

(Petition for Rulemaking Filed in 2008)

**BEFORE THE ENERGY FACILITY SITING COUNCIL,
OREGON DEPARTMENT OF ENERGY,
STATE OF OREGON
PETITION OF OREGON NATURAL DESERT ASSOCIATION, AUDUBON SOCIETY OF PORTLAND,
AND DEFENDER OF WILDLIFE FOR RULEMAKING PURSUANT TO OAR 137-001-0070**

Pursuant to OAR 137-001-0070, the Oregon Natural Desert Association, Audubon Society of Portland, and Defenders of Wildlife (collectively —Petitioners) hereby petition the Energy Facility Siting Council (EFSC) and the Oregon Department of Energy (ODOE) to amend existing regulations. The proposed regulatory amendment would clarify what constitutes a single energy facility for application of the EFSC jurisdictional threshold criteria in OAR Chapter 345 and ORS 469.300.

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

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OAR 137-001-0070(1)(a) The rule Petitioners request the agency to adopt, amend or repeal Facilities which require site certificates from EFSC are defined in OAR Chapter 345 Division 1. The requirement that a facility obtain a site certificate is found in ORS 469.320 and OAR 345-021-0000. The proposed amendment would amend two sections of OAR Chapter 345. OAR Chapter 345 Division 1 Section 0010, Definitions, would be amended to add a definition of Single energy facility at 345-001-0010(52), to read:

Single energy facility means a generating plant or the combination of multiple existing or proposed generating plants, despite the number of applications, owners or construction phases, if three or more of the following apply:

- (A) The generating plants are located on one or more adjacent parcels of land or parcels;
- (B) The generating plants share supporting facilities such as operation centers, operation and maintenance facilities, service and storage facilities, other related or supporting facilities, access roads, substations (except those owned by third party utility companies and not constructed specifically to serve the generating plant), transmission lines (except those owned by third party utility companies and not constructed specifically to serve the generating plant), water or discharge lines perimeter fencing, storage or parking areas; perimeter fencing, storage or parking areas;
- (C) The generating plants have been recognized as a single facility by a federal, state, county, city or local authority including, but not limited to siting council, state or local boards or commissions;
- (D) The generating plants have obtained or made application for siting or land use approval and other applicable permits, licenses or site certificates as a single facility, on a single application, or on applications that are substantially identical except for the site descriptions;
- (E) When the generating plants are designed to generate energy, the construction of the generating plants are performed under the same contract with a general contractor licensed under ORS 701 or multiple contracts entered into within two years of each other with one or more general contractors licensed under ORS 701. If a facility is composed of generating plants that will be completed in phases over time, the applicant must demonstrate that each of the phases of the facility would independently qualify as a single energy facility and that each phase of the facility are not interdependent in purpose or the manner in which they will be owned, financed, constructed, operated, or maintained or the facilities or phases of the facility will be considered as a single energy facility for the purposes of these rules.
- (F) The generating plant owners obtain or share one or more sources of financing, revenue, grants and other financial resources for the development, construction, operation and maintenance of the generating plants and associated equipment;
- (G) The generating plant owners share project expenses, personnel, capital investments including generating equipment, or other resources related to the generating plants, demonstrated by an agreement, anticipated agreement, or ownership or personnel common to the owners regardless of the owners' form or forms of business entity;
- (H) The generating equipment for the generating plant and the related generating plant was purchased by the same person or persons who own or operate the generating plant or have taken action under any of the above factors;

(ORS 183.390 & OAR 137-001-0007, Petition for Rulemaking Filed in 2008)

- (I) The generating plants are connected to the grid through a single connection or multiple connections when there is a shared net metering, power purchase or other applicable transmission agreement; or
- (J) Other factors or considerations which demonstrate that each generating plant is not a separate and distinct facility based on its construction, operation, maintenance and output. Current section OAR 345-001-0000(52) would be renumbered to OAR 345-001-0000(53) and all remaining subsections of OAR Chapter 345 Division 001 Section 0000 would be renumbered accordingly.

In addition, a new section OAR 345-021-0000(3) would be added by the proposed amendment, reading:

(3) Any person who has submitted an application for a county or municipal conditional use permit for an electric power generating plant with an average electric generating capacity of less than 35 megawatts from geothermal, solar or wind energy must submit to the Council information demonstrating that the proposed plant is separate and distinct from existing or proposed facilities and that it is not a —single energy facility|| as defined in 345-001-0010(52). The burden of proof shall be on the person to show that the proposed electric power generating plant is not a single energy facility.

Current section OAR 345-021-0000(3) would be renumbered to OAR 345-021-0000(4) and all remaining subsections of OAR Chapter 345 Division 021 Section 0000 would be renumbered accordingly.

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

Petitioners request that ODOE and EFSC amend existing regulations and adopt rules clarifying the statutory ambiguity regarding EFSC jurisdiction over segmented energy generation projects to limit the impacts and accumulating effects from multiple sites which are, for all practical purposes, and in terms of their effects, a single facility. According to ORS 469.300(11)(a)(J), one of the categories of energy facility for which a proponent must obtain site certification from EFSC is:

An electric power generating plant with an average electric generating capacity of 35 megawatts or more if the power is produced from geothermal, solar or wind energy at a single energy facility or within a single energy generation area.

A facility subject to site certification under ORS 469.320 is an energy facility together with any related or supporting facilities. ORS 469.300(14). However, the statutory term energy facility in ORS 469.300 is ambiguous because the term does not contain a definition of single energy facility, which is used in ORS 469.300(11)(a)(J) to define the threshold for EFSC jurisdiction over geothermal, solar and wind energy projects. The definition in ORS 469.300(11)(a)(J) thus defines one category of energy facility|| in terms of the generating capacity that is produced at a single energy facility, without providing legislative guidance on what constitutes a single facility. ODOE and EFSC must clarify this ambiguity to vindicate the legislature’s intent that EFSC have

broad jurisdiction over energy development projects that have significant impacts based on their mere size.

Projects with an average generating capacity of less than 35 megawatts (equivalent to a peak generating capacity of 105 megawatts) only require local land use permitting and thereby avoid EFSC jurisdiction and oversight by the State of Oregon. Currently, developers may segment a large development—what would be considered a single facility under the new temporary rules governing the Oregon Business Energy Tax Credit (BETC) by artificially separating development into allegedly separate sites. This loophole within EFSC permitting requires an immediate and permanent fix so that such artificially segmented projects can be evaluated by EFSC and subject to Oregon Department of Fish & Wildlife (ODFW) siting recommendations and mitigation requirements on the same footing as projects for which the proponents forthrightly present the full scope of the project to EFSC for review. Closing this loophole also will ensure that all developers of large-scale industrial energy generation projects are treated equally under Oregon permitting laws and will foreclose an unfair advantage sought by any developer who attempts to creatively segment a project to avoid EFSC jurisdiction.

EFSC provides unique regulatory oversight where accumulating effects from industrial-scale energy development might occur due the size or location of the project. EFSC members not only have valuable expertise and a history of effectively regulating and permitting wind development in Oregon, but they also draw on the expertise of ODFW and other State agencies such as ODOE and the Oregon Department of Environmental Quality. Amending the regulatory definition of facility to ensure a permitting process that objectively evaluates whether allegedly separate projects are in fact one facility will guarantee that Oregon stays at the forefront of responsible energy development and EFSC jurisdiction is not illicitly avoided in favor of local permitting.

When a large project is segmented into smaller projects to avoid EFSC jurisdiction, the impacts of the smaller projects together are equivalent to a single project covering the same area, but the application requirements and permitting standards might be vastly different for local government permitting of the multiple smaller projects compared to EFSC review if the project were forthrightly represented as a single facility. For example, if the county does not follow ODFW guidelines and mitigation standards, or if the county lacks ODFW's expertise and mandate for protecting Oregon's wildlife, this might lead to neglect for accumulating impacts incurred from development and a potential loss of important species. It is the State's responsibility to support and oversee county and local governance. In the case of wind, solar and geothermal development, the State needs to step in to ensure development is responsible and that local governments issuing conditional use permits are doing so within their limits and responsibilities.

ODFW expertise and recommendations regarding wind development are especially important in Oregon's high desert where large contiguous areas of sagebrush make up crucial habitat for imperiled sagebrush obligates such as the Greater sage-grouse. According to the US Geological

Survey, Oregon is one of 14 states where fragmentation and loss of sagebrush habitat are the primary threats to Greater sage-grouse. The population in 2008 of Greater sage-grouse in the state is around 22,000, which is approximately one-eighth of the estimated historical population. A recent study shows that the population is estimated to be at an all-time low in the state making this an issue of great importance and priority for Oregon's policy makers. The proposed Echanis, East Ridge, and West Ridge generation sites in Harney County (see attached map)—a cluster of development proposed by Columbia Energy Partners and in the heart of core sage-grouse habitat on North Steens Mountain—illustrate the need for a clearer definition of what constitutes a single energy facility for purposes of EFSC jurisdiction. The concentration of over 200 wind turbines, proposed for three adjoining sites, by a single developer, with common infrastructure, and which would use a single transmission line to export the generated power from the mountain, compel the conclusion the legislature intended that these sites be treated as a single 312 megawatt facility subject to EFSC site certification, rather than three separate adjacent projects just under 105 megawatts each.

Petitioners' request for a regulatory amendment clarifying EFSC's jurisdiction is essential in the face of rapidly increasing wind, geothermal and solar energy development throughout Oregon. Without explicit language in OAR Chapter 345 Division 1, artificial segmentation of large industrial energy projects is likely to continue and possibly increase as Oregon's renewable energy resources are developed. Clarification of the statutory ambiguity regarding the scope of EFSC's jurisdiction to foreclose this practice will allow the State to exercise the legislatively-intended oversight over large-scale energy developments while protecting the natural resources and scenic places all Oregonians enjoy.

The proposed amendment to OAR Chapter 345 Division 21 ensures that all persons who have submitted applications for county or municipal conditional use permits for electric power generating plants are required to present proof to EFSC that their proposed plant is separate and distinct from other facilities and are not required to obtain a site certificate from EFSC.

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

Not applicable, except to the extent that Petitioner asserts that the definition of energy facility in ORS 349.30(11)(a)(J) is ambiguous.

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

The substantive goal of the existing rule is to require EFSC site certification for facilities that are sufficiently large to meet the state certification threshold established by the legislature. There will be no negative economic impact on businesses by clarifying what constitutes a single energy facility subject to the ORS Chapter 469 site certification requirement, and such clarification will further the substantive goal of that chapter and of OAR Chapter 345.

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

The existing rule defines EFSC's jurisdiction to certify construction of energy facilities in Oregon and therefore continues to be necessary to satisfy ORS Chapter 469. The proposed amendment clarifies what constitutes a single facility subject to EFSC jurisdiction.

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

The existing rule is simple but ambiguous, adopting the statutory energy generation capacity threshold in ORS Chapter 469. The rule defining a facility does not address situations in which contemporaneous development of multiple sites or expansion of existing sites should be considered a single energy facility of sufficient capacity to be subject to the EFSC site certification requirement.

The current rule provides, in OAR 345-001-0000(20), that Facility as defined in ORS 469.300 or a small generating plant for which an applicant must have a site certificate according to OAR 345-001-0210 together with any related or supporting facilities.

ORS 469.300(14) in turn defines Facility to mean an energy facility together with any related or supporting facilities, and ORS 469.300(11) defines Energy facility means any of the following (excluding hydroelectric facilities under ORS 469.300(11)(b)):

- (A) An electric power generating plant with a nominal electric generating capacity of 25 megawatts or more, including but not limited to:
 - (i) Thermal power; or
 - (ii) Combustion turbine power plant.
- (B) A nuclear installation as defined in this section.
- (C) A high voltage transmission line of more than 10 miles in length with a capacity of 230,000 volts or more to be constructed in more than one city or county in this state, but excluding:
 - (i) Lines proposed for construction entirely within 500 feet of an existing corridor occupied by high voltage transmission lines with a capacity of 230,000 volts or more; and
 - (ii) Lines of 57,000 volts or more that are rebuilt and upgraded to 230,000 volts along the same right of way.
- (D) A solar collecting facility using more than 100 acres of land.
- (E) A pipeline that is:
 - (i) At least six inches in diameter, and five or more miles in length, used for the transportation of crude petroleum or a derivative thereof, liquefied natural gas, a geothermal energy form in a liquid state or other fossil energy resource, excluding a pipeline conveying natural or synthetic gas;
 - (ii) At least 16 inches in diameter, and five or more miles in length, used for the transportation of natural or synthetic gas, but excluding:
 - (I) A pipeline proposed for construction of which less than five miles of the pipeline is more than 50 feet from a public road, as defined in ORS 368.001; or
 - (II) A parallel or upgraded pipeline up to 24 inches in diameter that is constructed within the same right of way as an existing 16-inch or larger pipeline that has a site certificate, if all studies and necessary mitigation conducted for the existing site certificate meet or are updated to meet current site certificate standards; or

(ORS 183.390 & OAR 137-001-0007, Petition for Rulemaking Filed in 2008)

(iii) At least 16 inches in diameter and five or more miles in length used to carry a geothermal energy form in a gaseous state but excluding a pipeline used to distribute heat within a geothermal heating district established under ORS chapter 523.

(F) A synthetic fuel plant which converts a natural resource including, but not limited to, coal or oil to a gas, liquid or solid product intended to be used as a fuel and capable of being burned to produce the equivalent of two billion Btu of heat a day.

(G) A plant which converts biomass to a gas, liquid or solid product, or combination of such products, intended to be used as a fuel and if any one of such products is capable of being burned to produce the equivalent of six billion Btu of heat a day.

(H) A storage facility for liquefied natural gas constructed after September 29, 1991, that is designed to hold at least 70,000 gallons.

(I) A surface facility related to an underground gas storage reservoir that, at design injection or withdrawal rates, will receive or deliver more than 50 million cubic feet of natural or synthetic gas per day, or require more than 4,000 horsepower of natural gas compression to operate, but excluding:

(i) The underground storage reservoir;

(ii) The injection, withdrawal or monitoring wells and individual wellhead equipment; and

(iii) An underground gas storage reservoir into which gas is injected solely for testing or reservoir maintenance purposes or to facilitate the secondary recovery of oil or other hydrocarbons.

(J) An electric power generating plant with an average electric generating capacity of 35 megawatts or more if the power is produced from geothermal, solar or wind energy at a single energy facility or within a single energy generation area.

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

The existing rule establishes exclusive jurisdiction in EFSC for energy facilities defined in ORS 469.300 and concurrent jurisdiction with local governments for electric power generating plants with an average electric generating capacity of less than 35 megawatts from wind energy (OAR 345-021-0000(2)). The existing rule does not conflict or duplicate other state, federal or local government regulation.

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

The primary factor that has changed in the area of energy facility site certification is the trend of developers subdividing projects into multiple sites to either claim excessive tax credits through the Business Energy Tax Credit (BETC) program or to attempt to avoid obtaining site certificates from EFSC. Recent revisions to the BETC program have highlighted the need to tighten the State's definition of what constitutes a single facility to prevent evasion of the legislature's intent in promulgating statutes governing energy development funding and siting. In addition, the Association of Oregon Counties finalized a Wind Energy Task Force Report and Recommendations in early January 2010 which contained very weak recommendations for

uniform siting guidelines for wind energy projects with average generating capacity of 35 megawatts or less. Rather than the expected model ordinance, the resulting recommendations are simply features counties should (may) consider when customizing their own review process and requirements. The complete absence of any recommended substantive criteria for wildlife and other resource protection in this Report and Recommendation makes it particularly critical that EFSC provide a mechanism for asserting jurisdiction over large, artificially subdivided projects.