



**DEPARTMENT OF JUSTICE**  
GENERAL COUNSEL DIVISION

**MEMORANDUM**

DATE: February 26, 2010

TO: Robert Shiprack, Chair  
Energy Facility Siting Council

FROM: Janet L. Prewitt, Senior Assistant Attorney General  
Natural Resources Section

SUBJECT: Process for Reviewing a Petition for Rulemaking

On February 5, 2010, Oregon Natural Desert Association, Audubon Society of Portland and Defenders of Wildlife (ONDA) filed a joint petition for rulemaking with the Energy Facility Siting Council (Council) and the Oregon Department of Energy (ODOE). The petition requests that the Council amend OAR 345-001-0010 to add a definition of "Single energy facility." ONDA further petitioned the Council to amend OAR 345-021-0000 to add a requirement that any person seeking a conditional use permit for a renewable energy facility less than 35 MW provide information demonstrating to the Council that the proposed facility is not a "single energy facility" as defined by the proposed addition to the definition section of the rules.

You have asked for advice regarding the process for Council review of the petition for rulemaking. The applicable statute is ORS 183.390. The decision process has two steps. First, the agency must decide whether to grant or deny the petition. This decision must be made within 90 days of receipt of the petition. If the agency grants the petition and decides to commence rulemaking, the notice of proposed rulemaking must be filed with the Secretary of State within 90 days of receipt. Similarly, if the agency decides to deny the petition, it must do so in writing, again within 90 days of receipt of the petition. The Council will need take action on the petition before May 6, 2010.

As required in ORS 183.390 (1), the Attorney General has adopted model rules governing the "form for such petitions, and the procedure for their submission, consideration and disposition." The model rules are found at OAR 137-001-0070, and are attached as an appendix to this advice. Although ONDA's petition substantially conformed to the requirements for submission, it did not conform to letter of the requirement that the text of the rule be set out showing "matter proposed to be deleted and proposed additions shown by a method that clearly indicates proposed deletions and additions [.]" This failure should not be considered fatal to the petition because the petition supplies enough context to identify the rules affected by the proposed changes.

Public Comment

ORS 183.390 (2) provides:

(2) If a petition requesting the amendment or repeal of a rule is submitted to an agency under this section, the agency shall invite public comment upon the rule, and shall specifically request public comment on whether options exist for achieving the rule's substantive goals in a way that reduces the negative economic impact on businesses.

ONDA's petition can fairly be described as "requesting the amendment" of an existing rule. Thus, this notice requirement applies and the Council should invite public comment before deciding whether to grant or deny the petition. OAR 137-001-0070(3). Notice of this petition and the request for comments should be given to persons entitled to notice of a rulemaking under ORS 183.335(1). In addition, notice should be given to persons identified by ONDA pursuant to OAR 137-001-0070(1) as "persons known to the petitioners to be interested in the rule." Review of that list reveals that ODNA did not include as interested persons any energy facility developers or any county governments. The Council's notice for this rulemaking petition should include these two groups, if they are not already on the Council's general rulemaking notice list.

The reason for seeking comment from the public is to aid the Council in considering the consideration in ORS 183.390(3)(b), set out below. Note that there are two types of comments to invite in the notice. First, the statute specifically requires that the agency seek comment on "whether there are options for achieving the substantive goals of the rule in a way that reduces the negative economic impact on businesses." ORS 183.390(2), OAR 137-001-0070(3). Second, the agency can invite general comments of the rule, particularly on the other issues the Council must consider when deciding on the petition.

In addition to notice of the rule seeking public comment as described above, the agency may provide a copy of the petition to the interested persons named in the petition, as described in OAR 137-001-0070(4)(a), and may schedule oral presentations, OAR 137-001-0070(4)(b).

Review Process

ORS 183.390(3) sets out six criteria for an agency to consider when deciding to grant or deny a petition for rulemaking:

(3) In reviewing a petition subject to subsection (2) of this section, the agency shall consider:

- (a) The continued need for the rule;
- (b) The nature of complaints or comments received concerning the rule from the public;
- (c) The complexity of the rule;
- (d) The extent to which the rule overlaps, duplicates or conflicts with other state rules or federal regulations and, to the extent feasible, with local government regulations;
- (e) The degree to which technology, economic conditions or other factors have changed in the subject area affected by the rule; and

(f) The statutory citation or legal basis for the rule.

Obviously, not all of these considerations have equal weight for all petitions for rulemaking. For example, where, as here, the proposed amendment adds new language, ORS 183.390(3)(a) may have less force. However, if the Council decides to deny the petition, it should memorialize consideration of all of the six criteria in the written denial required by ORS 183.390(1). The statute does not require the agency to set forth the reasons for denial.

Finally, if the Council decides to grant the petition and commence rulemaking, the proposed rule provides the starting point. The rule as proposed can be amended during the course of the rulemaking. Similarly, denial of a petition for rulemaking does not preclude the Council from independently initiating rulemaking on the same subject at a later time.

cc: Tom Stoops, ODOE  
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