



# Oregon

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**To:** Energy Facility Siting Council

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

**Date:** May 8, 2020

**Subject:** Agenda Item J (Information/Action Item):  
Construction Disruptions Related to the COVID-19 Pandemic for the May 21-22  
EFSC Meeting

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## STAFF OVERVIEW

The Council may wish to provide relief to certificate holders who are unable to meet construction beginning deadlines due to the COVID-19 pandemic.<sup>1</sup> Some options to provide relief include:

1. Directing staff to expedite the process for review of requests for amendment to extend construction deadlines related to the pandemic;
2. Adopting rules to allow Council to stay expiration and termination of site certificate when failure to begin construction by the deadline was due to the COVID-19 pandemic;
3. Adopting rules to allow Council to stay expiration and termination of a site certificate when failure to begin construction by the deadline was with good cause.

Which, if any, option Council may wish to implement may depend on the extent and severity to impacts to certificate holders. For this reason, an opportunity for certificate holders and other stakeholders to provide comment is included in this agenda item.

## BACKGROUND

The Department has received a number of inquiries related to enforcement of beginning and ending construction deadlines during the COVID-19 pandemic. Specifically, some certificate holders have expressed concerns that they may not be able to meet deadlines to begin construction due to inability to contract crews to conduct pre-construction surveys, delays in acquiring facility components and other equipment due to supply chain interruption, delays in

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<sup>1</sup> Staff notes that the pandemic may also interfere with certificate holders' ability to meet construction completion deadlines, but because neither ORS chapter 469 or the Council's rules specify the consequence for failure to complete construction by the date specified in a site certificate we believe these issues can be addressed through compliance actions on a case-by-case basis.

financing due to disruption of financial markets, or other disruptions caused by the pandemic.<sup>2</sup> These certificate holders have asked what relief from the deadlines, if any, may be available.

The following facilities have upcoming construction beginning deadlines that have not yet been met:

- Golden Hills Wind: June 18, 2020
- Summit Ridge Wind: August 19, 2020
- Perennial Wind Chaser: September 23, 2020
- Boardman Solar, February 23, 2021

Depending on the duration of the disruptions, other facilities could potentially be affected as well.

### Construction Deadlines

The Council is required to specify the date by which construction of a facility must begin and a time for completion of construction in the site certificate under ORS 469.370(12) and 469.401(2) respectively. Statute does not provide specific consequences for failure to meet these construction deadlines, but failure to comply with the terms or conditions of a site certificate or amended site certificate is grounds for suspension or revocation of a site certificate under ORS 469.440, or the assessment of civil penalties under ORS 460.992. The Council may impose these sanctions in the event a certificate holder fails to meet either the deadline to begin or end construction.

The Council has not adopted rules which specify the consequences for a certificate holder's failure to meet construction completion deadlines. Staff believes these issues can be resolved through the Council's compliance program without formal policy direction or rulemaking actions. The Council has, however, adopted rules specifying that failure to begin construction by the date specified in a site certificate will result in automatic expiration and termination of a site certificate. This memo focuses on construction beginning deadlines for this reason.

Under OAR 345-027-0313, if a certificate holder does not begin construction of the facility by the construction beginning date specified in the site certificate or amended site certificate, the site certificate automatically expires on that date. Under OAR 345-027-0110(9), if the Council finds a site certificate has expired, it must issue an order terminating the site certificate, without regard to the reason or cause for the deadline being missed. The certificate holder may contest the order of termination, but because of the non-discretionary nature of the rule, it is not clear what the outcome of such proceedings would be.

As defined in ORS 469.300 and the Council's rules, "construction" means "work performed on a site, excluding surveying, exploration or other activities to define or characterize the site, the cost of which exceeds \$250,000." Consistent with this definition, to begin construction of a

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<sup>2</sup> The impact of the pandemic on the renewable energy industry nationally have also received media attention, including in recent stories by [the Associated Press](#) and [The Washington Post](#)

facility, a certificate holder must demonstrate that at least \$250,000 worth of work, excluding surveying, exploration, or other site defining activities, has been performed at the site.

In many site certificates, the Council has imposed preconstruction conditions that must be met before construction begins. Some site certificates also contain conditions which must be satisfied before any work on the site, or specific areas of the site, may begin. Depending on the requirements of preconstruction conditions of a particular site certificate, the certificate holder may be able to perform enough work on the site to meet the statutory definition of construction, even if disruptions related to the pandemic prevent the certificate holder from beginning work on all facility components. However, if the pandemic prevents these preconstruction conditions from being satisfied, the certificate holder may not be able to begin construction.

#### Options for addressing failure to meet construction beginning deadlines

Under ordinary circumstances, if a certificate holder believes that it may not be able to begin construction by the date specified in its site certificate, it must request an amendment to extend the construction deadlines in the site certificate or allow the site certificate to expire. If a request is submitted before the construction deadline, expiration of the site certificate is automatically suspended until the Council makes a final decision on the amendment request. While this option remains available for certificate holders who are unable to meet construction deadlines due to the COVID-19 pandemic, the Council could provide additional relief. Some options to provide this relief include:

1. Directing staff to expedite the process for review of requests for amendment to extend construction deadlines related to the pandemic;
2. Adopting rules to allow Council to stay expiration and termination of site certificate when failure to begin construction by the deadline was due to the COVID-19 pandemic;
3. Adopting rules to allow Council to stay expiration and termination of a site certificate when failure to begin construction by the deadline was with good cause.

These actions are discussed in more detail below.

#### *1. Expedited Processing of Requests to Extend Deadlines*

One option to provide relief using the rules that are currently in place is to provide for the expedited processing of requests for amendment to extend construction deadlines that are related to the pandemic. Submission of a request for amendment before a construction beginning deadline automatically suspends expiration of a site certificate, but the review process itself can have significant time and financial costs. An expedited process could reduce some of those costs, as well as the uncertainty associated with the review process. Some actions that could expedite the review process include:

- Directing staff to process any requests to extend construction beginning dates due to the COVID-19 Pandemic under the Type B review process;

- Limiting the Division 21 information a certificate holder must include in a preliminary request for amendment under OAR 345-027-0360(1)(c) to what is essential to process the request;
- Directing staff to process requests on the most expedited timeline allowed by rule.

It is important to note that while the actions described above could expedite processing of an amendment request, the amendment would still be subject to judicial review which can increase the costs and uncertainty involved in an amendment. There are also provisions of the rules that could make this option less appropriate for the type of relief sought by certificate holders.

### *2. Adopt rules to stay termination of site certificate for reasons related to the pandemic.*

An option to provide relief to affected certificate holders without requiring certificate holders to obtain an amendment is to amend OAR 345-027-0110(9) and 345-027-0313 to allow Council to stay expiration and termination of a site certificate when a failure to meet construction beginning deadlines is due to the COVID-19 pandemic.

If this option is pursued, the Council would need to decide whether to adopt permanent or temporary rules. Staff recommends that the rules be amended through the permanent rulemaking process. If the Council determined that failure to take immediate action to mitigate disruptions caused by the COVID-19 pandemic would result in a serious prejudice to affected certificate holders, temporary rulemaking could be justified; however, temporary rules may only be in place for a maximum of 180 days and, depending on the duration of COVID-19 related disruptions and the nature of the delays in construction activities, this may not be a sufficient timeframe to allow resolution of all the disruptions preventing certificate holders from beginning construction.

The Council would also need to determine what the requirements and procedures for a stay of expiration and termination would be. For example, a rule could provide that Council grant a stay through a summary order, or upon a more thorough review of the reasons provided by the certificate holder. To ensure that the rule is only applied to those affected by the pandemic, staff recommends that a rule authorizing a stay of expiration and termination of a site certificate should require a demonstration of substantial evidence that the certificate holder did not meet the construction beginning deadline due to disruptions cause by the COVID-19 pandemic. Under such a rule, an order staying expiration and termination would also need to contain findings that the failure to meet the deadline was caused by the COVID-19 pandemic and establish a date by which the certificate holder will begin construction that is commensurate with those findings.

### *3. Permanent rules to stay termination of site certificate for good cause.*

In place of, or in addition to, actions specifically designed to provide immediate relief to certificate holders affected by the COVID-19 pandemic, the Council could conduct permanent rulemaking to adopt a more general mechanism to provide relief in similar situations that may arise in the future, including, but not limited to a recurrence of the COVID-19 outbreak. For example, the Council could amend OAR 345-027-0110(9) and 345-027-0313 to allow the

Council to stay expiration and termination of a site certificate if the certificate holder shows good cause for failure to begin construction and provides specific actions it will take to come into compliance. Another option would be to adopt a separate rule allowing Council to waive enforcement of any rule that is not otherwise required by law upon its own motion.

There may be concerns that such a provision would erode the enforceability of deadlines, and staff recommends that such action should only be applicable in circumstances which were reasonably unforeseeable and beyond the certificate holder's control. If Council wishes to pursue this option, it should also consider adopting procedural rules which describe how a certificate holder can request a stay and show good cause, and how the Council would determine whether or not a reinstatement or waiver is justified.

#### **RECOMMENDED COUNCIL ACTION**

The Council may wish to implement one or more of the options above based on the extent and severity of impacts to stakeholders. Staff recommends Council make its decision based on advice provided by certificate holders and other members of the public provided during a comment period scheduled to be held during this agenda item.