRs received and the Department's determination.</li> <li>3) Includes any ADR submittals on the Siting Division's Monthly Siting Report</li> </ol>
Department responds in writing whether they concur that an amendment is not required	Same
N/A	<p>Department posts determination on the project page.</p> <p>Department provides notice to EFSC members.</p> <p>While not required by rule, the Department also:</p> <ol style="list-style-type: none"> <li>1) Provides a Courtesy email notice to individuals that have signed up to receive electronic notifications about the project or any Siting related updates via ClickDimensions.</li> <li>2) Includes any ADR determinations on the Siting Division's Monthly Siting Report</li> </ol>
Department has the option to refer its determination to the Council for concurrence modification or rejection	Same
N/A	At the first Council meeting after Department's determination, the Department provides verbal notice of its determination during the consent calendar.

Prior Change Request Rules	Current Amendment Determination Request Rules
A Council member or the certificate holder can request full Council review for concurrence modification or rejection of Department's determination	Same

As described above, the substantive elements are largely the same. The main difference, other than the name change, was to increase the transparency of the request, review, and determination. It is important to note that under the prior Change Request rules, it was unlikely that members of the public *ever saw these types of requests*.

It is also important to note that with one exception, under the prior and current rules, a certificate holder is under no obligation to submit such a request. Under the current rules, any proposed change that would add area to the site boundary must at a minimum submit an ADR. However, as previously stated, those rules lack the statutory support until HB 3681 goes into effect on January 1, 2026.

Certificate holders make minor operational changes to facilities with some frequency. Most do not come close to triggering the “three could’s” described above. Under OAR 345-026-0080(2)(g), as part of their annual operational report, certificate holders must provide the following:

*Facility Modification Report: A summary of changes to the facility that the certificate holder has made during the reporting period without an amendment of the site certificate in accordance with OAR 345-027-0050.*

The risk to certificate holders is if they make a change without going through the amendment process and when Compliance staff subsequently review the Facility Modification Report determine that an amendment was required, the certificate holder must seek retroactive approval. The prior Change Request rules and current ADR rules give the certificate holder the option to request Department/Council evaluation and determination whether an amendment is required. *OAR 345-027-0357(2) – For a proposed change that would not add area to the site boundary, the certificate holder **may (emphasis added)** submit an amendment determination request to the Department of whether:*

- (a) The proposed change requires an amendment under OAR 345-027-0350; or*
- (b) The proposed change is exempt from requiring an amendment under OAR 345-027-0353*

#### *Changes to monitoring and mitigation plans (Wendy King, Irene Gilbert)*

Ms. King and Ms. Gilbert both expressed concerns about possible changes to monitoring and mitigations plans occurring without public participation.

Staff Response:

ORS 469.503 requires Council to determine that the preponderance of the evidence on the record supports the conclusions that each applicable standard is met. However, ORS 469.402 (emphasis added) states the following:

“If the Energy Facility Siting Council elects to impose conditions on a site certificate or an amended site certificate, that require subsequent review and approval of a future action, the council may delegate the future review and approval to the State Department of Energy if, in the council’s discretion, the delegation is **warranted under the circumstances** of the case.”

Council clearly has the authority, in limited circumstances, to allow the Department to subsequently make decisions related to site certificate conditions. The key question is whether this delegation of authority is warranted under the circumstances. The time to object to this delegation of authority or the possible scope of a mitigation plan is during the public comment period or on the proposed final order.