



# Oregon

Kate Brown, Governor



**To:** Oregon Energy Facility Siting Council (EFSC or “the Council”)

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**Subject:** Agenda Item H (Information/Action Item) – Solar PV Rulemaking Update for the February 22, 2019 Council Meeting

**Attachments:** 1. Letter of Advice from Defenders of Wildlife, January 29, 2019  
2. Staff Proposal for Cumulative Impacts to Wildlife Subcommittee

## Background

The Council’s Solar PV rulemaking project is evaluating if rulemaking is needed to clarify what is considered to be a single “solar photovoltaic power generation facility” under ORS 469.300(11)(a)(D), and whether or not specific siting standards should be developed for solar PV facilities. The Rulemaking Advisory Council (RAC) appointed by Council for this project is scheduled to meet for the fourth time in late February or early March, and is anticipated to meet again in late March or early April.

The Land Conservation and Development Commission (LCDC) is also conducting rulemaking on solar PV facilities. The DLCD rulemaking project is assessing the rules for conditional use of Exclusive Farm Use Land for siting of solar PV facilities under OAR 660-033-0130. At Council’s direction, ODOE staff participated in the Rules Advisory Committee for DLCD’s solar PV rulemaking project. LCDC has adopted temporary rules amending OAR 660-033-0130 and is expected to adopt final rules in May.

## EFSC Solar PV Rulemaking Project

At its June 29, 2018 meeting, Council directed staff to initiating a solar PV rulemaking project to:

- 1) Evaluate whether multiple non-EFSC jurisdictional solar PV facilities could aggregate in a way that the aggregate is functionally the size of an EFSC jurisdictional solar PV facility;
- 2) If it’s determined that multiple non-EFSC jurisdictional solar PV facilities could functionally aggregate to the size of an EFSC jurisdictional solar PV facility, to develop new rules that identify objective criteria for determining the circumstances of when multiple non-EFSC jurisdictional solar PV facilities functionally aggregate to the size of an EFSC jurisdictional solar PV facility; and
- 3) Evaluate whether or not specific standards should be developed for the siting of solar PV facilities, and if so, to develop such standards.

A Rulemaking Advisory Committee was appointed to provide input on these issues and any draft proposed rules that Council may wish to consider.

## What is a Single Solar PV Facility?

As described above, when Council initiated this rulemaking project, two of the purposes of the project were to determine whether “multiple non-EFSC jurisdictional solar PV facilities could aggregate in a way that the aggregate is functionally the size of an EFSC jurisdictional solar PV facility” and, if so, “to develop new rules that identify objective criteria for determining the circumstances of when multiple non-EFSC jurisdictional solar PV facilities functionally aggregate to the size of an EFSC jurisdictional solar PV facility.”

In an October 25, 2018 letter to Council, three members of the RAC questioned “whether it is possible for non-EFSC jurisdictional projects to become jurisdictional” and requested that Council “seek legal advice from the Attorney General’s office regarding its authority to expand its own jurisdiction beyond the bounds established by the Legislature.”

After consultation with legal counsel, staff has determined that while Council does not have the authority to expand its statutory jurisdiction, it may clarify how it interprets and implements its statutory jurisdiction where statute is ambiguous or inexact. In addition, under ORS 469.470(2) Council may adopt rules to perform the functions vested in it by law, including “\* \* \* rules for the siting of *energy facilities* pursuant to ORS 469.501” (emphasis added.)

ORS 469.300(11)(a)(D) defines an “energy facility” as “*a solar photovoltaic power generation facility* using more than:

- (i) 100 acres located on high-value farmland as defined in ORS 195.300;
- (ii) 100 acres located on land that is predominantly cultivated or that, if not cultivated, is predominantly composed of soils that are in capability classes I to IV, as specified by the National Cooperative Soil Survey operated by the Natural Resources Conservation Service of the United States Department of Agriculture; or
- (iii) 320 acres located on any other land.” (Emphasis added.)

While it is instrumental to determining how to apply the acre thresholds set by statute, what is considered to be a single “solar photovoltaic power generation facility” is not explained in statute. Council may adopt rules interpreting this term if it determines, after receiving input from the RAC and other interested members of the public, that additional clarification of what is considered to be a single “solar photovoltaic power generation facility” is needed. As an example, LCDC has adopted a rule interpreting “photovoltaic solar power generation facility” as that term is used in ORS chapter 215 under OAR 660-033-0130(38)(f). The Public Utilities Commission also identifies circumstances where two or more projects may exhibit characteristics of a single development under OAR 860-088-0070.

## Specific standards needed for solar PV facilities

To help guide discussion on the issue of development of specific siting standards for solar PV facilities, staff researched areas related to solar PV facilities where specific standards could potentially be developed including toxicity and disposal of solar panels, impacts to wildlife and wildlife habitat, impacts related to glare from panels and system components, and impacts related to changes in microclimate near solar facilities. The RAC discussed these issues on Nov. 8, 2018, and Jan. 30, 2019. RAC members

were asked to provide input on the scope of the concerns related to each area, how potential impacts are currently being addressed, and how to mitigate or avoid adverse impacts.

RAC members generally agreed that most of these issues could be addressed through application of the existing EFSC standards; however, some additional concerns were identified by the RAC members. For example, Dan Morse from the Oregon Natural Desert Association expressed strong interest in seeing reasonable protective standards for scenic resources and protected areas and requested that the group evaluate how the standards address impacts to scenic quality. Several RAC members also requested that a subcommittee be formed to discuss cumulative impacts to wildlife and wildlife habitat, and report back to the RAC. Additional information, and a staff proposal for a subcommittee is included in **Attachment 2**.

### **Anticipated Schedule**

The Rulemaking Advisory Council (RAC) appointed by Council for this project is scheduled to meet for the fourth time in late February or early March to discuss interpretation of a “solar photovoltaic power generation facility” under ORS 469.300(11)(a)(D). Staff anticipates one additional RAC meeting may be needed in late March or early April for RAC members to review any draft rule language, subcommittee recommendations, or other outstanding issues. Council could be presented with staff’s recommendation and asked to authorize a Notice of Proposed Rulemaking as early as its May meeting. If the Notice is authorized, Council would have the option to hold a Rulemaking Hearing and consider adoption of final rules at its June or July meeting.

### **LCDC Solar PV Rulemaking Project**

The Department is participating as a Rulemaking Advisory Committee (RAC) member for the Land Conservation and Development Commission (LCDC) solar PV rulemaking, which is evaluating rules related to the siting of solar PV facilities located on Exclusive Farm Use zoned land under OAR 660-033-0130.<sup>1</sup> Four RAC meetings for this rulemaking occurred between Oct. and Dec. 2018.

At its Jan. 24-25 meeting, LCDC held a rulemaking hearing on proposed revisions to OAR 660-033-0130. At the meeting, the Commission granted a 21-day extension to the public comment period to allow stakeholders additional time to provide comment, and adopted temporary rules in the interim. The temporary includes many of the amendments that had been included in proposed rules. These include:

- Prohibiting a solar facility from being located on Class I, Class II, prime and unique soils unless a goal exception is taken.
- Establishing that a county may develop a “dual-use development plan” that allows an approved dual-use facility to use up to 20 acres of high-value farmland without a goal exception. Other facilities on high value farmland continue to be capped at 12 acres.
- Repealing a provision which sunsets the requirement for consultation with Oregon Department of Fish & Wildlife during development of a Solar PV Facility.

The comment period for the permanent rules has been extended until May 7, 2019. LCDC will hold a second public hearing for this rulemaking and may adopt the amended rules on May 23, 2019.

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<sup>1</sup> More information about this rulemaking project is available on LCDC’s website at: <https://www.oregon.gov/lcd/LAR/Pages/Solar.aspx>.