

October 22-23 EFSC Meeting
Agenda Item D: Protected Areas, Scenic Resources, and Recreation Rulemaking Project
Attachment 1: Issues Analysis Document
October 9, 2020

This document provides a summary of the Department's preliminary analysis of issues recommended to be addressed in the Protected Areas, Scenic Resources and Recreation Rulemaking Project. The document and associated draft 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 the Energy Facility Siting Council, staff, and stakeholders.

Issue 1 – Notification of Protected Area Land Managers

Affected Rules: OAR 345-001-0010; 345-022-0040

Issue description: Rules do not require Department or Applicant to notify manager a protected area of a Notice of Intent or Application for Site Certificate.

Background: To issue a site certificate, the Protected Areas Standard requires the Council to find that, taking mitigation into account, the design, construction, and operation of a proposed facility is not likely to result in significant adverse impacts to the Protected Areas identified in the rule.

An applicant for a site certificate must identify all protected areas in the twenty-mile study area for impacts to protected areas in Exhibit G of its Notice of Intent.¹ The application itself must include a description of potential significant impacts of the proposed facility, if any, on the protected areas in the analysis area identified in the Project Order.²

The current rules do not require the Department or Applicant to notify the managers of protected areas identified in a Notice of Intent or Application for comment on potential impacts unless the protected area falls within the notification distances for property owners. It is important to note that any person may also elect to receive notice of all projects by signing up for the Council's general mailing list.

One managing agency has requested the Council consider amending the rules to provide notification to ensure that a protected area manager is able to participate in the siting process when a facility is proposed to be located near a protected area it manages.

The majority of the protected areas protected by OAR 345-022-0040 are managed by state or federal agencies including, but not limited to:

- U.S. National Parks Service
- U.S. Bureau of Land Management
- U.S. Forest Service
- U.S. Fish and Wildlife Service
- Oregon Department of Fish and Wildlife
- Oregon Department of Parks and Recreation
- Oregon Department of State Lands

¹ OAR 345-020-0011(1)(g)

² OAR 345-021-0010(1)(L)

Other protected areas are managed by other public bodies, such as experimental forests and agricultural research stations operated by Oregon State University.³ A small number of protected areas included in the State Register of Natural Heritage Resources are owned or managed by private entities such as The Nature Conservancy.⁴

Alternatives:

- 1. Take no action and rely on existing public notification requirements to provide information to managers of protected areas.*
- 2. Amend OAR 345-001-0010(51) to specify that the managing agency of a protected area in the study area for impacts to protected areas for the proposed facility is a “reviewing agency.”*
- 3. Amend rules or provide policy directive to specify that any agency that manages a protected area within the study area for impacts to protected areas will be included in the distribution list for the Notice of Intent.*

Discussion: Each of the three alternatives describes above provide a mechanism for a manager of a protected area to receive information about a proposed facility. Alternative 1 would rely on existing public notification requirements which provide several options for interested persons to learn about proposed projects and facilities. At several points in the review process, the rules require the Department to provide notice to all persons signed up to receive notices through the Council’s general mailing list, and to publish notice in a newspaper of general circulation in the vicinity of a proposed facility.⁵ In addition, materials are posted to the Council’s website for public review and inspection. While these options do not guarantee that a manager of a protected area will receive notice of a proposed facility, they do provide several pathways for information about a proposed facility in the vicinity of the protected area to reach them.

ORS 469.350(2) requires copies of a notice of intent and application to be sent to state agencies with regulatory or advisory responsibility over a proposed facility and any city or county affected by an application for comment and recommendation. These agencies and local governments, along with tribal governments identified by the Legislative Commission on Indian Services as affected by the proposed facility are defined as “reviewing agencies” under OAR 345-001-0010(51). The definition also includes federal land management agencies with jurisdiction over any part of a proposed facility that is located on federal land. In addition to receiving notices, reviewing agencies are given an opportunity to provide comment and make recommendations on the completeness of a preliminary application that is not generally available to the public. As described in Alternative 2, the Council could expand the definition to include the manager of protected area within the study area for protected areas. This would provide managers of protected areas with additional opportunities to participate in the process but could increase costs of compliance for the applicant, such as costs associated with identifying appropriate contacts, noticing the protected areas managers, and processing comments and feedback received. If a state agency or local government that was not already included as a reviewing agency managed a protected area within the study area, that agency could also request compensation for its participation in the review process under ORS 469.360.

Under Alternative 3, the Council could specify that any manager of a protected area be included on the distribution list for the Notice of Intent either by rule or by directive to staff. Distribution lists are required to

³ ORS 345-022-0040(1)(L), (m), and (n)

⁴ OAR 345-022-0040(1)(i), the Register is available from: <https://inr.oregonstate.edu/orbic/natural-areas-program/register-natural-heritage-resources>.

⁵ See OAR 345-015-0110(1), 345-015-0190(7), 345-015-0220(2).

be compiled after receiving a Notice of Intent, Preliminary Application, or Complete Application, and must include the reviewing agencies for a facility and other persons who will be provided with information about the proposed facility and from whom comment will be requested.⁶ By only requiring notification at the Notice of Intent Stage, Alternative 3 would ensure that the manager of a protected area receives early notice of a proposed facility in its vicinity without giving it special status as a reviewing agency. This would also result in some increased costs of compliance, but these costs would be limited to identifying the appropriate land manager and providing the Notice during the NOI phase, after which the manager or the protected area would be required to take other action to continue to receive public notice on the proposed facility if they were interested in participating in the review process further.

Issue 2 – Scope of Required Findings

Affected Rules: OAR 345-022-0040(1); 345-022-0080(1); 345-022-0100(1)

Issue description: The Council’s Scenic Resources and Recreation Standards limit the scope of Council’s findings to resources in the appropriate analysis area identified in the project order. The Protected Area Standard contains no similar limitation.

Background: OAR 345-022-0080(1) and 345-022-0100(1) require the Council to make findings on the likelihood that the design, construction, or operation of a facility will result in a significant adverse impact to certain scenic resources and values or recreational opportunities, respectively. Both of these Standards limit the scope of the required findings to resources in the analysis area identified in the Project Order for the facility. The Council’s Protected Areas Standard similarly requires findings on the likelihood that a proposed facility will result in a significant adverse impact to any protected areas, as defined in the rule, but contains no similar limitation on scope.

The study area for protected areas under OAR 345-001-0010(58)(e), which is the default analysis area for the Project Order, is the area within the site boundary and within 20 miles from the site boundary. An applicant for a site certificate must identify all protected areas in the study area in Exhibit G of its Notice of Intent.⁷ The application must include a description of potential significant impacts of the proposed facility, if any, on the protected areas in the analysis area identified in the Project Order.⁸

Alternatives:

- 1. Make no changes.*
- 2. Amend OAR 345-022-0040(1) to limit the scope of Council’s findings for impacts to protected areas located within the analysis area described in the Project Order.*
- 3. Amend OAR 345-022-0080(1) and 345-022-0100(1) to remove the limitation on the scope of Council’s findings and include resources in all areas.*

Discussion: While the construction of the current Protected Areas Standard is not consistent with the Scenic Resources and Recreation Standards, the findings that result may be similar in most cases because the information requirements in OAR 345-020-0011 and 345-021-00010 are based on the study area and analysis area respectively. As such, the findings that result under any of the alternatives above are likely to be the same in most cases. In the event that impacts to protected areas outside of the analysis area identified in the

⁶ OAR 345-020-0040, 345-021-0050, 345-021-0055.

⁷ OAR 345-020-0011(1)(g)

⁸ OAR 345-021-0010(1)(L)

review process, Alternative 2 could impact the Council’s ability to consider them unless the Project Order was amended. Similarly, Alternative 3 is not likely to result in changes, but could create some confusion about the scope of information that is required to be provided to satisfy the Standard.

Issue 3 – Effective Date of Areas and Designations

Affected rules: OAR 345-022-0040(1)

Issue description: The Protected Areas Standard refers to “designations in effect as of May 11, 2007.” A number of new areas have been designated for protection since that time.

Background: The Protected Areas Standard under OAR 345-022-0040(1) refers to “designations in effect as of May 11, 2007.” A small number of new areas have been designated for protection or expanded since that time such as the Devil’s Staircase Wilderness Area, which was designated in 2019.⁹

Alternatives:

- 1. Amend rule to update the rule to reference the date of adoption of the new rules.*
- 2. Amend rule to remove references to specific publications and remove the date.*
- 3. Amend rule to specify that Council must make findings based on designations in effect on the date the preliminary application is submitted.*

Discussion: Because new protected areas have been designated for protection since the date referenced in rule, staff did not consider a no action alternative to be appropriate. The Council could update the date the rule to reference the date of adoption of permanent rules as described in Alternative 1, or delete the date as described in Alternative 2. Alternative 2 would likely reduce the need for future rulemaking to keep the rule current but would require the rule to be amended in a way that clearly identifies protected area designations without relying on specific publications produced by other entities. While the designation of new protected areas occurs infrequently, it is not clear how the Council would address a new designation that occurred while a proposed facility was under review. To reduce this uncertainty, the Council could specify that the standard only applies to areas designated before the applicant submitted its preliminary application, as described in Alternative 3. This would be consistent with the way applicable substantive criteria under ORS 469.504(1)(b)(A) are determined.¹⁰

Issue 4 – Lists of Protected Areas

Affected rules: OAR 345-022-0040(1)

Issue description: The rule contains lists of designations and specific protected areas that may be incomplete or out of date.

Background: OAR 345-022-0040(1) provides a list of categories of areas designated for protection by the state or federal government that must be considered when making findings under the Protected Areas Standard.

⁹ P.L. 116-9, Mar. 12, 2019

¹⁰ OAR 345-020-0000(9)

Some of the listed categories contain lists identifying specific areas within the categories that appear to be incomplete or out of date. For example, the rule lists the Fort Clatsop National Memorial under the subsection for National Parks, but the memorial was redesignated as the Lewis and Clark National Historical Park with expanded jurisdiction over multiple sites in 2004.¹¹ The rule also does not list the Nez Perce National Historic Park, the Cascade-Siskiyou National Monument, and a number of National and State Wildlife Areas and State Fish Hatcheries.

Alternatives:

1. *Make no changes.*
2. *Amend rule to provide update lists that identify all current protected areas.*
3. *Amend rule to remove lists of specific protected areas and rely on categories and designations.*

Discussion: Because the lists in the rule are not intended to be exhaustive the Council may choose to make no changes, or only make limited changes to remove outdated references at this time. The Council may also choose to update the lists to reflect current designations as described in Alternative 2, or remove the lists as described in Alternative 3. While none of these alternatives are expected to have a substantive impact on the operation of the rule, both Alternative 2 and 3 may improve clarity by updating or removing outdated lists. Alternative 3 would also reduce the need for future rulemaking. Staff notes that stakeholders are not likely to rely on the lists provided in rule because publicly available lists and geospatial data identifying protected areas are maintained by other sources.

Issue 5 – Outstanding Resource Waters

Affected Rules: OAR 345-022-0040(1)

Issue Description: The current rule does not list Outstanding Resource Waters as Protected Areas.

Background: Outstanding Resource Waters are high quality waters that constitute an outstanding state resource due to their extraordinary water quality or ecological values, or where special protection is needed to maintain critical habitat areas. Outstanding Resource Waters are nominated by the Oregon Department of Environmental Quality and designated by the Environmental Quality Commission. Oregon’s only current Outstanding Resource Waters are the North Fork Smith River and its tributaries and associated wetlands, as listed in OAR 340-041-0305(4), which were designated by the Commission in 2017.¹² The North Fork Smith River is considered a Protected Area as a Wild & Scenic River.

The Commission has identified National Wild and Scenic Rivers, State Scenic Waterways, and water bodies in State and National Parks, State and National Wildlife Refuges, and Wilderness Areas as priority for nomination as Outstanding Resource Waters, so it is possible that many Outstanding Resource Waters would be considered protected areas under the current rule. The Oregon DEQ is currently proposing that the Environmental Quality Commission designate Waldo Lake and Crater Lake as Outstanding Resource Waters.

Alternatives:

¹¹ P.L. 108–387, Oct. 30, 2004

¹² See OAR 340-041-0004(8)(d).

1. *Make no changes.*

2. *Amend OAR 345-022-0040(1) to add Outstanding Resource Waters to the list of protected areas.*

Discussion: Because future Outstanding Resource Waters are likely to be considered Protected Areas under the current rule, it may not be necessary for the Council to change the rule. However, this is not guaranteed and including the additional designation would ensure consistency with State environmental policy. It should be noted that to the extent that a rule change would expand areas included under the Protected Area Standard, it could increase costs associated with avoiding or mitigating impacts to Outstanding Resource Areas.

Issue 6 – Linear Facilities Located in Protected Areas

Issue Description: The current rule may permit a transmission line or natural gas pipeline to be sited in a protected area when other lesser impact alternatives are available.

Background: OAR 345-022-0040(2) allows the Council to issue a site certificate “for a transmission line or a natural gas pipeline or for a facility located outside a protected area that includes a transmission line or natural gas or water pipeline as a related or supporting facility located in a protected area * * * *if other alternative routes or sites have been studied and determined by the Council to have greater impacts.*” Emphasis added.

Staff believes this rule is intended to allow a transmission line or pipeline to pass through a protected area when greater impacts cannot be avoided, but the construction implies that a linear facility could be sited on a protected area when other lesser impact alternatives may be available.

Alternatives:

1. *Make no changes.*

2. *Amend rule to allow Council to issue a site certificate for a transmission line or pipeline located in a protected area when Council finds that no alternative routes or sites that would have lesser impacts are practicable.*

Discussion: Because an applicant for a site certificate for a transmission line or natural gas pipeline is already required to provide an alternatives analysis or an explanation of why alternate corridors are unlikely to better meet the applicant’s needs and satisfy the Council’s standards in its Notice of Intent, we believe that in most cases the rule will result in the selection of routes with lesser impacts, in which case a change is not necessary but could help clarify the rule. The change proposed in Alternative 2 could restrict the ability of the Council to approve multiple alternative routes located in protected areas that have differing level of impact. While this is unlikely, it is possible with large linear facilities. In this case, imposing a least impact alternative requirement could result in additional costs to applicants associated with avoiding or mitigating impacts.

Issue 7 – State Scenic Resources

Affected rules: OAR 345-022-0080

Issue description: The Scenic Resources does not specify that scenic resources and values identified as significant or important in state land management plans are protected under the standard.

Background: To issue a site certificate, the Scenic Resources Standard requires the Council to find that the design, construction and operation of the facility, taking into account mitigation, is not likely to result in significant adverse impact to scenic resources and values identified as significant or important in local land use plans, tribal land management plans and federal land management plans for any lands located within the analysis area described in the project order. The rule does not include scenic resources identified in state land management plan. It is not clear why state plans were omitted from the rule.

Alternatives:

1. Make no changes

2. Amend rule to specify that scenic resources identified as significant or important in state land management plans are protected by the Scenic Resources Standard.

Discussion: Some of the scenic resources identified in state management plans may also be inventoried in local government comprehensive plans, so it may be appropriate for Council to make no changes as described in Alternative 1. Staff have identified some resources, such as scenic byways that are identified in state land management plans but were either not included in a local plan or are in an area with no local inventory of scenic resources. To ensure these resources are included, the Council could amend the rule to add state land management plans as described in Alternative 2. While it is not clear that this would result in any direct fiscal or economic impacts, it could increase costs of compliance by increasing the amount of information and analysis needed to satisfy the standard and could potentially increase costs associated with avoiding or mitigating impacts to scenic resources.