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SUBJECT: SB 258 – Amending Site Certificates

What the bill does

Senate Bill 258 will make two statutory changes related to ORS 469.401(2). The first change will remove a reference to “amended site certificate” in ORS 469.401(2) to clarify that not all site certificate amendment requests need to be evaluated under all of the Energy Facility Siting Council standards that would apply to an original site certificate application. The second change would clarify that the provision related to compliance with local ordinances and state laws and rules of the council, in effect on the date the site certificate is executed, does not apply to land use regulations subject to the requirements of ORS 469.504(1)(b). This clarification would codify the Oregon Supreme Court’s decision in *Blue Mountain Alliance v. EFSC*.

Background Information

The Energy Facility Siting Council (EFSC) is a seven member board appointed by the Governor and confirmed by the Senate. EFSC has the responsibility to review applications for site certificates for all state-jurisdictional energy facilities, and either issue or deny a site certificate for the energy facility. The Oregon Department of Energy administers the EFSC facility siting process, which consolidates state agency and local government regulations into a single review process. State agencies and local governments participate throughout the process as reviewing agencies.

In 2009, the siting statutes were amended to clarify that an amended site certificate had the same legal status as the original site certificate. That change had the unintended consequence of potentially requiring that all amendment requests be reviewed as “general reopeners”, where the site certificate holder must comply with all local ordinances, state law and EFSC rules in effect on the date the site certificate amendment is executed irrespective of the scope of the amendment. Historically, site certificate holders requesting amendments to their site certificates have addressed only those local ordinances, state laws, and EFSC rules that would be impacted by the amendment. Only in circumstances where amendments were requested to extend deadlines for beginning or completing project construction would an amendment be considered a “general reopener” and be required to re-establish compliance with all Council standards and other applicable state laws and ordinances. This practice is consistent with EFSC rules.

In 2013, the Legislature passed HB 2105 requiring the Department of Energy to study several substantive and procedural issues related to energy facility siting. The Department was required to present a report to the Legislature by November 1, 2013. The legislation required the report to make recommendations for potential legislation. SB 258 was one of the recommendations that came out of the report.

Identified Issues

SB 258 identifies two problems, both under ORS 469.401(2).

The first issue relates to site certificate amendments. Pursuant to EFSC rules, a site certificate holder must submit a request to amend the site certificate if the certificate holder plans to design, construct or operate the facility in a manner different from the description in the site certificate. The scope of a site certificate amendment request varies significantly. An amendment request could be as limited as a change in a single site certificate condition or could be as broad as a change in the size of the energy facility, a change in the type of fuel used or a change in the start of the construction date.

Without a change in statute, the current language could potentially be interpreted to require EFSC and the department to review all site certificate amendment requests as “general reopeners.” Under such an interpretation, all amendments would be required to establish compliance with all current EFSC standards, local ordinances, and state laws regardless of the scope of the amendment and regardless of whether the amendment request relates to compliance with that specific law or standard. This would result in a need for increased resources (time and funding), without benefit when amendments have no impact with compliance on a council standard.

The second issue is the current language in ORS 469.401(2) requires the site certificate holder to abide by all "local ordinances and state laws and rules of the council in effect on the date the site certificate or amended site certificate is executed...." However, ORS 469.504(1)(b)(A) requires that applications be reviewed for compliance with the land use regulations “in effect on the date the application is submitted.” This creates a potential conflict when local land use regulations are adopted or amended after an application is submitted, but before the site certificate is executed. The Oregon Supreme Court recently recognized this potential conflict and concluded that the requirement in ORS 469.401(2) that a site certificate comply with local ordinances, state laws and EFSC rules in effect on the date the site certificate is amended does not include any ordinance, law or rule that is a land use regulation for purposes of ORS 469.504(1)(b). (*Blue Mountain Alliance v. EFSC*, 353 Or 465, 300 P3d 1203 (2013)).