BEFORE THE ENERGY FACILITY SITING COUNCIL OF OREGON

In the Matter of the Amendment of the Protected Areas, Scenic Resources, and Recreation Standards and Associated Rules.	Summary of Public Comments and Recommended Responses

At its meeting on May 27, 2022, the Council initiated formal proceedings for the amendment of the Protected Areas, Scenic Resources, and Recreation Standards and associated rules. Staff issued a Notice of Proposed Rulemaking containing the proposed rules under consideration by Council on June 1, 2022.

The Notice of Proposed Rulemaking began a public comment period on the proposed rules. An opportunity for oral comments was provided at a rulemaking hearing on June 23, 2022. The Notice also established 5:00 pm on July 21, 2022, as the deadline for written comments. The Council will not consider comments provided after the deadline unless the comment period is extended for everyone.

This Document contains excerpts representing major issues and recommendations raised in the written comments received on this rulemaking as of the deadline well as staff's recommended responses. In general, notes and citations have been omitted from excerpted comments and some formatting changes to recommended rule text have been made to improve consistency and readability. Exact copies of all comments are provided in **Attachment 2**.

General Comments

Applicability of OAR 345-022-0040, 345-022-0080, and 345-022-0100.[1]

Comment: "The Council needs to make sure that when new rules, standards, and protected areas come into being, they will apply to all pending (and future) applications. It is unfair to exempt pending applications from having to comply with current law. The public and designating agencies expect that when an area is designated as a protected area, that protection will actually have meaning. This includes energy projects that are currently under review.

[1] Several of these comments are also duplicated in the section below discussing the effective date for protected area designations that may be considered when evaluating an Application for Site Certificate of Request for Amendment. Staff recommends separate responses for that issue, and the issue related to applicability discussed here.

While the review of an energy project can go on for years, equally as long--or longer--the review of an area eligible for a protective status takes time to be approved and designated. The only consistent and fair way to approach this is to follow the law and retain the statutory requirements of ORS 469.401(2), which states that parties must abide by local ordinances, state law, and the rules of the Council in effect on the date the site certificate or amended site certificate is executed. This is the law, and Council cannot adopt rules to the contrary." **EX. 1-48, 50, 52-53, 55-65,67,69-71.**

Comment: "Existing rule OAR 345-022-0040 is outdated in a way which could result in negative unintended long-term consequences for Protected Areas, including Natural Areas, established between May 11, 2007, and present (15 years). The rule needs to be updated and clarified rules applied to applications under review. Rule revisions are undertaken because problems are noticed during review processes. Revisions should be applied so that rules meet their intent in processes that take years to complete." **Ex. 66.**

Comment: "Several of the Proposed Rules appear to be designed to exempt proposed energy projects from having to comply with the Council's current rules and standards, and instead would apparently make these projects subject to rules and standards adopted as long ago as 2002. The Council must decline to adopt these rules, which would violate the Siting Act.

In particular, the Legislature has expressly required the Council to apply to all pending applications for site certificates the rules and standards 'in effect on the date the site certificate or amended site certificate is executed,' not rules and standards from twenty years ago. ORS 469.401(2). Proposed Rules 345-022-0040(4), 345-022-0080(4), and 345-022-0100(4) would violate this statutory requirement by apparently requiring applications completed before the effective date of each of these Proposed Rules to be evaluated under previous versions of the Council's Rules…The Council must reject these Proposed Rules."
…
"There are additional reasons, grounded in good public policy, to not exempt pending proposed energy projects from newly adopted rules. Applications for site certificates can be pending before the Council for months or even years, yet under the Proposed Rules applicants would be able to cap their obligations at a relatively early stage in the process even though the law and the environment are changing around them. Allowing applicants for large energy projects to completely ignore newly enacted laws and standards would interfere with the Council's obligation to site energy facilities in accordance with the environmental protection policies of the state and to ensure protections for various categories of Protected Areas first designated by the Council's partner state and federal agencies and then by the Council itself. *See* ORS 469.310, 469.501(1)(c)."

"Finally, Proposed Rules 345-022-0040(4), 345-022-0080(4), and 345-022-0100(4) present significant transparency issues. As mentioned above, these Proposed Rules imply that applications that were completed before the effective date of these new Rules would not have

to comply with current rules and standards. Instead, the energy projects proposed in such applications would only have to comply with the standards articulated in Administrative Order EFSC 1-2007 or Administrative Order 1-2002, depending on the Rule. But those Administrative Orders are fifteen and twenty years old, respectively, and not easily accessible to the public and applicants, making it difficult to understand which outdated standards the Council might base its decisions on.

Furthermore, these Proposed Rules are extremely unclear, especially the language that EFSC must 'apply *the standard* adopted under' these prior Orders (emphasis added). Which 'standards' in the prior Orders are being referenced in these Proposed Rules? Does 'standards' mean 'rules,' or something else? If 'standards' means 'rules,' why do the Proposed Rules not state that, and why do they not provide the specific applicable rule section number(s)?

Furthermore, are these Proposed Rules intended to say that these unidentified 'standards' (or rules) from fifteen and twenty years ago are intended to apply *in place of* current law, or *in addition to* current law? As outlined above, either approach would violate the Siting Act, which prohibits the Council from applying obsolete rules and standards to pending applications. As a matter of both law and policy, the Council's rules should not vaguely incorporate by reference unclear portions of inaccessible, long-outdated agency orders." **Ex. 77.**

Recommended Response: Commenters argue that the "goal post" provisions in the proposed OAR 345-022-0040(4), 345-022-0080(4), and 345-022-0100(4) would violate ORS 469.401(2). Commenters argue that ORS 469.401(2) requires the Council and Applicant to abide by local ordinances, state law, and the rules of the Council in effect on the date the site certificate or amended site certificate is executed, and that the proposed rules violate this requirement by requiring applications completed before the effective date of the permanent rules to be evaluated under previous versions of the Council's standards.

Commenters assert that ORS 469.401(2) has been interpreted in *Blue Mountain Alliance v. Energy Facility Siting Council*, 354 Or. 465 (2013) to mean that Council must ensure compliance with all applicable ordinances, state law and Council rules in effect when a site certificate is executed—even standards adopted in the later stages of the Council's review. Commenters further assert that *Marbet v. PGE*, 277 Or. 447 (1977) confirms that it is proper and consistent with ORS Chapter 469 for new standards and rules to be adopted and applied in the course of a siting proceeding or contested case, so long as sufficient advance notice is provided to all parties.

We agree that ORS 469.401(2) requires the Council and the certificate holder to abide by local ordinances, state law and Council rules in effect when a Site Certificate or Amended Site Certificate is executed, except for land use regulations, which the Court held Council must evaluate "*only* under ORS 469.504(1), as part of the council's statewide planning goal determination under ORS 469.503(4)." *Blue Mountain Alliance*, 353 Or. at 481 (emphasis in

Court's decision). Under ORS 469.504(1), Council, in analyzing whether a facility complies with statewide planning goals, must determine whether a proposed facility complies with land use regulations in effect on the application date. *Id.* at 478.

The proposed goal post provisions in OAR 345-022-0040(4), 345-022-0080(4), and 345-022-0100(4) state that when reviewing an Application for Site Certificate or Request for Amendment that was complete before the effective date of these rules Council will apply the 2007 version of the Protected Areas, Scenic Resources, and Recreation Standards. Thus, the completed applications that these provisions cover would be in compliance with ORS 469.401(2) because the Council rules in effect when their Site Certificate or Amended Site Certificate is executed would explicitly include these goal post provisions applying to their applications. Further, nothing in the proposed rules waives the Council or certificate holder's obligation to abide by other applicable local ordinances, state laws, or administrative rules for which the Council determines compliance that are in effect when the Site Certificate or Amended Site Certificate is issued, including any ordinances or laws that prohibit or limit development within a specified protected area. Staff recommends that Council add clarifying language to this effect, as shown below.

Commenters argue that in addition to legal questions, there are policy reasons to apply the updated standards to the review of pending applications, particular to account for protected areas that were established in the past 15 years. Commenters recommend that the Council ensure that all new rules, standards, and protected areas are applied to all pending and future applications.

The Council has weighed the policy concerns raised by commenters against the need to provide regulatory certainty for applicants. As some commenters pointed out, the review of an Application for Site Certificate or Request for Amendment can take several years, and significant effort, time, and expense are required to develop application materials based on the standards of review in place at the time the application is submitted. Following the submission of a complete application, reviewing agencies, tribal governments, and members of the public review this information and provide comments to assist the Council in determining whether or not the information in the application demonstrates compliance with those same standards and to identify issues or concerns that may later be raised in a contested case proceeding. Changing the standards of review that apply to a project after the process of developing the decision record is mostly complete would be disruptive and could introduce significant delays and additional costs into the review process, and while Council reserves the discretion to amend the rules or standards that apply to a specific facility if needed to address a specific issue or impact, the Council intends to minimize unnecessary disruptions to the extent possible as a matter of fairness. Further, as explained above, if any ordinance or law that prohibits or limits development within a specified protected area has been adopted after the 2007 version of the Protected Areas, Scenic Resources, and Recreation Standards but before a pending application receives its site certificate, applicants covered by the proposed goalpost provisions would still have to comply with such an ordinance or law. The proposed goalpost provisions only mean

that such applicants would not be required to re-submit or supplement their application materials related to these standards.

Finally, commenters argue proposed OAR 345-022-0040(4), 345-022-0080(4), and 345-022-0100(4) present significant transparency issues because they would apply standards articulated in Administrative Order EFSC 1-2007 or Administrative Order 1-2002 to the review of a proposed facility. Commenters argue that those Orders are not easily accessible to the public and applicants, making it difficult to understand which outdated standards the Council might base its decisions on. Commenters further argue that it is not clear to which standards the proposed rules refer to and ask why the proposed rules do not provide specific applicable rule numbers.

We note that the versions of the standards referenced in the proposed OAR 345-022-0040(4), 345-022-0080(4), and 345-022-0100(4) are the versions that are currently in effect and that the text of those rules is easily found in the Oregon Administrative Rules Database and the Secretary of State Annual Rules Compilation for OAR chapter 345. We also believe the proposed rules are sufficiently clear that the 'standard' referred to in the proposed rules refers to the standard in question. However, to avoid any potential ambiguity the Department recommends the Council modify the proposed rule language as follows:

OAR 345-022-0040

(4) The Council shall apply the ~~standard~~ version of this rule adopted under Administrative Order EFSC 1-2007, filed and effective May 15, 2007, to the review of any Application for Site Certificate or Request for Amendment that was determined to be complete under OAR 345-015-0190 or 345-027-0363 before the effective date of this rule. Nothing in this section waives the obligations of the certificate holder and Council to abide by local ordinances, state law, and other rules of the Council for the construction and operation of energy facilities in effect on the date the site certificate or amended site certificate is executed.

OAR 345-022-0080

(4) The Council shall apply the ~~standard~~ version of this rule adopted under Administrative Order EFSC 1-2007, filed and effective May 15, 2007, to the review of any Application for Site Certificate or Request for Amendment that was determined to be complete under OAR 345-015-0190 or 345-027-0363 before the effective date of this rule. Nothing in this section waives the obligations of the certificate holder and Council to abide by local ordinances, state law, and other rules of the Council for the construction and operation of energy facilities in effect on the date the site certificate or amended site certificate is executed.

OAR 345-022-0100

(4) The Council must apply the ~~standard~~ version of this rule adopted under Administrative Order EFSC 1-2002, filed and effective April 3, 2002, to the review of any Application for Site Certificate or Request for Amendment that was determined to be complete under OAR 345-015-0190 or 345-027-0363 before the effective date of this rule. Nothing in this section waives the obligations of the certificate holder and Council to abide by local ordinances, state law, and other rules of the Council for the construction and operation of energy facilities in effect on the date the site certificate or amended site certificate is executed.

Applicability of OAR 345-001-0010, OAR 345-020-0011, and OAR 345-021-0010.

Comment: "Over the course of this rulemaking, Idaho Power has emphasized its concern regarding balancing the need to update the rules with minimizing disruption to Application for Site Certificate ('ASC') proceedings that are already far along in the review process. Idaho Power appreciates that ODOE Staff has considered this concern and has made recommendations that appear to limit the potential for disruption. In particular, Idaho Power appreciates the comments in the July 8, 2022, Staff Report noting that, '[t]o avoid disruption of projects that are currently under review,' the proposed rules 'specify that amended standards will only be applicable to the review of applications or requests for amendment filed on or after the effective date of the rules.' The proposed Division 22 rule revisions are clear on this point. For added clarity and consistency, Idaho Power recommends that the Council extend the approach in the Division 22 rules to the other rule revisions being considered. Specifically, Idaho Power recommends that the Council add to proposed OAR 345-001-0010, OAR 345-020-0011, and OAR 345-021-0010 similar language regarding the applicability of the new rules…In the event the Council declines to adopt the proposed rule language provided above, Idaho Power respectfully requests that the Council provide added clarity of the Council's intent that the revisions to the rules regarding definitions, notice of intent, and ASC information requirements do not apply to currently pending projects and explain its rationale either in its rulemaking order or on the record during its deliberation." **Ex. 54**.

Recommended Response: Commenters request that the Council add new applicability language to OAR 345-001-0010, 345-020-0011, and 345-021-0010. In the alternative, commenters request that the Council discuss how the proposed definitions and information requirements will be applied. We recommend that additional applicability clauses are not necessary for the following reasons. The sections specifying the applicability of the amended standards under OAR 345-022-0040(4), 345-022-0080(4), and 345-022-0100(4) are intended to avoid disruption of projects that are currently under review by the Council and for which an application for site certificate or Request for Amendment has been determined to be complete. Under ORS 469.503(1), in order to issue a site certificate, the Council must determine that the

preponderance of the evidence on the record supports the conclusion that the facility complies with the applicable standards adopted by the council pursuant to ORS 469.501 or the overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by the applicable standards the facility does not meet. We interpret the phrase 'applicable standards adopted by the council' in ORS 469.503(1) to mean any standards adopted and in effect at the time the Council makes its decision to approve or deny a site certificate under ORS 469.370(7), including any provisions specifying which version of a standard is applicable to decisions that are pending before the Council.

We recommend that similar applicability provisions are not needed for the amended information requirements, definitions, and other non-substantive provisions of the amended rules. For example, the rules in Division 020 and 021 apply to the submission of a Notice of Intent and Application for Site Certificate, respectively. Because the current Protected Area standard will continue to apply to the review of an application or request for amendment that had already been determined to be complete on or before their effective date, the applicant, by necessity, would have already satisfied all submission requirements related to the Notice of Intent or Application. The amended information requirements are not intended to retroactively apply to such completed filings or submittals. Similarly, an amended definition could inform the Council's interpretation or application of a new or existing standard, but in this case the only definition that is amended in the proposed rules is the definition of 'protected area.' That definition was previously located in the Protected Areas Standard itself, and as provided in the proposed OAR 345-022-0040(4), the current version of the standard will continue to be applicable to any review of an application for site certificate or Request for Amendment has been determined to be complete and is currently pending before the Council.

Environmental justice Considerations

Comment: "An [Environmental Justice (EJ)] lens or filter shall be applied by all natural resources reviewing agencies per ORS 182.545. Oregon Department of Energy, a natural resource agency, must assess and consider the affects [sic] of their decisions on environmental justice communities. ODOE through its public advocate position shall reach out to these communities to assess the environmental burden on them.

As proposed, there is no mention of EJ in the new rules. Often environmental burden is overlooked when analyzing environmental impacts. This must change. Directly encompassed within the definition of 'significant,' a condition central to the criteria for Council decision making, is the 'affects to the human population…' Therefore there are no excuses, and information on impacts and burdens to EJ communities must be provided in the Contents of Notice of Intent and the Contents of an Application." **Ex. 74.**

Recommended Response: Commenters recommend that information requirements related to environmental justice considerations be added to OAR 345-020-0011 and 345-021-0010. While we agree that environmental justice considerations should likely be addressed and evaluated and in the Council's review process, we believe that incorporating new information requirements without adopting corresponding standards establishing how this information will be evaluated would likely have limited benefit to environmental justice communities. Because adopting new standards or amending existing standards to address environmental justice considerations would likely exceed the scope of changes included in the Notice of Proposed Rulemaking, we recommend that this issue be further considered in future rulemaking that includes additional opportunities for environmental justice communities and other stakeholders to provide input on potential rule changes.

To the extent that commenters claim that addressing environmental justice considerations as part of this rulemaking is a legal requirement, we disagree. Commenters correctly identify that 2022 Oregon Laws Chapter 58, Section 11 adds several agencies, including the Oregon Department of Energy, to the list of "natural resource agencies" required to consider the effects of actions on environmental justice issues in their decision-making processes. The new law does not identify the Energy Facility Siting Council as a "natural resource agency." While the Oregon Department of Energy provides clerical and staff support to the Council, we note that the Council is an independent decision-making body, and mandates to the Department are not necessarily binding upon the Council.

<u>Requests to Terminate or defer rulemaking</u>

Comment: "…Meeting the 100% non-emitting electricity by 2040 mandate will require a significant build out of renewable energy projects to not only replace current emitting resources, but to also meet projected electricity demand increases as other sectors electrify, like industry, buildings, and transportation. As a state permitting authority, EFSC plays a key role in this transition, necessitating the need for a process that is both robust in review and efficient in process – as was set out in Governor Brown's Executive Order 20-04 (EO) which prioritized streamlining processes that are essential to decarbonization. This resulted in a much-delayed process review of EFSC, which we understand recently commenced. As EFSC plays a central role in Oregon's decarbonized future, the review to streamline the process should be completed before additional burdens are placed on applicants. Accordingly, we suggest that this rulemaking should wait for the conclusion of the process review..." **Ex. 75.**

Comment: "…we reiterate that this Rulemaking conflicts with the purpose and intent of the Governor's Climate Executive Order No. 20-40 (the 'Executive Order') and the legislature's adoption of House Bill 2021 ('HB 2021'). The Executive Order directs the Department to

facilitate achievement of greenhouse gas ('GHG') reduction goals, *prioritize and expedite* processes and procedures to *accelerate* reductions in GHG emissions, and *integrate climate change impacts* into planning, budget, investments, and policy making decisions. HB 2021 requires vast and immediate changes to the state's power generation portfolio in order to meet the bill's Clean Energy Targets. This Rulemaking runs counter to those urgent directives and goals by making renewable energy facility siting slower, more costly, and more burdensome. We strongly urge the Council to prioritize rulemakings that assist, rather than hinder, the state's climate goals." **Ex. 76.**

Recommended Response: Commenters argue that the proposed rules are inconsistent with directives provided in HB 2021 (2021) and Executive Order 20-04, and request the Council terminate this rulemaking or defer adoption of the proposed rules. The Council is tasked with the responsibility to adopt standards and rules to ensure that that the siting, construction and operation of energy facilities is accomplished in a manner consistent with protection of the public health and safety and in compliance with the energy policy and air, water, solid waste, land use and other environmental protection policies of this state. Neither HB 2021 or Executive Order 20-04 relieve the Council from this primary responsibility, and we do not recommend that Council defer action on this rulemaking simply because other rulemaking actions are pending. While we acknowledge that this rulemaking could result in some extra costs of compliance by requiring a more comprehensive evaluation of impacts to areas designated for protection by the state or federal government since 2007, we do not believe that commenters have demonstrated how this rulemaking would result in undue or unreasonable administrative burdens on applicants.

We further note that neither HB 2021 or Executive Order 20-04 provide specific mandates or directives to the Council regarding renewable energy siting. EO 20-04 does provide mandates to the Department, but as noted elsewhere, the Council is an independent decision-making body from the Department, and mandates to the Department are not necessarily binding upon the Council.

We do, however, recognize the importance of making the siting process more efficient, timely, and responsive to stakeholder and public issues or concerns. As commenters note, the Council initiated Phase 1 of its Application Process Review Rulemaking which is intended to accomplish these goals in August 2021. That rulemaking project is being conducted in tandem with a separate evaluation of the siting program which was also referenced in the Department's implementation plan for Executive Order 20-04. Work recently began on the evaluation, and the results of the stakeholder engagement that is currently being conducted as part of that project are expected to inform the Council's rulemaking efforts.

Objection to Fiscal Impact Statement

Comment: "…[the small business impact statement] is non-compliant with the [Oregon Administrative Procedures Act] and constitutes procedural error invalidating the Rulemaking. First, the NOPR does not address ORS 183.336(1)(c) at all. Second, it erroneously assumes that 'no small businesses' will be subject to the Rulemaking. There are currently Oregon small businesses, like Obsidian Renewables, that have pending or approved applications for site certificates before the Council. Other small businesses, including NewSun, are likely to seek site certificates from EFSC in the future. The NOPR makes an unjustified conclusion to the contrary that is unsupported by evidence, in violation of ORS 183.336(1)(a). The Rulemaking therefore also violates ORS 183.336(1)(d) because small businesses were not consulted during development of the Rulemaking. Finally, the Rulemaking fails to address ORS 183.336(1)(b) because it states only that affected persons 'could be subject to some increased costs' related to analyzing impacts on protected areas, but does not identify or analyze projected reporting, recordkeeping and other administrative activities required for compliance, including the cost of professional services."

"While we appreciate the intent of the Rulemaking, the existing rules provide adequate protection for areas of special interest and conservation in our state and, at most, should be updated to include new protected areas as stated in the purpose and intent of the NOPR. The Rulemaking as written creates new, ambiguous standards that will hinder renewable energy siting in conflict with legislative and executive directives. We request that the Council direct the Department to undertake further analysis of the specific 'new protected areas' that need to be added to the list in existing regulations and propose a new Rulemaking accordingly. At minimum, the Department must comply with the small business impact analysis required under the OAPA before this Rulemaking may proceed." Ex. 76.

Recommended Response: Commenters raise several objections to the fiscal impact statement included in the Notice of Proposed Rulemaking. We note that these objections were not raised in the manner required by ORS 183.333 and OAR 137-001-0087; however, staff recommends that Council appoint a Fiscal Impact Advisory Committee to review the statements and authorize staff to issue an amended Notice of Proposed Rulemaking following the review. To support the review, staff provides recommended responses to the objections below.

Commenters allege that the notice fails to provide an accurate estimate of the number of small businesses subject to the proposed rule as required by ORS 183.336(1)(a). This notice estimates that no small businesses, as that term is defined in ORS 183.310, are expected to be subject to the proposed rules. As commenters note, "Small business" is defined under ORS 183.310(10) as "a corporation, partnership, sole proprietorship or other legal entity formed for the purpose of making a profit, which is independently owned and operated from all other businesses and which has 50 or fewer employees." While we recognize that some businesses that have, or

may, apply for a site certificate may have 50 or fewer employees, we are not aware of any such entity that is independently owned and operated from all other businesses. To date, all certificate holders have either been public utilities or project-specific LLCs that depend on the experience, qualifications, and personnel of a parent company to satisfy the Council's Standards. The creation of separate business entities for specific energy projects is ubiquitous in the energy development industry.

Despite the fact that no small businesses are expected to be subject to the proposed rules, the statement of fiscal impact recognizes that the rules could result in some fiscal or economic impacts on a person proposing to construct or operate a new energy facility, and provides all the information required under ORS 183.336, including analysis that utilities, independent power producers, and energy developers "could be subject to some increased costs, including administrative costs and the costs of professional services associated with conducting analyses for impacts to protected areas, scenic resources, and recreational opportunities."

Commenters allege that the notice fails to address ORS 183.336(1)(b) because it does not identify or analyze projected reporting, recordkeeping and other administrative activities required for compliance, including the cost of professional services. This is incorrect. The statement of costs of compliance clearly states that utilities, independent power producers, and energy developers "could be subject to some increased costs, including administrative costs and the costs of professional services associated with conducting analyses for impacts to protected areas, scenic resources, and recreational opportunities." The fiscal impact statement further explains that these costs are not quantified because they "would only apply to future applications for a site certificate, and because their magnitude would be highly dependent on the size, type, and location of a proposed facility." We further note that this requirement is associated with the statement of effect on small businesses, and as the statement explains, no small businesses are expected to be subject to the proposed rules.

Commenters allege that the NOPR does not address ORS 183.336(1)(c), which requires an identification of equipment, supplies, labor and increased administration required for compliance with the proposed rule. Commenters are correct that there is no identification of equipment, supplies, labor and increased administration required for compliance with the proposed rule because none are expected. We further note that this requirement is associated with the statement of effect on small businesses, and as the statement explains, no small businesses are expected to be subject to the proposed rules.

While we believe the fiscal impacts statement and associated statement of costs of compliance is accurate, we do recognize that the reasons why we believe there will be no significant increases in costs for small businesses associated with the proposed rules could be more clearly articulated. As such, we recommend that the Council authorize staff to issue an amended Notice of Proposed Rulemaking under the procedure provided in ORS 183.333(5).

Finally, the commenters alleges that the NOPR violates ORS 183.336(1)(d) because small businesses were not consulted during development of the rule. The statute does not require small businesses to be consulted when developing rules, rather, it requires a description of the manner in which the agency proposing the rule involved small businesses in the development of the rule. The NOPR clearly states that because small businesses are not expected to be affected, small businesses were not specifically consulted during the development of these rules.

Comments related to definitions (OAR 345-001-0010)

General Comments on Definitions

Comment: "The proposed rules have no definitions for Scenic and Recreation Areas or Resources. Only Protected areas are defined. Since this rulemaking is also part of ODOE/EFSC's rulemaking project to 'clean up' the rules, reduce ambiguity, and to align the three rules as much as possible, we [believe] that scenic and recreation areas should also be defined under 345-001-0010." **Ex. 74.**

Recommended Response: We recommend that the meaning of scenic resources and recreational opportunities is sufficiently clear without further definition. We note that the criteria for determining whether a scenic resource or recreational opportunity is "significant or important" is further defined under OAR 345-022-0080 and 345-022-0100, respectively.

Definition of "Analysis area"

Comment: "The use of the terms 'study area' and 'analysis area' are very confusing. The definition provided in [OAR 345-001-0010(2)] provides no clear direction regarding how, who, or under what circumstances the 'analysis area' it is to be determined, and requires no justification regarding why a reduced analysis area is being allowed in the proposed order. In many instances the 'analysis area' is limited to the site when it is clear that the impacts extend significantly beyond the site. Some examples where the 'analysis area' has been restricted to the site while impacts extend beyond that area [include] wetlands [and] blasting[.]" **Ex. 72.**

Comment: "Analysis areas and study areas are confusing in the rules and will remain problematic without amendment. The analysis areas are not specifically defined by rule; rather they are defined in a Project Order arbitrarily determined by staff who can be influenced by the developer and who are for the most part unaccountable to the public.

Commenters believe that analysis areas should be eliminated completely from these rules. Retain 'study areas' which are clearly defined in the rules. This would lead to less confusion and more consistency among the three rules, be the most protective of special places, and simpler to administer.

This logic is consistent with the currently proposed Scenic and Recreation Area rule amendments. In these two rule amendments analysis areas *are eliminated* (see 345-022-0080 and 345-022-0100). There is not a reason to retain analysis areas within the Protected Area rule except to limit analysis which is contrary to the goal of protecting our special and protected resources. In addition, by aligning these definitions and their application, the amendments come closer to meeting a goal of this over-arching rulemaking project, i.e.: 'rule clarity and consistency' among the three (related) rules.

However, if analysis areas continue to be used and retained in the rules they must: a) not be established until after the Notice of Intent and issuing of the First Project Order; and b) have a mechanism for land managers, reviewing agencies, and the public, to object or appeal the limitations in the analysis area." **Ex. 74.**

Recommended Response: Commenters state that the process for establishing 'analysis areas' in the Council's review process is unclear and problematic. Commenters recommend that there should be more accountability and transparency in the establishment of analysis areas, or conversely, that analysis areas should be eliminated and the 'study areas' used in the review of a Notice of Intent should be relied upon throughout the process.

The analysis areas for a project are intended to reflect the geographic extent of areas in which the potential significant impacts from the construction or operation of a proposed facility could occur. Analysis areas are established in the Project Order, which is issued following the review of a Notice of Intent. Analysis areas may be the same as the study areas defined in OAR 345-001-0010 but may also be expanded or reduced based on the circumstances of the proposed facility and its site. Comments and recommendations on the appropriate size of analysis areas are specifically requested from reviewing agencies and the public during the review of the Notice of Intent. The Department or Council may subsequently amend analysis areas if evidence shows that the project order is not adequate.

While we agree that there could be more clarity and consistency in the manner in which analysis areas are established, we think that abolishing or significantly amending analysis areas likely exceeds the scope of changes contemplated in the Notice of Proposed Rulemaking.

We also note that the proposed changes to OAR 345-022-0080 and 345-022-0100 do not eliminate analysis areas from the review of compliance with the scenic resources and

recreation standards, it merely allows the Council to consider evidence regarding potential impacts outside of the analysis area if such evidence is introduced during a public hearing or contested case proceeding. The proposed OAR 345-021-0010(1)(r) and (t) only require an applicant to provide information about potential impacts to resources within the analysis area.

Definition of "existing corridor"

Comment: "In the past, [the term 'existing corridor' in OAR 345-001-0010(20)] did not cause concern regarding protected areas since no projects had been approved that allowed transmission lines to be run through protected areas. It is being proposed that a transmission line be allowed to pass through one of these areas for the first time. The 'existing corridor' rules will currently allow the route through the protected areas to be treated as 'energy corridors'. This will mean that future utilities will be encouraged to follow the new route and the negative impacts can increase multiple times by different utilities absent consideration of the negative impacts on the protected resource. The definition should include language stating that an existing corridor through a protected area does not constitute an 'energy corridor' for purposes of future developments." Ex. 72.

Recommended Response: Commenters state that the definition of "existing corridor" is problematic because it encourages colocation of transmission lines in routes that may cross through a protected area. An "existing corridor" is defined in the existing OAR 345-001-0010 as the right-of-way of an existing transmission line, not to exceed 100 feet on either side of the physical center line of the transmission line or 100 feet from the physical center line of the outside lines if the corridor contains more than one transmission line. This definition interprets the term as it is used in exception from the definition of "energy facility" in ORS 469.300(11)(a)(C)(i), and the exception from the local transmission siting process provided under ORS 469.442(5). While it is used in a similar manner, the term "existing corridor" in ORS 469.300(11)(a)(C)(i) and 469.442(5) is not equivalent to the term "existing utility right-of-way" in OAR 345-022-0040.

Definition of "land use approval"

Comment: "Council Rule language defining 'land use approval' and which may be used by ODOE in error in deciding application of land use law… The Oregon Rule regarding evaluation of compliance with Land Use goals has been interpreted as allowing the council to determine eligibility based upon the plain language of the statute used by counties which conflicts with state statutes in the following manner:

1. The Counties are not able to determine eligibility by using the language of the statute directly as the interpretation of the rules has been developed and changed through litigation results. When the Council has applied the county rules, they have not included compliance with the court decisions directing how to address protected areas or recreation areas under the rules regarding county determinations.

2. The process that must be used by the Council is defined in statute and the language of the above definition is not consistent with the language in the statute." Ex. 72.

Recommended Response: Commenters object to the definition of "land use approval" as conflicting with statute and case law governing local land use decisions. The definition of "land use approval" is used in the rules to describe a final quasi-judicial decision or determination made by a local government that can be relied upon by an applicant to satisfy the requirements of ORS 469.504 and the Council's land use Standard. Commenter did not provide specific arguments or recommendations on how they believe the definition is not consistent with statute or should be amended, and if they had, further amendments would likely exceed the scope of this rulemaking because the consideration of local land use approvals have limited applicability to the standards under review in this rulemaking.

Definition of "reviewing agency"

Comment: "…the land management entity with jurisdiction over the protected areas (public, private or nonprofit) within the study area must be 'noticed' and invited to be a 'reviewing agency.'" **Ex. 1-48, 50, 52-53, 55-59.**

Comment: "To align with the proposed amendment definitions, including the additions mentioned above, the land management entity with jurisdiction over the protected areas (public, private, nonprofit, or tribal) within the study area must be 'noticed' and invited to be a 'reviewing agency.' They are the most familiar with the areas and resources; therefore they are in the best position to review impacts and advise the Department.

With the exception of state agencies, it would be up to the manager, officer, agency, or authorized person, to participate as a reviewing agency -- or not. However, they should remain on the list. If electronic means of notification and communication is permissible, there should be no additional burdens on developers, a concern expressed by the developers." **Ex. 74.**

Comment: "The Council should empower managing agencies of Protected Areas within study areas by including these agencies within the Council's definition of 'reviewing agency' at Proposed Rule 345-001-0010(52). The Council's rules already expressly designate as 'reviewing

agencies' numerous other similar types of agencies, such as '[t]he governing body of any incorporated city or county in Oregon within the study area' and '[t]he federal land management agency with jurisdiction if any part of the proposed site is on federal land.' Proposed Rules 345-001- 0010(52)(p), (r). The agencies that directly manage Protected Areas should also be deemed reviewing agencies under the Council's rules in order to ensure their meaningful input and participation in the energy facility siting review process, and to comply with the Siting Act."

…

"Commenters acknowledge that the Council anticipates future rulemaking that may ensure notice of energy siting proposals to Protected Area managers, as well as Proposed Rules 345-020-0011(1)(L)(C) and 345-021-0010(1)(L)(A)(iii), which would require applicants to provide mailing addresses for managing agencies of Protected Areas within the study area or analysis area. However, relying on a policy proposal that has yet to be formally proposed, let alone implemented, would not sufficiently ensure that Protected Area managers will be meaningfully involved in the review process. Nor would merely providing the mailing addresses of these agencies and/or notice to these agencies be anywhere close to enabling them as full partners in the energy siting process…." **Ex. 77.**

Recommended Response: Commenters recommend that the land management entity with jurisdiction over the protected areas (public, private or nonprofit) within the study area must be 'noticed' and invited to be a 'reviewing agency.' We recognize the importance of providing sufficient opportunities for the managers of a protected area in the vicinity of a proposed facility proposed to participate in the siting review process, and as part of this rulemaking we recommended that the Council adopt a policy directing staff to provide all required public notices to the managers of any protected areas in the study or analysis area for a project. We believe this step will be sufficient to ensure these entities are able to participate in the proceedings in an appropriate capacity. We note that there may be legal limitations on the ability of private individuals or federal agencies to participate in the state review as "reviewing agencies" and recommend that this issue be explored further in proceedings to formally adopt the revised noticing requirements by rule.

With specific regard to State Natural Areas which are located on private lands that fall within the analysis area, the Department will provide notice to the State Natural Areas Program and will make reasonable efforts to provide notice to the organization or individual that owns the Natural Area. We expect the requirements for providing notice to protected areas managers will be formalized in a future rulemaking.

Comment: "The Columbia River Gorge National Scenic Area was created by Congress in 1986 as the largest National Scenic Area in the U.S. spanning 85 miles of the Columbia River and

covering 292,500 acres in Oregon and Washington. The Gorge Commission was created by bi-state compact in 1987 to manage the protection of scenic, natural, cultural and recreation resources as per the NSA Act.

As such, the Gorge Commission should be included as a reviewing agency since we do not fit as a state nor federal agency, but have all the responsibilities of managing the resources in the NSA, [superseding] state authority on resource protection. The Forest Service works with the Gorge Commission and oversees the federal lands in the NSA, and the Gorge Commission oversees all the other lands and permits development along with the counties in the NSA. We recommend you add letter (s) to include a public agency (not identified in the list) that manages a protected area within the study area." **Ex. 73.**

Recommended Response: Commenters recommend adding the Columbia River Gorge Commission as a reviewing agency. We do not recommend making this change, in part because the Commission is generally focused on issues related to the Columbia River Gorge National Scenic Area and under the Council's rules, with limited exceptions, no energy facility may be sited within this area. We note that as part of this rulemaking we recommended the Council establish a policy to provide any public notice on an application for site certificate or request for amendment to the state or federal agency or organization with jurisdiction over a protected area located within the analysis area for a project. As such we expect that public notice would be provided to the Columbia River Gorge Commission if a project was proposed in the vicinity of the NSA and the commission could request to become a reviewing agency for that project if it wished.

Comment: "…local governmental jurisdictions (counties and cities) with protected areas within their jurisdiction should not be limited to reviewing conditions of impacts to 'public services' only. Local jurisdictions have interests in addition to public services, for example tourism, economic development, and protection of their scenic and recreational resources as well. No other reviewing agency in the list has a condition or limitation on their participation therefore this clause should be removed:

> (p) The governing body of any incorporated city or county in Oregon within the study area as defined in OAR 345-001-0010 ~~for impacts to public services~~…" **Ex.74.**

Recommended Response: Under the existing definitions in OAR 345-001-0010, the governing body of any incorporated city or County within the study area for impacts to public services is a "reviewing agency." Commenters recommend that these bodies should not be limited to reviewing conditions of impacts to "public services." We note that the language proposed for deletion utilizes the study area for public services to establish the geographic scope of local

jurisdictions that may be affected by the proposed facility but does not necessarily limit the subjects upon which the affected local government can comment. Because the recommended change does not appear to be necessary to address the substantive concerns raised by commenters, we do not recommend further amendment of the proposed rules. To the extent that the rules are unclear or insufficient, however, we recommend that the issue of how to best include affected local governments other than the SAG into the review of a proposed facility be further explored in the APR rulemaking.

Definition of "site boundary"

Comment: "There are instances when there are related facilities which are not included in the perimeter of the site as the plain language of the [definition of 'site boundary'] implies. Instead, there are multiple small areas rather than one site for evaluation. It does not appear that this is the intent of the definition of the 'site'…From the time the Council was formed and up until about 3 years ago, the term 'proposed by the applicant' was interpreted to mean that the site included all areas of the development including all related and supporting facilities, temporary laydown and staging areas, etc. the applicant proposed to build or change in order to accommodate the development. During the contested case of Wheatridge Wind Energy, the interpretation was changed, and 'proposed by the applicant' was reinterpreted to mean that the applicant could choose which parts of the development to include in the application and site certificate process. This interpretation has caused a significant amount of public frustration and anger due to the following:

1. The public questions why parts of the development are not being required to meet the council standards or be included in any cumulative impact decisions.
2. No notice is provided to the residents who will be impacted at the time a decision is made regarding approval of the development.
3. Concern that in the event the area is later added as an amendment to the site certificate, that the public will not be provided access to a contested case procedure.
4. It is not clear that the areas not included will actually be evaluated for compliance with federal, state, local or city laws and rules.
5. [Omitted]
6. [The] developer should not control the definition of what is included as related and supporting developments.
7. This interpretation fails to provide consistency in the definition of the 'facility' for purposes of council actions" Ex. 72.

Recommended Response: Commenters object to the council's application and interpretation of the term "site boundary" in recent proceedings. We note that the substance of these

comments are outside of the scope of this rulemaking projects as they do not appear to relate directly to the Protected Areas, Scenic Resources, or Recreation Standards. We recommend that further clarifications of what must be included in a "site boundary" be considered in a future rulemaking.

Comments related to definition of "protected area"

General Comments

Comment: "The introductory sentence [of the definition of 'protected area'] references both federal and state designations, but the list (a) through (i) references only the 'federal government' and the references are nearly all to federal law. If the rule is going to specify the federal law, it should also specify the state law providing protection for the resource. The way the section is currently written, there will be ongoing arguments regarding whether the same or similar resources identified by the state should have the same protection as those recognized by the federal government." Ex. 72.

Recommended Response: Commenter recommends that legal citations be provided for state protected area. The proposed definition of "protected area" separates several subsections which previously included references to state and federal designations into separate subsections. As commenter points out, subsections (a) through (i) of the proposed rule now exclusively list federally designated protected areas; however, the remaining subsections (j) through (r) exclusively list state designated protected areas. We believe this separation creates less ambiguity as both federal and state designations are with appropriate legal authorities are now individually identified.

Construction of rule and statutory definitions

Comment: "…we previously advocated inserting statutory citations to the definitions that did not have them and altering citations that were too broad. For example, the suggested amendment of 345-001-0010 (49) (p) includes a reference to ORS Chapter 496 and 506. While ORS 506 does contain references to state fish hatcheries, it also contains references to research facilities (ORS 506.201), which are likely outside the scope of this rulemaking. Similarly, ORS 496 is extremely broad and includes references to funds, inspection stations, permits, and compacts, which are beyond the bounds of Protected Areas. A proper citation in the definitions will help to prevent the administrative burden on applicants and clearly direct applicants to include the relevant protect areas rather than facilities that are beyond the scope of this rule." **Ex. 75.**

Comment: "…the list of protected areas proposed under OAR 345-022-0040 and OAR 345- 001-0010(49) is overly broad and lacks adequate justification. The stated need for the Rulemaking explains that 'new protected areas have been designated by the state and federal government, and many previously designated areas have been renamed, re-organized, or redesignated' and, therefore, the Rulemaking is necessary to 'ensure that impacts to these new areas and designations are addressed during the siting process[.]' The NOPR also states that 'changes to state law surrounding the protection of scenic resources and recreational opportunities have created a need for better accommodation of resources of statewide importance that are not otherwise located within a protected area.'

The Rulemaking takes a uniform approach to revising the regulations by removing all listed protected resources and inserting generalized statements of resources 'established', 'created', 'designated' or 'listed' under statutes and regulations implementing resource protection programs. The problem with that approach is that the Department has proposed broad, generalized references to those statutes and regulations that capture resources that do not necessitate the type of protection established under EFSC's rules. [Commenters Footnote: For example, the Rulemaking might protect things like buildings and research facilities under ORS 506.201 because the rules would include a 'state fish hatchery' established under ORS Chapter 506 but that term is not defined in statute or under the Rulemaking. Another example: the NOPR proposes to list every experimental forest or range or special interest area under any federal land management plan, without identifying those areas specifically and analyzing whether protection from facility siting is necessary, *citation omitted*.] As a result, the NOPR and related materials fail to adequately and specifically identify the statutory authority for expanding these protections to locations that are not within designated protected areas. To achieve the purpose and goals stated in the NOPR, the Rulemaking should have updated the lists of protected areas currently in OAR 345-022-0040(1) to include those 'new protected areas' requiring protection under EFSC's rules. Instead, the Rulemaking inadvertently and unnecessarily expands the scope of protected areas, inserts new ambiguity into the regulations, and modifies the standards applicable to applicants seeking site certificates from EFSC without meeting the burden of justification for those changes required under the Oregon Administrative Procedures Act. **Ex 76.**

Comment: "…the Council should consider removing as many statutory citations from this definition as possible. Many of the subsections of the Proposed Rule cite various laws and statutes, at least some of which may be unnecessary information for some of the listed categories. In addition, the cross-referenced statute section numbers can be subject to change in the future, which could make the cross-references in the Council's Rules obsolete and potentially ineffective.

Perhaps most importantly, the various laws and statutes in this Proposed Rule are referred to in different ways in the different subsections of the definition, including lands and areas 'described under,' 'established under,' 'created under,' 'designated under,' and 'included under' various statutes and rules. Each of these terms may have slightly different meanings, and some of these terms may not be applicable in all intended cases—especially because Congress can establish new land designations without doing so 'under,' or pursuant to, a prior federal statute. To avoid confusion and litigation over whether certain areas were properly established under (or whichever other terms are used) the exact statute or statutory section listed in the rule, the Council should consider forgoing such statutory cross-references altogether.

To further prove the point, Commenters conducted a cross-check of a randomly selected sample of two statutory citations in the proposed definition and discovered that *both* of these citations appear to be in error. First, for National Monuments, the reference to '54 U.S.C. 320201' is probably intended to be '54 U.S.C. 320301.' Second, for the South Slough National Estuarine Research Reserve, the reference to 'ORS 273.563' is probably intended to be 'ORS 273.553.' These apparently erroneous citations illustrate the inherent pitfalls of cross-referencing other laws. Deleting as many of these citations from the rules as possible could reduce errors, eliminate confusion, and reduce the need to continually update the Council's Rules as various laws are relocated and recodified under new statutory sections in the future. **Ex. 77.**

Recommended Response: Commenters raise concerns with the revised definition of "protected areas." Based on comments during the informal stage, staff re-wrote the definition to remove specific examples of protected areas and to include legal citations for each category of protected area to the extent possible. Some commenters raise concerns that the legal citations provided are overly broad, where others assert that they are unnecessarily narrow and restrictive.

As a preliminary matter, we note that commenters that object to the removal of examples from the rule appear to suggest that only those areas and designations listed in the existing rule are considered protected areas. This is incorrect, as the existing rule uses incomplete lists prefaced with "including but not limited to" to provide examples. The fact that commenters appear to believe that the lists provided in the existing rule can be relied upon to identify protected areas in their applications for site certificate demonstrates that the current construction of the rule is unclear. To the extent that these commenters claim that the citations are overly broad, we disagree. There has been limited confusion about the meaning of terms and designations provided in the definition even though many subsections currently lack any legal citation. For the most part, the legal citations provided merely point to authorizing statutes and provide legal reference in the event that there is confusion. Commenters both specifically sited subsection (p) of the proposed rules, which refers to state fish hatcheries "established under

ORS chapter 496 or 506" as problematic, because those chapters also allow the Oregon Fish and Wildlife Commission to establish other facilities. We recommend that the rule specifically uses the term "fish hatchery" and we are not convinced that it could be read to include buildings or facilities that are not actively involved in fish hatchery activities, however, to avoid any confusion that the rule may include other facilities established under sections of ORS chapter 469 or 506 as protected areas, we recommend that the proposed rule be modified to remove the reference.

> (p) A ~~state~~ fish hatchery ~~established under ORS chapter 496 or 506~~ operated by the Oregon Department of Fish and Wildlife;

Information about fish hatcheries operated by the Oregon Department of Fish and Wildlife is readily available both on ODFW's website and through the annual Fish Propagation Reports and Management Plans.

In addition to asserting that some legal citations or descriptive language are overly restrictive, the other commenters identify several errors in citations included in the proposed rules. Commenters recommend that for National Monuments, the reference to '54 U.S.C. 320201' is probably intended to be '54 U.S.C. 320301' and for the South Slough National Estuarine Research Reserve, the reference to 'ORS 273.563' is probably intended to be 'ORS 273.553.' Commenters are correct that these citations include scrivener's errors, and we recommend that they be corrected. We do not recommend that all citations be removed from the rule as recommended by commenters as many of the citations provide additional helpful context. Many specific examples are provided elsewhere in this document. Commenters also provided markup suggesting several minor edits and corrections to the language. Some of these changes reflect editorial preference, others do appear to clarify or resolve inconsistencies or ambiguity. Accordingly, we recommend that the proposed rules be modified to include some of these edits, as presented below:

> (26) "Protected Area" means an area designated ~~for protection under federal or state law~~ as one or more of the following:
>
> (a) A ~~n~~National ~~p~~Park or other unit of the National Park System described under 54 U.S.C. 100501;
>
> (b) A ~~n~~National ~~m~~Monument established under 54 U.S.C. 320~~2~~301 or by an act of Congress;
>
> (c) A ~~w~~Wilderness ~~a~~Area established under 16 U.S.C 1131 et seq. or by an act of Congress;

(d) A ~~w~~Wild, ~~s~~Scenic, or ~~r~~Recreational ~~r~~River included in the National Wild and Scenic River System under 16 U.S.C. 1271 et seq.;

(e) A ~~n~~National ~~w~~Wildlife ~~r~~Refuge included in the National Wildlife Refuge System described under 16 U.S.C. 668dd;

(f) A ~~n~~National ~~f~~Fish ~~h~~Hatchery established under 16 U.S.C. 760aa;

(g) A ~~n~~National ~~r~~Recreation area, ~~n~~National sScenic ~~a~~Area, or ~~s~~Special ~~r~~Resources ~~m~~Management ~~u~~Unit established by an act of Congress;

(h) A ~~w~~Wilderness ~~s~~Study ~~a~~Area established under 43 U.S.C. 1782;

(i) Federal ~~L~~land designated ~~in a federal land management plan~~ as:

(A) An Area of ~~c~~Critical ~~e~~Environmental ~~c~~Concern;

(B) An Outstanding ~~n~~Natural ~~a~~Area;

(C) A Research ~~n~~Natural ~~a~~Area;

(D) An Experimental Forest or Range; or

(E) A Special Interest Area;

(j) A state park, wayside, corridor, monument, historic, or recreation area under the jurisdiction of the Oregon Parks and Recreation Department;

(k) The Willamette River Greenway created under ORS 390.310 to 390.368;

(L) A natural area listed in the Oregon Register of Natural Areas under ORS 273.581;

(m) The South Slough National Estuarine Research Reserve, described under ORS 273.5~~6~~53;

(n) A state scenic waterway designated under ORS 390.805 to 390.925 and related adjacent lands;

(o) A state wildlife refuge or management area established under ORS ~~chapter~~ 496.146;

(p) A ~~state~~ fish hatchery ~~established under ORS chapter 496 or 506~~ operated by the Oregon Department of Fish and Wildlife;

(q) An agricultural experiment station, experimental area, or research center established by Oregon State University under ORS chapter 567; or

(r) A research forest established by Oregon State University under ORS 526.215.

Scenic highways

Comment: "I see no reference to scenic highways which provide recreational opportunities designated by ODOT. The requirement that the plain language of rules be used unless it is not clear leaves any statements that begins with 'federal' or 'state' to apply only to those protected by that agency." Ex. 72.

Recommended Response: Commenters note that scenic highways are not included in the definition of protected areas. The proposed rules do not intend to establish State or National Scenic Byways as 'protected areas.' The proposed changes to require state land management plans to be considered in the identification of significant or important scenic resources OAR 345-022-0080 is expected to result in visual impacts to these resources being considered under that standard.

National Scenic and Recreation Areas

Comment: Proposed Rule 345-001-0010(49)(g), which reads 'A national recreation area, national scenic area, or special resources management unit *established by an act of Congress*' (emphasis added), is an instance where the proposed rules are unnecessarily specific and arbitrarily narrow. Not all national scenic areas are established by acts of Congress. Cape Perpetua Scenic Area is an example of a national scenic area in Oregon that was administratively established by the U.S. Forest Service ('USFS'), not by Congress. The language 'established by an act of Congress' should be removed from the proposed rule in order to ensure the continued protection of such administratively designated scenic areas that merit protection. **Ex. 77**.

Recommended Response: Commenters recommend that language stating that National Scenic and Recreation Areas are established by an act of Congress is unnecessarily specific and arbitrarily narrow. We disagree. Proposed subsection (g) is intended to establish that National Recreation Areas, National Scenic Areas, and Special Resource Management Units are

Protected Areas. These categories of protected areas are only established through acts of Congress. Other federally managed land that are administratively designated to protect scenic, geologic, botanic, zoologic, paleontological, archaeological/historic, or recreational values are considered protected areas under the proposed subsection (i). For example, the Cape Perpetua Scenic Area referenced by commenters is identified in the 1990 Siuslaw National Forest Plan as a Special Interest Area and as such, would be considered to be a protected area under the proposed rule.

Wilderness Study Areas

Comment: "…Proposed Rule 345-001-0010(49)(h), which reads 'A wilderness study area established under 43 U.S.C. 1782,' should not include the reference to 43 U.S.C. 1782. The citation to 43 U.S.C. 1782 only encompasses Wilderness Study Areas managed by the Bureau of Land Management ('BLM'), and not USFS-managed Wilderness Study Areas. Deleting the U.S. Code citation from the language is necessary to encompass USFS-managed Wilderness Study Areas." **Ex. 77.**

Comment: "Commenters recommend including as 'Protected Areas' all areas formally designated by the Bureau of Land Management or U.S. Forest Service as Lands with Wilderness Characteristics ('LWCs'), Potential Wilderness Areas, Recommended Wilderness Areas, and Inventoried Roadless Areas. Doing so will facilitate compliance with the Council's statutory obligations to cooperate with the BLM and USFS in protecting their designated conservation lands. *See, e.g.*, ORS 469.010(1), (2)(c), 469.310, 469.470(1), (4), 469.501(1)(c), (1)(e), (1)(i).

LWCs are areas the BLM has actively inventoried via a public process and determined to possess the same characteristics as a Wilderness Area or Wilderness Study Area. Under the statutory definition of 'wilderness,' these are areas that (1) generally appear to have been affected primarily by the forces of nature, where the imprint of human activity is substantially unnoticeable; (2) offer outstanding opportunities for solitude or for primitive and unconfined recreation; (3) are of at least five thousand acres in size; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value. 16 U.S.C. 1131(c). The BLM's land use planning process provides the opportunity to administratively prescribe management direction for LWCs to preserve their character.

Given that LWCs have the same or similar characteristics as designated Wilderness and Wilderness Study Areas and can similarly be managed by the BLM to preserve their wilderness characteristics, Commenters recommend that the Council include all LWCs as 'Protected Areas.' This will ensure that all BLM-managed, wilderness-quality lands (Wilderness, Wilderness Study Areas, and Lands with Wilderness Characteristics) that are managed to preserve wilderness

character—both now and in the future—will be protected from the adverse impacts of energy projects and can be enjoyed by future generations of Oregonians.

Similarly, Commenters recommend including Inventoried Roadless Areas, Potential Wilderness Areas, and Recommended Wilderness Areas. These designations are assigned by the USFS. Just as designating Lands with Wilderness Characteristics as Protected Areas will ensure compliance with the Council's mandate to cooperate with federal agencies in protecting their sensitive lands and resources, so will designating Inventoried Roadless Areas, Potential Wilderness Areas, and Recommended Wilderness Areas. *See, e.g.*, ORS 469.010(1), (2)(c), 469.310, 469.470(1), (4), 469.501(1)(c), (1)(e), (1)(i).

Inventoried Roadless Areas are undeveloped areas typically exceeding 5,000 acres that have been determined to meet the minimum criteria for Wilderness consideration under the Wilderness Act and that have been inventoried during the Forest Service's Roadless Area Review and Evaluation process, subsequent assessments, or forest planning. Potential Wilderness Areas are areas identified and evaluated during the development or revision of Forest Plans for administrative recommendation to Congress for a Wilderness designation. Recommended Wilderness Areas are areas that the USFS recommends to Congress as candidates for designation as Wilderness. In addition to the statutory considerations mentioned above, these areas merit inclusion in the 'Protected Area' definition because they have the same characteristics as Wilderness Areas, which are already included in the definition. The only reason they are not officially designated as Wilderness Areas is that only Congress, not the USFS, has the power to designate lands as Wilderness. Not protecting these additional areas, which have already been identified by the appropriate expert agency as having the same wilderness character as Wilderness Areas, would be arbitrary and would not meet the Council's obligations under the Siting Act.

Finally, designating as 'Protected Areas' all Lands with Wilderness Characteristics, Potential Wilderness Areas, Recommended Wilderness Area, and Inventoried Roadless Areas will achieve consistency and uniformity with the rest of the proposed definition of 'Protected Area,' which already includes similar areas like Wilderness Study Areas, Outstanding Natural Areas, Research Natural Areas, and Special Interest Areas. Moreover, protecting these additional areas will help account for the fact that Oregon contains such a low percentage of land designated as Wilderness Areas despite having substantial land that merits protection. Only 4% of Oregon is currently designated as Wilderness, compared to 9% of Idaho, 11% of Washington, and 15% of California. The categories of lands listed above should be designated as 'Protected Areas.'" Ex. 77.

Recommended Response: Commenters recommend including all areas formally designated by the Bureau of Land Management or U.S. Forest Service as Lands with Wilderness Characteristics ('LWCs'), Potential Wilderness Areas, Recommended Wilderness Areas, and Inventoried

Roadless Areas as Protected Areas. The existing rule includes reference to 43 U.S.C. 1782, which as commenters correctly point out, is specific to Wilderness Study Areas managed by the Bureau of Land Management. As explained in BLM Policy Manual 6320, although the same criteria are used to identify "Lands with Wilderness Characteristics" as are used to identify wilderness and Wilderness Study Areas, they are not subject to any protective requirements prior to a planning or project-level management decision. Similarly, Potential Wilderness Areas, Recommended Wilderness Area, and Inventoried Roadless Areas may be managed to preserve wilderness characteristics, but do not have formal protections in place. Because these areas are not designated for protection through any congressional or administrative action we do not believe it is appropriate to include them as protected areas under the Council rule.

Federal Administrative Designations

Comment: "…Proposed Rule 345-001-0010(49)(i), which begins with 'Land designated in a federal land management plan as,' should be changed to read 'Federally managed land designated as' in order to reduce ambiguity and correctly cover the intended categories of lands. Although most of the categories of designations that follow in this Proposed Rule are made by federal agencies, that is not always the case. For example, some Outstanding Natural Areas are designated by Congress, including the Yaquina Head Outstanding Natural Area. 43 U.S.C. 1783. Notably, the ODOE Memo (p. 20) specifically asserts that the Yaquina Head Outstanding Natural Area was meant to be included as a Protected Area. Correcting the language of the rule as recommended below would resolve this oversight and ensure that any Outstanding Natural Areas that may be designated by Congress in the future will be protected as well. In addition to that issue, the term 'federal land management plan' might be confusing, as agency planning is not always relevant to particular Areas of Critical Environmental Concern, Outstanding Natural Areas, Research Natural Areas, and other designations. Using the phrase 'federally managed land' instead would remove any potential ambiguity as to whether these designations are actually 'designated in a federal land management plan.'" **Ex. 77.**

Recommended Response: Commenters recommend that proposed OAR 345-001-0010(49)(i) be modified from 'Land designated in a federal land management plan as,' to read 'Federally managed land designated as' in order to reduce ambiguity and correctly cover the intended categories of lands. We agree that the recommended change would reduce ambiguity in the rule. We recommend the proposed rule be modified as follows:

(i) Federal ~~L~~land designated ~~in a federal land management plan~~ as:

(A) An Area of ~~c~~Critical e~~E~~nvironmental ~~c~~Concern;

(B) An Outstanding ~~n~~Natural ~~a~~Area;

(C) A Research ~~n~~Natural ~~a~~Area;

(D) An Experimental Forest or Range; or

(E) A Special Interest Area;

National Landscape Conservation System Lands

Comment: "Commenters recommend designating as 'Protected Areas' the areas in the National Landscape Conservation System ('NLCS'), the BLM-managed federal system codified at 16 U.S.C. 7202. Although some designations in the NLCS are included in other categories of land within the proposed definition, National Conservation Areas and similar designations are not. Identifying and including certain types of NLCS lands in the definition of 'Protected Areas' while omitting or excluding others would be arbitrary and confusing. In contrast, expressly listing the NLCS within the definition will protect these sensitive areas in full compliance with the Siting Act and in full partnership with the BLM."

…

"Designating NLCS lands as a category of Protected Areas will be a forward-looking solution in cooperation with the federal government that will reduce the need for future rulemaking if additional designations are made as part of the NLCS system in the future. The Council should designate the National Landscape Conservation System as a category of Protected Areas." **Ex. 77.**

Recommended Response: Commenters recommend adding all lands included in the National Landscape Conservation System as "protected areas" under the Council's rules. Under 16 U.S.C. 7202, the National Landscape Conservation System includes all areas administered by the Bureau of Land Management that are designated as a national monument; a national conservation area; a wilderness study area; a national scenic trail or national historic trail designated as a component of the National Trails System; a component of the National Wild and Scenic Rivers System; or a component of the National Wilderness Preservation System. The NCLS also includes BLM lands designated by Congress to be administered for conservation purposes, including the Steens Mountain Cooperative Management and Protection Area and the Yaquina Head Outstanding Natural Area.

Many of these areas are already included in the Council's definition of Protected Areas. Notable exceptions are National Conservation Areas, components of the National Trails Systems, and the Steens Mountain Cooperative Management and Protection Area.

According to maps and data published by the Bureau of Land Management there are currently no BLM administered lands within Oregon designated as National Conservation Areas and the closest, the Nelson Snake River Birds of Prey National Conservation Area in Idaho is around 25 miles from the Oregon Border at is closest point. While it is theoretically possible that a wind energy facility sited at the Oregon Border could have some effect on the Nelson Snake River Birds of Prey NCA, it is unlikely that these exact circumstances will arise and as such, we do not believe additional modifications of the rules are necessary.

As commenters mentioned, there are several national scenic and historic trails in Oregon, including approximately 68 trail miles on BLM lands. National trails are designated by congress and administered by federal agencies, but unlike other protected areas, the trails cross multiple jurisdictions and may include lands under both public and private ownership that may not be restricted from certain kinds of development, including renewable energy development. As such, we do not believe it is appropriate to include National Trails as "Protected Areas" for the purposed of the Council Standard.

We note that national trails are generally designated to protect significant and important resources and trail segments located on public lands would likely still be protected under the Council's Scenic, Recreation, and Historic, Archaeological and Cultural Resources.

The Council has previously considered, and declined, to grant a petition to add the Steens Mountain Cooperative Management and Protection Area (CMPA) to the Council's definition of "protected area" because renewable energy development was not intended to be excluded from all lands within the CMPA. The CMPA designation applies to approximately 428,156 acres of BLM land in Harney County. Within the CMPA, 174,287 acres are designated Wilderness Areas and dedicated State Natural Area. An additional 118,637 acres are managed as Wilderness Study Areas. The CMPA also contains two Areas of Critical Environmental Concern (ACEC), six Research National Areas (RNA), and 12 designated Wild and Scenic River segments but most of these are entirely within the designated Wilderness Area. As a result, approximately 70 percent of public lands within the CMPA boundary are considered to be protected areas under the current rule. The wilderness and other protected areas in the CMPA are also designated as exclusion or avoidance areas for renewable energy development under the Steens Mountain Resource Management Plan. The remaining portions of the CMPA are also withdrawn from mineral and geothermal exploration and development, but solar and wind development is recognized as a valid use in some areas.

Because not all components of the National Landscape Conservation System are intended to be precluded from renewable energy development, we do not recommend that commenters proposed changes be included in the permanent rule.

National Trails

Comment: "**…**Commenters also recommend the inclusion of the National Trails System, defined at 16 U.S.C. 1242, as a separate category within the definition of 'Protected Area' for several reasons.

In addition to National Scenic and Historic Trails, the National Trails System also encompasses National Recreation Trails, National Geologic Trails, and connecting trails and side trails. 16 U.S.C. 1242. Including the Nationals Trail System within the definition of 'Protected Area' will protect those sensitive areas, as well as the portions of the National Scenic and National Historic Trails that are not managed by the BLM and therefore not part of the NLCS.

The National Trails System was established by the National Trails Act of 1968, 16 U.S.C. 1241–1249, to establish and preserve recreation, scenic, and historic trails, and provide public access to scenic, historic, cultural, and natural resources. Nominally administered by the National Park Service, other agencies including the BLM, USFS, and other federal, state, and local agencies all manage lands with constituent segments of the National Trails System. Agencies adopt publicly planned strategies for ensuring continued public access and enjoyment of trails under their purview.

One particularly important trail is the Pacific Crest National Scenic Trail, which spans 2,650 miles from the U.S.-Mexico border to the U.S.-Canada border, including 455 miles in Oregon. This trail is an important symbol of the diverse landscapes of the western United States and it is enjoyed by many thousands of people each year. However, only relatively small sections of the Pacific Crest Trail are managed by the BLM and included in the NLCS.

The entire Pacific Crest Trail, along with the rest of the National Trails System, merits protection from destruction of these trails' special and unique resources. This will ensure compliance with the Council's mandates to cooperate with federal agencies and to protect recreation resources and opportunities, scenic and aesthetic resources, and historic resources—including the resources intrinsic to the National Trails System. *See, e.g.*, ORS 469.310, 469.470(1), 469.470(4), 469.501(1)(f), (i). **Ex. 77.**

Recommended Response: Commenters recommend that all components of the National Trails System be included in the Council's definition of Protected Areas. Several National Trails cross through portions of Oregon, including the Oregon National Historic Trail and the Pacific Crest National Scenic Trail mentioned by commenters. National Trails are generally designated by congress and administered by federal agencies, but unlike other protected areas, the trails

cross multiple jurisdictions and may include lands under both public and private ownership that may not be restricted from certain kinds of development, including renewable energy development. As such, we do not believe it is appropriate to include National Trails as "Protected Areas" for the purposed of the Council Standard.

Outstanding Resource Waters

Comment: "Commenters recommend including Outstanding Resource Waters ('ORWs') within the definition of 'Protected Area.' ORWs are Oregon's equivalent of the federal antidegradation policy's Outstanding National Resource Water ('ONRW') provision at 40 CFR 131.12(a)(3). ORWs are nominated by the Oregon Department of Environmental Quality ('DEQ') and designated by the Oregon Environmental Quality Commission ('EQC').

The ODOE Memo (p. 26) asserts that ORWs are not listed as 'Protected Areas' in the proposed rules because areas expressly identified in OAR 340-041-0004(8)(a) as the DEQ's priorities for ORW nomination, such as National Wild and Scenic Rivers, State Scenic Waterways, and more, will likely already be included under another category in the Council's definition of 'Protected Area.' However, while those areas may be priorities for ORW designation, they do not encompass all areas that may be designated as ORWs, now or in the future. Pursuant to OAR 340-041-0004(8), the only requirement for designation as an ORW is that the designated water must be a high-quality water, not that it must be located in one of the priority areas. Many high-quality waters in Oregon potentially deserving of future protection as ORWs fall outside of the priority areas.

Currently, Oregon has three designated ORWs. One of those areas, Waldo Lake, does not fall entirely within the priority areas and is not completely covered by the 'Protected Area' definition in the Proposed Rule. Waldo Lake, a remote lake with waters renowned for its outstanding clarity, has exceptionally high water quality and merits protection, along with other ORWs that may be designated in the future and that also do not fall within any priority area…" **Ex. 77.**

Recommended Response: Commenters recommend adding Outstanding Resource Waters (ORWs) designated by the Oregon Environmental Quality Commission as protected areas. Commenters note that while waters designated as National Wild and Scenic Rivers or State Scenic Waterways, which are considered to be protected areas under the existing rules, are prioritized for designation as Outstanding Resource Waters not all Outstanding Resource Waters are or necessarily will be located in the boundaries of these designations.

The Council considered adding "Outstanding Resource Waters" to the list of designations that are considered to be "protected areas" under the Council's rules during the informal stages of this rulemaking. As commenters point out, ORWs are designated by the Environmental Quality Commission to protect their extraordinary water quality or ecological values. The Council decided not to include ORWs as protected areas in part because these waters are also generally protected under other designations, and in part because Oregon's Outstanding Resource Water policy is part of the state's antidegradation policy, and as such, its implementation is part of the Department of Environmental Quality's delegated authority to issue Non-Point Discharge Elimination System Permits and water quality certifications under section 401 of the Clean Water Act and the Council generally does not have the authority to determine compliance with federally delegated laws and rules.

Commenters provide Waldo Lake as an example of a Designated Outstanding Resource Water that is not considered to be a "protected area" under the current rules. We note that this is incorrect. Waldo Lake is a state scenic waterway under ORS 390.805, and as such is a "protected area" under both the existing and proposed rules. In addition, the lake is surrounded to the north and west by the 36,000 acre Waldo Lake Wilderness Area.

State experimental forests

Comment: "Oregon State University is not the only college which has established "experimental forests" and all such areas should be addressed as protected areas." **Ex. 72.**

Recommended Response: As noted by commenter, there are experimental and research forests and similar properties other than those established and administered by Oregon State University, including but not limited to, Eastern Oregon University's Rebarrow Research Forest and the recently established Elliot State Research Forest established under 2022 Oregon Laws chapter 89 which is administered by an independent state agency but will be managed by Oregon State University or another contracted entity.

At this point, we do not have sufficient evidence to recommend that the rule be expanded to include these research forests, which are managed for multiple objectives, as "protected areas." Staff will reach out to the managers of these research forests for recommendations on whether additional protections under the Council's standards would be appropriate and will present its recommendations to the Council in future rulemaking proceedings.

Private Conservation easements

Comment: "Another concern that I would like to see improved in the proposed rules has to do with the growing trend of land trusts and conservation easements. Non-profit and private landowners have become the land managers filling the gap of protecting lands and species that are deserving of protections when government fails. Under 'Definitions' in the proposed rule, the list of protected areas needs to be expanded to include these conservation easements because they are being or have been designated and protected for the public interest…" **Ex. 1-48, 50, 52-53, 55-59.**

Comment: "… After discovering my love for the landscape of northeast Oregon, I was able to begin implementing my dream in 1999 in partnership with ODFW and Rocky Mountain Elk Foundation. In 2001 we created a continuous wildlife corridor adjacent to Ladd Marsh comprised of ODFW land, private with conservation easement, and EOU's Rebarrow Research Forest. More recently I am working with Blue Mountain Land Trust to protect parcels acquired later, and I have joined the State Natural Areas Program in recognition of the special status plants, animals, and plant communities on the land. Of note are a series of moist meadows, including the best preserved mid-montane meadow in all eastern Oregon.

With that in mind, I sincerely hope this rulemaking will recognize the value of private landowners working with nonprofits and local, state, and federal governments to manage land in perpetuity for ecosystems and the public good." **Ex. 49.**

Comment: "Conservation easements should qualify as Protected Areas, even beyond the State Natural Areas program. Alternatively, since the Natural Areas program is not well known, they should reach out to private landowners who have special status plants, animals, and communities under conservation easement-- to educate them about program. Conservation easements are known as the best way for private landowners with significant high quality native habitat and rare species occurrences to protect their land…" **Ex. 49.**

Comment: "There has been a growing trend of land trusts and conservation easements1 that should be included in the Council's definition of Protected Areas. These lands referred to as 'lands subject to conservation easements,' could be in private or public ownership (i.e.: public agencies, Indian tribes, nonprofit corporations like land trusts, and/or any combination of these).

Voluntary protection of land by owners who manage their acres as natural areas and employ conservation easements to ensure protection 'into perpetuity' should be highly encouraged by the State of Oregon and the federal government. They also need a certain degree of certainty that their lands would be protected given the contribution they are making.

Currently 12% of the land in the USA is protected; private landowners, nonprofit land trusts and various public-private partnerships in the form of conservation easements are an important contribution toward reaching the goal of 30% by 2030.

The State of Oregon's Natural Areas program (already included under this definition) fits perfectly with the '30 by 30' goal. Similar to [the] natural areas program, conservation easements designations should be included in the definition of protected areas because we believe that they are a growing and important designation for areas of special qualities; and inclusion now will reduce the need for frequent or additional updating and amendments." **Ex. 74.**

Comment: "Commenters recommend including in the definition of 'Protected Area' areas covered by conservation easements and highway scenic preservation easements held by the state and federal governments. These easements are agreements that permanently limit uses of land in order to protect its conservation values, and they are expressly authorized by state and federal law for conservation and scenic purposes. *See, e.g.*, ORS 271.715, 271.725.

State-held conservation easements are of a similar nature to state parks, waysides, and corridors (which are already proposed to be included as Protected Areas) in that they are areas that the State is entitled, encouraged, and required to preserve and protect indefinitely. In particular, protecting highway scenic preservation easements and other conservation easements held for scenic purposes will ensure compliance with ORS 469.501(1)(i), which instructs the Council to develop rules for protecting, among other things, 'recreation, scenic and aesthetic values' from the '[i]mpacts of [energy] facilit[ies].' Without protection in the energy siting process, these easements can lose their value as a means of conserving sensitive and important areas.

Designating these areas as Protected Areas will also protect the natural, scenic, historic, and other resources that the Council is required to protect under ORS 469.503(4) and 469.504, which require compliance with Oregon's statewide planning goals, which in turn require the protection of the types of resources that may be lawfully protected by conservation easements, such as scenic resources, natural resources, water resources, forest lands, agricultural lands, estuarine resources, coastal shorelands, beaches and dunes, and the Willamette River Greenway.

Moreover, Goal 5 *expressly encourages* the use of 'easements' to protect natural resources, scenic resources, historic resources, and open spaces. OAR 660-015-0000(5). Under these statutory and regulatory directives, it is necessary to include easements acquired specifically by state and federal agencies for scenic and conservation purposes within the 'Protected Area' definition.

In addition, designating state and federally held conservation easements will ensure compliance with ORS 469.501(1)(c), which instructs the Council to protect '[a]reas designated for protection by the state or federal government.' Finally, protecting conservation and scenic easements held by the federal and state governments will also facilitate compliance with the Council's mandatory obligations to cooperate with other state and federal agencies. *See, e.g.*, ORS 469.310 (requiring the Council to 'establish in cooperation with the federal government a comprehensive system for the siting, monitoring and regulating of the location, construction and operation of all energy facilities in this state.'), 469.470(1) (requiring the Council to '[c]onduct and prepare . . . in cooperation with others . . .programs relating to all aspects of site selection'), 469.470(4) (requiring the Council to '[a]dvise, consult, and cooperate with other agencies of the state, political subdivisions, industries, other states, the federal government and affected groups, in furtherance of the purposes of' the Siting Act), and 469.520 (requiring 'cooperation' among all state agencies, including EFSC, on their 'activities and programs relating to energy, including rulemaking). The Council should ensure this mandatory cooperation among agencies by protecting these other agencies' scenic and other conservation easements. **Ex. 77.**

Recommended Response: ORS 469.501(1) directs the Council to adopt standards for the siting, construction, operation, and retirement of facilities, including standards addressing areas designated for protection by the state or federal government, including but not limited to monuments, wilderness areas, wildlife refuges, scenic waterways and similar areas. Typically, designation of a protected area establishes permanent restrictions on development within the boundaries of the area by law. While they are an important tool for the protection of habitat, open space, and other important resources, conservation easements are typically voluntary programs and are not intended to permanently restrict a landowner's ability to develop or lease their land, although as some commenters mention, some landowners may take additional steps to register or dedicate their land for conservation purposes through the State Natural Areas Program. Because they lack the same legal protections, and development restrictions, as areas designated for protection by the state or federal government, we do not believe it would be appropriate to treat private lands under a conservation easement as protected areas.

We do note, however, that the Council's determination of compliance with the standard, or granting of a site certificate, does not grant the right to construct a facility on private land and does not establish that the condemnation of land is justified.

Public Conservation and Highway Scenic Preservation Easements

Comment: "Commenters recommend including in the definition of 'Protected Area' areas covered by conservation easements and highway scenic preservation easements held by the state and federal governments. These easements are agreements that permanently limit uses

of land in order to protect its conservation values, and they are expressly authorized by state and federal law for conservation and scenic purposes. *See, e.g.*, ORS 271.715, 271.725.

State-held conservation easements are of a similar nature to state parks, waysides, and corridors (which are already proposed to be included as Protected Areas) in that they are areas that the State is entitled, encouraged, and required to preserve and protect indefinitely. In particular, protecting highway scenic preservation easements and other conservation easements held for scenic purposes will ensure compliance with ORS 469.501(1)(i), which instructs the Council to develop rules for protecting, among other things, 'recreation, scenic and aesthetic values' from the '[i]mpacts of [energy] facilit[ies].' Without protection in the energy siting process, these easements can lose their value as a means of conserving sensitive and important areas."

…

"Finally, protecting conservation and scenic easements held by the federal and state governments will also facilitate compliance with the Council's mandatory obligations to cooperate with other state and federal agencies. *See, e.g.*, ORS 469.310 (requiring the Council to 'establish in cooperation with the federal government a comprehensive system for the siting, monitoring and regulating of the location, construction and operation of all energy facilities in this state.'), 469.470(1) (requiring the Council to '[c]onduct and prepare . . . in cooperation with others . . . programs relating to all aspects of site selection'), 469.470(4) (requiring the Council to '[a]dvise, consult, and cooperate with other agencies of the state, political subdivisions, industries, other states, the federal government and affected groups, in furtherance of the purposes of' the Siting Act), and 469.520 (requiring 'cooperation' among all state agencies, including EFSC, on their 'activities and programs relating to energy, including rulemaking). The Council should ensure this mandatory cooperation among agencies by protecting these other agencies' scenic and other conservation easements. **Ex. 77.**

Recommended Response: Commenters recommended including conservation and scenic easements held by federal and state governments as protected areas. While we note that these lands are often acquired and managed for the preservation of scenic or ecological resources, it is unclear at this time that all these easements have the same permanent legal protections and development restrictions as other protected areas. In addition, it is not clear if there is a readily available source of information that clearly identifies all relevant easements. For example, the National Conservation Easement Database (NCED) is estimated to only contain 49% of publicly-held easements across the United States. For these reasons, we do not believe it would be appropriate to treat public lands under a conservation or scenic easement as protected areas although we recommend that this issue be explored further in future rulemaking.

Critical Habitat

Comment: "Commenters recommend designating as 'Protected Areas' all critical habitat designated pursuant to the federal Endangered Species Act of 1973 ('ESA'). This will ensure consistency with, among other requirements, ORS 469.501(1)(e), which instructs the Council to protect 'fish and wildlife, including threatened and endangered fish, wildlife or plant species,' from harm caused by the Council's siting decisions; ORS 469.310, which requires the Council 'to establish in cooperation with the federal government a comprehensive system for the siting, monitoring and regulating of the location, construction and operation of all energy facilities in this state'; and Oregon statewide planning goal 5 (made applicable by ORS 469.503(4) and 469.504), which requires the Council to protect 'fish and wildlife areas and habitats,' OAR 660-015-0000(5).

Critical habitat consists of fish and wildlife habitat that is determined via federal public decision-making processes to be essential to the conservation and recovery of federally protected species. The Council should support federal efforts to protect critical habitat by prohibiting energy development in these areas. Notably, many federally listed species are also protected under state law (ORS 496.171–496.182) or designated by the state as sensitive species (OAR 635-100-004) or as Species of Greatest Conservation Need in Oregon's federally approved State Wildlife Action Plan. Siting energy projects in critical habitat could adversely affect these species and contribute to their extirpation or extinction.

Moreover, including critical habitat as Protected Areas would also help the Council avoid its own potential liability for violations of the ESA. Federal courts have consistently and uniformly held that government officials and entities such as EFSC are liable under section 9 of the ESA, 16 U.S.C. 1538, for allowing private parties to take listed species, including by issuing permits or similar project approvals that harm critical habitat. *See, e.g.*, *Loggerhead Turtle v. County Council of Volusia*, 148 F.3d 1231, 1249 (11th Cir. 1998); *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997); *Sierra Club v. Yeutter*, 926 F.2d 429, 438–39 (5th Cir. 1991); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir. 1989); *Coal. for a Sustainable Delta v. McCamman*, 725 F. Supp. 2d 1162, 1167–68 (E.D. Cal. 2010); *Oregon Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 1005 n.8 (D. Or. 2010); *Animal Welfare Inst. v. Martin*, 588 F. Supp. 2d 110, 113 (D. Me. 2008); *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1079 (D. Minn. 2008); *Seattle Audubon Soc'y v. Sutherland*, No. CV06-1608MJP, 2007 WL 1300964, at *9–*12 (W.D. Wash. May 1, 2007); *Pac. Rivers Council v. Brown*, No. CV 02-243-BR, 2002 WL 32356431, at *10 (D. Or. Dec. 23, 2002). The Council can reduce potential liability, proactively achieve compliance with the ESA and Siting Act, and ensure natural resource protection in cooperation with the federal government by designating critical habitat as 'Protected Areas'." **Ex. 77.**

Recommended Response: We do not recommend making the recommended rule change at this time. As commenters explain, critical habitat consists of fish and wildlife habitat that is determined to be essential to the conservation and recovery of a federally listed threatened or endangered species. Critical habitat designations are made by the National Oceanic and Atmospheric Administration (for marine and anadromous species) and the US Fish and Wildlife Service (for other species).

Critical habit designations are only intended to affect federal agency actions or federally funded or permitted activities. Critical habitat designations do not affect activities on private land unless there is a federal "nexus" (i.e. federal funding or authorization that requires action by a federal agency.) Because the designation is not intended to preclude development on private lands, we do not believe it would be appropriate to add it to the list of "protected areas."

The Council currently only considers impacts to state designated threatened and endangered species under the Council's Threatened and Endangered Species Standard (OAR 345-022-0070). Consideration to federally listed species may be given while categorizing habitat to determine compliance with the Council's Fish and Wildlife Habitat Standard under OAR 345-022-0060. We note that if critical habitat were located within the analysis area for impacts to fish and wildlife habitat it could potentially result in that habitat being excluded from development or protected from impacts. We further note that no Council rule or decision relieves a certificate holder from their responsibility to comply with the Endangered Species Act or obtain any required incidental take permits.

Comments related to Protected Areas Standard (OAR 345-022-0040)

<u>"Goal post" for protected area designations.</u>

Comment: "The proposed rules DO NOT protect areas that were designated since May 2007 in any pending application! Given the potential for permanent and irrevocable effects to these areas, particularly Protected Areas, inconvenience to developers is not a valid reason to limit Council's ability to consider impacts to protected areas that are still pending or those areas receiving designation during the review of an energy project's application for a site certificate.

The Council needs to make sure that when new rules, standards, and protected areas come into being, they will apply to all pending (and future) applications. It is unfair to exempt pending applications from having to comply with current law. The public and designating agencies expect that when an area is designated as a protected area, that protection will actually have meaning. This includes energy projects that are currently under review.

While the review of an energy project can go on for years, equally as long--or longer--the review of an area eligible for a protective status takes time to be approved and designated. The only consistent and fair way to approach this is to follow the law and retain the statutory requirements of ORS 469.401(2), which states that parties must abide by local ordinances, state law, and the rules of the Council in effect on the date the site certificate or amended site certificate is executed. This is the law, and Council cannot adopt rules to the contrary." **Ex. 1-48, 50, 52-53, 55-59.**

Comment: "I am a land conservationist. I grew up in rural North Carolina exploring the native hardwood forests and knowing almost every species of tree, shrub, forb, grass, mammal and bird. This early connection with nature had a tremendous positive influence on me; so that as an adult I vowed to protect 2000 acres of land from any form of development for the public good and future generations. After discovering my love for the landscape of northeast Oregon, I was able to begin implementing my dream in 1999 in partnership with ODFW and Rocky Mountain Elk Foundation. In 2001 we created a continuous wildlife corridor adjacent to Ladd Marsh comprised of ODFW land, private with conservation easement, and EOU's Rebarrow Research Forest. More recently I am working with Blue Mountain Land Trust to protect parcels acquired later, and I have joined the State Natural Areas Program in recognition of the special status plants, animals, and plant communities on the land. Of note are a series of moist meadows, including the best preserved mid-montane meadow in all eastern Oregon.
With that in mind, I sincerely hope this rulemaking will recognize the value of private landowners working with nonprofits and local, state, and federal governments to manage land in perpetuity for ecosystems and the public good.

It saddens me to read this antiquated rule (OAR 345-022-0040). The rule only includes protected areas on a list dated May 11, 2007. Now, years later, a developer may override my intentions, actions, and investments. Fifteen years is a long time to give a developer a head start! It's taken decades for me to purchase the parcels to create a continuous block of habitat, make the agency connections, and research the programs available to protect the special status plants, animals, and communities. Would not my intentions on my property be equal to or greater than a developer?

When I heard that rulemaking was occurring to update confusing and outdated language I had to comment. The rules come up short by declaring that the date an application is declared 'complete' will be the new starting date and any areas protected after that, will not matter – even if an application is in progress. ORS 469.401(2), states that the starting date is when the site certificate is issued. The site certificate date is later in the process. This gives the developer enough time to review county records to determine if any lands they wish to develop are under conservation easement or designated Protected and plenty of time to contact the owner(s) to discuss." **Ex. 49.**

Comment: "[The Native Plant Society of Oregon (NPSO)] recommends that the list of State Natural Areas to be Protected should NOT be limited to those in place as of May 11, 2007, as

the current antiquated rule (OAR 345-022-0040) reads. All properties in the Natural Areas program admitted at ANY time up until a Site Certificate is issued, should be Protected. Oregon's special status species are not replaceable. All properties admitted to the Natural Areas program must have a management plan in place to preserve these rare plant and animal species and unique priority plant associations. As such, these Natural Areas should be given top priority for protection from development and disturbance." **Ex. 66.**

Comment: "Finally, and at the risk of redundancy with our consortium's comments filed separately, the rules cannot be amended in a way inconsistent with the law. Given the potential for permanent and irrevocable effects to the areas, particularly Protected Areas, inconvenience to developers is not a valid reason to limit Council's ability to consider impacts to protected areas that are designated from 2007 to 2022, as well as those receiving designation during the review of a Project. The law is clear and the rules simply need to reflect that. The public's interest, and that of sensitive species and places of special environmental and historical qualities are best served by retaining the requirements of ORS 469.401, which requires a site certificate or amended site certificate to require both the Council and applicant to abide by local ordinances, state laws, and the rules of the Council in effect on the date the site certificate or amended site certificate is executed.

As you know, the review of a project can go on for many years; similarly the review of an area eligible for a protective status can also take years to be designated. These lands and resources are designated for a reason, i.e.: to protect Oregon's most important recreational opportunities, sensitive natural resources, scenic resources, and special places. Commenters urge the Council to remain mindful of these values during all energy development reviews and siting decisions." **Ex. 74.**

Comment: "…Proposed Rules 345-022-0040(1)(a) and (b) would only require the protection of any Protected Areas that may have been designated on or before the date an application is completed, not on or before the date any site certificate is executed. These Proposed Rules would unlawfully exempt energy projects from having to comply with the laws, rules, and standards in effect at the time a site certificate is executed, and thus violate ORS 469.401(2). The Council must reject these Proposed Rules."
…
Applications for site certificates can be pending before the Council for months or even years, yet under the Proposed Rules applicants would be able to cap their obligations at a relatively early stage in the process even though the law and the environment are changing around them. Allowing applicants for large energy projects to completely ignore newly enacted laws and standards would interfere with the Council's obligation to site energy facilities in accordance with the environmental protection policies of the state and to ensure protections for various categories of Protected Areas first designated by the Council's partner state and federal agencies and then by the Council itself. *See* ORS 469.310, 469.501(1)(c).

When other state and federal agencies and governmental bodies designate these areas for protection, they expect the protections to actually apply to energy projects. The Proposed Rules would render such designations utterly meaningless for all proposed energy projects already under review prior to the designations—even in situations where these projects are likely to harm the Protected Areas. The Legislature never intended such an absurd, harmful result when it directed the Council to ensure meaningful cooperation with the federal government and other state agencies and instructed the Council to ensure the protection of special places around the state and the sensitive resources of these areas. To ensure compliance with the Siting Act and the precedent of the Oregon Supreme Court, the Council must reject the Proposed Rules identified below.

OAR 345-022-0040

(1) To issue a site certificate, the council must find:

(a) The proposed facility will not be located within the boundaries of a protected area ~~designated on or before the date the application for site certificate or request for amendment was determined to be complete under OAR 345-015-0190 or 345-027-0363~~;
(b) The design, construction and operation of the facility, taking into account mitigation, are not likely to result in significant adverse impact to a protected area ~~designated on or before the date the application for site certificate or request for amendment was determined to be complete under OAR 345-015-0190 or 345-027-0363~~.
* * *

Ex. 77.

Recommended Response: Commenters argue proposed OAR 345-022-0040(1)(a) and (b), which would only require the consideration of impacts to Protected Areas designated on or before the date an application is completed, would violate ORS 469.401(2) because they would exempt projects from having to comply with the applicable ordinances, state law, or rules, in effect at the time a site certificate is executed. We disagree. The proposed rules in OAR 345-022-0040(1)(a) and (b) only limit the applicability of Council's own Protected Areas standard to protected areas designated on or before an application is complete. Nothing in the proposed rules waives the Council or certificate holder's obligation to abide by other applicable local ordinances and state laws, including any ordinances or laws that prohibit development within a specified protected area.

The proposed rule is intended to provide regulatory certainty to applicants and certificate holders who have already filed a complete application or request for amendment by not requiring an additional evaluation of impacts to a protected area designated after the date of filing. We note that the Council's determination of compliance with the standard, or granting of

a site certificate, does not relieve a certificate holder from the requirement to abide by local ordinances and state law and the rules of the council in effect on the date the site certificate or amended site certificate is executed established by ORS 469.401(2).

Linear facilities

Comment: "…The proposed rule tries to keep the linear facilities in the same right of way. While this may sound reasonable on the surface, it is very problematic for protected, scenic and recreation areas. The decision to site one facility did not contemplate nor approve a second facility. The cumulative impact of applying this rule will create a de facto utility corridor. A utility corridor should not be placed in a protected, scenic or recreation area, period." **Ex. 1-48, 50, 52-53, 55-59**

Comment: "The proposed rules allow linear facilities to be built in a protected area if "other reasonable routes or sites have been studied" and if the route through the protected area would "result in fewer adverse impacts to resources or interests protected by Council standards." There are two substantive parts to the siting of linear facilities that should be corrected--in addition to the wording changes proposed in our consortium's letter5. [FOOTNOTE: The words "reasonable" and "unsuitable" should be replaced with "practicable" and "not practicable," respectively.] To make these rules more protective of Oregon's precious resources: studying comparative or alternative routes, and analysis of cumulative impacts when creating a corridor, need to be improved and added, respectively.

First, studying comparative routes, is problematic without strict conditions or requirements in selecting the alternatives which would yield meaningful comparative analysis for the Council's review. Commenters recommend including the following:

a) Selection of the additional route(s) for comparative analysis must be approved in advance of the application by ODOE, possibly at the first Proposed Order phase.

b) If a federal or state land management agency, a tribal or local jurisdictional entity, or other land management entity, has commissioned or executed an alternative routing study, that routing study must be included and considered as one of the "other reasonable routes."

c) Allow the conditions above to be appealed to the Council before an application is deemed "complete" and ready for review." **Ex. X.**

Comment: "…cumulative impacts protection do not apply when there is an existing transmission and pipeline of a defined size (in the current and proposed rules). In other words, the rule tries to keep the linear facilities in the same right of way. While this may sound reasonable on the surface, it is very problematic for protected, scenic and recreation areas. The decision to site one facility did not contemplate nor approve a second facility. The cumulative

impact of applying this rule will create a de facto utility corridor. This cumulative impact is not taken into account and it must be. A utility corridor should not be determined by a single project. Ideally, a utility corridor would be designated in process determined by the legislature due to its significant impacts.

Therefore, in lieu of that, Commenters recommend that this provision of the rule be eliminated and that the analysis of the linear facility be conducted on its own merits per the rule and standards. **Ex. X.**

Recommended Response: The exception from the protected areas standard for linear facilities proposed for construction within or adjacent to an existing corridor are found in existing rule and are consistent with similar provisions in ORS 469.300(11)(a)(C) and (E). These provisions provide that a transmission line proposed for construction entirely within 500 feet of an existing corridor occupied by a transmission line with a capacity of 230 kV or more is not subject to the Council's jurisdiction. OAR 345-022-0040(3) expands upon this provision to

Because colocation is often a desirable outcome for transmission siting and because changes to this exception were not considered in the development of the proposed rules, we do not recommend additional changes at this time.

Comment: "Commenters appreciate that the proposed rules would clarify that linear facilities are allowed in Protected Areas only when other alternatives would have greater impacts to resources. However, some important changes are necessary to Proposed Rule 345-022-0040 to avoid unlawful adverse impacts to protected resources. Specifically, the words 'reasonable' and 'unsuitable' should be replaced with 'practicable' and 'not practicable,' respectively.

The word 'practicable,' which is generally defined as 'capable of being … done' and in the Gorge Management Plan as '[a]ble to be done, considering technology and cost,' offers a clear, unambiguous standard under which the Council would be authorized to issue site certificates for linear facilities proposed in Protected Areas. 'Reasonable' and 'unsuitable,' on the other hand, are relatively subjective standards that would inevitably result in unlawful, adverse impacts to resources that must be protected.

ORS 469.503(1) provides that energy siting certificate cannot be approved unless they comply with 'the applicable standards adopted by the council pursuant to ORS 469.501,' which includes the standards related to Protected Areas. The weak language of the Proposed Rule would invite arguments about what it means for an alternative route to be 'reasonable' or 'unsuitable,' and could be exploited to result in the approval of facilities that would harm Protected Areas and their sensitive resources in violation of ORS 469.503(1) and other provisions of the Siting Act and the Council's rules.

By using the words 'practicable' and 'not practicable,' the Council will create a clear, unambiguous, and not easily exploited standard governing the circumstances under which linear facilities may be allowed in Protected Areas. This would also bring the Council's rules into greater alignment with other environmental protection systems that use the terms 'practicable' and 'not practicable' for determining the circumstances under which projects may intrude into environmentally protected areas (such as wetlands and other water resources) where they would not otherwise be allowed, as used in the statutes or implementing regulations for the Clean Water Act, the Columbia River Gorge National Scenic Area Act, the National Environmental Policy Act, and other laws."

…

> **"OAR 345-022-0040** (2) Notwithstanding section (1)(a), the Council may issue a site certificate for (a) A facility that includes a transmission line, natural gas pipeline, or water pipeline located in a protected area, if the Council determines that other ~~reasonable~~ practicable alternative routes or sites have been studied and that the proposed route or site is likely to result in fewer adverse impacts to resources or interests protected by Council standards; or (b) Surface facilities related to an underground gas storage reservoir that have pipelines and injection, withdrawal or monitoring wells and individual wellhead equipment and pumps located in a protected area, if the Council determines that other alternative routes or sites have been studied and are ~~unsuitable~~ not practicable." **Ex 77.**

Recommended Response: We understand that there is extensive case law and guidance interpreting the term "practicable" as it is used in federal environmental regulations, including the National Environmental Policy Act. We note, however, that those authorities are not necessarily binding or applicable to the Council's rules so it is unclear how use of that term would necessarily be less subjective or ambiguous than the reasonableness standard included in the proposed rules. We note that the terms "practicable", "reasonable", and "reasonably practicable" appear throughout the Council's rules and we recommend that this usage be reviewed in future rulemaking to improve consistency and clarity of requirements.

Consideration of Ecological values

Comment: "MANY OF THE PROTECTD AREAS ARE DESIGNATED DUE TO THE UNIQUE VALUE THEY POSSESS REGARDING THREATENED AND ENDANGERED PLANT AND ANIMAL SPECIES AND THE RECREATIONAL USES MADE OF THE AREA. In particular, transmission lines pose hazards to wildlife such as multiple bird and bat species as well as reducing the value and desirability of recreational areas due to the substantial impact of the above ground components. The

Protected Area standard is meaningless if there is no required area for evaluation of impacts to Threatened or endangered species and recreational uses of the area." **Ex. 72.**

Comment: Oregon's Natural Areas program is designed to protect a full range of Oregon's natural heritage resources. These areas are to be used for scientific research, education and nature interpretation. Each of Oregon's Natural Areas is unique and has an important role to play as part of a statewide network to conserve Oregon's rare native species and priority native plant communities. **Ex. 66.**

Recommended Response: We acknowledge that despite the fact that protected areas are designated to protect important wildlife habitat or other ecological values, and that the Protected Areas Standard does not specifically take impacts to wildlife, wildlife habitat, or habitat connectivity, into account. We agree that the Protected Areas standard could be better targeted to address impacts to the specific values or resources that a designation is intended to protect but, as discussed during the informal stages of this rulemaking, we believe that additional work is needed to understand how such a change would interact with existing wildlife related rules and standards. For that reason, we recommend this issue be explored further in a future rulemaking and that no additional changes be made at this time.

Comments related to Scenic Resources Standard (OAR 345-022-0080):

Comment related to visual impact assessment methodology

Comment: "…[We] are concerned about the lack of improvement, or any proposed amendments in the rules, regarding the **scenic methodology analysis**…we appreciate and supported the Rules Coordinator and the Council for separating those amendments from the rest of this process with the promise to continue working on the scenic methodology amendment. We are eager to provide more input for improving the standards for scenic resources and scenic methodology and hope that issue will be resolved soon in future amendments." **Ex. 74.**

Recommended Response: Commenters correctly note that staff recommended that Council consider further changes to the rules for visual impact assessments in a future rulemaking as part of its Staff Report for Agenda Item C of the April 8, 2022 Council meeting. We anticipate that this project will be included in the next rulemaking schedule update.

Comments related to interstate, bi-state, and regional management plans

Comment: "Please add 'interstate, bi-state, regional' to the list of agencies and tribes with adopted management plans [under OAR 345-021-0010(1)(?)(A)]." **Ex. 73.**

Comment: "Please add 'interstate, bi-state, regional' to the list of agencies with adopted management plans [under OAR 345-022-0080(3)]. The Gorge Commission has a management plan for the Columbia River Gorge National Scenic Area approved by the Gorge Commission and concurred with the Secretary of Agriculture for the National Scenic Area that implements the National Scenic Area Act to protect the scenic, natural, cultural and recreation resources of the Gorge in Oregon and Washington." **Ex. 73.**

Comment: "Proposed Rules 345-021-0010 and 345-022-0080 should expressly include 'interstate' and 'regional' land use plans among the list of sources for identifying significant and important scenic resources.

Among other authorities, ORS 469.501(1)(i) instructs the Council to develop rules for protecting 'recreation, scenic and aesthetic values' from the '[i]mpacts of [energy] facilit[ies].' Moreover, Oregon statewide planning goal 5, which is applicable to the energy siting process via ORS 469.503(4) and 469.504, calls for the conservation of scenic resources, including in 'coordinat[ion] with local and *regional* plans.' OAR 660-015-0000(5) (emphasis added). The Council is therefore required to ensure that its rules comprehensively address impacts to scenic resources, including such resources protected by interstate and regional plans.

Expressly including interstate land use plans would also better capture the Management Plan for the Columbia River Gorge National Scenic Area ('Gorge Management Plan'), which is arguably a federal land management plan and thereby already included within the current language of the rules, but is best described as an interstate land use plan. The Gorge Management Plan is adopted by the Columbia River Gorge Commission, an interstate compact agency, with only the Special Management Area provisions prepared by the USFS, a federal agency. 16 U.S.C. 544d(c), 544f(f)(1).

As state agencies, EFSC and ODOE are required to comply with the requirements and standards of the Gorge Management Plan. *See* ORS 196.155 ('[A]ll state agencies . . . are hereby directed and provided authority to carry out their respective functions and responsibilities in accordance with the [Columbia River Gorge Compact] and the Columbia River Gorge National Scenic Area Act.'). One important mandatory aspect of protecting scenic resources within the National Scenic Area is to ensure that air pollution from new thermal power plants does not reduce visibility and thereby mar the Gorge's natural scenic resources and values. *See* 2020 Gorge Management Plan at 118 ('Air quality [in the Columbia River Gorge National Scenic Area] shall be protected and enhanced, consistent with the purposes of the Scenic Area Act. . . . [T]he States shall develop and implement a regional air quality strategy to carry out the purposes of the Scenic Area Act . . . .').

Similarly, expressly including 'regional' land use plans in the Rules would better capture plans adopted by regional governments such as Oregon Metro and any other metropolitan service district. *See* ORS Chapter 268; ORS 197.015(14). In the alternative, the existing 'local land use plans' language in Proposed Rule 345-022-0080 could be revised to instead expressly refer to land use plans adopted by 'local governments' as that term is defined by ORS 197.015(13) ('any city, county or metropolitan service district formed under ORS chapter 268 or an association of local governments performing land use planning functions under ORS 195.025'). Either way, the Council's rules need to better reflect coverage of regional plans.

As it is currently written, the Proposed Rule fails to take regional and interstate land use plans into account when establishing which scenic resources are important for the energy siting process, thereby frustrating compliance with the Siting Act and potentially causing unwarranted harm to important scenic resources and values. Expressly including interstate and regional land use plans, as recommended below, would clarify and improve the language of the Council's proposed rule and bring it into compliance with the law.

> **OAR 345-021-0010(1)(r): Exhibit R.** An analysis of potential visual impacts of the proposed facility, if any, on significant or important scenic resources within the analysis area, providing evidence to support a finding by the Council under OAR 345-022-0080, including: (A) An inventory of scenic resources identified as significant or important in a land use management plan adopted by one or more local, tribal, state, <u>interstate, regional,</u> or federal government or agency applicable to lands within the analysis area…
>
> **OAR 345-022-0080**(1) To issue a site certificate, the Council must find that the design, construction and operation of the facility, taking into account mitigation, are not likely to result in significant adverse visual impacts to significant or important scenic resources … (3) A scenic resource is considered to be significant or important if it is identified as significant or important in current a land use management plan adopted by one or more local, tribal, state, <u>interstate, regional,</u> or federal government or agency…" **Ex. 77**

Recommended Response: Commenters recommend that land management plans adopted by interstate, bi-state, or regional entities be reviewed to identify significant or important visual resources. The proposed rules would require that an applicant review land management plans "adopted by one or more local, tribal, state, or federal government or agency" to identify significant or important visual resources. This change is specifically intended to ensure that multi-jurisdictional plans, such as the Management Plan for the Columbia River Gorge National Scenic Area are considered. To the extent that the proposed rule still is not clear that a regional body may be considered, we recommend that the proposed rule be modified as follows:

OAR 345-022-0080(3): A scenic resource is considered to be significant or important if it is identified as significant or important in a current land use management plan adopted by one or more local, tribal, state, regional, or federal government or agency.

Comments related to changes in landscape character or quality

Comment: "Please add...plumes, including changes in landscape character or quality [to OAR 345-021-0010(1)(L)(C)(v)" **Ex. 73.**

Comment: "**The Council should continue to require applicants for large energy facilities to identify the potential visual impacts of their proposed projects on scenic resources.** Proposed Rule 345-021-0010(1)(r)(D)(ii) would replace the current requirement for siting applicants to identify the 'visual impacts of facility structures or plumes' with a requirement to merely identify '*[c]hanges in landscape character or quality* due [to] facility structures or plumes' (emphasis added). *Both* requirements should be included in the rule, and not only in Proposed Rule 345-021-0010(1)(r)(D)(ii) (Exhibit R, scenic resources), but also in Proposed Rules 345-021-0010(1)(L)(C)(v) (Exhibit L, protected areas) and 345-021-0010(1)(t)(B)(iv) (Exhibit T, recreation resources).

Adverse visual impacts can involve more than just impacts at a landscape level. The Council's Rules should ensure that the impacts of each proposed large energy facility on scenic values will be fully disclosed and evaluated pursuant to ORS 469.501(1)(i). In addition, Oregon statewide planning goal 5, which is applicable to the energy siting process via ORS 469.503(4) and 469.504, calls for the conservation of scenic resources. OAR 660-015-0000(5). The Council is therefore required to ensure that its rules comprehensively address potential impacts to scenic resources, and not just impacts to landscape character and quality.

Retaining the 'visual impacts' language in this Rule is also necessary to maintain consistency with Proposed Rule 345-021-0010(1)(L)(C)(v), which even under the draft rules as proposed would still require the identification of potential 'Visual impacts of facility structures or plumes' on Protected Areas, as well as Proposed Rule 345-021-0010(1)(t)(B)(iv), which would still require the identification of 'Visual impacts of facility structures or plumes' to recreational opportunities in the analysis area.

In fact, Commenters' suggestion for Proposed Rule 345-021-0010(1)(r)(D)(ii) should be implemented for Proposed Rules 345-021-0010(1)(L)(C)(v) and 345-021-0010(1)(t)(B)(iv) as well, as shown below. The Council should maintain applicants' current obligations to disclose potential impacts to scenic resources, while clarifying that such impacts may include changes in landscape character or quality.

OAR 345-021-0010

(1) … The applicant must include in its application for a site certificate information that addresses each provision of this rule identified in the project order…
…
(L) **Exhibit L.** ...
... (C) A description of significant potential impacts of the proposed facility, if any, on the protected areas including, but not limited to, potential impacts such as: …
(v) Visual impacts of facility structures or plumes, including changes in landscape character or quality…
… (r) **Exhibit R.** ...
...
(D) Identification of potential visual impacts to the scenic resources identified in paragraph (A), including, but not limited to: …
…
(ii) Visual impacts of facility structures or plumes, including changes in landscape character or quality ~~due facility structures or plumes~~; …
…
(t) **Exhibit T.** ...
...
(B) A description of any potential adverse impacts to the important opportunities identified in paragraph (A) including, but not limited to: …
(iv) Visual impacts of facility structures or plumes, including changes in landscape character or quality; **Ex. 77.**

Recommended Response: Commenters note that several proposed rules providing informational requirements associated with visual impacts would replace the current requirement for siting applicants to identify the "visual impacts of facility structures or plumes" with a requirement to merely identify "changes in landscape character or quality due to facility structures or plumes." Commenters contend that proposed rules should retain requirements for applicants to consider visual impacts other than just changes in landscape character or quality.

We agree that the proposed rule change unintentionally and unnecessarily limits the scope of visual impacts that must be considered. We recommend that the proposed rules be modified consistent with commenters recommended language, with the exception that the phrase "including, but not limited to" be used in place of "including" for clarity and consistency with other rules using similar language:

OAR 345-021-0010

(1)(L)(C): A description of significant potential impacts of the proposed facility, if any, on the protected areas including, but not limited to, potential impacts such as: …

(v) Visual impacts of facility structures or plumes, including, but not limited to, changes in landscape character or quality; and

(1)(r)(D): (D) Identification of potential visual impacts to the scenic resources identified in paragraph (A), including, but not limited to:

…

(ii) Visual impacts of facility structures or plumes, including changes in landscape character or quality ~~due facility structures or plumes~~; …

…

(t) **Exhibit T.** ...

...

(B) A description of any potential adverse impacts to the important opportunities identified in paragraph (A) including, but not limited to: …

(iv) Visual impacts of facility structures or plumes, including changes in landscape character or quality;

Comment opposing removal of reference to "analysis areas" in OAR 345-022-0080 and 345-022-0100

Comment: " We continue to be concerned that the suggested amendment of 345-022-0080 and 345-022-0100 to remove reference to an analysis area for scenic resources and recreational opportunities impacts introduces significant uncertainty into the process…"

"…We acknowledge that impacts on visual resources and recreational uses could extend beyond the analysis area of a project site, however, the lack of reasonable limitations on the extent to which these 'impacts' can be applied and lack of clarity on when this occurs in the process creates uncertainty and the potential for unreasonable administrative burden. **Clarification of the intent in removing the analysis area reference is needed to limit this uncertainty and potential increase to administrative burden**."

"In addition to administrative burden, this change raises concerns around who bears the burden of proof for any impacts suggested for consideration outside of the analysis area as allowable by the above suggested changes. Does this burden fall to the applicant to prove the absence of impacts beyond the analysis area? Will this be clarified in guidance or future rulemaking? EFSC rules currently place the burden of proof on the applicant. OAR 345-021-

0100(2). Requiring the council to find that a project is not likely to result in significant impacts to significant or important scenic resources or to important recreational opportunities without reference to an analysis area would therefore appear to require an applicant to bear the burden of introducing evidence to support such a finding. We understand that the specific evidentiary requirements set forth elsewhere in the draft rules do reference analysis areas; however, this does not resolve the problem but rather introduces an uncomfortable ambiguity into the draft rules. How is the council supposed to make findings that are not limited to the analysis area based on evidence that is limited to the analysis area?"

Including an evidentiary based standard without geographic limits is unreasonable - if not impossible in practice. **Clarifications are needed on application of evidentiary burden** as the current discussion in rules is limited to burden on the applicant. Again, we acknowledge that visual and/or recreational use impacts could extend beyond the analysis area, however, without clarification of the language and intent, the removal of any limitations on how far away impacts must be considered vastly expands the legal and practical burden on the applicants and creates ambiguity in the standard, which could set up challenges in the future…" **Ex. 75.**

Recommended Response: Commenters raise concerns that the proposed removal of references to the analysis area for scenic resources and recreational opportunities impacts from OAR 345-022-0080 and 345-022-0100 would introduce significant uncertainty into the process. While the proposed rules remove references to analysis areas in the standards, the information requirements established in OAR 345-021-0010(1)(L), (r) and (t) still clearly require that the applicant is only responsible for identifying and describing impacts within the analysis area established in the project order. We further note that the definition of "analysis area" clearly establishes the assumption that the analysis area will encompass all resources that could be significantly affected by a proposed facility:

> OAR 345-001-0010(1): "Analysis area" means the area or areas specifically described in the project order issued under OAR 345-015-0160(1), containing resources that the proposed facility may significantly affect. The analysis area is the area for which the applicant must describe the proposed facility's impacts in the application for a site certificate. A proposed facility might have different analysis areas for different types of resources. For the purpose of submitting an application for a site certificate in an expedited review granted under 345-015-0300 or 345-015-0310, the analysis areas are the study areas defined in this rule, subject to modification in the project order.

The Council regularly relies on this assumption when making findings under other Standards that do not contain a specific reference limiting findings to the analysis area, including the Protected Areas Standard. As such, are not convinced by commenters that this change will result in undue burden on the applicant and staff. The intent of the proposed change, as stated in the notice of proposed rulemaking, is simply to allow the Council to consider evidence

introduced into the record related to impacts to scenic resources and recreational opportunities outside the analysis area. If an issue related to a scenic resource or recreational opportunity outside of the analysis area was raised in public comment, during public hearing on the draft proposed order, or during the contested case, this change would allow the issue to be considered on its merits without requiring the additional procedural step of amending the project order.

Other Comments

Comment: "The distances for identification of property ownership have been a concern to the public for a great deal of time.

1. Many people directly impacted by an energy development receive no notice that this may occur and may not read it in the news or other places it is posted.
2. The notice requirements should be tied to the distance that impacts can potentially be significant under one of the EFSC rules.
3. State agencies are required to notify individuals who are impacted by a development with specific information regarding impacts of the development and many of the impacts occur beyond the maximum 500 feet of property where development is planned." **Ex. 72.**

Recommended Response: Property owner notifications requirements are likely outside of the scope of changes considered in the notice of proposed rulemaking. We note that the existing property owner notification rules comply with the requirements of ORS 197.797 (2), as required by ORS 469.370(2)(a). We recommend that Council consider whether additional notice or other changes to noticing requirements in future rulemaking.