

ATTACHMENT 1

**OAD CHAPTER 345 – OREGON ENERGY FACILITY SITING COUNCIL
RULES EFFECTIVE AUG. 29, 2023**

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DIVISION 1 - GENERAL PROVISIONS

345-001-0005 - Uniform and Model Rules

(1) Except as described in this rule, the Council adopts and incorporates by reference in this chapter the following rules from the Attorney General's Uniform and Model Rules (~~January-December 2012~~²⁰²³): OAR 137-001-0005 through 137-001-0100, 137-002-0010 through 137-002-0060, ~~137-003-0001 through 137-003-0092~~^{137-003-0501 through 137-003-0700}, and 137-005-0010 through 137-005-0070.

(2) Notwithstanding the provisions of OAR 137-003-~~0055~~⁰⁶⁶⁰(1), following the issuance of notice of a contested case, the Department of Energy shall enter into the record the substance of any significant contact between a Council member and any Department staff from that point forward, concerning facts in the record.

(3) In any conflict between the model rules and Council rules, the Council shall apply its own rules.

Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.490

Commented [TJ1]: NOTE – The comments throughout this proposed redline indicate the reason for the proposed change, but they also have a number that corresponds with the five categories of changes discussed in the accompanying February staff report to Council.

Commented [TJ2]: Setting date to version of OAH Model Rules Council would adopt if accepted as proposed.

Commented [TJ3R2]: #2 OAH Rule

Commented [TJ4]: Updated reference due to move to OAH model rules.

Commented [TJ5R4]: #2 OAH Rule

Commented [TJ6]: Updated reference due to move to OAH model rules.

Commented [TJ7R6]: #2 OAH Rule

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DIVISION 15 - PROCEDURES GOVERNING COUNCIL AND DEPARTMENT OF
ENERGY PROCEEDINGS, INCLUDING SITE CERTIFICATE HEARINGS

345-015-0001 - Purpose and Authority

The rules in this division, authorized by ORS 469.040, 469.470 and 469.440, establish procedures governing Department of Energy and Council review processes, including contested case ~~hearings/proceedings. The Council shall apply the Attorney General's Uniform and Model Rules, as specified in OAR 345-001-0005, for contested case proceedings and collaborative dispute resolution.~~

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.310 to 183.550, ORS 469.040, ORS 469.370, ORS 469.405, ORS 469.440

345-015-0014 - Contested Case Notices

~~(1)~~ The Department must issue contested case notices for Council contested case proceedings as provided in OAR 137-003-~~0001~~0505. The notices, ~~at a minimum, must include:~~

- ~~(a) A caption with the name of the person or agency to whom the notice is issued;~~
- ~~(b) A short and plain statement of the issues to be considered under OAR 345-015-0016, and a reference to the particular sections of the statute and rules involved;~~
- ~~(c) A statement of the party's right to be represented by counsel and that legal aid organizations may be able to assist a party with limited financial resources;~~
- ~~(d) A statement of the party's rights to participate in the hearing as a party or limited party;~~
- ~~(e) A statement of the agency's authority and jurisdiction to hold a hearing on the issues; and~~
- ~~(f) A statement of the time and place of the hearing; and must also include:~~

~~(1) The deadline for the Department and applicant or certificate holder to respond to petitions for party or limited party status; and~~

~~(2) (g) A statement that active-duty/active-duty service members have a right to stay a contested case proceedings under the federal Servicemembers Civil Relief Act as described in ORS 183.415(3)(g); and~~

~~(2) The Department must send a contested case notice by registered or certified mail to the applicant or certificate holder, and to each party or limited party to the contested case.~~

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415

Commented [TJ8]: Changing "hearings" to "proceedings" whenever the entire contested case process is being referred to as opposed to the more narrow "hearing" where evidence is presented to the hearing officer.

Commented [TJ9R8]: #3 Consistency

Commented [TJ10]: Removed as 345-015-401 now contains the language about the adopted rules governing the contested case proceeding.

Commented [TJ11R10]: #1 Reorganize

Commented [TJ12]: Removed existing list as unnecessary given the proposed adoption of OAR 137-003-0505, which serves the same function.

Commented [TJ13R12]: #2 OAH Rules

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Procedures for the Conduct of Contested Cases

345-015-0400 – Governing Provisions – NEW RULE

(1) All contested case proceedings before the Council shall be conducted in accordance with OAR 137-003-0501 through 137-003-0700 (as of December 31, 2023), referred to herein as the Office of Administrative Hearing rules.

(2) The rules in this Division addressing contested cases (OAR 345-015-0400 through 345-015-0475) are intended to supplement the Office of Administrative Hearing rules by providing additional procedures governing requests for and the conduct of Energy Facility Siting Council contested cases.

(3) In any conflict between the Office of Administrative Hearing rules and Council rules, the Council shall apply its own rules.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440

345-015-~~0023~~ 0405 – Appointment and Duties of Hearing Officer

(1) The Council shall appoint a hearing officer to conduct a contested case proceeding on behalf of the Council or to compile the record and recommend resolution of objections to the record of a local land use proceeding held pursuant to ORS 469.503(2)(a). The Council may refer a contested case to the Office of Administrative Hearings for appointment of a hearing officer, or Council may appoint a Council member, an employee of the Department of Energy, or some other person or persons as it sees fit.

(2) A hearing officer shall take all necessary action to:

- (a) Ensure a full, fair, ~~and impartial, and efficient~~ hearing proceeding;
- (b) Facilitate presentation of evidence;
- (c) Comply with statutory time limits on Council decisions;
- (d) Maintain order; and
- (e) Assist the Council in making its decision.

~~(3) At the commencement of a contested case hearing, the hearing officer shall explain the issues involved in the hearing and the matters that the parties must either prove or disprove.~~

(4) The hearing officer shall keep the Council informed regularly on the status of the contested case and maintain a complete and current record of all motions, rulings, testimony and exhibits during the course of the hearing. The hearing officer shall keep the Council informed regularly on the status of the contested case.

- (a) All pleadings, motions, and intermediate rulings;
- (b) Evidence received or considered;

Commented [TJ14]: New rule to clarify governing provisions for the contested case process.

Commented [TJ15R14]: #4 Clarity

Commented [JT*O16]: #4 Clarity

Commented [TJ17]: Removed as duplicative of OAR 137-003-0600(3).

Commented [TJ18R17]: #2 OAH Rules

Commented [TJ19]: Matching language found in statute (ORS 183.417(9))

Commented [TJ20R19]: #3 Consistency

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(c) Stipulations;

(d) A statement of matters officially noticed;

(e) Questions and offers of proof, objections, and rulings thereon;

(f) Information about any ex parte communication with the hearing officer that must be made part of the record under OAR 137-003-0625(2);

(g) Proposed findings and exceptions; and

(h) The proposed contested case order.

(54) The hearing officer is authorized to carry out the responsibilities assigned in this rule, including ~~but not limited to~~ the authority to:

(a) Administer oaths and affirmations;

(b) Rule on offers of proof and receive evidence pursuant to the hearing officer's established schedule;

(c) ~~Consider petitions for, authorize, and limit depositions, as provided in OAR 137-003-0572 Order depositions and other discovery to be taken and to issue subpoenas;~~

(d) Order and control discovery, as provided in OAR 137-003-~~00250568~~, and all other aspects of the contested case hearing proceeding, the order of proof, and the conduct of the participants;

(e) Dispose of procedural matters and rule on motions;

(f) Call and examine witnesses;

(g) Hold conferences, including one or more prehearing conferences as provided in OAR 137-003-~~00350575~~, before or during the hearing for settlement, simplification of issues, or any other purpose the hearing officer finds necessary. The hearing officer may limit the issues of the contested case and including, for a contested case proceeding on an application for a site certificate or for an amendment to a site certificate, determinings shall limit these issues that have been raised with sufficient specificity in the public hearing;

(h) Continue the hearing-contested case proceeding from time to time;

(i) Issue protective orders in accordance with the standards of Rule 36(C) of the Oregon Rules of Civil Procedure.

(j) At the request of the Council, or upon motion of a party or limited party for good cause shown as provided in OAR 345-015-00620470, and with reasonable notice to all parties, reopen the contested case hearing proceeding for reception of further evidence on issues identified in the notice at any time prior to final decision by the Council;

(k) Within the hearing officer's discretion, or at the request of the Council, certify any question to the Council for its consideration and disposition;

Commented [JT*O21]: This is presumed by (m), below.

Commented [JT*O22R21]: #4 Clarity

Commented [TJ23]: Making it clear that evidence submitted by parties must be part of the scheduled established by the HO

Commented [TJ24R23]: #4 Clarity

Commented [TJ25]: OAR 137-003-0568 explains how the issuance of subpoenas will work.

Commented [TJ26R25]: #2 OAH Rules

Commented [TJ27]: Reflecting adoption of OAH rules as proposed.

Commented [TJ28R27]: #2 OAH Rules

Commented [JT*O29]: #3 Consistency

Commented [TJ30]: Reflecting adoption of OAH rules as proposed.

Commented [TJ31R30]: #2 OAH Rules

Commented [TJ32]: #4 Clarity

Commented [TJ33]: #3 Consistency

Commented [TJ34]: #1 Reorganize

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(l) Prepare and serve upon the parties a proposed order addressing those issues enumerated in the request for contested case hearing and any additional issues approved by the hearing officer, including findings of fact, findings of ultimate fact and conclusions of law; and

(m) Take any other action consistent with the Council's governing statutes and the Council's rules.

~~(6) Notwithstanding the provisions of OAR 137-003-0055(1), following the issuance of a notice of contested case, the hearing officer shall enter into the record the substance of any significant contact with Department staff or the parties from that point forward concerning facts in the record.~~

(75) The Council may, on its own motion or upon the motion of a party or limited party, remove a hearing officer if it determines that the hearing officer is not competent to conduct the proceeding, is demonstrably biased for or against any party, or is otherwise unable to conduct the proceeding.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

345-015-~~0012~~ 0410 - Filing and Service of Documents in a Contested Case

(1) The hearing officer shall specify permissible means of filing and service of any pleading or document. The methods of filing with the ~~Council or its~~ hearing officer and service upon any party or limited party, may include, but are not limited to: personal delivery, first class or certified mail (properly addressed with postage prepaid), facsimile, or ~~other electronic means~~ mail.

~~(2) A party or limited party shall file a pleading or document with the Council accompanied by as many copies as required by the Council or its hearing officer and a certificate of service stating the names and addresses of the persons upon whom a true copy of the document was served and the date of service.~~

~~(23) Upon motion by any party or limited party, the hearing officer may waive requirements for serving parties who are no longer actively participating in the proceeding and may modify the requirements for serving a limited party consistent with such party's limited interest upon consent by the party or limited party.~~

~~(3) The hearing officer may modify the requirements for serving a limited party consistent with such party's limited interest.~~

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440

345-015-~~0016~~ 0415 - Requests for Party or Limited Party Status in Contested Cases on Applications for a Site Certificate

(1) Notwithstanding OAR 137-003-~~0005(2)~~ 0535(2) and (3), a person requesting to participate as a party or limited party in a contested case proceeding must submit a petition to the hearing officer ~~and provide copies to the agency and the site certificate applicant~~ by the date specified in the Department's notice issued under OAR 345-015-0230 ~~and OAR 345-015-0014~~. ~~Petitions received after the deadline will not be considered unless the hearing officer determines that good cause has been shown for failure to submit the petition by the required date.~~

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Commented [TJ35]: Removing this language, given that OAR 137-003-0625 ("Ex Parte Communications with Administrative Law Judge") covers this topic thoroughly.

Commented [TJ36R35]: #2 OAH Rules

Commented [TJ37]: #4 Clarity

Commented [TJ38]: Removing (2) to remove wasted time and effort by participants. The only docs that should be filed with Council are those it must take action on.

Commented [TJ39R38]: #5 Efficiency

Commented [TJ40]: #5 Efficiency

Commented [TJ41]: Updating to reflect adoption of OAH rules. Note that this is in here because unlike what is specified in the model rules / OAH model rules, in EFSC contested cases all petitions go to the hearing officer (not the agency) and by the deadline established in the notice (not 21 days before the hearing).

Commented [TJ42R41]: See OAR 137-003-0535(2), which states that petitions to participate in a contested case should be submitted to the agency and 137-003-0535(3), which states that petitions are to be filed 21 days before the hearing unless the agency by rule has set a different deadline.

Commented [TJ43R41]: #2 OAH rules

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~~(2) Persons who have an interest in the outcome of the Council's contested case proceeding or who represent a public interest in such result may request to participate as parties or limited parties.~~

(3) Except as described in section (4) of this rule, only those persons who have commented in person or in writing on the record of the public hearing described in OAR 345-015-0220 may request to participate as a party or limited party in a contested case proceeding on an application for a site certificate. To raise an issue in a contested case proceeding, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing, unless the Department did not follow the requirements of ORS 469.370(2) or (3) or unless the action recommended in the proposed order described in OAR 345-015-230, including any recommended conditions of approval, differs materially from the action recommended in the draft proposed order, in which case the person may raise only new issues within the jurisdiction of the Council that are related to such differences.

(3) If a person has not raised an issue at the public hearing with sufficient specificity to afford the Council, the Department and the applicant decision maker an adequate opportunity to respond to the issue, the hearing officer may not consider the issue in the contested case proceeding. To have raised an issue with sufficient specificity, the person must have identified the recommended findings of fact, conclusions of law, or conditions of approval to which they object, specified the Council standard or other applicable state and local requirements on which their objection is based, and presented facts or statements supporting that objection on the record of the draft proposed order at the public hearing that support the person's position on the issue.

~~(4) Following a Council decision to grant a contested case hearing under OAR 345-015-0310, only those persons who have commented in person or in writing on the record of the public hearing described in OAR 345-015-0320 may request to participate as a party or limited party in a contested case proceeding on an application for a site certificate. To raise an issue in a contested case proceeding, the issue must be within the jurisdiction of the Council, and the person must have raised the issue in person or in writing on the record of the public hearing. If a person has not raised an issue at the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, the hearing officer may not consider the issue in the contested case proceeding. To have raised an issue with sufficient specificity, the person must have presented facts at the public hearing that support the person's position on the issue.~~

(4) The requirements in (2) and (3) also apply to a Council decision to grant a contested case proceeding under OAR 345-015-0310 (Request for Expedited Review of Special Criteria Facilities), with the exception that a person must have commented in person or on the record of the public hearing described in OAR 345-015-320 as opposed to the public hearing described in OAR 345-015-0220.

(5) In a petition to request party or limited party status, the person requesting such status must include:

(a) The information required under OAR 137-003-00050535(34);

Commented [TJ44]: Removing as duplicative of proposed adoption of OAR 137-003-0535(2).

Commented [TJ45R44]: "Persons who have an interest in the outcome of the agency's contested case proceeding or who represent a public interest in such result may request to participate as parties or limited parties. Unless otherwise provided by law, a person requesting to participate as a party or limited party shall file a petition with the agency and shall include a sufficient number of copies of the petition for service on all parties."

Commented [TJ46R44]: #2 OAH Rules

Commented [TJ47]: Revised to be consistent with ORS 469.370(3), which states that "... issues shall be raised with sufficient specificity to afford the council, the department and the applicant an adequate opportunity to respond to each issue."

Commented [TJ48R47]: #3 Consistency

Commented [TJ49]: Clarifying what it means to present an issue at the DPO hearing with sufficient specificity.

Commented [TJ50R49]: #4 Clarity

Commented [TJ51]: Cleaning up what was (4) and is now (3) to reduce complexity. The standard is the same even during an expedited review of special criteria facilities so no need to spell it out twice.

Commented [TJ52R51]: #1 Reorganize

Commented [TJ53]: Updated to reflect adoption of OAH model rules

Commented [TJ54R53]: #2 OAH rules

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(b) A short and plain statement ~~of the for each issue or issues~~ that the person desires to raise in the contested case proceeding; ~~the statement itself must identify the issue the person wishes to raise, it is not permissible to identify an issue a person wishes to raise only by referencing comments the person made on the record of the draft proposed order;~~ and

(c) A reference to the person's comments ~~on the record of the draft proposed order at the public hearing~~ showing that the person raised the issue or issues ~~at the public hearing on the record of the draft proposed order.~~

~~(6) The applicant, the Department, or the certificate holder may submit written responses to petitions to request party or limited party status to the hearing officer by the date specified for such responses in the Department's notice issued under OAR 345-015-0230, providing copies to one another and the person who submitted the petition for party or limited party status.~~

~~(7) A limited party is a person to whom the hearing officer grants standing to participate in one or more, but not all the issues to be addressed in the contested case, as established in a prehearing order on party status and issues described in OAR 345-015-0430. Except as detailed in OAR 345-015-0445(3), a limited party may participate in the contested case on the issues, including proposed site certificate conditions, for which the hearing officer has granted them standing to participate but may not participate on issues, including proposed site certificate conditions, for which the hearing officer has not granted them standing to participate.~~

~~(6) The hearing officer's determination on a request to participate as a party or limited party is final unless the requesting person submits an appeal to the Council within seven days after the date of service of the hearing officer's determination.~~

Statutory/Other Authority: ORS 469.373 & 469.470
Statutes/Other Implemented: ORS 469.370, 469.440, 469.605, 469.615 & 469.992

~~345-015-0018 – Authorized Representative~~

~~An authorized representative may represent a party or limited party, other than a state agency, participating in a contested case proceeding before the Council as provided in OAR 137-003-0008. An authorized representative may represent a state agency participating in a contested case as a party, limited party or interested agency subject to the requirements of ORS 183.450(7) and (8).~~

Stat. Authority: ORS 469.470
Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

~~345-015-0022-0420 - Petition for Indigent Status~~

(1) By petition to the hearing officer in a contested case submitted before the time of the prehearing conference, a party or limited party may request to be treated as an indigent. In the petition, the petitioner shall state in detail the facts demonstrating that the petitioner is indigent in the context of the financial burdens associated with full participation as a party or limited party in the contested case- and the reasons why the petitioner would be prejudiced if indigent status were not granted.

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Commented [TJ55]: To simplify and speed up resolution of issues. Separate statements for each issue makes it easier for a hearing officer and the parties to address each issue.

Commented [TJ56R55]: #5 Efficiency

Commented [TJ57]: Added to ensure a swifter and easier resolution by the hearing officer. The drafter of the statement is the expert on their own claims, it should not be up to the hearing officer and/or applicant to decipher what is being claimed.

Commented [TJ58R57]: #5 Efficiency

Commented [TJ59]: The comments don't have to occur at the actual hearing, but can be any time during the public comment period.

Commented [TJ60R59]: #3 Consistency

Commented [TJ61]: Adding clarity as to how responses to petitioner requests by department and applicant should take place.

Commented [TJ62R61]: #4 Clarity

Commented [TJ63]: Defining what it means to be a limited party in order to remove as much confusion as possible regarding this issue.

Commented [TJ64R63]: #4 Clarity

Commented [TJ65]: See proposed 345-015-0430(4).

Commented [TJ66R65]: #1 Reorganize / #3 Consistency

Commented [JT*067]: Removing this language as unnecessary given OAR 137-003-0555, which states that a party or limited party may be represented by an authorized representative, defines "authorized representative" and establishes the scope of their participation in the case. See also ORS 183.452(2), which states that an agency may be represented at contested case hearings by an officer or employee of the agency.

Commented [TJ68R67]: #2 OAH Rules

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(2) "Indigent" means the person has an income level at or below 100 percent of the United States poverty level as defined by the most recently revised poverty income guidelines published by the U.S. Department of Health and Human Services for the person's household/family size, unless the hearing officer makes a determination as to the person's ability to pay for the cost to participate in the pending case based on other factors. In making the determination as to a person's ability to pay costs to participate in the case, the hearing officer shall consider not only the person's income, but also the availability of any assets, including, but not limited to, cash, stocks, bonds, and any other property that may be applied to the satisfaction of judgments, other financial obligations the person bears, and the nature and complexity of the case.

Commented [TJ69]: Defining what indigent means.

Commented [TJ70R69]: #4 Clarity

(23) The hearing officer shall issue a determination on a petition for indigent status in writing and shall state the grounds for the determination. The hearing officer's determination is final unless the petitioner submits an appeal to the Council within seven days after the date of service of the determination.

(34) The hearing officer may excuse a person granted indigent status from such requirements of the rules of this division as the hearing officer determines appropriate. As determined by the hearing officer, the Council may provide for the cost of service of pleadings and other documents, reasonable travel expenses of witnesses and copies of the record necessary to enable a person granted indigent status to participate fully in the contested case.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

345-015-~~0080~~425 - Participation by Government Agencies

(1) Any state or local government agency other than the Department may request participation in a contested case as a party, limited party or interested agency, subject to the limitations described in OAR 345-015-~~0016~~0415. For a contested case on a site certificate application, the agency must submit the request to the hearing officer in writing by the date specified in the Department's public notice issued under OAR 345-015-0230(3). For a contested case on a site certificate amendment, the agency must submit the request to the Department by the date specified in the notice of the opportunity to request a contested case issued under OAR 345-027-0371(4).

(2) The Department must participate in all contested case proceedings conducted by the Council with all the rights of a party.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 469.370, 469.405, 469.440, 469.605, 469.615 & 469.992

345-015-~~0083~~430 - Prehearing Conference and Prehearing Order

(1) The hearing officer may hold one or more prehearing conferences to address petitions for party or limited party status and issues. The hearing officer shall consider which issues, if any, the person has standing to participate in by considering the applicable provisions in OAR 345-015-0415 and OAR 137-003-0535(8).

Commented [TJ71]: Rewritten solely to make this more readable.

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~~(2) The hearing officer may also conduct one or more prehearing conferences for the purposes and in the manner described in OAR 137-003-0575.~~

~~(3) At the conclusion of the prehearing conference(s) described in (1) and (2), the hearing officer must issue a prehearing order or orders stating the issues to be addressed in the contested case hearing, the persons with standing on each issue, the contested case procedures, and the schedule.~~

~~(4) The hearing officer's order on a request to participate as a party or limited party is final and may not be appealed to Council unless the ruling would terminate the petitioner's ability to participate in the contested case proceeding.~~

~~(4.5) The hearing officer may cancel or reschedule any previously noticed prehearing conference.~~

~~(6) If an appeal to Council of a hearing officer's ruling on party status described in subsection (1) results in the granting of party status, the hearing officer shall issue an amended order.~~

~~(7) Failure to raise an objection regarding suggested procedures to be followed in the contested case or a proposed description of an issue during the prehearing conference when such procedures and issues are being discussed and established by the hearing officer constitutes waiver of that issue.~~

~~(2) The hearing officer may conduct one or more prehearing conferences for the purposes and in the manner described in OAR 137-003-0035. At the conclusion of the conferences, the hearing officer must issue a prehearing order stating the issues to be addressed in the contested case hearing and, in a contested case on an application for a site certificate, limiting parties to those issues they raised on the record of the public hearing described in OAR 345-015-0220. The hearing officer may not receive evidence or hear legal argument on issues not identified in the prehearing order.~~

~~(3.8) Failure to raise an issue in the prehearing conferences for the contested case hearing on an application for a site certificate constitutes a waiver of that issue.~~

STATUTORY/OTHER AUTHORITY: ORS 469.470

STATUTES/OTHER IMPLEMENTED: ORS 183.415, 469.370, 469.405, 469.440, 469.605, 469.615, 469.992

345-015-0435024 - Suspension of Hearing and Exclusion of a Party

(1) If any person engages in conduct that interferes with the hearing officer's duty in connection with any aspect of a contested case proceeding or fails to obey an order of the hearing officer, the hearing officer may suspend the ~~contested case hearing proceeding~~ or order such person excluded from the ~~hearing proceeding~~ temporarily or permanently. Conduct that interferes with the hearing officer's duties includes, ~~but is not limited to,~~ ~~conduct impeding discovery,~~ ~~conduct impeding hearing schedules,~~ or ~~disruptive the-conduct during of~~ the contested case hearing.

(2) If the hearing officer issues an order permanently excluding a party, limited party, or legal counsel from further participation in a contested case proceeding, the hearing officer shall issue the order in writing and shall state in the order the grounds for the order. The order is final unless the person subject to the order submits an appeal to the Council within seven calendar days of service of the order.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

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Commented [TJ72]: Clarifying that that party status is set after the prehearing conference(s).

Commented [TJ73R72]: #4 Clarity

Commented [TJ74]: Adding language to better describe how the prehearing conference works. Note that 137-003-0575 cited in (2) outlines all the acceptable reasons for holding a prehearing conference, but it does not specifically mention party status, which is why we have supplemented our rules with subsection (1) here.

Commented [TJ75R74]: #1 OAH Rules / #4 Clarity

Commented [TJ76]: Making it clear that an amended order is required if party status is granted as the result of an appeal of party status.

Commented [JT*077R76]: #4 Clarity

Commented [TJ78]: Making it clear how waiver of an issue occurs. Previous language implies parties have to reaise every issue to maintain standing.

Commented [JT*079R78]: #4 Clarity

Commented [TJ80]: This is language is removed as duplicative. The threshold for participation is established in 345-015-0415(2) and the hearing officer's allowing only issues that were raised on the record of the DPO hearing is covered in 315-015-0405(4)(g).

Commented [TJ81R80]: #1 Reorganize / #2 OAH Rules

Commented [JT*082]: Removing "but not limited to" as this is implied.

Commented [TJ83R82]: #4 Clarity

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~~345-015-0038 – Separate Hearings~~

~~The Council or its hearing officer may order separate hearings on particular matters at issue in a contested case to conduct the entire proceeding expeditiously.~~

~~Stat. Authority: ORS 469.470~~

~~Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992~~

Commented [JT*084]: Removing as duplicative of OAR 137-003-0525(c), which gives the hearing officer the authority to bifurcate hearings.

Commented [TJ85R84]: #2 OAH Rules

~~345-015-0440 - Burden of Presenting Evidence~~ - NEW RULE

~~In a contested case regarding an application for a site certificate or amendment to a site certificate, each party or limited party bears the burden of presenting evidence in support of facts that party or limited party alleges and/or positions they take on any issue for which the hearing officer grants them standing to participate.~~

~~Stat. Authority: ORS 183.341, ORS 183.417, ORS 469.470~~

~~Stat. Implemented: ORS 183.450~~

Commented [TJ86]: Adding to reflect ORS 183.450(2), which states: "The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position."

Commented [TJ87R86]: Note -- adopting this change should include the removal of OAR 345-021-0100, which has the added benefit of removing a contested case rule from Division 21 and putting it in Division 15 with the rest of the Contested Case rules, in line with the goal of simplification.

Commented [TJ88R86]: #3 Consistency

~~345-015-0043-0445 – Submission of Evidence and Proposed Site Certificate Conditions: Testimony Submitted in Writing~~

~~(1) The hearing officer may require parties or limited parties to submit to the hearing officer, in writing, the qualifications and direct testimony of each witness whom a party or limited party proposes to call and all exhibits that a party or limited party proposes to introduce in conjunction with the testimony of a witness. Parties and limited parties shall send to all other parties and limited parties copies of all written materials submitted to the hearing officer under this rule.~~

~~(2) The hearing officer shall allow any party, including any limited party, to propose site certificate conditions related to issues for which they have been granted standing to participate in the contested case and to present evidence related to any such conditions. Parties shall submit proposed site certificate conditions to the hearing officer in writing according to a schedule set by the hearing officer, which shall occur no later than the deadline for the submission of direct evidence.~~

~~(3) In a contested case proceeding on an application for a site certificate or on a proposed site certificate amendment, any party or limited party may address material changes to site certificate conditions that are suggested during the contested case proceeding.~~

~~(4) The hearing officer may not receive evidence or hear legal argument on issues not identified in the prehearing order.~~

~~Stat. Authority: ORS 469.470~~

~~Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992~~

Commented [TJ89]: Making it clear that, as it is throughout this process, parties can only participate to the extent they have standing.

Commented [TJ90R89]: #4 Clarity

Commented [TJ91]: Including language consistent with ORS 469.370(7), which indicates any party can comment on conditions proposed by any other party, if the changes proposed are material.

Commented [TJ92R91]: #3 Consistency

Commented [TJ93]: Moving this language to better suit subject of rule language (submission of evidence).

Commented [TJ94R93]: This was part of what was 345-015-0083(2), which is now gone.

Commented [TJ95R93]: #1 Reorganize

~~345-015-0046-0450 – Official Notice of Evidence: Official Notice~~

~~(1) In a contested case proceeding, the hearing officer may take official notice of the following:~~

- ~~(a) All facts of which the courts of the State of Oregon may take judicial notice;~~

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- (b) Administrative rulings and reports of the Council and other governmental agencies;
- (c) Facts contained in permits and licenses issued by the Council or any other government agency;
- (d) The factual results of the hearing officer's or the Council's personal inspection of physical conditions involved in the contested case; and
- (e) General, technical, or scientific facts within the specialized knowledge of the Council or the Department of Energy.

(2) The hearing officer shall notify parties of facts officially noticed and shall allow parties an opportunity to contest the facts so noticed.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

~~345-015-0051 – Evidence: Resolutions of Cities, Counties and Tribes~~

~~Upon the request of a governing body of a city, county or tribe, the Department of Energy shall offer, and the hearing officer shall receive in evidence, a certified copy of a resolution of the governing body. The hearing officer shall receive such resolutions subject to rebuttal as to the authenticity of the resolution or the circumstances surrounding its procurement. The hearing officer shall receive such resolutions only for the purpose of showing the expression of official action of the resolving body with respect to matter contained in the resolution. Such resolutions are not proof of facts related to the subject of the resolution.~~

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

345-015-0054-0455 - Motions

~~(1)~~ All parties, including limited parties, shall submit any motions in a contested case to the hearing officer. All motions are subject to OAR 137-003-0630 and the following requirements:

(a) Unless a motion is made orally on the record during a contested case ~~hearing~~hearing, or unless the hearing officer directs otherwise, the moving party shall submit the motion in writing and shall state with particularity the grounds and relief sought. The moving party shall submit with the motion any brief, affidavit or other document relied on, and, as appropriate, a proposed form of order. The moving party shall serve the motion on all parties and limited parties to the contested case.

~~(2)~~b Within seven calendar days after the date of service of a written motion, or such other period as the hearing officer may prescribe, a party or limited party may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence. The moving party shall have no right to reply, except as permitted by the hearing officer.

~~(3)~~ The parties shall not have oral argument on a motion unless permitted by the hearing officer. The hearing officer shall dispose of motions by written order served on all parties and limited parties or read into the ~~hearing~~record of the contested case proceeding.

Stat. Authority: ORS 469.470

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Commented [JT*O96]: Removing as under 137-003-0610 as any evidence -- including the evidence discussed here -- would be admissible as long as it is not irrelevant, immaterial, or unduly repetitious. So this does not really add anything.

Commented [TJ97R96]: #2 OAH Rules

Commented [TJ98]: Making clear that newly adopted OAH model rules apply here.

Commented [TJ99R98]: #2 OAH Rules / #4 Clarity

Commented [JT*O100]: #3 Consistency

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Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

345-015-~~0057-0460~~ – Prohibitions on Interlocutory Appeals to Council

(1) ~~Except as otherwise specifically provided for in the rules of this division, a~~ party or limited party may not take an interlocutory appeal to the Council from a ruling of the hearing officer unless such ruling would terminate that party's right to participate in the contested case proceeding.

Commented [TJ101]: Removing as it is not otherwise permitted by the rules.

Commented [TJ102R101]: #3 Consistency

(2) A party or limited party shall submit an appeal involving that party's right to participate in a contested case proceeding, with supporting arguments and documents, to the Council within seven calendar days after the date of the ruling of the hearing officer.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

345-015-~~0059-0465~~ - Prohibitions on Stays

~~(1) The hearing officer has the power to stay a proceeding for good cause, including to ensure a full, fair, and impartial proceeding.~~

Commented [TJ103]: Making it clear that a hearing officer has the power to stay proceedings for good cause.

Commented [TJ104R103]: #4 Clarity

~~(2) Unless otherwise ordered by the hearing officer, n~~either the filing of a motion nor the certification of a question to the Council stays a contested case proceeding or extends the time for the performance of any act.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

345-015-~~0062-0470~~ - Reopening Record Prior to Decision

The Council or its hearing officer, on its own motion or for good cause shown, may reopen the ~~hearing~~ contested case proceeding record for the taking of additional evidence while the proceeding is under advisement with the hearing officer or the Council. In addition to good cause, the moving party or limited party shall show that:

Commented [JT*O105]: #3 Consistency

- (1) The evidence is material to the proceeding; or
- (2) The evidence would substantially affect the outcome of the proceeding.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

345-015-~~0085-0475~~- Hearing Officer's Proposed Contested Case Order

~~(1) The hearing officer shall allow any party, including any limited party, to propose site certificate conditions that the party believes are necessary or appropriate to implement the policy of ORS 469.310 or to meet the requirements of any other applicable statute, administrative rule or local government ordinance. Parties shall submit proposed site certificate conditions to the hearing officer in writing according to a schedule set by the hearing officer.~~

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~~(2) In a contested case proceeding on an application for a site certificate or on a proposed site certificate amendment, any party or limited party may present evidence relating to the appropriateness, scope or wording of any other party's proposed site certificate conditions and may present written proposed findings of fact, briefs and other argument concerning proposed conditions.~~

~~(13) After the completion of a hearing in a contested case proceeding on an application for a site certificate or on a proposed site certificate amendment, the hearing officer shall issue a proposed contested case order stating the hearing officer's findings of fact, conclusions of law, and recommended site certificate conditions on the issues in the contested case. The hearing officer shall serve the proposed contested case order on all parties and limited parties. In the proposed contested case order, the hearing officer shall include recommended resolutions of objections to the local land use record, if any. The hearing officer's recommendations are part of the decision-making record for the application but are not part of the Council's order unless adopted by Council.~~

~~(42) After the hearing in a contested case proceeding on any matter other than an application for a site certificate or proposed site certificate amendment, the hearing officer shall issue a proposed contested case order stating the hearing officer's findings of fact and conclusions of law. The hearing officer shall serve the proposed contested case order on all parties and limited parties.~~

~~(35) Parties and limited parties may file exceptions to the proposed contested case order within the time set by the hearing officer, not to exceed 30 days after the hearing officer issues the proposed order. A party filing exceptions shall serve a copy of the exceptions on all other parties and limited parties. In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.~~

~~(64) Parties and limited parties may file responses to exceptions within the time set by the hearing officer, not to exceed 15 days after the time set for filing exceptions. A party filing responses to exceptions shall serve a copy of the responses to exceptions on all other parties and limited parties.~~

~~(5) The filings described in (3) and (4) are only allowed to the extent they relate to issues on which parties have been granted standing by the hearing officer.~~

~~(67) After the period for filing responses to exceptions to the proposed order, the Council shall:~~

~~(a) Evaluate the exceptions and responses to the proposed order described in (3) and (4);~~

~~(57) After the period for filing responses to exceptions, the Council shall issue a final order. (b) shall review the hearing officer's proposed contested case order and; and~~

~~(c) The Council shall review the Department's proposed order; and~~

~~(d) After the period for filing responses to exceptions, the Council shall issue a final order. The Council may adopt, modify or reject the hearing officer's proposed order. The final order may adopt, modify or reject the hearing officer's proposed order and also the Department's proposed order.~~

Commented [TJ106]: Moved (1) and (2) to 345-015-0445 to better fit subject matter of heading (submission of materials to HO).

Commented [TJ107R106]: #1 Reorganize

Commented [TJ108]: #3 Consistency

Commented [TJ109]: #3 Consistency

Commented [TJ110]: #3 Consistency

Commented [TJ111]: Updating to match how term is used in OAR 345-015-0240.

Commented [TJ112R111]: #3 Consistency

Commented [TJ113]: Clarifying that the Council is the final say as to the content of the Council's order on an application for a site certificate.

Commented [TJ114R113]: #4 Clarity

Commented [TJ115]: #3 Consistency

Commented [TJ116]: #3 Consistency

Commented [TJ117]: #3 Consistency

Commented [TJ118]: Adding language to describe who is allowed to file responses to exceptions.

Commented [TJ119R118]: #4 Clarity

Commented [TJ120]: Adding language to clarify how the Council uses the exceptions and the hearing officer's proposed contested case order when issuing its own final order.

Commented [TJ121R120]: #4 Clarity

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~~(78)~~ Following a contested case proceeding on an application for a site certificate, the Council, in its final order, ~~the Council~~ shall either ~~grant~~ **approve** or deny ~~issuance of a site certificate~~ **the application**. ~~If the Council grants issuance of a site certificate~~ **approves the application**, the Council shall issue a site certificate. ~~The site certificate becomes effective upon execution by the Council and by the applicant.~~ However, for purposes of identification, the Department may refer to a site certificate by the date of the Council action.

Commented [JT*O122]: Modified phrasing to be more consistent with statute.

Commented [JT*O123R122]: #3 Consistency

~~(89)~~ Following a contested case proceeding on a proposed site certificate amendment, the Council, in its final order, shall either grant or deny issuance of an amended site certificate. If the Council grants issuance of an amended site certificate, the Council shall issue an amended site certificate. The amended site certificate becomes effective upon execution by the Council and by the applicant. However, for purposes of identification, the Department may refer to a site certificate by the date of the Council action.

~~(109)~~ The Council shall issue a site certificate or amended site certificate in duplicate counterpart originals and each counterpart, upon signing, will have the same effect.

Stat. Authority: ORS 469.470

Stat. Implemented: ORS 183.415, ORS 469.370, ORS 469.405, ORS 469.440, ORS 469.605, ORS 469.615, ORS 469.992

END OF CONTESTED CASE RULES

The changes made as indicated in redline below are additional edits made to ensure conformity with the proposed revised contested case rules.

345-015-0200 - Notice to Agencies that the Application is Complete

(1) After receiving notification from the Department that the application is complete, the applicant must prepare an application supplement that includes all amendments to the preliminary application and all additional information requested by the Department before the determination of completeness.

(2) The applicant must submit to the Department, two printed copies of the application supplement, and an electronic version of the application supplement in a non-copy-protected format acceptable to the Department. The applicant must submit additional printed copies of the application supplement to the Department upon request.

(3) After receiving the application supplement, the Department must determine a distribution date and prepare a distribution list that includes, but is not limited to, the reviewing agencies for the application.

(4) Except as described in OAR 345-015-0310, and unless the Department directs otherwise, the applicant must mail or email an electronic copy of the application supplement to each person on the distribution list provided by the Department on or before the distribution date. The applicant must

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provide a printed copy of all or part of the application supplement to a person on the mailing list upon request.

(5) If the Department determines it is necessary to present the amendments and additional information described in section (1) of this rule clearly, the Department may require the applicant to provide a complete revision of the preliminary application in place of the application supplement under sections (2) and (4) of this rule.

(6) After the date of filing, the Department must prepare a notice for distribution. In the notice, the Department must:

(a) State the date of filing;

(b) Explain that if a person intends to raise an issue in the contested case, the person must raise the issue in the manner described in ~~OAR 345-015-00160415~~;

(c) State a date by which the Department and the applicant must receive the reports described in sections (d) through (f) below;

(d) Request an agency report containing the following information:

(A) The agency's recommendations regarding any applications for permits administered by the agency that are applicable to construction or operation of the proposed facility;

(B) Issues significant to the agency;

(C) The agency's conclusions concerning the proposed facility's compliance with state statutes, administrative rules or ordinances administered by the agency;

(D) A list of site certificate conditions recommended by the agency; and

(E) Any other information that the reviewing agency believes will be useful to the Council in reviewing the site certificate application.

(e) Request a report from the affected local government regarding the proposed facility's compliance with the applicable substantive criteria for a land use decision under ORS 469.504(1)(b).

(f) Request a report from the affected local government that describes any land use decisions made under ORS 469.504(1)(a).

(g) Explain that the reports described in sections (d) through (f) above are part of the decision record for the application for a site certificate.

Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.350

345-015-0220 - Public Hearing and Notice on the Draft Proposed Order

(1) After the issuance of the draft proposed order described in OAR 345-015-0210, the Council or its hearing officer must conduct at least one public hearing on the draft proposed order in the vicinity of
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Commented [TJ124]: #1 Reorganize

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the site of the proposed facility. The public hearing is not a contested case hearing. If there is more than one public hearing, the “close of the record of the public hearing” means the close of the record of the final public hearing.

(2) The Department must, at least 20 days before the hearing:

(a) Submit notice for publication in a newspaper of general circulation available in the vicinity of the proposed facility; and

(b) Send notice of the hearing by mail or email to:

(A) Persons on the Council's general mailing list as defined in OAR 345-011-0020;

(B) Persons on any special mailing list set up for the proposed project; and

(C) The property owners listed in Exhibit F of the application, as updated by the applicant upon the request of the Department.

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

(3) In the notices described in subsections (2)(a) and (2)(b), the Department must include:

(a) The date, time and location of the public hearing;

(b) A description of the facility and the facility's general location;

(c) The name, address, email address, and telephone number of the Department's representative to contact for additional information;

(d) The addresses of locations where the public may inspect copies of the complete application and the website where the application may be found;

(e) The website where the draft proposed order may be found;

(f) The deadline for the public to submit written comments to be included in the record of the public hearing and a statement that such comments should be submitted to the presiding officer in care of the Department;

(g) A statement that to raise an issue on the record of the public hearing, a person must raise the issue in person at the public hearing or in a written comment submitted after the date of the notice and received by the Department before the deadline;

(h) A statement that failure to raise an issue in person or in writing on the record of the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue precludes consideration of the issue in a contested case;

(i) A statement that to raise an issue with sufficient specificity, the person must have identified the recommended findings of fact, conclusions of law, or conditions of approval to which they object, specified the Council standard or other applicable state and local requirements on which their objection is based, and presented facts or statements supporting that objection on the record of the

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~~draft proposed order; person must present facts that support the person's position on the issue;~~
and

Commented [TJ125]: #3 Consistency with the changes made above.

(j) A statement that the Council will not accept or consider any further public comment on the site certificate application or on the draft proposed order after the close of the record of the public hearing.

(4) During the public hearing, the Department must explain the application process, including the means and opportunities for the general public to participate in the process. The Department may provide this explanation by a written handout.

(5) At the commencement of the public hearing, the presiding officer must state that:

(a) A person who intends to raise any issue that may be the basis for a contested case must raise the issue in person at the hearing or in a written comment submitted to the Department before the deadline stated in the notice of the public hearing; and

(b) A person who intends to raise any issue that may be the basis for a contested case must raise the issue with sufficient specificity to afford the Council, the Department, and the applicant an adequate opportunity to respond, including a statement of facts that support the person's position on the issue.

(6) At the public hearing, any person may present information regarding the pending application without administration of an oath. The presiding officer must record all presentations made during the public hearing. The presentations are part of the decision record for the application and may be rebutted in the contested case proceeding.

Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.370

345-015-0230 - Council Review and the Department of Energy's Proposed Order

(1) Following the close of the record of the public hearing conducted under OAR 345-015-0220, the Council must review the draft proposed order. In accordance with ORS 469.370(3), when the Council meets to review a draft proposed order, the Council may not permit the applicant, reviewing agencies or the public to comment on any issue that may be the basis for a contested case.

(2) Following the Council's meeting to review the draft proposed order, the Department must issue a proposed order in accordance with ORS 469.370(4), taking into consideration the comments of the Council, any public comments made at a public hearing, written comments received before the close of the record of the public hearing, and agency consultation. In the proposed order, the Department must recommend either granting a site certificate with conditions or denying a site certificate for the proposed facility.

(3) Following issuance of the proposed order, the Department must issue a public notice of the proposed order, subject to the following:

(a) The public notice of the proposed order must include:

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- (A) A description of the facility and the facility's general location;
- (B) A summary of the recommendations included in the Proposed Order;
- (C) A description of the process and deadline for requests to participate as a party or limited party in the contested case under OAR 345-015-00160415;
- (D) The date of the prehearing conference, if any; and
- (E) The date of the hearing; and

~~(F) The deadline for the Department and the applicant or certificate holder to respond to petitions for party status; and~~

(b) The Department must send the notice by mail or email to:

- (A) All persons on the Council's general mailing list;
- (B) All persons on any special mailing list set up for the proposed project;
- (C) All persons who commented in person or in writing on the record of the public hearing conducted under OAR 345-015-0220; and
- (D) The property owners listed in Exhibit F of the site certificate application, as updated by the applicant upon the request of the Department.
- (E) The land management agency or organizations with jurisdiction over the protected areas identified in the proposed order.

(4) On the same date as notice is issued under section (3) of this rule, the Department must notify the applicant that the applicant must notify the hearing officer and the Department of any issues the applicant intends to raise in the contested case proceedings by the date established in paragraph (3)(a)(C) of this rule.

Stat. Authority: ORS 469.470
Stat. Implemented: ORS 469.370

DIVISION 21 - APPLICATION FOR SITE CERTIFICATE

~~345-021-0100 – Contested Case Proceeding on the Application – Burden of Proof~~

~~(1) After the issuance of a notice of contested case as described in OAR 345-015-0230, the hearing officer shall conduct a contested case proceeding on the application according to the provisions of OAR chapter 345, division 15.~~

~~(2) The applicant has the burden of proving, by a preponderance of the evidence in the decision record, that the facility complies with all applicable statutes, administrative rules and applicable local government ordinances.~~

Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.370

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Commented [TJ126]: Matching rule number change.

Commented [TJ127R126]: #3 Consistency

Commented [TJ128]: #4 Clarity

Formatted: Stat. hist, Centered

Commented [TJ129]: Removed, see proposed OAR 345-015-0440, which deals with the burden of proof.

Commented [TJ130R129]: #1 Reorganize

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