



To: Senate Committee on Environment and Natural Resources

From: Todd R. Cornett, Assistant Director for Siting
Oregon Department of Energy

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Subject: SB 258 – Energy Facility Siting Council Review of Applications and Amendments

INTRODUCTION

The Oregon Department of Energy is introducing and supports Senate Bill 258. The bill 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 against all of the Energy Facility Siting Council standards that would apply to an original site certificate application. The second change will 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, do not apply to land use regulations subject to the requirements of ORS 469.504(1)(b). This clarification will codify the Oregon Supreme Court’s decision in *Blue Mountain Alliance v. EFSC*.

BACKGROUND

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. The Oregon Department of Energy (ODOE) administers the EFSC facility siting process, which consolidates state agency and local government regulations into a single review process. Local governments, state agencies, federal agencies, tribes and other entities identified in statute or rule that have regulatory or advisory responsibility with respect to a proposed energy facility participate throughout the process as “Reviewing Agencies.”

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



Pursuant to EFSC rules, a site certificate holder must submit a request to amend the site certificate if they plan to design, construct or operate the facility in a manner different from the site certificate. Amendment requests vary greatly in scope and scale. They could be as limited as a change in a single site certificate condition or as broad as a large increase in the project footprint of the energy facility.

Historically, site certificate holders requesting amendments to their site certificates have addressed only those local land use regulations, state laws, and EFSC rules (Council standards) that would be impacted by the amendment. An amendment requested to change a site certificate condition would only be evaluated against those Council standards applicable to the change in condition. An amendment requested to increase the project footprint would be evaluated against all Council standards but only for the area being added. An amendment requested to extend deadlines for beginning or completing project construction would be evaluated against all Council standards for the entire project and be required to re-establish compliance with all Council standards. This is referred to as a “general reopener”. This practice is consistent with existing EFSC rules.

In 1999, the siting statutes were amended to clarify that an amended site certificate had the same legal status as the original site certificate by adding “or amended site certificate” to every “site certificate” reference. That change had the unintended consequence of potentially requiring that all amendment requests, no matter the scope or scale, be reviewed as “general reopeners”, where the site certificate holder must comply with all Council standards in effect on the date the site certificate amendment is executed, irrespective of the scope of the amendment and whether or not the facility is under construction or already in operation.

ORS 469.401(2) requires a 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 executed 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))



DISCUSSION

Senate Bill 258 will remove “or amended site certificate” in the first two sentences of ORS 469.401(2) allowing the EFSC rules to establish which council standards are applicable to different types of amendments. Without a change in statute, the current language could be interpreted as a requirement for 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 Council standards regardless of the scope of the amendment and regardless of whether the facility is already under construction or in operation. This would result in a need for increased resources (time and funding), without benefit when amendments have no impact on compliance.

Senate Bill will also amend ORS 469.401(2) to clarify that the timing requirements of that statute do not apply to land use regulations, which instead are subject to the requirements of ORS 469.504(1)(b). This clarification would codify the Oregon Supreme Court’s decision in the *Blue Mountain Alliance v. EFSC*.

SUMMARY

The Oregon Department of Energy supports Senate Bill 258 which will eliminate the unintended consequence associated with potentially requiring that all amendment requests be reviewed as “general reopeners” where the site certificate holder must comply with all local land use regulations, state laws and EFSC standards regardless of the scope of the amendment. The bill will also remove the conflict between ORS 469.401(2) and ORS 469.504(1)(b) and codify the Oregon Supreme Court decision that fixes local land use regulations at the time an application is submitted and not when it is executed.