



# Oregon

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**To:** Oregon Energy Facility Siting Council

**From:** Thomas L. Jackman, Rules Coordinator

**Date:** March 10, 2023

**Subject:** Agenda Item F (Action Item) – Initiation of Rulemaking Alignment Phase 1 (R211) for the March 24, 2023 EFSC Meeting

**Attachments:** Attachment 1: Draft Rules  
Attachment 2: Summary of Draft Rule Changes

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## STAFF RECOMMENDATION

Staff recommends that the Council initiate formal proceedings on Phase 1 of the Application Process Review Rulemaking, which was approved for the 2023-2025 Rulemaking Schedule. Staff has completed an initial draft of updated rule language as part of Phase 1 of the Application Process Review (R211) and recommends that Council approve the scope and general direction of the changes that staff has drafted. Staff also requests that the Council approve the creation of a Rulemaking Advisory Committee (RAC). Staff's recommended makeup of this RAC (by category) is discussed below. Please note that the Council is not being asked to consider proposed rule amendments or the adoption of permanent rules at this time.

## BACKGROUND AND SUMMARY

The Council authorized staff to begin work on a multi-phase rulemaking project to update, clarify and simplify its rules for the site certificate application review process as part of its 2021 to 2023 Rulemaking Schedule. The first phase (R211) of this three-phase project is intended to reorganize rules in divisions 015 to 026 to create clear separation of procedural and substantive provisions in the rules, while also clarifying what the applicant's responsibilities are and what staff's responsibilities are in the siting process.

As part of the 2023-2025 Rulemaking Schedule, the Council again directed staff to work on the Application Process Review — this time indicating that Phase 1 of the project should be the top priority for 2023.

As directed, staff completed a preliminary review of divisions 015 through 026 for Phase 1 of this rulemaking and presents the results in this staff report. This report contains:

- Staff's recommended scope and objectives for Phase 1
- A review of the initial draft of Phase 1, attached.
- A review of staff's recommended RAC for this rulemaking, including the number of spots allocated to various interest groups such as investor-owned utilities, the public, reviewing agencies, etc..

## **APPLICATION PROCESS REVIEW – PHASE 1 (R211) – SCOPE AND OBJECTIVES**

Phase 1 of the Application Process Review is intended to review and reorganize the rules in divisions 015 to 026 to create a clear separation of the various procedural and substantive provisions in the rules. While this phase will primarily be organizational, it seeks to clarify and simplify existing procedures for the application review process where practicable, consistent with the intent and objectives described above. As you will see in the initial draft of the rules, discussed below, the proposed changes currently include relocating language, making minor modifications to the rules for clarity, or to conform them to longstanding practices.

Much of this rulemaking effort is focused on separating the rules governing the applicant's and staff's responsibilities as it relates to the process for seeking a site certificate. The purpose behind this separation is to make it easier for an applicant or a member of the public to understand what the applicant must do compared to what staff must do at the various stages of the siting process.

Phase 1 is not intended to create or remove duties or responsibilities, to substantively alter any existing process, nor to modify the standards applied by the Council in determining whether to grant a site certificate. It is intended to optimize the layout of the siting rules in OAR 345 to make them easier for applicants and the public to follow. Again, the goal is to reduce confusion, not to raise or lower the bar for an applicant seeking to obtain a site certificate.

For reference, here is a brief overview of the other two phases of this Application Process Review, which should help provide a greater understanding of the limited scope of Phase 1.

### Application Process Review – Phase 2 (R212)

Phase 2 will include a review of application information and procedural requirements currently located in divisions 021, 022 and 024 to ensure that the requirements align with what is needed to demonstrate compliance with the Council's standards. If any requirements that do not align with an existing standard are identified, staff will evaluate whether the requirements should be removed, or modified. This project is expected to incorporate recommendations produced by the siting program evaluation being conducted as part of the Department's implementation of Executive Order (EO) 20-04, along with any applicable advice provided during Phase 1 of the project.

### Application Process Review – Phase 3 (R213)

Phase 3 will substantively evaluate the Council's standards and application requirements. This phase will likely consist of numerous, smaller rulemakings, rather than one large one. As these rulemakings have the potential to alter the standards used by the Council in granting site certificates, it will likely generate the most scrutiny from all interested parties and the makeup of each RAC will likely be different based on the standard or standards being reviewed.

## **APPLICATION PROCESS REVIEW – PHASE 1 (R211) – OVERVIEW OF INITIAL DRAFT**

The initial review and drafting of the Application Process Review - Phase 1 resulted in four divisions being altered in some way: 15, 20, 21, and 22, with most of the changes taking place in Division 15. These changes are summarized in Attachment 2 and can be divided roughly into three categories:

- 1) consolidating references to Department responsibilities into Division 15;
- 2) modifying the structure of division 15 to be consistent across the different stages of the siting process; and
- 3) tweaking rule language throughout 15, 20, and 21 to improve clarity and consistency.

Staff recommends the Council approve the current direction and scope of Phase 1 as laid out in the attached draft rules. Each of the three categories of changes in the draft rules is discussed in more detail below.

#### Consolidating References to Department Responsibilities into Division 15

As it currently stands, the most significant changes in Phase 1 involve moving language from Divisions 20 and 21 directed at the Department into Division 15. The goal of these changes is that Division 15 will contain substantially all the procedural requirements the Department is responsible for in the siting process. See, for example, OAR 345-020-0016(2), stating that “The Department must issue public notice . . . of any amendment . . .”), which was moved to a subsection of 345-015-0110, the OAR that pertains to the Department’s responsibilities regarding the public notice of a Notice of Intent.

Another example of this type of change is the language pulled from OAR 345-021-0050, which pertains to the distribution by the Department of a preliminary application and the accompanying memorandum and combining this rule language with OAR 345-015-0180, which pertains to the content of the agency’s memorandum on the preliminary application. Whereas before a reader had to go to two different divisions to understand the Department’s responsibilities regarding the preliminary application and related documentation, in the draft rules all this information is located within one rule. While everything in this first draft is subject to further revision, it should be noted that this unification will almost certainly require further changes to ensure a proper joining of these two rules, particularly as it relates to the Special Advisory Group and the local government election process. As it stands, there is potentially some duplication of language and confusion about how things work should an applicant elect to be subject to review by local government.

#### Modifying the Structure of Division 15 to be Internally Consistent Across the Siting Process

The second set of changes deals with internal consistency. The siting process consists of several stages, including the notice of intent, the project order, the preliminary application, and so on. The current version of the rules goes through these stages, but it treats each stage slightly differently, with a different set of rules for each. With this draft version of the rules, staff attempted to unify this process so—where it makes sense—each stage follows the same rule structure.

One example of this pertains to public notice. Currently there is a rule, OAR 345-0110, which details the process for public notice of a Notice of Intent. While the rules also require public notice for a Preliminary Application and a Complete Application, no corresponding rules currently exist, at least not in the same form. The current draft fixes this disparity, creating new notice rules for the various stages by pulling out the existing notice language and placing it into their own sections, in the same manner as OAR 345-0110. The hope is that that the reader will be able to follow the siting process with the assistance of the rule headers and structure. As it stands now, a reader glancing through the headers may incorrectly conclude that notice requirements exist for each stage of the siting process, not just at the Notice of Intent.

As another example, the draft rules move existing language around so there is no longer one stage of the siting process with a separate rule for the informational meeting, but another stage with a corresponding informational meeting tucked inside a different rule. Each of the stages in the siting process covered by Division 15 should now match in structure and format to the extent practicable.

### Modifying Rule Language to Improve Clarity / Consistency

The last set of changes are relatively minor ones, with small edits consisting of both the removal and addition of words to improve the readability and clarity of Divisions 15, 20, and 21. It bears repeating that the intent of these edits is not to alter the rules in any meaningful way.<sup>1</sup>

Examples of these smaller edits include the removal of now redundant references to rules that have been combined with the rules they used to reference (e.g., deleting the reference “under OAR 345-021-0055” from rule language that has been combined with OAR 345-021-0055) or modifying language to be internally consistent (e.g., modifying OAR 345-015-0120(3) to add the word “time” and remove the word “agenda” to match corresponding language used in OAR 015-0110(2)(f)). Where the rules contemplate similar situations, it does not make sense to have two different versions of these rules absent a rational basis for the differences to exist.

One modification a member of a future RAC or the public may assert as being outside the scope of this rulemaking relates to a change in the rules that was made to conform them to current practices. This change is a removal of the phrase “in coordination with the applicant” in the draft version of OAR 345-015-0180(2). This language refers to work done by the Department to determine a distribution date and compile a distribution list for the agency memorandum on the preliminary application. Staff indicates that this task has been done without the assistance of an applicant for as long as anyone can remember. If any protests are raised regarding this change as outside the scope of this rulemaking, staff recommends simply leaving the language as is.

### **APPLICATION PROCESS REVIEW – PHASE 1 (R211) – RAC FORMATION**

At this time, staff recommends the formation of a RAC, which will be relied upon to provide feedback from interested parties about the proposed modifications to the rules. Staff proposes a RAC consisting of 15 members:

- 2 – Investor-owned utilities
- 3 – Independent power producers and their representation
- 5 – Reviewing agencies (which includes the counties, state agencies, and the nine tribal governments)
- 3 – The public
- 2 – Resource interest groups and environmental justice groups

While the scope of this Phase 1 rulemaking does not contemplate substantive changes to the siting rules, staff expects relatively high interest in this rulemaking given the divisions being modified. It is also likely that the Phase 2 rulemaking would utilize a similar or even identical RAC. Given this, it is important that the Phase 1 RAC is both comprehensive in who it represents, while not growing to a size that makes the RAC too unwieldy to serve its intended purpose. Staff’s recommendation for the RAC is intended to strike the balance between these competing interests.

### **ATTACHMENTS:**

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<sup>1</sup> It should be noted that changes to Divisions 21 and 22 outside the scope of Phase 1 are being tabled until Phase 2, where these two divisions will be the focus.