Secretary of State

STATEMENT OF NEED AND FISCAL IMPACT

A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

Oregon Department of Energy, Energy Facility Siting Council (EFSC)	345
Agency and Division	Administrative Rules Chapter Number

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

Rule Caption (Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.)

In the Matter of: The adoption, amendment, renumbering, amendment and renumbering, and repeal of rules in OAR Chapter 345, Division 015 and 027, governing requests for amendments to energy facility site certificates.

Statutory Authority: ORS 469.470 and 469.501

Stats. Implemented: ORS 469.350, 469.501 and 469.503

Need for the Rule(s):
The changes to the rules in Chapter 345, Division 27 are needed to improve the process by which EFSC reviews requests for amendment to a site certificate that are submitted by energy facility site certificate holders. In addition, the proposed rules are intended to clarify points of past confusion in existing rules and improve the organization of the Division 27 rules in general. In particular, EFSC stakeholders have asked EFSC staff and EFSC members to review and, to whatever extent possible, make changes to the Council's amendment review processes to bolster the public's opportunity for participation and, to whatever extent possible, make the amendment review processes more efficient. In turn, EFSC members have directed EFSC staff to conduct a rulemaking to rewrite and reorganize the Division 27 rules, especially those governing the review processes of requests for amendment to a site certificate.

Documents Relied Upon:
OAR 345-027-0000 through -0240: http://arcweb.sos.state.or.us/pages/rules/oars_300/oar_345/345_027.html
OAR 345-015-0014, 345-015-0016, 345-015-0080, and 345-015-0083:
http://arcweb.sos.state.or.us/pages/rules/oars_300/oar_345/345_015.html

Fiscal and Economic Impact:
Currently, existing EFSC rules provide several different processes that are applicable to the Council's review of applications for and amendments to site certificates. Under existing rules, the applicant (and in the case of amendments, the certificate holder) bears the costs of preparing an application or request for amendment, supplying all the necessary documentation, and the time and resources EFSC and EFSC staff spend reviewing the application or request for amendment to determine whether compliance with all applicable state statutes and administrative rules and compliance with post-certification monitoring and reporting requirements have been successfully demonstrated by the applicant or certificate holder. Various state agencies, local governments, and tribal governments are also involved in the review of applications for and amendments to site certificates and, generally, the costs incurred by these entities related to their reviews are also eligible for reimbursement from the applicant or certificate holder. Therefore, because of the way existing statutes and rules are written, nearly all the costs associated with the review of an energy facility site certificate holder's request for amendment (RFA) are paid for by the site certificate holder. Requests for amendment vary significantly based on the nature of the amendment, the location and the applicable rules, statutes and local land use regulations. As such, the cost associated with amendments vary significantly as well.

The proposed rules would change the EFSC processes governing how requests for amendments to site certificates are reviewed. Due to the extreme variety of changes site certificate holders can propose through a request for amendment (RFA), it is not possible for EFSC staff to predict with any certainty the fiscal and economic impact the proposed rules could have on an "average" RFA. Generally speaking, the costs of EFSC's review process increase and decrease commensurate with the complexity of the change(s) being proposed in the site certificate holder's RFA and the amount and quality of supporting documentation and information the site certificate holder provides EFSC and EFSC staff. While it's possible some of the proposed rule changes could increase the costs to site certificate holders, it's also possible that some of the proposed changes could decrease the costs to site certificate holders. Therefore, in the aggregate, staff does not expect that the proposed rules would result in a significant increase in the costs incurred by site certificate holders relative to the costs incurred by site certificate holders under the existing rules.

Staff evaluated the potential fiscal and economic impacts associated with the review processes embodied in the proposed rules and the following paragraphs summarize the major areas where there could be increases or decreases in costs.

Pre-Amendment Conference (PAC)
For most proposed changes, the PAC would be voluntary. Therefore, any additional costs borne by the certificate holder due to this rule provision being added would be voluntary. However, for RFAs proposing to add area to the site boundary, the PAC would be

mandatory. In the circumstances where the PAC occurs, whether voluntary or mandatory, it is not anticipated it would require more than a few hours for both EFSC staff and the site certificate holder to prepare for and participate in the PAC. Additionally, any time spent during a PAC is time that, in all likelihood, would have been spent conferencing with the site certificate holder later on in the review process to address issues that could have been dealt with earlier, but for the PAC not occurring. On the whole, there is not expected to be a significant increase in cost or time as a result of these rules.

Preliminary Amendment Request (pRFA)
The proposed rules requiring a pRFA would function broadly the same as existing rules requiring the initial RFA. The reason for defining a discrete pRFA step in the process is because of the proposed rule that would formally institute a Determination of Completeness step. Despite there not being a formal Determination of Completeness provision in existing rules, in practice, every time EFSC staff receives an initial RFA under the existing rules, staff must determine whether the RFA is complete. Redefining the initial process step as a pRFA, rather than an RFA, is not expected to add any additional costs to the review process.

Determination of Completeness (DOC)
As mentioned above, while existing rules do not formally provide for a Determination of Completeness step, in practice, this step already occurs in the existing review process. It is not possible for EFSC staff to conduct its review and make a recommendation to approve an RFA to the Council without staff having a complete RFA and a complete set of supporting documents that demonstrate how the certificate holder will comply with all applicable laws and Council standards. Codifying the already existing practice of determining completeness is not expected to add a significant cost to the review process.

Under existing rules, upon receipt of an RFA, staff has 15 days to determine whether the RFA requires extended review and to send notice of the RFA to reviewing agencies and EFSC mailing lists requesting comments. If the RFA does not require extended review, staff must issue a Proposed Order within 60 days of sending notice. If the RFA does require extended review, staff must issue a Proposed Order within 180 days of sending notice. Based on staff research, the last review of an RFA under existing rules that did not require the 180 day extended review was Golden Hills Amendment #1 in 2011. The persistent need for extended review is typically driven by staff's need for additional information under 345-027-0070(2)(b). Once staff has all the information necessary for it to conduct its analysis, the RFA is considered complete. Staff makes similar requests for additional information during its review of an initial application for site certificate, only under those rules, requests for additional information are accomplished in a discrete determination of completeness step.

The proposed rules would formally codify the 180 day extended review process as the default review process. Under proposed rules, upon receipt of a pRFA, staff would have up to 60 days to determine the completeness of the preliminary request. Then, from the date staff notifies the certificate holder its request is complete, staff would have up to 120 days to issue a Draft Proposed Order. Because current staff has only reviewed RFAs via the extended review process (up to 180 days of review) under existing rules, the 180 days it would have to review an RFA under the proposed rules (up to 60 days for determination of completeness and up to 120 days to issue a DPO) is not expected to add a significant cost to the review process.

Draft Proposed Order (DPO)
There is no requirement for EFSC staff to issue a DPO in existing rules. Under existing rules, rather than issuing and taking comment on a DPO, staff issues and takes comments on a Proposed Order (PO). Proposed rules would require staff to issue and take comment on a DPO, consider comments received on the record of the DPO, and potentially issue a PO that differs from the DPO due to staff revisions based on comments received. Because the proposed rules would move the public comment period on staff's analysis and conclusions of facts and law to an earlier stage of the review process (by instituting a comment period on the DPO rather than the PO), the comment period on the PO would no longer be necessary and would be eliminated by the proposed rules.

While the proposed addition of the DPO is an additional step, the time and effort staff would spend generating the analysis and conclusions of facts and law that would make up the DPO are commensurate with the time and effort staff spends under existing rules to generate the same that make up a PO. The costs associated with the time staff spends reviewing and responding to comments on the record of the PO under existing rules are also expected to be commensurate with the time staff would spend reviewing and responding to comments received on record of the DPO. On the whole, since the proposed rules would effectively transform the existing comment period on the PO into a new comment period on the DPO, there is not expected to be a significant additional cost associated with these proposed changes.

Public Comment and Hearing on the DPO
The proposed rules would add a mandatory public hearing to the procedure a certificate holder must go through to make an amendment to its site certificate. The public hearing would be conducted by the Council and is very likely to occur at a regularly scheduled EFSC meeting (based on the availability of Council members, efficiency and convenience). The public hearing would be

scheduled inside of whatever comment period is prescribed by EFSC staff (a comment period not less than 20 days from the Dept.'s issuance of a Draft Proposed Order (DPO)).

While the addition of a mandatory public hearing is an additional step, the hearing would likely take place at an EFSC meeting with several other agenda items. Because EFSC meeting costs are prorated based on the time associated with each agenda item, costs associated with such a hearing would therefore only be a fraction of the overall costs associated with convening the EFSC and EFSC staff. Also, because of the variance in the timing of when staff would issue a DPO for a RFA and the variance in the timing of regularly scheduled EFSC meetings, the addition of a mandatory public hearing could sometimes require a slightly longer public comment period for the DPO relative to the duration of the public comment period under existing rules for the PO. However, it is useful to remember that the initial comment period on the RFA under existing rules would also be eliminated in the proposed rules, which would likely offset any increase in the duration of the comment period proposed for the DPO.

While there would be an additional cost associated with adding a mandatory public hearing on the DPO, any increase is likely to be small relative to the costs already incurred by site certificate holders under the existing review process in existing rules.

Proposed Order (PO)
The proposed rules would retain the requirement in existing rules that EFSC staff issue a PO. However, as discussed above, under the proposed rules staff would have issued a DPO before issuing a PO. Therefore, because of the significant amount of time staff would have already spent on creating a DPO, it's expected that any additional amount of time and effort staff would subsequently spend on converting a DPO to a PO would be significantly less than the amount of time staff spent creating the DPO.

The proposed rules subtract a comment period from the procedure a certificate holder must go through to make an amendment to its site certificate. Existing rules required two comment periods. The first comment period allows state agencies, units of local government and the public to comment on the RFA submitted by the certificate holder and received by EFSC staff. The second comment period allows the certificate holder, state agencies, units of local government defined in OAR 345-001-0010(52) and the public to comment on the PO, which contains staff's analysis and conclusions of facts and law. The proposed rules only require a single comment period, the comment period on the DPO described above, within which the newly proposed mandatory public hearing would occur. Not only would the proposed rules eliminate the first comment period on the RFA, but the proposed rules would relocate the second comment period earlier in the review process to become a comment period on the DPO.

Because the proposed rules would remove the comment period on the PO and because the majority of work in creating the PO under current rules would be done under the DPO phase under the proposed rules, converting the DPO to the PO is not expected to add a significant cost to the review process.

Requests for Contested Case (CC)
Proposed rules require requests for CC on the PO be limited to those persons 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. While this would be a change as to who would be eligible to request a CC at this stage of the review process, under the proposed rules anyone can participate and comment on the record of the DPO and thereby ensure their eligibility to request a CC. Therefore, because the rules alone do not restrict who can request a CC in the review process for amendments, there are not expect to be any additional costs associated with the CC provisions in the proposed rules.

Council Considers CC Requests
There are no substantive changes to the process of how EFSC considers and evaluates CC requests under the proposed rules. Therefore there are not expected be any additional costs associated with the proposed provisions.

Council's Final Decision and Scope of Review
Proposed rules would only 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). Therefore there are not expected be any additional costs associated with the proposed provisions.

RFA Required for Adding Any Area to Site Boundary
Proposed rules requiring a certificate holder to make a request for amendment when proposing to add any amount of area to the site boundary could add new costs to certificate holders because under existing rules it is possible to add area to a site boundary without making a request for amendment. Under existing rules, a certificate holder is only required to request an amendment to its site certificate when proposing to add area to the site boundary when that additional area triggers any of the thresholds under existing rule 345-027-0050(1): could result in a significant adverse impact that the Council has not addressed in an earlier order and

the impact affects a resource protected by Council standards; could impair the certificate holder's ability to comply with a site certificate condition; or could require a new condition or a change to a condition in the site certificate.

EFSC staff expects its stakeholders to address the issue of how certificate holders can add area to site boundaries during the public comment period for this rulemaking. In response to comments received, EFSC and EFSC staff may revise the proposed rules in a manner that would give EFSC or EFSC staff 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.

Elimination of the Expedited Review Process

Proposed rules eliminate the expedited review process under existing rule 345-027-0080. Based on staff research, the last review of an RFA under the existing expedited review process was the South Mist Pipeline Extension Amendment #2 in 2003. Therefore, while it is possible for a certificate holder to encounter unforeseen circumstances where the availability of an expedited or emergency review process could be valuable, it is unclear to staff whether the existing expedited review process, or an amended form of it, should be retained. Staff could see particular value in the availability of an emergency review process for proposed changes shown to be necessary to prevent a significant and relatively immediate threat to the public health, safety or the environment. Without the availability of an expedited or emergency review process, all changes proposed by certificate holders would be subject to the new standard review process.

Because current staff do not have experience in reviewing an RFA under the existing expedited review rule, the type of proposed change(s) and the reasons and explanations a certificate holder would have to supply under 345-027-0080(1)(b) in its request for expedited review, including an explanation of why the need for expedited review was unforeseeable by the certificate holder, are not clear. However, in addition to supplying the information required by 345-027-0080(1)(b), based on a reading of 345-027-0080(2), a certificate holder would also presumably need to show that a delay in the review of the RFA would unduly harm the certificate holder and that the facility, with the proposed change, would not likely result in a significant new adverse impact.

Therefore, the existing expedited review process is currently only available under a very small amount of circumstances where the need for expedited review was unforeseeable by the certificate holder, where the delay of reviewing the proposed change through a process other than expedited review would unduly harm the certificate holder, and where the proposed change that would not likely result in a significant new adverse impact on the resources protected by applicable laws, Council standards and site certificate conditions.

If a certificate holder's request for expedited review was granted, the changes proposed by the certificate holder would be reviewed against all applicable laws and Council standards. Initial applications for site certificates and requests for amendment to site certificates are both evaluated by EFSC and EFSC staff for compliance with all applicable laws and Council standards. In that respect, the time it takes for staff to conduct its review is always commensurate with the complexity of the change(s) being proposed in the site certificate holder's RFA and the amount and quality of supporting documentation and information the site certificate holder provides EFSC and EFSC staff.

Because of the variety of RFAs that can be submitted by certificate holders, because the current staff lack experience in reviewing RFAs under the provisions of 345-027-0080, and because the time and effort of staff's review will always be commensurate with the complexity of the change(s) being proposed and the amount and quality of supporting documentation and information the site certificate holder provides, any cost savings or increases of the EFSC review process as a result of the elimination of 345-027-0080 are not currently known. Likewise, if the expedited review process was retained, and for the same reasons just mentioned, it is not certain that an RFA reviewed under 345-027-0080 would result in any cost savings or increases compared to an RFA reviewed under existing rules 345-027-0060 and -0070 or the new standard process under the proposed rules.

EFSC staff expects its stakeholders to address the issue of the availability of an expedited or emergency review process during the public comment period for this rulemaking. In response to comments received, EFSC and EFSC staff may revise the proposed rules in a manner that would provide for some form of an expedited or emergency review process.

Summary of Fiscal and Economic Impacts

While it's possible some of the proposed rule changes could increase the costs incurred by site certificate holders, it's also possible that some of the proposed changes could decrease the costs incurred by site certificate holders. On balance, while the proposed rules feature many changes to the existing procedure site certificate holders are required to go through to amend a site certificate, the changes being proposed are not likely to significantly increase the costs incurred by certificate holders, nor is it likely the proposed rules would significantly increase the costs for state agencies, units of local government and the public to participate in the state's review process of a request to amend a site certificate.

Statement of Cost of Compliance:

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

While it's possible some of the proposed rule changes could increase the costs of compliance to site certificate holders, it's also possible that some of the proposed changes could decrease the costs of compliance to site certificate holders. When considering all the proposed rule changes relating to how energy facility site certificate holders request a site certificate amendment in the aggregate, and considering the costs already associated with the existing rules governing the procedure by which a site certificate holder must go through in order to make an amendment to its site certificate, it is not likely that the proposed rules would impose a significant increase in the certificate holder's cost of compliance, nor is it likely the proposed rules would significantly increase the costs for state agencies, units of local government and the public to participate in the state's review process of a request to amend a site certificate.

2. Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:

Few, if any, small businesses would be subject to the proposed rule changes. EFSC rules apply to applicants for, and holders of, site certificates for large energy facilities as defined in ORS 469.300. Applicants for site certificates are usually large corporations or subsidiaries of large corporations. Nevertheless, a small business could become an applicant or certificate holder. The only industry or business affected by these rules are those related to developing, building or operating energy facilities. Because the proposed rules are not expected to significantly increase the costs of the review process for requests for amendments to site certificates, and because few, if any small businesses are applicants or certificate holders, the proposed rules are not expected to result in significant adverse impacts on small businesses.

Furthermore, while it is possible for a site certificate holder to be a small business, as defined under ORS 183.336, the burden of any such small business to comply with all applicable siting standards prescribed in Oregon's energy facility siting statutes and Council rules cannot be diminished in any way. Therefore, while the costs of compliance for an energy facility to meet Oregon's applicable siting standards may vary depending on the type and location of a proposed facility, the costs of compliance will not vary depending on the type of business entity applying for a site certificate. Therefore, regardless of an applicant's characterization as a small business or not, the Council could not reduce any significant adverse economic impact of the rule for potential small business applicants.

b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:

None anticipated because few, if any, small businesses would be subject to the proposed rule changes.

c. Equipment, supplies, labor and increased administration required for compliance:

None anticipated because few, if any, small businesses would be subject to the proposed rule changes.

How were small businesses involved in the development of this rule?

Because of the minimal expected impact to small businesses, small businesses were not involved in the development of the proposed rule. However, small businesses and others will have the opportunity to comment on the proposed rule through the close of the public hearing and public comment period.

Administrative Rule Advisory Committee consulted? If not, why?:

Yes.

	Jason Sierman	01-13-17
Signature	Printed name	Date