



Oregon

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To: Energy Facility Siting Council

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

Date: October 9, 2020

Subject: Agenda Item D (Action Item):
Council initiation of Scenic Resources, Protected Areas, and Recreation
Rulemaking for the October 22-23, 2020, EFSC Meeting

Attachments: Attachment 1: Issues Analysis Document

STAFF RECOMMENDATION

Staff recommends Council initiate rulemaking to develop proposed revisions to the Council's Protected Areas, Scenic Resources, and Recreation Standards and associated rules, and requests authorization to solicit written advice from stakeholders to assist in the development of proposed rules and the associated fiscal impact statements.

BACKGROUND

The Council authorized staff to begin preliminary work on a rulemaking project to review the Protected Areas, Scenic Resources, and Recreation standards and associated rules to ensure that the areas, designations, and resources protected by rules are up to date, and that rules are clear and consistent with the Council's review process.

Staff has completed its preliminary review of these standards and rules and provides its preliminary analysis and recommendations for rulemaking below. Specifically, this staff report will provide an overview of:

- The need and authority to adopt rules
- The recommended scope and objectives for the rulemaking, including the policy issues to be addressed
- The potential fiscal and economic impacts on stakeholders
- The recommended method for obtaining stakeholder input in the development of proposed rules
- The projected timeline for the rulemaking process

The report concludes with a request for Council to initiate the rulemaking process. Please note that the Council is not being asked to consider proposed rule amendments or the adoption of permanent rules at this time.

Need and authority to adopt rules

ORS 469.470(2) authorizes the Council to adopt standards and rules to perform the functions vested in it by law, including the requirement for Council to adopt standards for the siting, construction, and operation of energy facilities. While Council has broad authority to adopt the standards it believes are necessary to implement the energy policy set forth in ORS 469.310, the statute specifically identifies several subjects that may be addressed by standards, including areas designated for protection by the state or federal government, and impacts of the facility on recreation, scenic, and aesthetic values. ORS 469.501(1)(c) and (i). The Council has adopted standards for addressing these subjects under its general standards for siting facilities found in OAR chapter 345, division 22.

OAR 345-022-0040 is the Council's Protected Areas Standard. The Standard provides that, except for certain transmission lines and pipelines, the Council may not issue a site certificate for a facility proposed to be located in one of the protected areas identified by the rule. The Standard also provides that to issue a site certificate for a facility proposed to be located outside of a protected area the Council must find that, taking into account mitigation, the construction and operation of a facility is not likely to result in significant adverse impacts to a protected area.

OAR 345-022-0080 is the Council's Scenic Resources Standard. The Standard provides that to issue a site certificate for most facilities, the Council must 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.

OAR 345-022-0100 is the Council's Recreation Standard. The Standard provides that to issue a site certificate for most facilities, the Council must find that the design, construction and operation of a facility, taking into account mitigation, are not likely to result in a significant adverse impact to important recreational opportunities in the analysis area as described in the project order. The Standard also prescribes criteria that the Council must consider when judging whether or not a recreational opportunity is important.

The Protected Areas and Scenic Resources Standards were last amended in 2007. The Recreation standard was last amended in 2002.

Recommended scope and objectives

Staff have identified a number of issues it recommends be addressed by proposed rules in the preliminary analysis included as Attachment 1 to this report. These include:

- Evaluating options to provide notice of a proposed facility to Protected Area land managers

- Addressing an inconsistency in the scope of required findings needed to satisfy the Protected Areas, Scenic Resources, and Recreation Standards
- Including protected areas designated after 2007 under the Protected Areas Standard
- Updating and clarifying the list of Protected Areas under OAR 345-022-0040
- Considering the inclusion of Outstanding Resource Waters as Protected Areas
- Clarifying exceptions for linear facilities in OAR 345-022-0040(2)
- Addressing scenic resources or values identified in state land management plans

In addition to these issues, staff recommends Council consider additional issues and alternatives related to the Protected Areas, Scenic Resources, and Recreation Standards and associated rules, including any applicable definitions in OAR 345-001-0010 or informational requirements in OAR 345-020-0011 or 345-021-0010 raised by stakeholders. Staff's recommended method of obtaining advice to assist in the development of proposed rules is described further below. Staff may also propose additional changes to improve the clarity and consistency of the rules.

While staff have not identified specific issues related to the Recreation Standard, we recommend these three standards be reviewed together because the resources protected by and information required to satisfy each standard often overlap. For example, many Protected Areas have been designated as such at least in part to preserve the scenic value or recreational opportunities they provide.

While this project is primarily intended to be an administrative update, staff recommends the objectives of any proposed rules should ensure that the language of the Standards clearly identifies important resources the Standard intends to protect, and to ensure that the Standards are consistent with the policy set forth in ORS 469.310.

Potential Fiscal and Economic Impacts on stakeholders

Staff believes that the proposed rules could result in some potential fiscal or economic impacts on applicants, particularly if the proposed rules expand the type or number of resources protected under the standards recommended for review. While these impacts would primarily be associated with increased information and analysis needed to satisfy the standard, there could also be increased costs associated with the mitigation of impacts to scenic or recreational resources. Because these impacts would only apply to future applications for a site certificate, and because their magnitude would be highly dependent on the size, type, and location of a proposed facility, staff is unable to quantify the potential impacts at this time.

Stakeholder input

Because of broad public interest in the resources protected by the Council's Protected Areas, Scenic Resources, and Recreation Standards, and because of the potential fiscal and economic impacts on energy developers and other stakeholders, staff recommends Council solicit advice from the public to assist in the development of proposed rules before initiating formal rulemaking proceedings. In the 2020-2022 rulemaking schedule, staff recommended advice on this project be obtained through the use of a Rulemaking Advisory Committee, however, due to the nature of issues being considered and the ongoing need to limit in-person meetings as a result of the COVID-19 pandemic, we believe soliciting written advice from persons on the

Council’s rulemaking mailing lists, as well as any federal and state natural resource agencies with jurisdiction over protected areas, and any other stakeholders identified by council would allow appropriate opportunities for participation.

In addition to soliciting advice on the issues and alternatives identified in Attachment 1, staff recommends Council request stakeholder input on other issues that should be considered, and advice on whether rule changes would have a fiscal impact, what the extent of that impact would be and whether rule changes could have a significant adverse impact on small businesses. We note that this opportunity is in addition to the opportunity for formal public comments that must be provided after Council issues its Notice of Proposed Rulemaking.

Projected Timeline

If Council decides to initiate informal proceedings as described above, staff recommends allowing approximately 60 days for stakeholders to submit advice on the issues and analysis provided in Attachment 1. Staff would consider this advice and prepare draft proposed rules for the Council’s consideration in early 2021. If Council initiated formal rulemaking proceedings at that time, a formal public comment period and rulemaking hearing in front of Council on the proposed rules would follow before Council considered the adoption of permanent rules in the spring. A projected rulemaking timeline based is provided below.

Projected Rulemaking Timeline	
Council Initiates Rulemaking	October 22, 2020
Staff Solicits Written Advice from Stakeholders	Nov – Dec 2020
Council Considers Draft Proposed Rules and Issues Notice of Proposed Rulemaking	Jan 2021
Public Comment Period on Proposed Rules	Feb-March 2021
Rulemaking Hearing & Consideration of Permanent Rules	March 2021 (or later).

RECOMMENDED COUNCIL ACTION

Staff recommends Council initiate informal proceedings to develop proposed revisions to the Council’s Protected Areas, Scenic Resources, and Recreation Standards and associated rules. Staff has provided its preliminary analysis of issues it has identified to be addressed through this project in Attachment 1.

Staff further recommends the Council solicit and consider written advice from stakeholders to assist in the development of proposed rules and the associated fiscal impact statements. In addition to soliciting advice on the issues and alternatives identified by staff, staff recommends Council consider additional issues or alternatives identified in stakeholder advice.