

Energy Facility Siting Council
April 24, 2020
Agenda Item C – Solar PV Rulemaking
Attachment 2 – Issues Document

This document summarizes the Department’s analysis and recommendations for the Solar PV Rulemaking Project. The document and associated draft proposed rules are for information only and are not notice of rulemaking action by the Energy Facility Siting Council. The analysis and recommendations within are subject to change based on input from Council, staff, and stakeholders.

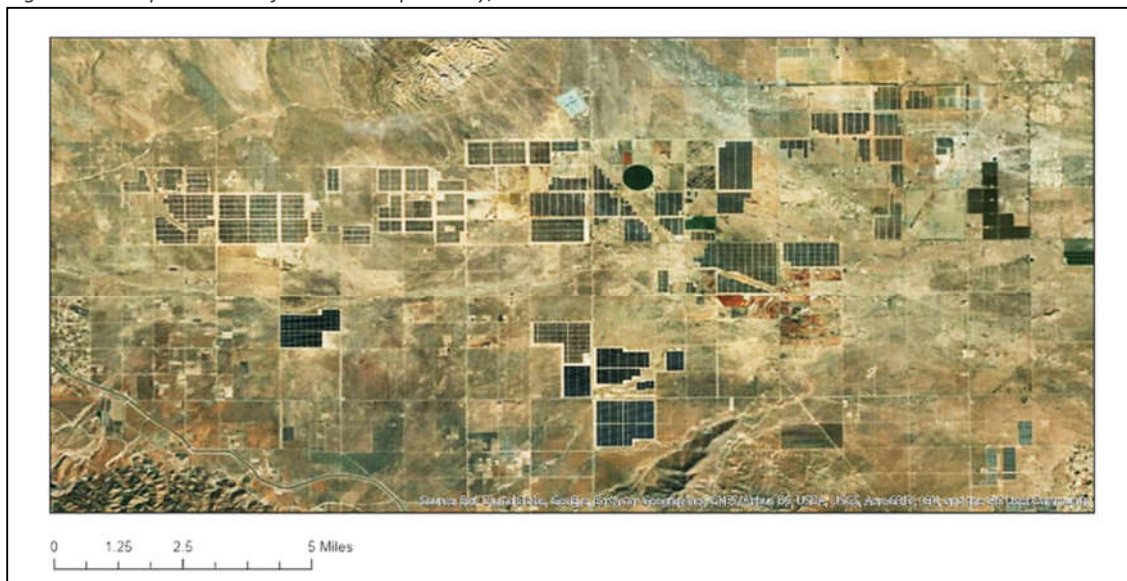
The purpose of this project is to determine if rulemaking is required to: (1) Clarify what is considered to be a “solar photovoltaic power generation facility” as that term is used in the definition of “energy facility” under ORS 469.300(11); (2) Determine if there are issues unique to solar PV facilities that require development of specific siting standards; and (3) Implement new statutory provisions related to solar facilities enacted by HB 2329 (2019).

Issue 1: Definition of “solar photovoltaic power generation facility”

Under ORS 469.320(1), no “facility” may be constructed unless a site certificate has been issued for its site by the Council. Under ORS 469.300, a “facility” includes an “energy facility” together with any “related or supporting facilities.” A “solar photovoltaic power generation facility” is an “energy facility” if it uses land in excess of the acreage thresholds set by ORS 469.300(11)(a)(D). The term “solar photovoltaic power generation facility” is not defined by statute.

A solar development project may consist of several arrays spread across multiple locations, may be developed in phases, and may later be split or combined with other projects according to customer needs. As shown below in Figure 1, when multiple projects are located in close proximity to each other it may be difficult to determine if the projects should be viewed as separate and distinct facilities or as components of a single facility.

Figure 1: Multiple Solar Project in Antelope Valley, CA



The statute does not provide additional criteria for determining when proposed or existing solar projects are separate and distinct developments. The primary purpose of this rulemaking project is to establish a clear standard and process for the Council to make these determinations.

The Land Conservation and Development Commission (LCDC) has developed standards for determining when projects are considered to be components of a solar facility for the purposes of applying the acreage thresholds for when a goal exception is required under OAR 660-033-0130(38):

(f) “Photovoltaic solar power generation facility” includes, but is not limited to, an assembly of equipment that converts sunlight into electricity and then stores, transfers, or both, that electricity. This includes photovoltaic modules, mounting and solar tracking equipment, foundations, inverters, wiring, storage devices and other components. Photovoltaic solar power generation facilities also include electrical cable collection systems connecting the photovoltaic solar generation facility to a transmission line, all necessary grid integration equipment, new or expanded private roads constructed to serve the photovoltaic solar power generation facility, office, operation and maintenance buildings, staging areas and all other necessary appurtenances. For purposes of applying the acreage standards of this section, a photovoltaic solar power generation facility includes all existing and proposed facilities on a single tract, as well as any existing and proposed facilities determined to be under common ownership on lands with fewer than 1320 feet of separation from the tract on which the new facility is proposed to be sited. Projects connected to the same parent company or individuals shall be considered to be in common ownership, regardless of the operating business structure. A photovoltaic solar power generation facility does not include a net metering project established consistent with ORS 757.300 and OAR chapter 860, division 39 or a Feed-in-Tariff project established consistent with ORS 757.365 and OAR chapter 860, division 84.”

The acreage thresholds in ORS 469.300 were initially based on the LCDC rule. Given this shared history and purpose, the Council has directed staff to develop a definition that is consistent with the one above. To develop a rule which defines what constitutes a “solar photovoltaic power generation facility” under ORS 469.300, staff has identified several changes which may be needed to align the LCDC definition with the energy facility siting process. A draft proposed rule providing a definition and a procedural rule establishing a process for its implementation are included in **Attachment 1**.

Base Definition

The LCDC definition provides that a photovoltaic solar power generation facility “includes, but is not limited to, an assembly of equipment that converts sunlight into electricity and then stores, transfers, or both, that electricity.” ORS 215.447 contains a similar definition. The rule lists equipment that could be components of such an assembly, including “photovoltaic modules,

mounting and solar tracking equipment, foundations, inverters, wiring, storage devices and other components.”

Staff reviewed recent applications for site certificates for solar facilities and found some minor inconsistencies between the list of components in the LCDC rule and the way facility components are typically described by applicants. In particular, most utility scale solar PV facilities are supported by posts rather than foundations, and applications often describe the wiring which connects modules to each other and to other components as “electrical cabling.” In addition, the inverters which convert the DC output of the modules to AC power that can be transmitted to the grid, are often coupled with step-up transformers which convert the low-voltage output of the modules to a higher voltage to transmit via a collection system to the project substation. Staff also eliminated “storage devices” because battery storage would be considered to be a related or supporting facility under ORS 469.300.

To address these inconsistencies, the draft proposed rules contain several minor changes to the list included in the LCDC Rules: photovoltaic modules, mounting and ~~solar tracking equipment, foundations~~ **posts, electrical cabling**, inverters, **transformers**, ~~wiring, storage devices~~ and other components.

Alternatives

The Council may choose to adopt staff’s recommended changes, modify them, or reject them and adopt the definition as provided in OAR 660-033-0130. The Council could also choose to not adopt any list of components and rely upon information obtained during review of an application to determine what is considered to be a facility component.

1. Adopt staff’s recommendation
2. Modify staff’s recommendation
3. Reject staff’s recommendation and adopt LCDC list of components
4. Remove list of components from the definition

Discussion: The RAC reviewed staff’s proposed changes, and while many RAC members did not have comments on the language, some members raised concerns that some of the terms in the list were too vague. Commenters were concerned that it was not clear if “electrical cabling” referred to the low voltage wiring that connected modules, or the 34.5kV collection cables that connected the inverter/transformer banks to the project substation. Staff agrees that there is some ambiguity, and that the rule language is intended to capture all components that produces or transfers electricity to related or supporting facilities. Other commenters were concerned that including the term “other components” left the definition too open to interpretation, and that the list should be exhaustive. While staff agrees that it may be possible to develop an exhaustive list, there may be some benefit to allowing flexibility to account for differences in facility design or changes in technology over time.

Recommendation:

Staff recommends council modify staff's initial proposed language to specify that a solar photovoltaic power generation facility includes "collection systems" in addition to the components already listed.

Inclusion of related or supporting facilities

Background: The LCDC definition includes some facility components that would be considered "related or supporting facilities" under ORS 469.300. The LCDC definition provides:

"Photovoltaic solar power generation facilities also include electrical cable collection systems connecting the photovoltaic solar generation facility to a transmission line, all necessary grid integration equipment, new or expanded private roads constructed to serve the photovoltaic solar power generation facility, office, operation and maintenance buildings, staging areas and all other necessary appurtenances."

ORS 469.320 provides that no "facility" may be constructed or expanded unless a site certificate has been issued by the Council. A "facility" is an "energy facility together with any *related or supporting facilities*" under ORS 469.300 (emphasis added). Project components such as transmission lines, grid integration equipment, roads, offices, operation and maintenance buildings, and staging areas are considered to be "related or supporting facilities" under ORS 469.300(13) when they are proposed to be constructed or substantially modified in connection with the construction of an energy facility.¹

By statute, "related or supporting facilities" are considered to be components of a "facility" that are separate from the "energy facility" itself. Importantly, under ORS 469.320(5), related or supporting facilities are not required to be included in a site certificate when they are addressed in and subject to the site certificate for another energy facility.

Figure 2 illustrates the components of a typical utility scale solar PV facility. In a typical facility, photovoltaic modules (or panels) are mounted on metal racking systems supported by posts which are driven into the ground. The racking system may contain devices to track the sun across the sky. The modules are wired together in strings to form a solar array. Electrical cabling systems and combiner boxes connect arrays to inverters which convert the DC power generated by the modules into AC power. Transformers then step up the inverter AC output to a higher voltage (typically 34.5kV) that can be transmitted by a collection system to one or more combining switchgears or collector substations. Related and supporting facilities needed to store or transmit the output of the facility to the regional grid, or to support ongoing operations and maintenance of the facility such as transmission lines or service roads can also occupy large amounts of land.

¹ ORS 469.300(13) "Related or supporting facilities" means any structure, proposed by the applicant, to be constructed or substantially modified in connection with the construction of an energy facility, including associated transmission lines, reservoirs, storage facilities, intake structure, road and rail access, pipelines, barge basins, office or public buildings, and commercial and industrial structures. "Related or supporting facilities" does not include geothermal or underground gas storage reservoirs, production, injection or monitoring wells or wellhead equipment or pumps.

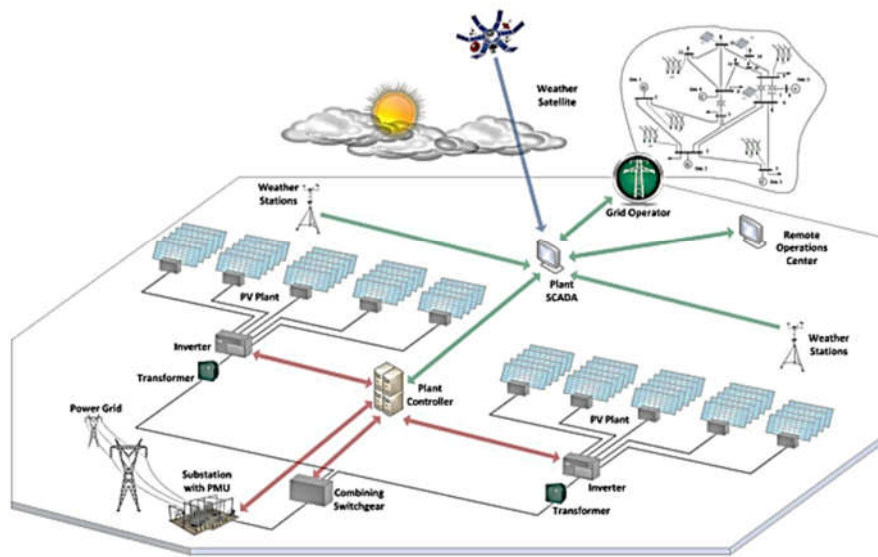


Figure 2. Components of a typical utility-scale solar PV facility. (Image from NREL)

Because the jurisdictional thresholds for solar facilities are based on acreage instead of generating capacity, whether or not the land used by these components is counted as land used by the energy facility is relevant to the jurisdictional determination. Because the thresholds are intended to reflect the magnitude of land-use impacts associated with the facility, the Department and Council have historically included the land occupied by related or supporting facilities when calculating the total acres used by the solar facility. To continue this practice, the Council could specify that related or supporting facilities will be included as parts of the energy facility for the purpose of applying the acreage thresholds of ORS 469.300 similar to how the facilities are included in the LCDC definition. In the alternative, Council could exclude this land from the analysis and count only land used by components that are considered to be part of the energy facility.

Because related or supporting facilities are considered to be part of a solar facility under the LCDC definition, the tract and proximity criteria also apply to these components. This means that transmission lines, service roads, or interconnection equipment that is shared or co-located could also trigger a review. If the Council counts the lands used by related or supporting facilities as part of the energy facility, it should also specify whether any tract or proximity criteria it adopts will apply. Applying the criteria would be more consistent with the LCDC rule but could also discourage developers from co-locating transmission or interconnection facilities.

Alternatives: Because related and supporting facilities are considered to be separate from the energy facility under ORS chapter 469, staff recommends that the Council definition should not include the third sentence of the LCDC definition. In addition, Council should specify how related or supporting facilities will be considered in the jurisdictional determination process:

1. Exclude related or supporting facilities from consideration in determining acreage or in evaluating the tract or proximity criteria for triggering jurisdictional review.
2. Specify that related or supporting facilities will only be considered in determining the total acreage used by the solar facility, but will not be considered in evaluating the tract or proximity criteria for triggering a jurisdictional review.
3. Specify that related or supporting facilities will only be considered in evaluating the tract or proximity criteria for triggering a jurisdictional review, but will not be considered when determining acreage.
4. Specify that related or supporting facilities will be considered both when determining acreage used by the solar facility and in evaluating the tract or proximity criteria for triggering a jurisdictional review.

Discussion: Staff developed proposed rules based on the second alternative and presented them to the RAC for review. One RAC member raised concerns that specifying that the related or supporting facilities would only be included for the purposes of determining acreage could be interpreted to imply that other standards or mitigation would not be required. Staff explained that the intent would be that the related or supporting facilities would still be facility components subject to Council review, but that under the statutory definition a component is not considered to be a “related or supporting facility if it was not “proposed by the applicant.” Another RAC member raised concerns that the rule changes could create a discrepancy between the way local governments and the Council count acreage. Staff acknowledges that potential for discrepancy but does not believe there would be a direct conflict because the two definitions implement different statutes with different purposes. In addition to discussion on this issue, a RAC member recommended that the definition should explicitly exclude related or supporting facilities from the definition of “solar photovoltaic power generation facility.” Staff have made additional changes to the draft proposed rule based on this recommendation.

Staff Recommendation: Staff recommends Alternative 2. This would allow Council to consider all land used by a solar facility when calculating acreage under ORS 469.300(11)(a)(D) without discouraging co-location of transmission infrastructure or other related or supporting facilities.

Tract and Proximity Criteria

Background: The LCDC definition contains two criteria for determining when projects are considered to be a single facility for the purpose of determining if a goal exception is required:

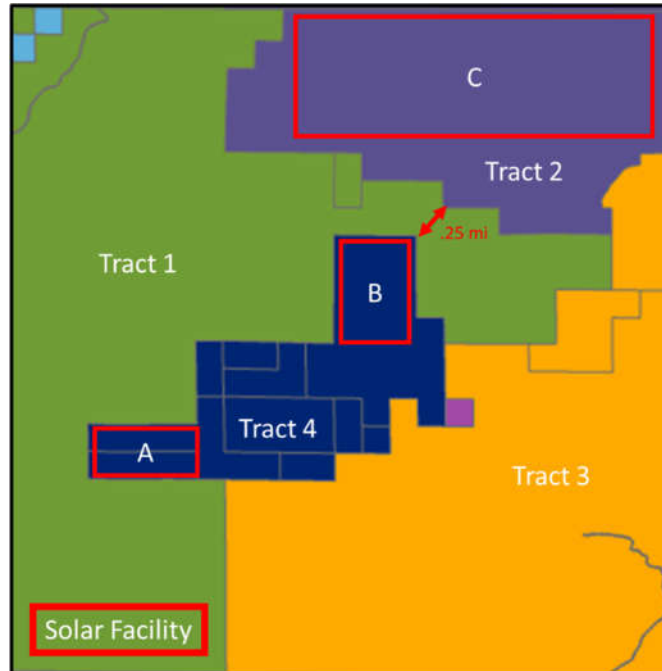
“For purposes of applying the acreage standards of this section, a photovoltaic solar power generation facility includes all existing and proposed facilities on a single tract, as well as any existing and proposed facilities determined to be under common ownership on lands with fewer than 1320 feet of separation from the tract on which the new facility is proposed to be sited. Projects connected to the same parent company or

individuals shall be considered to be in common ownership, regardless of the operating business structure.”

Under the *tract criterion* all facilities on a single tract (i.e. contiguous parcels or lots under the same ownership) are considered to be components of a single facility. Under the *proximity criterion*, all facilities on tracts with fewer than 1320 feet of separation are considered to be components of a single facility if they are determined to be owned by or affiliated with the same company or person.

In Figure 3 shown below, Solar Array A & B would be a considered to be a solar facility regardless of ownership because they are proposed to be developed on the same tract. Solar Array C would also be included if it shared common ownership with A or B because it is proposed to be developed on a tract with less than 1320 feet of separation.

Figure 3. Illustration of Tract and Proximity Criteria



The Council could adopt one or both of the criteria in its rule or it could alter the criteria to better fit the siting process. Because of the large scale of energy facilities, it is not clear how often the tract criterion would be utilized in the siting process although tract sizes can be very large in portions of eastern Oregon. In addition, under LCDC’S tract criterion, projects sited on a single tract are considered to be a single facility even if the projects are not owned by the same person. Several stakeholders raised concerns that a rule which could require unaffiliated companies to share a site certificate would be difficult to implement and may not be practicable from a business perspective.

Applying a proximity criterion may be more appropriate; however, some changes may be appropriate. Amending the criteria to measure from a project boundary rather than the tract would eliminate the need for staff to analyze the underlying ownership of the land a facility is sited on and would be more consistent with the siting process. However, a rule that only considers projects within 1320 feet of a proposed or expanded facility may not be a meaningful standard since it would be easily avoidable. Because fenced solar projects may be impermeable to wildlife, establishing a review distance that would allow wildlife movement between projects (e.g. 1 km) could be appropriate. Considering the scale of solar facilities which are considered to be energy facilities, a larger distance may be appropriate. For example, the PUC uses a five-mile radius for combining community solar projects which exhibit characteristics of a single development. Another distance, such as one or two miles between solar facilities, may be sufficient to identify projects that are not separate and distinct.

Alternatives:

1. Adopt LCDC Tract Criteria
2. Adopt proximity criterion based on property or project boundaries:
 - a. 1320 feet of separation
 - b. 1 miles of separation
 - c. 5 miles of separation
 - d. other
3. Both 1 & 2.
4. Use other criteria to determine when review is needed.

Discussion: Staff developed draft proposed rule language based on Alternative 2 and presented it to the RAC at its March 9, 2020 meeting. Feedback on language was mixed, with some members preferring Council adopt both criteria and some preferring neither. In particular, RAC members representing local governments and energy developers raised some concerns that using the tract or distance criteria in the LCDC rule could inadvertently lead to greater impacts on land use or wildlife by incentivizing project sprawl. Other RAC members commented that the criteria were appropriate and were necessary to maintain consistency in jurisdictional determinations and reflective of the impacts of concentrated solar development.

Staff considered this feedback and still recommends that Council retain the proximity criteria which, as described above, some RAC members found to be problematic. Staff also recommends that Council maintain the provision that common ownership of projects is a pre-condition for any jurisdictional review. Staff recommends Council retain these provisions both to maintain consistency with the LCDC rules and to provide reasonable limitations on what projects the Council will consider under jurisdictional review. While it is true that the provisions of the draft proposed rules may raise the level of scrutiny placed on facilities proposed for development near existing facilities, without such a rule, the draft proposed rules do not convey any power or authority for conducting jurisdictional review that does not already exist. While there was no clear feedback on what the appropriate distance should be established to limit the Council's review, several RAC members commented that the 1320 ft established in the LCDC rule as an approximation of a 40-acre parcel, was both arbitrary and too small to mitigate

resource impacts. In consideration of this feedback, staff have recommended a distance of 1 mile. This is generally consistent with the “study area” required to be established for certain solar facilities under the LCDC rule.

Staff recognizes that project spacing may not always be beneficial, and there are some risks that the draft proposed rules could contribute to project sprawls if project developers were to attempt to avoid regulation by proposing projects further apart, however staff believes these risks are minimal. The draft proposed rules, as presented in Attachment 1 do not automatically impose Council jurisdiction over projects within a mile of one other, but rather provides for a reasonable and balanced approach for making determinations. Staff believes this, and the provisions excluding related or supporting facilities from consideration, provides for colocation of projects that are truly separate and independent from one another.

Recommendation: Staff recommends alternative 2; and recommends one mile be established as the appropriate distance for a Council proximity criterion.

Net metering and feed-in tariffs

Background: The LCDC definition specifies that “a photovoltaic solar power generation facility” does not include a net metering project established consistent with ORS 757.300 and OAR chapter 860, division 39 or a Feed-in-Tariff project established consistent with ORS 757.365 and OAR chapter 860, division 84.”

Net-metering facilities are limited to two megawatts or less and feed-in-tariff projects are limited to 500 kilowatts.² There is no exception for net-metering projects or feed-in-tariff projects provided in ORS chapter 469; however, because of the small size of these types of projects it is unlikely that they would use land in excess of the thresholds for council jurisdiction.

Alternatives:

1. Adopt exclusion for net-metering and feed-in-tariff projects in rule.
2. Do not adopt exclusion for net-metering and feed-in-tariff projects in rule.

Discussion: Draft proposed rule language implementing Alternative 2 was presented to the RAC at its March 9, 2020 meeting, but this issue was not specifically discussed at the meeting. No comments or concerns were provided by RAC members.

Recommendation: Staff recommends Alternative 2.

Issue 2: Factors to be considered in jurisdictional determination

Background: The Council directed staff to develop a rule which used the LCDC definition as a basis for determining when jurisdictional review is needed, but specified that the actual

² OAR 860-039-0010 and ORS 757.365(1).

jurisdictional determination should use a multi-factorial approach similar to the 15 Questions developed for Wind Facilities:

1. What company is the legal owner of the proposed project? Is that company related to the owner of the nearby wind energy project? For example, are the companies related through a parent corporation?
2. How close are the two projects geographically?
3. Is any part of the site of the proposed project included within the site of another wind project?
4. Would the proposed project share any transmission infrastructure with the nearby wind project? For the purpose of this question, “transmission infrastructure” means related or supporting collector lines or other transmission lines or equipment associated with a wind project to the point of connection with the regional transmission system (the “grid”).
5. Would the proposed project share any related or supporting facilities with the nearby wind energy project (for example, access roads, substations, O&M structures, perimeter fencing, water supply or discharge lines, storage areas, parking areas, etc.)?
6. Would the proposed project be operated from a separate control room? Would the control equipment (central computers) for the proposed project be located in the same building as the control equipment for the nearby wind energy project?
7. Would power output dispatching decisions for the proposed project be made independent of such decisions for the nearby wind energy project? Would these decisions be made by separate personnel?
8. Would operational decisions (such as maintenance, routine inspections, fire protection agreements with local authorities, weed control, etc.) for the proposed project be made independent of such operational decision for the nearby wind energy project? Would separate personnel be responsible for making those decisions?
9. Would the proposed project have separate operations or maintenance staff or would operations and maintenance staff be shared with the nearby wind energy project?
10. Would the power output from the proposed project be sold into the same market as the power output from the nearby wind energy project? In what way would the markets differ?
11. Would the marketing of the power output from the proposed project be done independent of marketing for the nearby wind energy project?
12. Would contracts for the sale of the power output from the proposed project be separate from the contracts for sale of power output from the nearby wind energy project? Would there be any aggregated sales of power output from the proposed project with power output from the nearby project?
13. Would the financing for the proposed project be separate from the financing for the nearby project?
14. Would contracts for transmission of the output from the proposed project be separate from contracts for transmission of the output from the nearby wind energy project?
15. What other information would support a conclusion that the proposed project would be a separate wind energy project and not an expansion of a nearby wind energy project?

In what other ways would the projects be operated or otherwise treated as separate projects?

Because the LCDC definition is primarily concerned with ownership and proximity, it may not be necessary to include the first three questions. Based on conversations with the RAC, it may be possible to consolidate the remaining questions into four broad categories: shared related or supporting facilities (4-5), joint operations (6-9, 13), marketing and sale of power (10-12), and transmission and interconnection agreements (14). Based on feedback from the RAC, the Council may also wish to consider the operational or permitting status of the facilities in a determination.

Alternatives:

1. Do not specify factors by rule
2. Adopt factors based on broad categories discussed by the 15 questions
3. Adopt other factors.

Discussion: Staff developed draft proposed rule language implementing Alternative 2 and presented it to the RAC at its March 9, 2020 meeting. Specifically, the draft language provided that in a jurisdictional review, the Council would consider factors including, but not limited to:

- “(a) The permitting or operational status of the existing and proposed facilities;
- (b) Whether or not facilities share related or supporting facilities;
- (c) Whether or not operational and financing decisions for the facilities would be made independently from one another;
- (d) Whether or not the output of the facilities would be sold under separate power purchase agreements; and
- (e) Whether or not the output of the facilities would be transmitted under separate interconnection agreements.”

RAC members were generally supportive of using factors based on the 15 questions, although some members questioned whether or not the factors prepared by staff were appropriate. Some RAC members were concerned that there would not be sufficient information to review some of the factors at the time a jurisdictional review is likely to occur. Others raised concerns that including a consideration of related or supporting facilities could disincentivize those facilities being shared, which could increase impacts on land use and other resources. Some RAC members commented that the list was generally reflective of issues that should be considered but recommended that the rule should be more explicit about how the factors would be interpreted or applied.

In consideration of the concerns about related or supporting facilities, staff have eliminated that factor from the draft proposed rules included in Attachment 1. Staff believes the other

factors are adequate to determine whether or not a facility is intended to operate independently or as part of a larger development. Staff believes that the other factors are appropriate, and that even if not all information is available to determine how a proposed facility will ultimately be marketed, sold, or operated, statements and other publicly available documentation should be sufficient for the Council to make a reasonable determination about what is intended.

Recommendation: Staff recommends Council adopt factors based on 15 questions, consistent with Alternative 2.

Issue 3: Process for jurisdictional determinations

Background: In addition to creating a standard for when and how the Council will make jurisdictional determinations, it could adopt a procedural rule to explain how the determinations will be made. The Council could develop a new process, or it could clarify how an existing process could be applied.

The Council has previously used the declaratory ruling process described in ORS 183.410 and OAR 137-002 to consider jurisdictional issues. This process allows for an agency to provide a binding ruling on the applicability of any statute or rule enforceable by the agency based on a particular set of facts. The process described in OAR 137-002 allows interested parties an opportunity to submit arguments and have a hearing without undergoing the full Contested Case process. The process also provides Council the discretion to issue a ruling or not, so the Council could decide not to pursue a ruling if it determines that the facts are not clear, or the issue is moot.

The declaratory ruling process is generally shorter than a full contested case proceeding, but it can still be time intensive. In addition, the process is only appropriate for circumstances where the application of law is at question, not when there is a disagreement about facts. To address these issues, the Council could develop a more abbreviated process to issue an order based on findings or recommendations presented by the Department. It could also delegate the initial decision to the Department, similar to the process for Amendment Determination Requests. Such a process would allow determinations to be made quickly, but the decisions could potentially be subject to the Contested Case process.

Because the declaratory ruling process and ability to issue contested case orders are already available to the Council without rulemaking, the Council could also proceed without a specific process for making jurisdictional determinations. This would allow more flexibility in how the Council and the department approach jurisdictional issues but may not provide the clarity or consistency of a specific process.

Alternatives:

1. Adopt rules explaining the applicability of the declaratory ruling process to jurisdictional determinations.

2. Adopt new procedure for making jurisdictional determinations based on Amendment Determination or other Council process
3. Adopt rules for providing specific process for Council to seek civil enforcement.
4. Adopt no procedural rules and rely on existing processes.

Discussion: Staff presented draft proposed language implementing Alternative 1 to the RAC at its March 9, 2020 meeting. The RAC was generally supportive of the proposal, although some concerns were raised about what would happen in the event that a dispute of facts or other situation made the declaratory ruling process untenable. Staff acknowledges these concerns and have made some changes to the draft proposed rules intended to clarify that the declaratory ruling process is not the only tool available for Council to make a determination. One commenter recommended that because the declaratory ruling process is already available to the Council, adopting procedural rules are unnecessary. Staff agrees that the Council may issue a declaratory ruling, or investigate jurisdictional issues through other methods, but that the draft proposed rules would still provide Council and stakeholders with some clarity about how the proceedings would be conducted and what requirements must be satisfied in a petition.

Recommendation: Staff recommends Alternative 1 because it is an existing process that allows for public participation without the need for a full Contested Case.

Issue 4: Applicability of rule to existing facilities

Background: ORS 469.320 provides the Council with siting jurisdiction over any facilities that are constructed or expanded in Oregon. As such, a new definition could be applied to any proposed or existing facilities. While staff is not aware of any existing facilities that would trigger jurisdictional review under the proposed rule, it may be appropriate to provide some additional regulatory certainty to projects which were approved under the county process before the effective date of the rule.

Alternatives:

1. Adopt rule that applies new standard and process to any existing and proposed facilities
2. Adopt rule that only applies to facilities or facility modifications that have not been approved under local process on the effective date of the rule.

Discussion: Staff presented draft proposed rules implementing Alternative 2 to the RAC at its March 9, 2020 meeting. Some RAC members recommended the proposed exception be expanded to cover all facilities proposed prior to the effective date of the rule. Some went further and recommended that any proposed or existing facilities should also be protected from consideration under the proposed proximity criteria discussed above. Staff believes these changes could be problematic and would undermine the ability of the Council to determine when proposed solar development project is actually an expansion or modification of a proposed or existing facility.

One RAC member did not raise concerns with the concept but recommended that the intent of the proposed rule language was unclear. Staff reviewed the proposed language and made some additional changes to clarify that while the rules themselves are applicable to any facility, the Council will not consider any petition for jurisdictional review of a facility with land use approval in place on or before the effective date of the rule.

Recommendation: Staff recommends Council adopt rules to implement Alternative 2, with the changes included in Attachment 1.

Issue 5: Implementation of HB 2329

Background: In addition to increasing the thresholds for Council’s jurisdiction over solar photovoltaic power generation facilities, HB 2329 (2019) also broadened the provisions for which types of facilities may elect to obtain a site certificate under ORS 469.320(8). As of January 1, 2020, a developer or governing body of a local government may elect to defer to Council regulatory authority over certain wind facilities, associated transmission lines, and solar facilities that are not otherwise subject to Council jurisdiction.

The current OAR 345-020-0006(3) and 345-021-0000(2) allow a person to submit a Notice of Intent or Application for a wind facility with an average electric generating capacity of less than 35 megawatts, which was the only type of facility which could “opt-in” under the previous law. This was consistent with the language in ORS 469.320(8) that was in place before HB 2329 (2019) became effective. The new law provides:

“ORS 469.320(8)(a) If the developer of a facility elects, or the governing body of the local government after consulting with the developer elects, to defer regulatory authority to the Energy Facility Siting Council, the developer of a facility shall obtain a site certificate, in the manner provided in ORS 469.300 to 469.563, 469.590 to 469.619, 469.930 and 469.992, for a facility that, notwithstanding the definition of “energy facility” in ORS 469.300, is:

(A) An electric power generating plant with an average electric generating capacity of less than 50 megawatts produced from wind energy at a single energy facility or within a single energy generation area;

(B) An associated transmission line; or

(C) A solar photovoltaic power generation facility that is not an energy facility as defined in ORS 469.300 (11)(a)(D).

(b) An election by a developer or a local government under this subsection is final.

(c) An election by a local government under this subsection is not a land use decision as defined in ORS 197.015.

(d) A local government may not make an election under this subsection after a permit application has been submitted under ORS 215.416 or 227.175.”³

This new language makes two important changes. First, where the old law only allowed the owner or developer of an energy facility to elect to obtain a site certificate, the new law also allows local governments to “defer regulatory authority” to the Council. Second, the new law expands the types of facilities for which regulatory authority may be deferred to include associated transmission lines and any non-jurisdictional solar photovoltaic power generation facility.

Alternatives: Because the current rules are inconsistent with the new law, staff recommends that some action is needed; however, Council may amend the rules in a number of ways that would be consistent with the new law:

1. Amend the current sections of rule that implement ORS 469.320(8) to reference statute.
2. Adopting a new rule describing procedures for making an election to defer regulatory authority to the Council under ORS 469.320(8).
3. Amending the definition of “energy facility” in OAR 345-001-0010(18) to include facilities for which an election to defer regulatory authority to the Council has been made under ORS 469.320(8).

Discussion: Staff presented draft proposed rules implementing Alternative 3 to the RAC at its March 9, 2020 meeting. The RAC raised no questions or concerns about the proposed language.

Recommendation: Staff recommends Alternative 3, to establish that all facilities for which an election has been made will be treated the same as other energy facilities.

³ 2019 Oregon Laws, Ch. 650, S. 2.