



Oregon

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To: Energy Facility Siting Council

From: Christopher M. Clark, Siting Policy Analyst and Rules Coordinator

Date: April 10, 2020

Subject: Agenda Item C (Action Item):
Solar Photovoltaic Rulemaking Project (R183) –
Council Initiation of Formal Rulemaking Proceedings for the April 24, 2020 EFSC Meeting

Attachments: Attachment 1: Draft Proposed Rules (Rev. 4/10)
Attachment 2: Issues Document (Rev. 4/10)

STAFF RECOMMENDATION

Staff requests that Council initiate formal rulemaking proceedings and authorize issuance of the Notice of the Proposed Rulemaking, consistent with the proposed rules contained in Attachment 2 to this report. The proposed rules would:

1. Adopt a definition of “solar photovoltaic power generation facility” that is consistent with the Land Conservation and Development Commission’s definition under OAR 660-033-0130(38)(f). The definition would act as a trigger for a multifactorial analysis of when solar projects under common ownership are considered to be an “energy facility.”
2. Amend OAR 345-020-0006(3) and 345-021-0000(2) to implement statutory changes in the types of facilities that can elect to obtain a site certificate under HB 2329 (2019).

To provide opportunity for the public to submit oral testimony, staff recommends Council schedule an electronic hearing on the proposed rules on June 25, 2020 at 5:00 pm (the scheduled date for the June EFSC meeting). Staff recommends Council close the record for written comments concurrent with the hearing.

BACKGROUND

Staff presented its preliminary research and recommendations for this rulemaking project at the Council’s January 23-24, 2020 meeting. Staff developed draft proposed rules based on the feedback Council provided at that meeting and presented them to the RAC appointed for this project on March 9, 2020. This report provides an overview of the procedural history of the rulemaking project and summarizes major issues and points of discussion raised at the RAC

meeting. The report concludes with a recommendation for Council to initiate formal proceedings to adopt the proposed rules provided in **Attachment 1**. A full summary of issues associated with this rulemaking project is provided in **Attachment 2**.

Procedural History

Department staff included a proposed rulemaking project to address these issues in the recommended rulemaking schedule for 2018, presented at the December 14-15, 2017 Council meeting. Council approved inclusion of the project, adding a review of issues, such as land use, which may require the development of specific standards for the siting of solar facilities to the scope of the project. On June 29, 2018, Council directed Oregon Department of Energy staff to begin the solar photovoltaic rulemaking project, defining the scope of the project with three objectives:

1. To evaluate whether multiple non-EFSC jurisdictional solar photovoltaic facilities could aggregate in a way that the aggregate is functionally the size of an EFSC jurisdictional solar photovoltaic facility;
2. If it is determined that multiple non-EFSC jurisdictional solar photovoltaic facilities could aggregate in a manner that is functionally equivalent to the size of an EFSC jurisdictional facility; to develop new rules that identify objective criteria for determining the circumstances of when multiple non-EFSC jurisdictional solar photovoltaic facilities functionally aggregate to the size of an EFSC jurisdictional solar photovoltaic facility; and
3. To evaluate whether specific standards should be developed for the siting of solar photovoltaic facilities, and if so to develop such standards.¹

Council appointed a Rules Advisory Committee (RAC) representing energy developers, conservation organizations, local governments, state agencies, and members of the public to discuss the questions, provide input to help inform staff's evaluation of the Council defined purpose of the rulemaking project, and to provide input on the drafting of any proposed rule language.

The RAC discussed the first objective of the scope at its first meeting on August 30, 2018. The RAC discussed a number of issues related to current and historic approaches to jurisdictional determinations, and some RAC members raised concerns over the phrasing of the project scope.

On October 25, 2018, Renewable Northwest, the Association of Oregon Counties, and the Oregon Solar Energy Industries Association submitted a letter to Council requesting that Council seek legal advice on whether or not it could extend its jurisdiction to non-jurisdictional facilities. Upon review and consultation with legal counsel, staff agreed that rules extending jurisdiction to "non-jurisdictional facilities" could be problematic, but that ambiguity in what solar facilities are "jurisdictional" or "non-jurisdictional" persisted. Staff concluded that rules interpreting the term "solar photovoltaic power generation facility," would likely be within Council's statutory

¹ EFSC Meeting Minutes, June 29, 2018.

authority, and that such rules could potentially provide additional clarity, consistency, and predictability in how Council applies the jurisdictional thresholds for the siting of energy facilities under ORS 469.300(11).

To clarify the purpose of the project and address the concerns raised in the letter, staff presented a revised project scope for the project in its proposal for the 2019 Annual Rulemaking Schedule approved by Council at its February 22, 2019 meeting. The revised scope states the purpose of this project is to evaluate whether rulemaking is needed to clarify:

1. 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); and
2. Whether there are issues unique to solar photovoltaic facilities that require development of specific siting standards similar to those that govern wind facilities, fossil-fueled facilities, transmission lines, and pipelines.

Additional RAC meetings were held on November 8, 2018 and January 30, 2019 to discuss whether specific siting standards for solar facilities would be required. A fourth RAC meeting was held on March 6, 2019 to discuss the revised jurisdictional question. Work on this project was suspended following the introduction of legislation relating to solar photovoltaic jurisdictional thresholds during the 2019 legislative session. The legislature ultimately approved the bill, HB 2329, and it became effective on January 1, 2020.

While the bill increased the size of facilities that may be sited under local governmental jurisdiction, it did not change the underlying analysis required to determine what is considered to be an “energy facility.” In analysis of the bill; however, staff did identify some rules which are not consistent with the provisions of the new law allowing developers or local governments to defer regulatory authority to the Council. Council authorized staff to evaluate technical changes required to implement the bill as part of this project at its meeting on January 24, 2020.

Staff also presented its preliminary analysis and recommendations on the other issues described in the revised project scope at the Council’s January meeting. With Council’s feedback, staff presented draft proposed rule language to the RAC at a final meeting on March 9, 2020. The RAC was asked to provide feedback on the draft proposed rule language and staff recommendations whether the draft proposed rule would have a fiscal impact, what the extent of that impact would be and whether the rule would have a significant adverse impact on small businesses.

The remainder of this report will provide staff’s final analysis of the issues included in the revised scope of this project based on feedback from the Council, the RAC, and members of the public. A detailed description of the issues is included as **Attachment 1** and revised draft proposed rule language is included as **Attachment 2**.

ISSUES ANALYSIS

As discussed above, the revised scope of this project, as approved on January 24, 2020, includes three issues:

1. 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. Are there issues unique to solar photovoltaic facilities that require development of specific siting standards?
3. What additional rule changes are necessary to implement HB 2329 (2019)?

This section contains staff’s analysis and recommendations for each issue.

Issue 1: What is considered to be a “solar photovoltaic power generation facility”?

The Council has jurisdiction over facilities that meet the statutory definition of an “energy facility.” Under ORS 469.300(11)(a)(D), a solar photovoltaic power generation facility is an “energy facility” if it uses more than:

- “(i) 160 acres located on high-value farmland as defined in ORS 195.300;
- (ii) 1,280 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) 1,920 acres located on any other land.”²

Under this definition, a project that proposes to use less than 160 acres of land is automatically subject to review by the local jurisdiction in which it is proposed to be located; a project that proposes to use 1,920 acres or more of land is automatically subject to review by the Council. If a project proposes to use between 160 and 1,920 acres, a soils mapping exercise is required to determine jurisdiction.

Most solar development is concentrated around existing transmission infrastructure. While this type of colocation has some land use benefits, it can also make it more difficult to determine if a proposed solar project is a new and independent development, or when it is an expansion of an existing use. Several agencies, including the Land Conservation and Development Commission (LCDC) and the Public Utility Commission (PUC), have adopted rules to assist in making this type of determination.³ The Council also developed a set of 15 questions for use in making this type of determination for wind facilities when similar issues arose in the mid-2000’s; however, this methodology was never adopted as a formal Council policy or rule.⁴

At the January 2020 Council meeting, staff presented several alternatives for approaches the Council could adopt to make jurisdictional determinations. The Council’s discussion focused on two alternatives:

Alternative 1. Adopting a definition of “solar photovoltaic power generation facility” based on the LCDC definition under OAR 660-033-0130 that would provide criteria for

² 2019 Oregon Laws, ch. 650, s. 1.

³ See OAR 660-033-0130(38) and 860-022-0070(2)

⁴ An overview of these approaches and approaches from other jurisdictions was provided in the staff report for Agenda Item I of the January Council meeting.

when a jurisdictional review is required, and procedural rules that establish how the review will be conducted and what factors the Council will consider when making a determination; or

Alternative 2. Adopting only a procedural rule which establishes factors the Council will consider when making a jurisdictional determination.

Staff presented draft proposed rule language based on Alternative 1 to the RAC. The language also contained provisions which could be used implement Alternative 2. As discussed further below, the RAC provided feedback on both alternatives, as well as on specific provisions of the draft proposed rules:

- Most RAC members generally supported using a multifactorial analysis to make Council determinations, all though there was not a clear consensus on whether or not the factors proposed by staff were appropriate.
- Several RAC members suggested that any definition adopted by Council should be as clear, unambiguous, and objective as possible.
- The feedback on staff's proposal to use one or both of the criteria found in the LCDC rule as a "trigger" for the analysis was more mixed.
 - RAC members representing local governments and energy developers in particular 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.
 - No clear feedback was given on what, if any, distance, between two or more solar photovoltaic projects should be used to trigger the analysis.
- Discussion about the procedural provisions of the draft proposed rules was more limited. While generally RAC members supported use of the declaratory ruling process to make jurisdictional determinations, some RAC members questioned whether a procedural rule was necessary or if it would be appropriate in all circumstances.
- Some RAC members suggested that facilities proposed for development before the effective date of any permanent rule adopted by the Council should be exempt from any jurisdictional review. Other RAC members were generally supportive of staff's recommendation that the rules be applicable to any facility, except those with an approved land use permit issued on or before the effective date, unless the facility is expanded.

Discussion

The RAC's discussion is reflected in the relevant sections of the Issues Document included as Attachment 2 to this report. A detailed meeting summary is also available from the department's website.

Staff has revised the draft proposed rules based on the RAC's feedback. First, to address concerns about the treatment of related or supporting facilities, staff amended the language of

the draft proposed definitional rule to further clarify that the land occupied by related or supporting facilities would be considered when determining the acreage used by the facility, but related or supporting facilities are not otherwise considered to be components of a solar photovoltaic power generation facility. Staff also made additional changes to the structure of the rule to clarify that related or supporting facilities are not considered when evaluating the proximity criteria. To further address concerns that the proposed rules could discourage colocation of related or supporting facilities, staff also removed the factor addressing shared related or supporting facilities from consideration during jurisdictional review.

Staff also made several changes intended to improve the clarity and readability of the draft proposed rules and their intended applicability. Staff made several changes to distinguish between various term that use the term “facility.” In the revised draft proposed rules, the term “solar photovoltaic power generation project” is now used to describe any land use proposal to (1) establish a new solar photovoltaic power generation facility or (2) expand or modify an existing or proposed solar photovoltaic power generation facility. The procedural rule has also been amended to clarify that the primary purpose of a jurisdictional review is to determine when a project is considered to expand or modify an existing or proposed solar photovoltaic power generation facility in a way that could result in an “energy facility” subject to the state siting jurisdiction. The draft proposed rules also clarify that the Council will not make a jurisdictional determination on a solar photovoltaic power generation facility that obtained county approval before the rules come into effect unless a project is proposed within one mile. The rule is intended to provide some regulatory certainty to previously approved solar photovoltaic power generation facilities, while ensuring that the rule would apply if those facilities are proposed to be expanded or modified.

These changes do not address all concerns raised by RAC members. In particular, several RAC members recommended that the Council’s proposed rule should not contain either the tract or proximity criteria included in the LCDC definition. Staff recommends 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, either directly or through a parent company, 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 state jurisdiction 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 provide for a reasonable and balanced approach for making determinations. Staff believes this, and the provisions excluding related or supporting facilities from consideration as part of the proximity trigger, provides for colocation of projects that are truly separate and independent from one another.

Recommendation

Staff recommends Council adopt rules to implement Alternative 1 described above, consistent with the definition and procedural rule provided in pages 1 to 4 of Attachment 1.

Issue 2: Specific standards for solar photovoltaic facilities

The Council has adopted 14 general standards for the siting, construction, operation, and retirement of energy facilities as provided in ORS 469.501(1). These standards address a broad range of subjects that apply to all energy facilities including solar facilities. Generally, the Council must deny an application for a facility that does not comply with the standards. However, for solar, wind, and geothermal facilities, the standards for seismic hazards (OAR 345-022-0020); historic, cultural, or archaeological resources (OAR 345-022-0090); waste minimization (OAR 345-022-0120) and public services (OAR 345-022-0110) may not be the basis for denial of an application; although they may still be applied to impose conditions as the Council determines is appropriate.

The Council has also adopted specific standards for wind energy generation facilities, energy facilities that emit carbon dioxide, and transmission lines that meet the definition of an energy facility. In part due to the large footprint of solar facilities and emergent nature of photovoltaic technologies, the Council instructed staff to examine the existing standards and determine if there were any issues or subjects that may require specific standards for solar photovoltaic power generation facilities.

In its preliminary review, the Department identified four potential areas for discussion about specific issues related to solar facilities:

- Toxicity and safe disposal of panels
- Reflectivity and public safety
- Ambient temperature and microclimate effects
- Wildlife and wildlife habitat

Staff evaluated these issues, and consistent with feedback from the Council, and from RAC members at the second and third RAC meetings, recommends that the issues are adequately addressed by the existing general standards; however two issues were raised that may merit further discussion in future rulemaking process.

First, while most RAC members agreed that the existing Fish and Wildlife Habitat standard adequately address the impacts of a single facility, some RAC members felt that the standard

did not adequately address the impacts of solar development on wildlife movement and habitat connectivity.

Second, several RAC members requested that the Council evaluate whether solar photovoltaic power generation facilities should be exempt from certain standards or application requirements.

Council discussed both of these issues in prior Council meetings and concurred with staff recommendations that they were outside of the scope of the rulemaking project, as such no draft proposed language to address these issues was presented to the RAC for feedback.

Recommendations

Because there is limited evidence to suggest that the current standards are not adequate to address the impacts associated with solar facilities, staff does not recommend Council adopt any additional specific standards for solar facilities at this time.

Staff recommends that Council evaluate the two outstanding issues discussed above in future rulemaking projects associated with specific standards and the Council's procedural requirements.

Issue 3: Implementation of HB 2329

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.

Background

The current OAR 345-020-0006(3) and 345-021-0000(2) allow a person to submit an NOI 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 2020 (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.”⁵

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.

Staff presented several alternatives for implementation of the new law to the Council at its January 24, 2020 meeting. Based on Council’s feedback, staff presented draft proposed rule language that would delete the current sections of rule that implement ORS 469.320(8) and 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). The RAC did not raise any questions or concerns with the draft proposed rule during the meeting.

Recommendations:

Staff recommends Council amend OAR 345-001-0010(18) to specify that a facility for which an election to defer jurisdiction to the Council is included in the definition of “energy facility” for the purposes of OAR chapter 345 and delete OAR 345-020-0006(3) and 345-021-0000(2), consistent with the draft proposed rules on pages 5 to 7 of Attachment 1.

RECOMMENDED COUNCIL ACTION

Staff recommends that Council authorize staff to issue the Notice of the Proposed Rulemaking and initiate formal proceedings to adopt the proposed rule changes provided in Attachment 1 to this report. The proposed rules would:

1. Adopt a definition of “solar photovoltaic power generation facility” that is consistent with the Land Conservation and Development Commission’s definition under OAR 660-033-0130(38)(f). The definition would act as a trigger for a multifactorial analysis of when solar projects under common ownership are considered to be an “energy facility.”

⁵ 2019 Oregon Laws, ch. 650, s. 2.

2. Amend OAR 345-020-0006(3) and 345-021-0000(2) to implement statutory changes in the types of facilities that can elect to obtain a site certificate under HB 2329 (2019).

To provide opportunity for the public to submit oral testimony, staff recommends Council schedule a hearing on the proposed rules on June 25, 2020 at 5:00 pm. Staff recommends Council close the record for written comments at the end of the hearing. Staff recommends this hearing be scheduled to be conducted by telephone or other electronic means, as allowed under ORS 192.670 to comply with social distancing guidelines related to the COVID-19 pandemic.

Council may approve this request and propose rules as recommended by staff, modify the proposed rules recommended by staff, or reject the proposed rules and specify other alternatives for staff to pursue.