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To: Oregon Energy Facility Siting Council

From: Thomas L. Jackman, Rules Coordinator

Date: August 10, 2023

Subject: Agenda Item B (Action Item): Application Process Phase 1 Rulemaking – Review of Public Comments and Consideration of Permanent Rules for the August 24, 2023 EFSC Meeting

Attachments: Attachment 1: Proposed Rules in Track Changes
Attachment 2: Draft Permanent Order
Attachment 3: Summary of Rule Changes
Attachment 4: Comment Period Public Comments (*any comments received after the date of this staff report will be provided in Supplemental Council Packet Materials prior to August 24, 2023 meeting)

STAFF RECOMMENDATION

Assuming no substantive comments are received prior to the end of the public comment period on August 18, 2023, at 5:00 pm, staff recommends the Council adopt as permanent the amended rules that are presented in the Draft Permanent Order, included as Attachment 2 to this staff report.

If additional comments are received prior to the close of the public comment period, staff will provide exact copies of these comments to the Council and staff's recommended responses. If these comments are substantive in nature, staff may change its recommendations and the Council may make any changes to the proposed rules it deems necessary to respond to these or any other public comments received by the deadline.

If Council adopts these rules as permanent, staff recommends that the permanent rules become effective upon filing with the Secretary of State.

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 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 by the Council at its March 24, 2023 meeting, staff formed a RAC, which met one time on April 27, 2023. Several RAC members provided feedback, which was presented to Council at its June 23, 2023 meeting. Following staff's presentation, the Council approved proposed rules and authorized staff to initiate formal rulemaking proceedings by issuing a Notice of Proposed Rulemaking. This began the public comment period, which is scheduled to end on August 18, 2023 at 5pm. Staff also scheduled a public hearing, which was held on July 27, 2023. No comments were made at this time. To date, only staff has suggested additional changes and they are discussed below.

This report contains:

- An overview of the scope and objectives for Phase 1
- A review of additional changes suggested by staff¹
- Proposed rules with track changes, attached
- A summary of proposed rule changes in chart form, attached
- The draft permanent order, attached

APPLICATION PROCESS REVIEW – PHASE 1 – 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 is primarily 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 seen in the proposed rules, discussed below, the changes include relocating language, making minor modifications to the rules for clarity, or conforming them to longstanding practices.

Much of this rulemaking effort was focused on separating the rules governing the applicant's and staff's responsibilities as they relate 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.

This Phase 1 rulemaking 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

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.

¹ A review of public comments will be attached if any are made between now and the close of the public comment period.

Application Process Review – Phase 3

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 – OVERVIEW OF PROPOSED RULES

The proposed rule additions and amendments 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 1 and can be divided into roughly 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 rules as laid out in the attached draft permanent order. Each of the three categories of changes is discussed in more detail below.

Consolidating References to Department Responsibilities into Division 15

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 proposed rules all this information is located within one rule.

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 proposed 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 proposed rules fix 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 proposed 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.²

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 was made to conform the rule language to current practices. This change is a removal of the phrase “in coordination with the applicant” in the proposed 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 since the advent of digital distribution. The rule change reflects this shift.

ADDITIONAL PROPOSED CHANGES BY STAFF

Since the filing of the Notice of Proposed Rulemaking (NPR), staff has identified two additional changes to the proposed rules. These two changes are highlighted in the attached draft permanent order and are discussed in detail below.

Change #1

As discussed above, in the NPR version of the rules there is an additional notice requirement for the applicant throughout the application process. See, e.g., proposed rule at 345-105-1094(1)(d), requiring notice to “[t]he land management agency or organization with jurisdiction over the protected areas identified in the application.” The NPR version of the rules omitted this new requirement for OAR 345-015-220, which deals with the public notice of the draft proposed order. Staff recommends adding this requirement as 345-015-0220(2)(D), which would read:

"The land management agency or organization with jurisdiction over the protected areas identified in the application."

Change #2

To improve clarity and flow, the NPR version of the rules moved some language regarding the distribution of the Notice of Intent (NOI) directed primarily at the Department from Division 20 to Division 15. However, this also included language directed at the applicant, which was rephrased to fit the nature of Division 15 and its focus on the Department. See, NPR version of the rules, 345-015-

² 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.

0120(5), which originally read in Division 20 as “The applicant must provide a printed copy of all or part of the NOI to any person on the distribution list upon request” and was changed after being moved to “Should any person on the distribution list request a printed copy of all or part of the NOI, the Department will ensure that the applicant does so.”

To improve clarity, staff recommends reverting the move of the language originally directed at the applicant by removing OAR 345-015-0120(5) (NOPR version) entirely from Division 15 and inserting this language into Division 20 by modifying OAR 345-020-0016 as follows:

“The applicant must prepare and submit additional copies of the amended NOI as required by OAR 345-020-0040” → “The applicant must provide a printed copy of all or part of the amended NOI to any person on the distribution list as directed by the Department.”

Note that the proposed rules have removed OAR 345-020-0040 entirely, so this reference would need to be updated regardless. Also note that OAR 345-020-0006(3) already requires that the applicant “submit additional copies of the NOI to the Department upon request,” which further supports the proposed change.