

Oregon Natural Desert Association

April 2, 2010

Governor Ted Kulongoski  
160 State Capitol  
900 Court Street  
Salem, OR 97301-4047

Tom Stoops, Council Secretary  
Energy Facility Siting Council  
Oregon Department of Energy  
625 Marion St. NE  
Salem, OR 97301-3737

Dear Governor Kulongoski and Mr. Stoops;

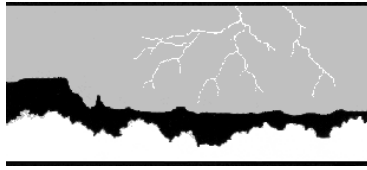
On behalf of the Oregon Natural Desert Association,<sup>i</sup> Audubon Society of Portland,<sup>ii</sup> and Defenders of Wildlife,<sup>iii</sup> I am submitting the enclosed Petition to amend the current definition of “Protected Areas” outlined in OAR 345-022-0040(1) to include the Steens Mountain Cooperative Management Area (CMPA) designated by Congress within the Steens Act of 2000.

Steens Mountain is among the greatest undeveloped landscapes with some of the most important wildlife habitats anywhere in Oregon. We feel the exclusion of the CMPA in the list of protected areas is an oversight by the Council and ODOE. The list of “Protected Areas” was originally developed prior to passage of the Steens Act in 2000 after the enactment of ORS 469.501 (which this rule implements) in 1993. Included in the list is the Columbia River Gorge National Scenic Area, an area of mixed private and public lands designated by Congress for special protection in 1984. The CMPA has a similar designation by Congress for special management and protection of valuable and unique natural resources. Because the Steens Act prohibits development within the CMPA that would alter the character of Steens Mountain (please reference 16 U.S.C. § 460nnn-12), any attempt to permit industrial development within the CMPA violates this Act and would lead to an appropriate legal response. This petition simply asks the Council to update its list of protected areas to reflect the unique designation accorded to the Steens Mountain area by Congress in 2000.

ONDA, Audubon and Defenders support responsible renewable energy development in Oregon. We understand the imminent threat of climate change and recognize the potential for renewable energy to diversify our country’s energy portfolio and reduce dependence on fossil fuels, while shrinking our carbon footprint. However, we believe that development is responsible and truly sustainable when it is sited appropriately. Large-scale development is not intended for the CMPA and we urge the State to take the appropriate steps to add the CMPA to the list of protected areas.

Thank you for this opportunity to voice our concerns.  
Sincerely,

Brent Fenty  
Executive Director  
Oregon Natural Desert Association  
33 NW Irving Avenue Bend, OR 9770



Oregon Natural Desert Association

---

<sup>i</sup> ONDA is a non-profit public interest organization dedicated to preserving and protecting the public lands of eastern Oregon. ONDA's mission is to protect, defend, and restore forever the health of Oregon's native deserts. The over 1,400 members of ONDA use and enjoy the public lands, waters, and natural resources of eastern Oregon for recreational, scientific, spiritual, educational, aesthetic, and other purposes.

<sup>ii</sup> Audubon Society of Portland is a nonprofit organization that promotes the understanding, enjoyment, and protection of native birds, other wildlife and their habitats. They focus on their local community and the Pacific Northwest. Address: 5151 Northwest Cornell Road Portland, OR 97210-1081

<sup>iii</sup> Defenders of Wildlife is a national, non-profit membership organization dedicated to the protection of all native animals and plants in their natural communities. Address: 1880 Willamette Falls Dr #200 West Linn, OR 97068

**BEFORE THE ENERGY FACILITY SITING COUNCIL,  
OREGON DEPARTMENT OF ENERGY,  
STATE OF OREGON**

**PETITION OF OREGON NATURAL DESERT ASSOCIATION FOR RULEMAKING  
PURSUANT TO OAR 137-001-0070**

Pursuant to ORS 183.390 and OAR 137-001-0070, the Oregon Natural Desert Association (the “Petitioner”) hereby petitions the Energy Facility Siting Council (“the Council”) and the Oregon Department of Energy (“ODOE”) to amend an existing rule. The proposed regulatory amendments would add the Steens Mountain Cooperative Management and Protection Area (“CMPA”), established by the United States Congress in the Steens Mountain Cooperative Management and Protection Act of 2000 (“Steens Act”), to the list of protected areas in OAR 345-022-0040(1). *See* Steens Mountain Boundary Map 9/18/00 (attached to this Petition).

**OAR 137-001-0070(1) Name and address of Petitioner and others interested in the rule**

Bob Sallinger  
Conservation Director  
Audubon Society of Portland  
5151 NW Cornell Road  
Portland, OR 92710

Bruce Taylor  
Oregon Biodiversity Director  
Defenders of Wildlife  
1880 Willamette Falls Drive, Suite 200  
West Linn, OR 97068

Brent Fenty  
Executive Director  
Oregon Natural Desert Association  
33 NW Irving Avenue  
Bend, OR 97701

Names and addresses of persons known to the Petitioner to be interested in the rule:

Robert Freimark  
Senior Policy Analyst  
The Wilderness Society  
720 Third Avenue, Suite 1800  
Seattle, WA 98104

Brian Pasko  
State Director  
Oregon Chapter of the Sierra Club  
1821 SE Ankeny St.  
Portland, OR 97214

Doug Heiken  
Conservation and Restoration Coordinator  
Oregon Wild  
PO Box 11648  
Eugene, OR 97440

Mark Salvo  
Director, Sagebrush Sea Campaign  
WildEarth Guardians c/o  
2224 W. Palomino Drive  
Chandler, AZ 85224

Randy Rasmussen  
Senior Policy Manager  
American Hiking Society  
946 NW Circle Blvd. #145  
Corvallis, OR 97330

Andy Kerr  
Czar  
The Larch Company  
313 10th Street NE  
Washington, DC 20002

Maeve Sowles  
President  
Lane County Audubon Society  
PO Box 5086  
Eugene, OR 97405

Ann Vileisis  
President  
Kalmiopsis Audubon Society  
P.O. Box 1265  
Port Orford, OR 97465

Pepper Trail  
Conservation  
Rogue Valley Audubon Society  
2011 Crestview Drive  
Ashland, OR 97520

Will Wright  
President  
Audubon Society of Corvallis  
P.O. Box 148  
Corvallis, OR 97339

Greg Dyson  
Executive Director  
Hells Canyon Preservation Council  
P.O. Box 2768  
La Grande, OR 97850

Joe Serres  
President  
Friends of Living Oregon Waters  
(FLOW)  
P.O. Box 2478  
Grants Pass, OR 97528

Nathan Baker  
Staff Attorney  
Friends of the Columbia Gorge  
522 SW Fifth Avenue, Suite 720  
Portland, OR 97204

David Harrison  
President  
Salem Audubon Society  
189 Liberty Street NE, Suite 210  
Salem, OR 97301

Dave Willis  
Chairman  
Soda Mountain Wilderness Council  
P.O. Box 512  
Ashland, OR 97520

Darrel Samuels  
Chair President  
Klamath Basin Audubon Society  
P.O. Box 354  
Klamath Falls, OR 97601

Stan Vejtasa  
Conservation Chair  
Umpqua Valley Audubon Society  
P.O. Box 381  
Roseburg, OR 97470

Noah Greenwald  
Endangered Species Program Director  
Center for Biological Diversity  
PO Box 11374  
Portland, OR 97211

Eric Clough  
President  
Cape Arago Audubon Society  
P.O. Box 381  
North Bend, OR 97459

Steven E. Grasty  
County Judge  
Harney County  
450 N. Buena Vista # 5  
Burns, OR 97720

Kenny McDaniel  
District Manager  
Bureau of Land Management  
Burns District Office  
28910 Hwy 20 West  
Hines, OR 97738

Ken Popper  
Senior Conservation Planner  
The Nature Conservancy  
821 SE 14<sup>th</sup> Avenue  
Portland, Oregon

Suzanne Leta Liou  
Senior Policy Advocate  
Renewable Northwest Project  
917 SW Oak St, Suite 303  
Portland, OR 97205

**OAR 137-001-0070(1)(a) The rule Petitioner requests the agency to adopt, amend or repeal**

The Petitioner asks that the Council to amend the list of “Protected Areas” in OAR 345-022-0040(1) by adding the Steens CMPA to the list of protected areas.

Protected areas are defined in Oregon Administrative Rules Chapter 345 Division 022 Section 0040. OAR 345-022-0040(1)(a) through OAR 345-022-0040(1)(p) lists the protected areas. The following is the current text of OAR 345-022-0040(1):

(1) Except as provided in sections (2) and (3), the Council shall not issue a site certificate for a proposed facility located in the areas listed below. To issue a site certificate for a proposed facility located outside the areas listed below, the Council must find that, taking into account mitigation, the design, construction and operation of the facility are not likely to result in significant adverse impact to the areas listed below. References in this rule to protected areas designated under federal or state statutes or regulations are to the designations in effect as of May 11, 2007:

- (a) National parks, including but not limited to Crater Lake National Park and Fort Clatsop National Memorial;
- (b) National monuments, including but not limited to John Day Fossil Bed National Monument, Newberry National Volcanic Monument and Oregon Caves National Monument;
- (c) Wilderness areas established pursuant to The Wilderness Act, 16 U.S.C. 1131 et seq. and areas recommended for designation as wilderness areas pursuant to 43 U.S.C. 1782;
- (d) National and state wildlife refuges, including but not limited to Ankeny, Bandon Marsh, Baskett Slough, Bear Valley, Cape Meares, Cold Springs, Deer Flat, Hart Mountain, Julia Butler Hansen, Klamath Forest, Lewis and Clark, Lower Klamath, Malheur, McKay Creek, Oregon Islands, Sheldon, Three Arch Rocks, Umatilla, Upper Klamath, and William L. Finley;
- (e) National coordination areas, including but not limited to Government Island, Ochoco and Summer Lake;
- (f) National and state fish hatcheries, including but not limited to Eagle Creek and Warm Springs;
- (g) National recreation and scenic areas, including but not limited to Oregon Dunes National Recreation Area, Hell's Canyon National Recreation Area, and the Oregon Cascades Recreation Area, and Columbia River Gorge National Scenic Area;

- (h) State parks and waysides as listed by the Oregon Department of Parks and Recreation and the Willamette River Greenway;
- (i) State natural heritage areas listed in the Oregon Register of Natural Heritage Areas pursuant to ORS 273.581;
- (j) State estuarine sanctuaries, including but not limited to South Slough Estuarine Sanctuary, OAR Chapter 142;
- (k) Scenic waterways designated pursuant to ORS 390.826, wild or scenic rivers designated pursuant to 16 U.S.C. 1271 et seq., and those waterways and rivers listed as potentials for designation;
- (L) Experimental areas established by the Rangeland Resources Program, College of Agriculture, Oregon State University: the Prineville site, the Burns (Squaw Butte) site, the Starkey site and the Union site;
- (m) Agricultural experimental stations established by the College of Agriculture, Oregon State University, including but not limited to:
  - Coastal Oregon Marine Experiment Station, Astoria
  - Mid-Columbia Agriculture Research and Extension Center, Hood River
  - Agriculture Research and Extension Center, Hermiston
  - Columbia Basin Agriculture Research Center, Pendleton
  - Columbia Basin Agriculture Research Center, Moro
  - North Willamette Research and Extension Center, Aurora
  - East Oregon Agriculture Research Center, Union
  - Malheur Experiment Station, Ontario
  - Eastern Oregon Agriculture Research Center, Burns
  - Eastern Oregon Agriculture Research Center, Squaw Butte
  - Central Oregon Experiment Station, Madras
  - Central Oregon Experiment Station, Powell Butte
  - Central Oregon Experiment Station, Redmond
  - Central Station, Corvallis
  - Coastal Oregon Marine Experiment Station, Newport
  - Southern Oregon Experiment Station, Medford
  - Klamath Experiment Station, Klamath Falls;
- (n) Research forests established by the College of Forestry, Oregon State University, including but not limited to McDonald Forest, Paul M. Dunn Forest, the Blodgett Tract in Columbia County, the Spaulding Tract in the Mary's Peak area and the Marchel Tract;
- (o) Bureau of Land Management areas of critical environmental concern, outstanding natural areas and research natural areas;
- (p) State wildlife areas and management areas identified in OAR chapter 635, Division 8.

The proposed amendment to OAR 345-022-0040(1) would add sub-section OAR 345-022-0040(1)(q) as follows:

- (q) The Steens Mountain Cooperative Management and Protection Area designated by the Steens Mountain Cooperative Management and Protection Act of 2000, including all lands within the boundaries of the Cooperative Management and Protection Area depicted on the Steens Mountain Boundary Map.

## **OAR 137-001-0070(1)(b) Reasons for the request:**

Petitioners request that EFSC amend the existing rule to add the Steens CMPA to the list of protected areas, consistent with its treatment of other lands that have been designated for special management under state or federal law because of their significant natural resource values. Congress's stated purpose in enacting the Steens Act in 2000 was "to conserve, protect, and manage the long-term ecological integrity of Steens Mountain for future and present generations." 16 U.S.C. § 460nnn-12(a). Accordingly, the Steens Act established, as a matter of national policy, that "[d]evelopment *on public and private lands* within the boundaries of the Cooperative Management and Protection Area which is different from the current character and uses of the lands is inconsistent with the purposes of this subchapter." *Id.* § 460nnn-42(a) (emphasis added). Because the Steens Act prohibits development within the CMPA that would alter the character of Steens Mountain, any attempt to permit industrial development within the CMPA violates this Act and would lead to an appropriate legal response.

The Steens Act was an act of collaboration on the part of the federal government, the State of Oregon, Harney County, landowners, and conservationists. By agreeing to and participating in the cooperative management process, the State of Oregon, the Bureau of Land Management, and private landowners within the CMPA have agreed to exclude development from the CMPA that would change the mountain's undeveloped character. Private landowners within the CMPA voluntarily chose to be included in this protected area and took part in land exchanges and grazing permit retirement that resulted in monetary compensation (reference 16 U.S.C. § 460nnn-101-104 for details).

Steens Mountain is among the greatest undeveloped landscapes and most important wildlife habitats anywhere in Oregon. As an unusually large and diverse complex of relatively intact natural systems, Steens Mountain has long been recognized for its importance as a reservoir of biological diversity. As described in the Steens Act, the current character and use of the lands on Steens Mountain include "grazing, recreation, historic, and other uses that are sustainable," "traditional access to cultural, gathering, religious, and archaeological sites," and the conservation and protection of "geological, biological, wildlife, riparian, and scenic resources." *Id.* §§ 460nnn-12(b)(2)–(4). No industrial development exists on the mountain or within the CMPA, development is limited to private ranches and small-scale or primitive campgrounds and recreation facilities. There is no doubt whatsoever that installation of hundreds of 400-foot-tall wind energy turbines, solar arrays, transmission towers and lines, or other infrastructure associated with industrial-scale energy development, would be dramatically "different from the current character and uses of the lands"—both public and private—that Congress included within the boundaries of the CMPA.

The exclusion of the CMPA is an oversight by the Council and ODOE. The list of protected areas currently included in OAR 345-022-0040(1) was originally developed prior to passage of the Steens Act in 2000 after the enactment of ORS 469.501 (which this rule implements) in 1993. However, the intent of the legislature in instructing the Council to adopt standards addressing "[a]reas designated for protection by the state or federal government," and the Council in establishing the list of Protected Areas, is to restrict energy development from lands that have special federal or state management designations designed to protect resources in those areas. ORS 469.501; OAR 345-022-0040(1). These include areas such as the Bureau of Land Management's "areas of critical environmental concern, outstanding natural areas, and research

natural areas.” OAR 345-022-0040(1)(o). Notably, the Council included on the list the Columbia River Gorge National Scenic Area, an area of mixed private and public lands designated by Congress for special protection in 1984. The CMPA should be an exclusion zone for energy and other industrial development due to its similar designation by Congress for special management and protection of valuable and unique natural resources. This petition simply asks the Council to update its list of protected areas to reflect the unique designation accorded to the Steens Mountain area by Congress in 2000.

### **OAR 137-001-0070(1)(c) Propositions of law to be asserted**

Inclusion of the Steens CMPA as a protected area in OAR 345-022-0040(1) is necessary based on the purpose of the Steens Act to prevent development within the CMPA and the prior inclusion of the Columbia River Gorge National Scenic Area among the protected areas in OAR 345-022-0040(1).

### **OAR 137-001-0070(2)(a) Options for achieving the existing rule’s substantive goals while reducing the negative economic impact on businesses**

Achievement of the existing rule’s substantive goal requires the addition of the Steens Mountain Cooperative Management Area to the list of protected areas, consistent with the rule’s treatment of other areas designated under state or federal law for special management because of significant natural resource value. Designation of the Steens CMPA by Congress in 2000 marked the culmination of a long and often contentious debate over the best options to balance economic and conservation goals while ensuring the long-term sustainability of the ecosystems and human communities the area support. The Steens Act provided a resolution of those issues, and it is unnecessary to reopen the debate in the context of this rule.

There are currently no applications for development of energy resources within the CMPA pending before EFSC or Harney County as of April 2, 2010, and therefore no businesses will be adversely affected by the adoption of the proposed amendment. Because the Steens Act prohibits “[d]evelopment on public and private lands within the boundaries of the Cooperative Management and Protection Area which is different from the current character and uses of the lands,” no business can or could have had a reasonable expectation that development of an industrial project could occur within the congressionally-designated CMPA boundary.

Steens Mountain, including the lands within the CMPA, is one of Oregon’s iconic landscapes and attracts thousands of visitors to southeast Oregon. Maintaining these natural resource qualities, including the scenic and recreational qualities, and conserving the “current character and uses of the lands” as required by the Steens Act, will help ensure that the economic benefits associated with Steens-related tourism continue to contribute to the sustainability of local communities for years to come.

In addition, the Steens Act authorizes federal funding for acquisition of conservation easements and other financial incentives for private landowners to maintain the undeveloped character of the lands within the CMPA and conserve the area’s outstanding natural resources.

**OAR 137-001-0070(2)(b) The continued need for the existing rule**

The proposed amendments will not affect the need for the existing rule, but rather would extend the scope of the current rule to cover another federally-protected area consistent with ORS 469.501 and OAR 345-022-0040. The proposed amendment to OAR 345-022-0040(1) would add a special management area for which Congress has established protection to an already comprehensive list of protected areas.

**OAR 137-001-0070(2)(c) The complexity of the existing rule**

Not applicable. The existing rule is simple, and the amendment is equally simple, adding an additional designated area to existing lists of protected areas in OAR 345-022-0040(1).

**OAR 137-001-0070(2)(d) The extent to which the existing rule overlaps, duplicates, or conflicts with other state or federal rules and with local government regulations**

The existing rule on protected areas does not overlap, duplicate, or conflict with other state or federal rules and with local government regulations, except that most of the protected areas have special designations for protection under federal or state law which the protected area rule reinforces. Federal law preempts any state or local law that might purport to authorize development on the congressionally-designated lands within the CMPA boundary. United States Constitution Art. VI.

**OAR 137-001-0070(2)(e) The degree to which technology, economic conditions, or other factors have changed in the subject area affected by the existing rule, since the agency adopted the rule**

Since ORS 469.501 was enacted in 1993 and the original list of protected areas developed, Congress adopted the Steens Act in 2000. Adoption of the proposed amendment extends the protection Congress mandates to preserve the “current character and uses of the lands” within the CMPA. The existing character and uses of the land have not changed since adoption of the existing rule nor since the adoption of the Steens Act.

