



Oregon

Kate Brown, Governor



550 Capitol St. NE
Salem, OR 97301-3737
Phone: (503) 378-4040
Toll Free: 1-800-221-8035
FAX: (503) 373-7806
www.Oregon.gov/ENERGY

To: Oregon Legislative Assembly
From: Oregon Department of Energy
Date: January 28, 2020
Re: 2019 Annual Agency Rulemaking Report

Pursuant to Oregon Laws 2016, chapter 44, section 1 (HB 4106), the Oregon Department of Energy is providing the following information about the agency’s rulemakings for the preceding 12-month period, January 1, 2019 through December 31, 2019. This report summarizes the number of permanent and temporary rules the agency adopted, amended, repealed or suspended in 2019. The agency conducts rulemaking across two OAR Chapters: Chapter 330 - Department of Energy and Chapter 345 - Energy Facility Siting Council.

Permanent Rulemakings, pursuant to ORS 183.335(2) and (3)

Chapter 330 - Department of Energy

Number of Rulemakings:	3
Number of Rules Adopted:	19
Number of Rules Amended:	24
Number of Rules Repealed:	0
Number of Rules Suspended:	0

- DOE 1-2019 Chapter 330: Large Electric Consumers Public Purpose Program (LECPPP)
Caption: Clarifies and updates industrial self-direction program rules relating to project applications and fees.

Date Adopted: 1/11/2019	Date Filed: 1/11/2019	Date Effective: 7/1/2019	
Adopted:	Amended: 9	Repealed:	Suspended:

Amended: 330-140-0010, 330-140-0020, 330-140-0030, 330-140-0040, 330-140-0050, 330-140-0060, 330-140-0070, 330140-0080, 330-140-0140

- DOE 2-2019 Chapter 330: Implementing Oregon Laws 2019 Chapter 160 (House Bill 2496)
Caption: Clarifies and updates requirements of 1.5 Percent for Green Energy Technology Program.

Date Adopted: 12/19/2019	Date Filed: 12/19/2019	Date Effective: 1/1/2020	
Adopted: 3	Amended: 15	Repealed:	Suspended:

Adopted: 330-135-0032, 330-135-0037, 330-135-0051

Amended: 330-135-0010, 330-135-0015, 330-135-0018, 330-135-0020, 330-135-0025, 330-135-0030, 330-135-0031, 330-135-0035, 330-135-0036, 330-135-0040, 330-135-0045, 330-135-0050, 330-135-0052, 330-135-0055, 330-135-0060

Oregon Department of Energy 2018 Rulemaking Report

- DOE 3-2019 Chapter 330: Implementing Oregon Laws 2019 Chapter 655 (House Bill 2618)
Caption: Creates rebate program for solar electric systems and paired solar and storage systems.

Date Adopted: 12/19/2019	Date Filed: 12/19/2019	Date Effective: 01/01/2020
Adopted: 16	Amended:	Repealed:
		Suspended:

Adopted: 330-240-0000, 330-240-0010, 330-240-0020, 330-240-0030, 330-240-0040, 330-240-0050, 330-240-0060, 330-240-0070, 330-240-0100, 330-240-0110, 330-240-0120, 330-240-0130, 330-240-0140, 330-240-0150, 330-240-0160, 330-240-0170

Chapter 345 - Energy Facility Siting Council

Number of Rulemakings:	1
Number of Rules Adopted:	0
Number of Rules Amended:	16
Number of Rules Repealed:	0
Number of Rules Suspended:	0
Number of Rules Renumbered:	0

- EFSC 10-2019 CHAPTER 345 – 2019 Housekeeping Rulemaking Project.

Date Adopted: 9/27/2019	Date Filed: 6/12/2019	Date Effective: 10/4/2019
Adopted:	Amended: 16	Repealed:
		Suspended:

Amended: 345-001-0000, 345-001-0010, 345-015-0110, 345-015-0120, 345-015-0180, 345-015-0190, 345-015-0200, 345-015-0220, 345-015-0310, 345-020-0011, 345-020-0016, 345-020-0040, 345-021-0000, 345-021-0010, 345-021-0050, 345-021-0055, 345-021-0090

Temporary Rulemakings, pursuant to ORS 183.335(5)

Chapter 330 – Department of Energy

Number of Temporary Rulemakings:	0
---	---

Chapter 345 – Energy Facility Siting Council

Number of Temporary Rulemakings EFSC 9-2019 Chapter 345 Department of Energy, filed 08/22/2019 Effective date: 08/22/2019 - 02/17/2020	One temporary rulemaking which resulted in: 20 rules adopted, 7 rules amended, 20 rules suspended Temporary rules governing the process for amending energy facility site certificates, replacing rules in OAR 345-015, 345-025, and 345-027 approved by the Council in October 2017.
Rules adopted 8/22/2019	20 rules adopted: OAR 345-027-0311, 345-027-0313, 345-027-0350, 345-027-0351, 345-027-0353, 345-027-0355, 345-027-0357, 345-027-0359, 345-027-0360, 345-027-0363, 345-027-0365, 345-027-0367, 345-027-0368, 345-027-0371, 345-027-0372, 345-027-

Oregon Department of Energy 2018 Rulemaking Report

	0375, 345-027-0380, 345-027-0385, 345-027-0390, 345027-0400.
Rules amended 8/22/2019	7 rules amended: OAR 345-015-0014, 345-015-0016, 345-015-0080, 345-015-0083, 345-025-0006, 345-0250010, 345-025-0016 to reflect changes to rules made under Administrative Orders EFSC 4-2017 and EFSC 5-2017.
Rules suspended 8/22/2019	20 rules suspended: OAR 345-027-0011, 345-027-0013, 345-027-0050, 345-027-0051, 345-027-0053, 345-0270055, 345-027-0057, 345-027-0059, 345-027-0060, 345-027-0063, 345-027-0065, 345-027-0067, 345027-0068, 345-027-0071, 345-027-0072, 345-027-0075, 345-027-0080, 345-027-0085, 345-027-0090, and 345-027-0100.

Statement of need: The temporary rulemaking was needed due to the Oregon Supreme Court’s August 1, 2019 decision in Friends of the Columbia River Gorge v. EFSC, S065478. The Oregon Energy Facility Siting Council (Council) found that adopting temporary rules governing the process for amending energy facility site certificates was needed in order to ensure that the Oregon Department of Energy (ODOE) and the Council could continue to process pending applications for site certificate amendments without prejudice to the certificate holders who had submitted applications, and to provide regulatory certainty and continuity in the processing of new applications for site certificate amendments. Failure to act promptly would have resulted in serious prejudice to the public interest and the interest of the parties concerned including the site certificate holders in process.

Agency findings: ODOE and the Council identified specific consequences that would result from the failure to immediately adopt temporary rules. The following explanation identifies why proceeding under ORS 183.335(5) *was the most appropriate method for adopting, amending or suspending rules* and applies to each rule listed above.

Background: The Council amended administrative rules relating to the procedures for the amendment of site certificates in October 2017. The rules were then challenged in the Oregon Supreme Court by the Friends of the Columbia River Gorge (Friends) and other groups. On August 1, 2019, the Supreme Court issued a decision declaring that the rules were invalid since the Council had failed to comply with ORS 183.335(3)(d), because it did not issue a statement identifying how it would later determine whether the proposed rules were accomplishing their objective. The Court also found that certain sections of the adopted rules exceeded the Council’s statutory authority regarding the scope of judicial review.

Petitioners in the case took the position that following the Supreme Court ruling invalidating the current rules, that pre-October 2017 rules would be in effect immediately and that certificate holders who had made application for amendments under the now invalidated rules must reapply for said amendments under the pre-October 2017 rules. The Council was advised by its

Oregon Department of Energy 2018 Rulemaking Report

own counsel that the rules adopted in October 2017 would continue to be legally effective until the Court issued its appellate judgement, but that state policy dictated that the Court's decision should be respected even before the entry of the appellate judgement.

To complicate matters, when the Council adopted the amendment rules in October 2017, it also *repealed* OAR 345-027-0070 (the rule that had previously governed the process for site certificate amendments) in Order EFSC 5-2017. As a result, *it was not clear which, if any, rules were in effect pending issuance of the appellate judgement*. This resulted in site certificate holders voicing significant concerns regarding how the Council would proceed with pending requests for amendment, and ODOE expressing uncertainty regarding how to process new site certificate amendment requests that it might receive.

Further, the Council found that even if it assumed that the pre-October 2017 rules were effective, it would be unfair and substantially prejudicial to require certificate holders with pending applications for site certificate amendments to resubmit their requests for amendment under the pre-October 2017 rules, thereby restarting the entire amendment process. *Therefore, proceeding under ORS 183.335(5) was determined to be the most appropriate method for adopting, amending and suspending each of the rules above.*

The Council found that it was not appropriate to proceed in accordance with ORS 183.335(2) and (3) due to the uncertainty involving the public, applicants, the agency, and participants in the site certificate amendment process. In addition, the Council determined that if no immediate action was taken, there would have been substantial uncertainty as to which rules the Council should apply to process requests for amendment until permanent rules were adopted.

The adoption of temporary rules provided certainty as to what rules applied to the review of requests for amendment and allowed the orderly processing of amendment requests, including requests in progress, by allowing amendments to be addressed under the temporary rules. The temporary rules also removed provisions regarding judicial review that the Supreme Court held were not within the Council's statutory authority. This was necessary to bring the process in line with the Court's ruling.

The specific consequences to individual certificate holders are more specifically set forth in [Temporary Administrative Order EFSC 9-2019](#) filed on August 22, 2019 with the Secretary of State (Oregon).

Update: The Oregon Supreme Court upheld the Energy Facility Siting Council's temporary rules in an opinion issued on January 16, 2020.

Appendix

Detail of temporary rulemaking

Adopted - Adopts provisions included in Administrative Order EFSC 5-2017 and 345-027-0311 which defines the applicability of temporary rules related to site certificate amendments. Clarifies that the Department and Council will continue to process all requests for amendment and amendment determination requests submitted on or after October 24, 2017 for which Council has not made a final decision prior to the effective date of these rules, without requiring the certificate holder to resubmit the request or to repeat any steps taken as part of the request prior to the effective date of these rules:

345-027-0313 - Provides that site certificates expire when deadlines to begin construction are not met.

345-027-0350 - States what types of changes require a certificate holder to submit a request for amendment to the Department.

345-027-0351 - States the different review processes for different types of requests for amendments.

345-027-0353 - States what types of changes are exempt from requiring an amendment to the site certificate.

345-027-0355 - States that a certificate holder must perform a written evaluation for changes that it determines do not require an amendment, and states what the certificate holder must do with that evaluation.

345-027-0357 - States the process a certificate holder must go through when submitting an Amendment Determination Request to the Department.

345-027-0359 - States that a certificate holder may elect to participate in a pre-amendment conference with the Department.

345-027-0360 - States what a certificate holder must submit to the Department when making a request for amendment, and that this submittal is considered a preliminary request for amendment until the Department determines the request is complete.

345-027-0363 - States that the Department must first determine a request for amendment is complete (and how that completeness is determined) before it proceeds to writing and issuing a Draft Proposed Order.

345-027-0365 - States the process by which the Department issues a Draft Proposed Order.

345-027-0367 - States the process by which Public Notice and Comment occurs on Draft Proposed Orders for Request for Amendment under Type A Review.

345-027-0368 - States the process by which Public Notice and Comment occurs on Draft Proposed Orders for Request for Amendment under Type B Review. Provides that judicial review of the Council's final order either granting or denying an amended site certificate shall be as provided in ORS 469.403

345-027-0371 - States the process by which the Proposed Order is issued, the process for requesting and granting a Contested Case, and the process for how the Council makes its Final Decision on Requests for Amendment Under Type A Review.

345-027-0372 - States the process by which the Proposed Order is issued, the process for requesting and granting a Contested Case, and the process for how the Council makes its Final Decision on Requests for Amendment Under Type B Review. Provides that judicial review of the Council's final order either granting or denying an amended site certificate shall be as provided in ORS 469.403

Oregon Department of Energy 2018 Rulemaking Report

345-027-0375 - States the scope of Council's review and what standards and laws apply to the Council's review of various types of changes proposed in a request for amendment.

345-027-0380 - States when and how the Type C review process could be approved, and the procedural steps of the Type C review process.

345-027-0385 - States the process by which certificate holders can make a request for amendment to extend construction deadlines.

345-027-0390 - States the process by which a person may request that subsequent laws or rules (laws that became effective after an approved site certificate or amended site certificate was issued) be made applicable to a facility and a site certificate holder.

345-027-0400 - States the circumstances that require a request for amendment to transfer the site certificate and the process by which that review is completed.

Amended - Adopts provisions included in Administrative Order EFSC 5-2017

345-015-0014 - States how and to whom the Department sends notice of a contested case.

345-015-0016 - States who is eligible to request party status to a contested case on an application for a site certificate and the process by which those requests must be made.

345-015-0080 - States the process by which any state or local government agency may request to participate in a contested case.

345-015-0083 - States the purpose and requirements of the prehearing conference and prehearing order related to contested cases.

345-025-0006 - Provides conditions to be included in every site certificate.

345-025-0010 - Provides site-specific conditions which may be included in a site certificate.

345-025-0016 - Provides procedures related to monitoring and mitigation plans.

Suspended - Suspends Div. 27 rules approved through Administrative Order EFSC 5-2017

345-027-0011

345-027-0013

345-027-0050

345-027-0051

345-027-0053

345-027-0055

345-027-0057

345-027-0059

345-027-0060

345-027-0063

345-027-0065

345-027-0067

345-027-0068

345-027-0071

345-027-0072

345-027-0075

345-027-0080

345-027-0085

345-027-0090

345-027-0100