

**June 25-26, 2020 Energy Facility Siting Council Meeting**  
**Agenda Item I: Solar PV Rulemaking**  
**Attachment 3: Staff Summary and Evaluation of Public Comments**  
**Updated June 25, 2020**

This document summarizes the significant data, views, and arguments contained in the hearing record and create a record of the Department’s recommendations to address the major issues raised therein. Exact copies of the written testimony are included in **Attachment 2**.

**Clarification of “other components” in proposed definition** **Ex. 1**

**Issue Summary:** The proposed definition of “solar photovoltaic power generation facility” provides that a solar photovoltaic power generation facility includes “photovoltaic modules, mounting and tracking equipment, posts, electrical cabling, inverters, transformers, collection systems, fencing, and other components.” Commenters request that Council confirm that the term “other components” as used in the proposed rule would be limited to energy facility components that is intended to be a catch-all in case technology or construction techniques change over time” and “is not meant to capture what would otherwise be considered ‘related or supporting facilities.’”

**Staff Recommendation:** Staff recommends that Council clarify that, consistent with the commenters reading of the proposed rules, the term “or other components” is intended to allow flexibility to account for differences in energy facility design and changes in technology, but would only apply to components of a similar nature to those included in the list. Staff confirms that “other components” is not intended to apply to structures or equipment that would otherwise be considered to be related or supporting facilities.

**Clarification of treatment of related or supporting facilities** **Ex. 1**

**Issue Summary:** The proposed definition provides that “[r]elated or supporting facilities” are included in acreage calculations for determining EFSC jurisdiction but “are not otherwise considered to be components of the solar photovoltaic power generation facility.” Commenters request clarification of if the proposed rule is intended to exclude “related or supporting facilities” such as gen-tie lines, access roads, O&M buildings, and battery storage systems from the one-mile calculation presented in the proposed OAR 345-001-0010(56)(b)(A).

**Staff Recommendation:** Staff recommends that Council clarify that the proposed rule language is intended to specify that related or supporting facilities located outside of the energy facility site boundary will only be considered in determining the total acreage used by the solar facility, but will not be considered in evaluating the proximity criteria for triggering a jurisdictional review. The rule is intended to 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.

**Recommendation to reduce distance for “proximity” trigger** **Ex. 1, 2**

**Issue Summary:** The proposed rule language provides that projects proposed within one mile of an existing solar photovoltaic power generation facility “may be determined to be an expansion” of the existing facility. Both commenters recommend Council reduce the one-mile radius to a quarter-mile to align with DLCD’s solar siting rule.

**Staff Recommendation:** Staff recommends that council preserve the one-mile radius for the “proximity” review trigger. The one-mile radius is consistent with the one-mile study area for impacts to agricultural practices found in the LCDC rule under OAR 660-033-0130(38)(h)(G) and (i)(D), and accounts for

differences in the way distance is measured in the Council process vs the LCDC process. Under the LCDC rules, distance is measured from the edge of the tract upon which the facility is sited, whereas under the proposed Council rules distance would be measured from the energy facility site boundary.

**Clarification of “common ownership”**

**Ex. 1**

**Issue Summary:** The proposed rule provides that projects under common ownership with an existing solar photovoltaic power generation facility may be determined to be an expansion of the existing facility and that “[p]rojects connected to the same parent company or individuals will be considered to be in common ownership, regardless of the operating business structure.” Commenters request Council clarify if the phrase “connected to the same parent company or individuals” refers to projects connected by a common majority owner or owners, regardless of the structure or structures that insulate that owner from liability related to the project, or if it is also intended to capture debt lenders, tax equity investors, minority partners, and other entities involved in financing the project.

**Staff Recommendation:** Staff recommends Council clarify that the phrase “connected to the same parent company or individuals” to be intended to primarily intent to the relationship between project specific entities that are affiliated under a common ownership structure and share the same ultimate parent company or companies, regardless of whether ownership by the parent company is direct or through one or more intermediate subsidiaries. While the rule is not intended to capture debt lenders, tax equity investors or other entities involved solely in the financing of a project, under certain circumstances staff believes projects could potentially be connected through one or more minority owners.

**Clarification of “other proceeding” in proposed procedural rule**

**Ex. 1, 2**

**Issue Summary:** The proposed OAR 345-001-0250(1) provides that to find that a project is an expansion of an existing facility, “the Council must find that the preponderance of the evidence on the record of a declaratory ruling issued under this rule, or other proceeding before the council, supports such a conclusion.” Both Commenters request that Council clarify what “other proceedings” could be used to make a determination.

**Staff Recommendation:** As commenters point out, the declaratory ruling process is intended to provide an expeditious process for determining legal issues, not for resolving factual disputes. If the parties necessary to the resolution of the declaratory ruling process are unwilling or unable to participate or agree to the facts in the matter, the Council would not be able to issue a declaratory ruling. If the Council felt that a petitioners claim that a facility was being constructed or expanded in violation of ORS 469.320 had merit, the Council would likely have the authority to pursue the fact finding through its own investigation to develop the evidentiary record needed to make a determination through an Order in other than a contested case..

**Recommendation that petition by person other than Applicant or ODOE be dismissed**

**Ex. 2**

**Issue Summary:** A commenter recommended that a petition from a person other than the applicant or Department should be dismissed, and if not, if the applicant would be required to intervene.

**Staff recommendation:** Staff recommends that any person has the right to petition for a declaratory ruling under ORS 183.410, and that the Council would decide the merits of the petition and decide whether or not it will issue a ruling on a case by case basis. Staff notes that this is true under current law, and that the proposed rule does not create any right that does not otherwise exist.

**Clarification of Council’s Authority to Reject a Petition for Declaratory Ruling** **Ex. 1**

**Issue Summary:** Commenters request clarification of whether the Council has authority under the declaratory-order process to reject a petition if Council staff determine that relevant parties do not agree regarding the underlying facts.

**Staff Recommendation:** Staff recommends that Council clarify that an agency has complete discretion to issue a declaratory ruling or not in response to a petition under ORS 183.410. As noted above, the Council would not be able to issue a ruling if the persons needed to resolve the declaratory ruling were unable or unwilling to agree to the underlying facts.

**Clarification of “safe harbor provisions”** **Ex. 1,2**

**Issue Summary:** Commenters request Councils clarification that under the “safe harbor” provisions of the proposed OAR 345-001-0250(3), the rule would not apply to existing facilities but only to new projects proposed within the distance specified under the proposed OAR 345-001-0010(56)(b)(A) of the existing facility and the proposed project is under common ownership with the existing or approved facility, in which case the new project may be reviewed under OAR 345-001-0250. Commenters further request clarification that this safe harbor applies to solar photovoltaic power generation facilities which are not “energy facilities” under ORS 469.300.

**Staff Recommendation:** Staff recommends Council clarify that, the proposed rules would not apply to any existing solar photovoltaic power generation facility, regardless of whether or not the solar photovoltaic power generation facility is subject to Council jurisdiction, that has a land use permit issued by a local government on or before the date the rules become effective, unless new solar photovoltaic development which could be considered to be an expansion of that facility under the proposed definitional rule is proposed. In that case, the rule would apply to the existing facility because the jurisdictional review would be needed to ensure that the facility is not being expanded in violation of ORS 469.320.

**Expansion of “safe harbor” provisions** **Ex. 2**

**Issue Summary:** Commenters recommend that the proposed OAR 345-001-0250(3) be amended to expand the safe harbor provisions to specify that the rules are not applicable to safe harbor projects. The commenters propose the following amendments to the proposed language:

(3) ~~OAR 345-001-0250 shall not apply to~~ ~~The Council will not make a ruling on the applicability of ORS 469.300(1)(a)(D) or section (1) of this rule to~~ any solar photovoltaic power generation facility with a land use permit approved by a local government on or before the effective date of this rule, ~~unless a solar photovoltaic power generation project is proposed on lands within one mile of the solar photovoltaic power generation facility.~~

**Staff Recommendation:** Staff recommends Council reject the recommended amendment to the proposed rule language because it could suggest that a local jurisdictional facility could be expanded in violation of ORS 469.320 if it were permitted before the effective date of the rule.