

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 received on December 8, 2022 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. In response to comments received on that Notice, the Council appointed a Fiscal Impact Advisory Committee, which was convened by staff on November 14, 2022. An Amended Notice of Proposed Rulemaking containing a revised fiscal impact statement and updated rule language was issued on November 18, 2022. In accordance with ORS 183.333(5) the Amended Notice established an extended public comment period and specified that all comments must be received by 5:00 p.m. on December 8, 2022, to be considered by the Council.

This Document contains excerpts representing major issues and recommendations raised in the written comments received in response to the Amended Notice as 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**. Previously submitted comments and responses are included in the Staff Report for Agenda Item B of the October 28, 2022, Council meeting.

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**General Comments**

Costs of Compliance for Small Business

**Comment:** “We disagree with the Department’s determination that the impact will not be significantly adverse and will not disproportionately impact small businesses as compared to large businesses. The relevant inquiry is whether the Rulemaking imposes “disproportionately burdensome demands . . . on small businesses as a result of uniform regulatory requirements.”<sup>5</sup> The Department’s conclusion omits that increasing the costs on small businesses reduces their ability to even apply for a siting permit at EFSC. While larger applicants can pay compliance costs, margins for small businesses are much smaller and any increase in costs reduces the

probability that the projects will be permitted and built. The Department's findings that the Rulemaking imposes a uniform regulatory requirement on both small and large businesses therefore demonstrates that there will be a disproportionate effect on small businesses due to the increase in cost of compliance.

We reiterate that the members of the FIAC recommended that the Rulemaking will significantly impact small businesses and suggested the following changes to the Rulemaking:

- (1) Fully exempt small businesses from compliance with the Rulemaking;
- (2) Exempt small businesses from compliance with the requirement to provide names, addresses, phone numbers, and email addresses of any land management agency or organization with jurisdiction over the protected areas proposed to be added to Exhibit L of an Application for Site Certificate;
- (3) Provide a mechanism to assist small businesses with compliance with the Rulemaking, such as allowing small businesses to submit a project area map for the Department to undertake the analysis of impacted protected areas.

OSSIA requests that the Council amend the Rulemaking to reduce the economic impact of the rule on small businesses as required by ORS 183.540." Att. 2, Page 2.

**Recommended Response:** The Department carefully considered the feedback provided by the Fiscal Impact Advisory Committee and determined that the proposed rules, and determined that because the proposed rules would only potentially affect a small number (12-15) of small businesses, would only result in relatively small changes in costs of compliance, and would affect large and small energy developers equally, we do not expect the proposed rules to have a significant adverse impact on small businesses. We note that the purpose of a Fiscal Impact Advisory Committee is to provide recommendation on whether a rule will have a significant impact on small business, and if so, to provide recommendations on compliance with ORS 183.540. The agency is required to consider the committee's recommendations, but no provision of statute indicates that the agency is bound to follow them.

In this case the Council authorized the Department to prepare revised statements of fiscal and economic impacts in consideration of the committee's advice. The Department recognizes that the committee indicated that the rules would have a significant impact and disagreed for the reasons above. The department did, however, seek the committee's recommendations on compliance with ORS 183.540 and considered whether or not additional changes to the rules based on those recommendations would be appropriate. As explained in the Amended Notice of Proposed rulemaking, we do not believe the recommendations to fully exempt small businesses from the rules would be consistent with the rules' regulator purpose, and other options presented would not reduce economic burdens on small business because it would merely transfer compliance obligations to the Department, which is statutorily required to recover costs from the applicant.

The Department notes, however, that any small business that does not have the organizational expertise or technical capacity to complete an application is welcome to seek assistance from the Department, and all applicants are able to request waiver or modification of application requirements under OAR 345-021-0000.

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### Rulemaking Impacts on Small Business

**Comment:** “In addition, we strongly recommend that EFSC direct the Department to undertake efforts to better measure the impact of rulemakings on small businesses, including:

- **Report:** Issuing a report within 6 months, with 12-month updates thereafter, documenting: (1) the number of solar permits issued by EFSC to small businesses, as compared to the number of EFSC applicants; (2) the average timeline from application submittal to permit issuance; (3) the fallout rate of applications; and (4) the average costs to applicants including both estimates of reimbursable costs pursuant to ORS 469.421 and non-reimbursable costs, with an opportunity for companies to voluntarily provide expense data.
- **Committee:** Convening a special advisory group to examine standards and process changes that could reduce burdens on potential and actual EFSC applicants that are small businesses.
- **Guidance:** Preparing an agency guidance document that: (1) outlines the Department’s approach to conducting a small business impact analysis; (2) explains how the Department ensures compliance with ORS 183.336(1)(d) to involve small businesses in the development of rules; and (3) provides a statement of the agency’s legal interpretation of the definition of “small business” under ORS 183.310(10)(a).
- **Recommendations:** Based on those inputs, examining and preparing rulemaking and legislative recommendations to alleviate burdens on small businesses related to obtaining an EFSC permit, and considering expected increases in the number of permit applications to meet Clean Energy Targets under HB 2021.” Att. 2, page 3.

**Recommended Response:** The Department defers to the Council on what, if any, actions to involve small businesses or measure the impact of rules on small businesses are appropriate.

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### Request to Extend Comment Period

**Comment:** “Although the public comment period on the proposed rules was extended, the extension occurred over the [Thanksgiving] holiday. Frankly, Friends of the Columbia Gorge has not been given sufficient time to review the latest versions of the proposed rules. Friends requests that the Council further extend the public comment period in order to allow the public to assist the Council with developing and adopting rules that fully comply with the applicable law and protect the public interest.” Att. 2, page 5.

**Recommended Response:** The Department recommends that the Council has provided adequate opportunities for the public to provide input and participate in the development of the proposed rules over the past two years. We also note that the extended comment period established in the Amended Notice of Proposed rulemaking complied with the requirements of ORS 183.333(5). The Department defers to the Council on whether or not an additional extended comment period is appropriate.

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## Comments relating to protected areas

### Definition of Protected Areas

**Comment:** “As discussed at length in Friends’ prior comments, the proposed definition of ‘Protected Area’ will not adequately protect Oregon’s special places and sensitive resources from the harmful effects of large energy projects. The new version of the proposed rules does not address and resolve Friends’ concerns with this definition. Friends refers the Council to pages 3 through 14 of our July 21, 2022 Comments and asks that the Council revise the definition of ‘protected area’ as requested.

The Department’s draft recommended responses to Friends’ comments also does not address and resolve Friends’ concerns and would also supply the Council with arbitrary and improper bases for denying Friends’ requests. For example, the Department recommends excluding National Trails from the definition of ‘Protected Areas’ because ‘unlike other protected areas, [National T]rails cross multiple jurisdictions and may include lands under both public and private ownership.’ This is not a valid basis to exclude National Trails from the definition of ‘Protected Areas,’ given that National Scenic Areas, such as the Columbia River Gorge National Scenic Area, also cross multiple jurisdictions and include both public and private lands. For both National Scenic Areas and National Trails, what matters is that the federal government (usually Congress) has designated these places for special protections because of their sensitive and important resources. Given these important federal designations, the Council should ensure the protection of National Trails from adverse effects by designating them as Protected Areas.”

**Recommended Response:** The issues raised in these comments were previously evaluated by the Council at its meetings on July 22, 2022, and October 28, 2022. The Department defers to the Council on whether or not an additional changes to the proposed rules to address Friends’ previous comments are appropriate.

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### Protected Areas Managers as Reviewing Agencies

**Comment:** “In the draft recommended response to public comments, the Department has misinterpreted the comments of the Columbia River Gorge Commission (‘Commission’). Although it is true that the Gorge Commission’s comment included language that ‘the Gorge Commission should be included as a reviewing agency,’ the Commission was not literally proposing rule language that the Commission should always be deemed a reviewing agency by

rule for every application for a large energy facility across the state of Oregon. Rather, the Commission was asking to be deemed (by rule) a reviewing agency for all energy projects that may adversely affect the Columbia River Gorge National Scenic Area. That is why the Commission specifically requested that the Council 'add [to the definition of 'reviewing agency' at OAR 345-001-0010(52) a new] letter (s) to include a public agency (not identified in the list) that manages a protected area within the study area.'

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"Similarly, the Department also misinterpreted Friends' comments on this same issue. The Department has drafted the recommended responses to comments to read as follows: "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.'" The italicized words were added by the Department and did not appear in Friends' July 21, 2022 Comments.

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"Again, government agencies that manage protected areas should be included in the decision-making process as reviewing agencies. Merely providing notice to these agencies is insufficient, especially because it does not guarantee that their costs will be reimbursed as would happen if they are included as reviewing agencies.

"In sum, the Council should include all managing agencies of protected areas within the definition of 'reviewing agenc[ies]'. Specifically, the Council should adopt the following language within that definition: 'Any managing agency of any Protected Area within the study area.'"Att. 2, pages 5-6.

**Recommended Response:** The Department did misinterpret the comments provided by the Columbia River Gorge Commission, and notes that the Commission recommended that the definition of "reviewing agency" be amended to include 'a public agency...that manages a protected area within the study area.' We apologize for any confusion.

With regard to the alleged misinterpretation of Friends' comment, we note that Friends' comments were evaluated along with other comments raising similar issues, and the language cited did not appear in Friends' comments but did appear in more than 50 other public comments received on the initial Notice of Proposed Rulemaking.

With regard to the substantive changes proposed to the definition, we note that the Council has previously evaluated this issue and we do not recommend further changes at this time. With regard to the Columbia River Gorge Commission, we restate our commitment to ensuring the Commission is fully notified of any facilities proposed to be sited in the vicinity of the Columbia Gorge National Scenic Area and working with the Commission to ensure appropriate opportunities for participation in the review of such projects.

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## Comments relating to visual impact assessments

**Comment:** "...as Friends previously stated in our July 21, 2022 Comments, Friends supports the proposed addition of language to the rules clarifying that as part of addressing potential impacts of proposed energy facilities to protected areas, scenic resources, and recreation resources, applications must address any "changes in landscape character or quality," but only if this new language is added to clarify that "changes in landscape character or quality" is part of the required visual impacts analysis, and not in a way that would entirely replace such analyses. Accordingly, Friends recommends adopting the language 'Visual impacts of facility structures or plumes, including changes in landscape character or quality' for all three types of resources involved (protected areas, scenic resources, and recreation resources).

"Similarly, Friends supports the proposed rule language clarifying that the required visual impact assessment will include "[a]n assessment of the significance of the visual impacts." Currently, this language is only proposed for Proposed Rule 345-021-0010(1)(r)(E) (Exhibit R, scenic resources). The same or similar rule language should also be adopted as part of OAR 345-021-0010(1)(L) (Exhibit L, protected areas) and OAR 345-021-0010(1)(t) (Exhibit T, recreation resources). Adding this language in all three places will help ensure that visual impact assessments address potential impacts in a uniform way regardless of whether the resource involved is a designated protected area, a scenic resource, or a recreational resource.

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"Again, the Council should simply clarify within its rules that applications for energy facilities must include assessments of the significance of any impacts to protected areas, scenic resources, and recreation resources. The rules already require disclosures and descriptions of any significant potential adverse impacts. It would be advisable and entirely appropriate to further clarify that assessments will in fact include disclosures of the significance of any impacts to these resources.

"By adopting rule language clarifying and explaining the requirements for a complete application, the Council will be assisting new applicants who may be unfamiliar with the standard components of any visual impact assessment. The Council should proceed with the recommendation in Friends' comments.

"Specifically, the Council should ensure that its rules continue to require applicants for large energy facilities to identify the potential visual impacts of their proposed projects on protected areas, scenic resources, and recreation resources, and should clarify within its rules (in all three places—involving its rules for protected areas, scenic resources, and recreation resources) that the required assessments of impacts to these resources must identify any potential changes in landscape character or quality and must assess the significance of any impacts."

**Recommended Response:** Staff notes that the proposed rules require applicants to describe the “Visual impacts of facility structures or plumes, including but not limited to, changes in landscape character or quality” under the information requirements for all three standards under consideration in this rulemaking. Friends is correct that the proposed Exhibit L requirements employ a slightly different construction than the proposed Exhibit R and T. Where the latter two exhibit rules require a description of any potential adverse impacts on the protected resource, and then a description of the significance of those impacts, the Exhibit L requirements merely require a “description of significant potential impacts of the proposed facility, if any, on the protected areas...”

The Council could improve consistency between the three standards by amended OAR 345-021-0010(1)(L) as follows:

(L) **Exhibit L.** Information about the potential impacts of the proposed facility on protected areas in the analysis area, providing evidence to support a finding by the Council as required by OAR 345-022-0040, including:

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

- (i) Noise resulting from facility construction or operation;
- (ii) Increased traffic resulting from facility construction or operation;
- (iii) Water use during facility construction or operation;
- (iv) Wastewater disposal resulting from facility construction or operation;
- (v) Visual impacts of facility structures or plumes, including, but not limited to, changes in landscape character or quality; and
- (vi) Visual impacts from air emissions resulting from facility construction or operation, including, but not limited to, impacts on Class 1 Areas as described in OAR 340-204-0050.

(D) An assessment of the significance of the impacts described under paragraph (C);

(E) A description of the measures the applicant proposes to avoid, reduce or otherwise mitigate any potential significant adverse impacts; and

(F) The applicant's proposed monitoring program, if any, for impacts to protected areas.

Because the Council has previously evaluated the proposed language, we defer to the Council on whether it is appropriate to make these changes at this time. Staff notes that Council has previously agreed with the Department's recommendation that additional changes to rules regarding Visual Impact Assessments be considered in future rulemaking.