



PUBLIC NOTICE

Second Rulemaking Hearing and Public Comment Period

Reorganization of Div. 27 and rewrite of rules governing requests for amendments to site certificates.

Summary

Date Issued: April 21, 2017

Proposal: Reorganization of Div. 27, and rewrite of rules governing requests for site certificate amendments.

Second Rulemaking Hearing:

Date: May 25, 2017

Time: EFSC meeting begins at 4:00 p.m.
Rulemaking hearing begins at 4:30 p.m.

Location: Meitner Conference Room
Oregon Dept. of Energy
550 Capitol St. NE, 1st Fl.
Salem, OR 97301

Call-in: 877-873-8017

Passcode: 799345

Written Comment Deadline:

May 25, 2017 (close of the rulemaking hearing)

Introduction

The ultimate goals of the proposed rules are to enhance the opportunity for public participation while minimizing increases in review time. This rulemaking is not intended to alter the substantive aspects of how the Council's rules and standards apply to the Council's review of a request for an amendment to a site certificate. The scope of this rulemaking is intended to be strictly procedural in nature and effect.

Description of Rulemaking Activity

The proposed rules would provide a standard, generally applicable, one-size-fits-most process that the Council would use to review most types of changes proposed by energy facility site certificate holders in a request for amendment (RFA). The idea of having most types of proposed changes reviewed through a standard process is not new and is consistent with existing rules. Existing

rules provide three Council review processes: a standard, one-size-fits-most process; a transfer process; and an expedited process. The proposed rules provide for two processes: a standard, one-size-fits-most process and a transfer process. Ultimately, the proposed rules amount to a wholesale re-write of the existing rules governing the Council's processes for reviewing RFAs.

The originally proposed rules provided for only two processes: a standard, one-size-fits-most process and a transfer process. However, based on direction staff received from the Council after the first rulemaking hearing it held on February 24, 2017, staff revised the proposed rules to include a new expedited review process that is functionally similar to the existing standard review process in terms of the estimated time it takes the Council to complete its review. The proposed new expedited process is also similar to the proposed new standard process in that the steps comprising the new expedited process are the same as the steps in the proposed new standard process, minus the public hearing step, minus the step for the Council to comment on the DPO, and minus the opportunity for persons to request a contested case. Finally, the new expedited process is also similar to the existing expedited process because in order for an RFA to be reviewed through the new expedited process, the Council must first approve the certificate holder's request for expedited review in a preliminary step. Staff has written provisions for this preliminary step into the Amendment Determination Request process found in proposed rule OAR 345-027-0057.

Therefore, the procedural steps of the proposed rules would provide both a new standard review process that would function quite differently than the steps of the existing standard amendment process, and a new

expedited review process that would function quite similarly to the existing standard review process, but it would be comprised of many of the same steps as the new standard review process. This new standard review process borrows some steps from the existing review process for site certificate applications, including adding steps for completeness determination, a draft proposed order, and a public hearing on the draft proposed order.

The Council's existing rules for reviewing requests for amendment do not include a list of the specific types of changes that must be reviewed through the existing standard process and do not include a list of the specific types of changes that must be reviewed through the existing extended review process. Rather, under existing rules, the standard, shorter review process is the default, and the extended, longer review process must be justified by staff or requested by a certificate holder.

In recent years, staff has reviewed nearly all RFAs under the extended review process. Extended review has been required due to the complexity of the changes proposed in RFAs and the incompleteness of RFAs. Therefore, the proposed rules would flip the concept employed under the existing rules. Rather than having the shorter process set as the default review process (as it is under existing rules), the proposed rules would set the default review process as being the process with the most steps. Under the proposed rules, this default process would still be called the standard process, but where the new standard process is the review process with the most steps. Under the proposed rules, the shorter review process with less steps (the expedited review process) would apply to an RFA only after the Council approves a certificate holder's request for expedited review under proposed rule 345-027-0057.

The new standard process would be applicable to the same types of changes that the existing standard amendment process applies to under the existing rules. In other words, all types of proposed changes that require an RFA under existing rules would also require an RFA under the proposed rules, and transfers of site certificate holders or transfers in ownership of site certificate holders would continue to be reviewed through the transfer review rules of 345-027-0100.

In addition to the new steps being proposed, the proposed rules also require an amendment to the site

certificate for changes proposing to add any quantity of area to the site boundary. This differs from the existing amendment process, where existing rules only require an amendment for a proposed change that adds area to the site boundary if adding area, or if some other change proposed in the same request for amendment to add area, triggers any of the thresholds under existing rule 345-027-0050(1). Staff's rationale for requiring an amendment to the site certificate for changes proposing to add area to the site boundary is that adding new area carries a relatively high likelihood of impacts to the resources the Council's rules and standards are designed to protect. Also, compared to other types of proposed changes, adding area to the site boundary increases the likelihood that new neighboring property owners could be affected by the proposed change.

Based on direction staff received from the Council after the first rulemaking hearing it held on February 24, 2017, staff revised the proposed rules to include a new option under the Amendment Determination Request (ADR) process to give the Council discretion in deciding, on a case by case basis, whether a certificate holder's proposal to add area to its site boundary would require a request for amendment. The ADR process in the proposed rules is the functional equivalent of the change request process in existing rules. Similar to the existing change request process, the proposed ADR process allows the certificate holder to request authorization to add area to the site boundary that does not trigger the need for an amendment under proposed rule 345-027-0050(5). However, rather than the optional Council review under the existing change request process, Council review is mandatory under the proposed ADR process. Under the proposed ADR process, staff is required to refer its determination of whether the proposed addition of area requires an amendment to the Council for concurrence or rejection.

The 9 major steps of the new standard amendment process being proposed in this rulemaking are summarized briefly in the following 9 paragraphs:

Pre-Amendment Conference (PAC)

Proposed rules codify how a voluntary PAC is available to certificate holders for most types of proposed changes. Council staff has always been available for consultation to assist a certificate holder before submission of a request for amendment, but people

may not have been aware of this option due to it not being written in rule. One exception to the voluntary nature of the PAC is that the proposed rules would require the certificate holder to participate in a mandatory PAC with staff before submitting an RFA for a change proposing to add area to the site boundary. For all other types of proposed changes, the PAC is voluntary.

Preliminary Request for Amendment (pRFA)

Proposed rules require all RFAs be deemed a preliminary request for amendment (pRFA) until staff determines that the certificate holder has submitted all the information necessary for staff to complete its review of the RFA.

Determination of Completeness (DOC)

Proposed rules add an explicit stage in the amendment review process for staff to determine whether the pRFA contains adequate information for the Council to make findings or impose conditions on all applicable Council standards. This step is consistent with how staff currently processes RFAs, but officially codifying staff's practice in rule would ensure staff has a sufficient period of time to determine whether it needs additional information from the certificate holder in order to prepare a draft proposed order (DPO) (see next paragraph for more discussion on the DPO).

Draft Proposed Order (DPO)

The proposed rules require staff to issue a DPO containing staff's written analysis of how the certificate holder's RFA demonstrated compliance with all applicable laws and Council standards. The DPO would be the first written document reflecting staff's analysis and draft recommendations issued to the public. In contrast, under the existing process, the first written document reflecting staff's analysis and recommendations issued to the public is a proposed order (PO). Adding this step would allow the Council more flexibility to make changes in response to comments received during the public comment period.

Public Comment and Hearing on the DPO

In the existing amendment process, upon receipt of an RFA, staff solicits comments on the RFA from the public and reviewing agencies. After receiving comments on the RFA, staff reviews all the timely comments it receives, completes its analysis of how the RFA complies with all applicable laws and Council standards,

and then issues its analysis and recommendations in a PO. Once a PO is issued, staff solicits a second round of comments and solicits requests for contested case on the PO.

The proposed rules consolidate the two existing comment periods into a single round of comments after the issuance of the DPO. Rather than taking comments on a potentially incomplete RFA and in the absence of staff's analysis and recommendations, taking comments after a DPO allows for comments to be based on a complete RFA and staff's initial analysis and conclusions of facts and law as to whether the certificate holder has demonstrated compliance with all applicable laws and Council standards.

The proposed rules also provide for a mandatory public hearing on the DPO. The hearing would increase the public's opportunity to participate in the review of an RFA by instituting an automatic time and place for people to provide oral comments. To ensure the Council hears all testimony directly, the DPO hearing for an RFA would always be conducted by the Council itself rather than by an appointed hearing's officer.

A feature of the proposed DPO hearing and comment period is for it to function as a "raise it or waive it" opportunity for people to engage in the amendment review process. As such, any person who does not properly raise an issue in a comment on the record of the DPO would not be eligible to raise new issues later in the process and would not be able to participate in a contested case on any issues. In the existing amendment review process, after the PO is issued, anyone can provide comment on any issue and anyone can request a contested case on any issue.

Proposed Order (PO)

Before issuing a Proposed Order (PO), staff would consider all oral and written comments received on the record of the DPO. Because the recommendations in the DPO may change in response to comments received on the DPO, the PO may or may not include the same recommendations to the Council that were made in the DPO.

As discussed above, the proposed rules would not include a comment period on the PO. However, with the addition of the DPO and the mandatory public hearing on the DPO, the public and the certificate

holder would have more opportunity for participation than what the existing amendment review process provides.

Requests for Contested Case (CC)

Proposed rules require requests for CC on the PO be limited to those who previously commented on the record of the DPO hearing and limited to only those issues a prior commenter previously raised on the record of the DPO hearing. The public comment period and the public hearing on the DPO, therefore, would function as a “raise it or waive it” opportunity for the public and the certificate holder to raise issues and preserve their ability to participate further in the review process.

Council Considers CC Requests

Proposed rules would not make any changes to how the Council considers and evaluates CC requests to determine whether to grant a CC for a RFA. The existing amendment process does not include an automatic CC. Instead, any person may request a CC proceeding on the PO for an RFA. Requests for CC are then considered by the Council to determine if any requests meet the threshold criteria necessary for the Council to grant a CC. To grant a request for a CC, the Council must find that the request raises a significant issue of fact or law that may affect the Council’s determination that the facility, with the change proposed by the amendment, meets the applicable laws or Council standards. Proposed rules clarify the language describing this Council’s CC determination process, but proposed rules make no substantive changes to how this process functions in existing rules.

Under proposed rules, if the Council finds that the CC request was properly raised on the record of the DPO hearing, and the CC request meets the threshold determination described above, a CC would be conducted as described in the existing Council rules. Proposed rules would not make any substantive changes to how the CC would be conducted. If the Council finds that the CC request was not properly raised on the record of the DPO hearing, or if the CC request does not meet the threshold determination described above, the Council would review the proposed order and make a final decision on the amendment request. Proposed rules would not make any substantive changes to how the Council makes its final decision when there is not a CC.

Council’s Final Decision and Scope of Review

Proposed rules clarify the existing rules stating how the Council makes its final decision and what the Council’s scope of review is for the various types of amendments (i.e. under existing rules, the Council’s scope of review for RFA’s proposing to add new area to a site boundary differs from the scope of review for an RFA proposing to extend construction deadlines). These changes are necessary to clarify existing rule language, and to ensure consistency and compatibility with the other rule changes being proposed.

EFSC Decision Process

EFSC relies upon its authority under ORS 469.470 and ORS 469.501 to conduct rulemaking. EFSC will make all decisions on the proposed rule amendments at a public meeting and will provide public notice of the date, time, and location of all EFSC meetings. EFSC received written comments and heard oral comments on the proposed rules at its February 23-24, 2017 meeting. In response to EFSC direction to staff at that meeting, staff has revised the originally proposed rules to include a second, more expedited, review process, to include an option for the certificate holder to ask the Council whether a proposed change to add area to the site boundary requires an amendment, and to include an option for the certificate holder to ask the Council whether a proposed change can be reviewed under the proposed new standard process or the proposed new expedited process. Staff also received six (6) comment letters before March 24, 2017. Staff will present the suggestions from these letters to the Council at the April 28, 2017 EFSC meeting. A second rulemaking hearing will be held on May 25, 2017. All comments on this rulemaking (both written and oral) must be received by EFSC staff before the close of the May 25 hearing. After considering all comments received on the record of this rulemaking, EFSC could consider the revised proposed rules and potentially take action to approve the revised proposed rules at its May 25-26, 2017 meeting.

Comment Period

EFSC requests public comment on these proposed rules. EFSC also requests public comment on whether other options should be considered for achieving the substantive goals of the proposed rules while reducing the negative economic impact of the proposed rules on business.

The Oregon Department of Energy will accept written comments on the proposed rules until the end of the second rulemaking hearing on May 25, 2017. Any person or agency may provide oral comments on this rulemaking in person or via telephone during the second rulemaking hearing.

Any person or agency may send written comments by email to EFSC.rulemaking@oregon.gov, or by mail, hand-delivery or fax to:

EFSC Rules Coordinator
Oregon Department of Energy
550 Capitol St. NE
Salem, OR 97301
Fax: 503-373-7806

More Information

Please contact Jason Sierman at 503-373-2127, by email to jason.sierman@oregon.gov, or at the mailing address listed above with any questions regarding this rulemaking.

Additional information about the proposed rulemaking and updates on the rulemaking review process are available using any of the following options:

1) Oregon Department of Energy's Webpage

Details and more information about this rulemaking, including: proposed rule language; a crosswalk document comparing existing Division 27 rules to proposed rules; process charts showing how EFSC reviews RFAs under existing rules and how RFAs would be reviewed under proposed rules; documents relied upon in preparing the rule; required rulemaking forms that have been filed with the Oregon Secretary of State; and links to

EFSC webpages containing prior information relating to this rulemaking are available online at: <https://services.oregon.gov/energy/Get-Involved/Pages/Energy-Facility-Siting-Council-Rulemaking.aspx>

2) Updates by Email

Subscribe to GovDelivery for email updates on EFSC rulemaking activities and other activities related to energy facilities under EFSC jurisdiction.

GovDelivery is an automated email system that allows the public to manage subscriptions to receive information on ODOE's projects and events. For more information, please visit: <http://tinyurl.com/EFSC-email>.

3) In Hardcopy

Copies of the proposed rules, and all the information related to this rulemaking that is posted to the EFSC webpage, are available in hardcopy for public inspection at:

Oregon Department of Energy
550 Capitol St. NE
Salem, OR 97301

Accessibility Information

The Oregon Department of Energy is committed to accommodating people with disabilities. If you require any special physical or language accommodations, or need information in an alternate format, please contact Esther Kooistra at 503-378-3895, toll-free in Oregon at 800-221-8035, or by email to: Esther.Kooistra@oregon.gov.