Protected Areas, Scenic Resources, and Recreation Rulemaking Project
Attachment 1: Issues Analysis Document
April 9, 2021

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 must provide evidence to support this finding in both the Notice of Intent and the Application for Site Certificate. In the Notice of Intent, the applicant must identify all protected areas in the twenty-mile study area for impacts to protected areas.[1] The information in the NOI is used to inform the Project Order which establishes the study requirements for the Application, including the analysis areas for impacts to Protected Areas. In the Application, the applicant must describe any potential significant impacts of the proposed facility on the protected areas in the analysis area.[2]

To further develop the record and assist the Council and Department in the evaluation of compliance with the Protected Areas Standard, the Department must also seek input from the general public and request comment and recommendations from reviewing agencies at several points in the application review process. The rules do not require the Department to provide public notice to or request comment from the managers of protected areas that may be affected by a proposed facility specifically. One agency that manages several protected areas in Oregon requested the Council consider amending the rules to ensure that the manager of protected areas near the site of a proposed facility receives notice of a proposed facility early enough in the process to ensure that the agency is able to participate in the application review process.

We note that the existing rules do provide a number of pathways for protected area managers to receive public notices related to a proposed facility. Public notice must be provided upon receipt of a notice of intent, upon filing of a complete application, and upon the Department's issuance of its draft proposed order and the Council's proposed order. Generally, when public notice is given, it must be published in a newspaper of general circulation in the vicinity of the proposed facility, and must be mailed or emailed to the Council's general mailing list, any special mailing list for the proposed facility, and to the owners of property within and in the immediate vicinity of the site boundary.[3] The manager of a protected area would receive notice automatically if the protected area falls within the notification distances for property owners, and the

[1] OAR 345-020-0011(1)(g)
[2] OAR 345-021-0010(1)(L)
[3] OAR 345-015-0110; 345-015-0190(7); 345-020-0016;

protected area manager could choose to receive public notices by subscribing to the Council's general mailing list, or to the special mailing list set up for a project that is already under review.[4]

The manager of a protected area would also receive requests for comments and recommendations if it is considered to be a reviewing agency for other reasons. OAR 345-022-0040 identifies 16 categories of protected areas that are protected by the standard. Most of these areas are on public lands, and are owned and 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

Under OAR 345-001-0010(51), the Oregon Department of Fish and Wildlife and the Department of State Lands are included as reviewing agencies in every application review. The federal land management agency with jurisdiction over any federal lands on which a facility is proposed to be sited is also included as a reviewing agency.

Other protected areas are managed by other public bodies, such as experimental forests and agricultural research stations operated by Oregon State University.[5] A small number of protected areas included in the State Register of Natural Areas are owned or managed by private individuals or organizations such as The Nature Conservancy.[6]

A request for comments and recommendations must be sent to reviewing agencies upon receipt of a notice of intent, a preliminary application, and a complete application. Reviewing agencies include state agencies with regulatory or advisory responsibility over a proposed facility, local and tribal governments affected by an application, and federal land management agencies with jurisdiction over any federal lands on which the facility is proposed to be located. The department may also identify other reviewing agencies during the review,[7] and may request comments and recommendations from other persons on a distribution list that is developed in coordination with the applicant. Unless the Department provides other direction, the applicant must distribute electronic versions of the application materials to all persons on the distribution list and must provide paper copies to any person on the distribution list upon request.[8]

Alternatives:

1. Take no action. 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."

[4] Any person may sign up for email updates at http://web.energy.oregon.gov/cn/a6n53/subscribe
[5] ORS 345-022-0040(1)(L), (m), and (n)
[6] OAR 345-022-0040(1)(i).
[7] ORS 469.350(2), OAR 345-001-0010(51)
[8] OAR 345-015-0120; 345-015-0180; 345-015-0200; 345-020-0040; 345-021-0050; 345-021-0055

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.

4. Amend rules to provide public notice to the managers of a protected area identified in the Notice of Intent, Application, or Request for Amendment.

Discussion: Alternative 1 would rely on these existing notification requirements to provide information about a proposed facility to the manager of a protected area in its vicinity. As described above, the current rules provide several pathways for protected area managers to receive notification during the application review process, but there is room for potential notification gaps as well. For example, the rules allow any person, including any protected area manager to elect to receive notices either through the Council's general mailing list or a special mailing list for a specific facility, but to know to sign up, the manager would need to have some previous knowledge of or familiarity with the Council and the state energy facility siting process. This may be somewhat unlikely in areas of the state where energy development is less common.

The rules also establish that the Department has at least some discretion to identify reviewing agencies that are not automatically included in the request for comment and recommendation, and to add persons to the distribution list for requests for comment and recommendation. While this provides considerable flexibility to the notification process, without a rule, there is no guarantee that notification of protected area managers would be carried out consistently across projects. Relying on the reviewing agency notification procedures would also face the same challenges as Alternative 2 and 3.

As described in Alternative 2, the Council could expand the definition of "reviewing agency" to include the manager of protected area identified in the Notice of Intent or Application as potentially affected by the proposed facility. Several stakeholders expressed support for this alternative in their responses to the request for advice on this project issued by the Department in December of 2020, and the Department agrees that implementing this alternative would go far to ensure that the manager of a protected area in the vicinity of a proposed facility receives notification. There would also be some challenges with this alternative. Not all protected area managers may be interested in participating in the review and adding a state agency to the list of reviewing agencies could raise concerns about their legal obligation to respond under ORS 469.350. In addition, while the Department generally makes application materials available from its website, an applicant may still be required to provide electronic and paper copies of application materials to reviewing agencies at multiple stages in the process which may also result in additional costs of compliance.

Some of these additional costs could be mitigated by only requiring that the protected area managers be added to the distribution list for requests for comments at the NOI phase, as described in Alternative 3. This would ensure that the protected area manager receives notification early in the process, but would allow the Department, in consultation with the Applicant, the discretion to remove the protected area manager from the distribution lists for requests associated with the Preliminary Application or Complete Application if the reviewing agency failed to respond to an earlier request for comments or stated they were not interested in participating further. In response to the Department's request for comment on this rulemaking, one stakeholder pointed out that changes to a proposed facility's design, or changes to the proposed route or routes for a linear facility, can occur after the NOI phase and that these changes could shift the analysis areas to include new protected areas, so Alternative 3 may not always ensure that a protected area manager receives notice.

To address some of the concerns raised during the review of Alternative 2 and 3, staff identified an additional alternative which would expand the public notice requirements to include notice to protected area managers, which is presented as Alternative 4. This alternative would ensure notice is sent to the protected areas manager at the notice of intent stage and at other important steps in the review without automatically making

them a reviewing agency, and would therefore avoid some additional costs of compliance associated with providing application materials, and would avoid creating any new real or perceived obligations on protected area managers that are not interested in participating in providing recommendation or comment on a proposed facility. If the protected area manager was interested, it could still provide public comment, and the Department could potentially add them to the list of reviewing agencies or distribution list, as appropriate.

Finally, a logistical challenge that is common to all of the Alternatives described above, is that it is difficult for the Department to identify the appropriate contact or position within an agency that manages a protected area to send notice to or request comment from. To address this, regardless of the Alternative it selects, the Council may also consider amending the information requirements in Division 020 and 021 to require an applicant to identify the agency or organization that manages a protected area identified in the applicable study or analysis area, as well as a mailing address and any other reasonably available contact information for the protected area manager.

Recommendation: Staff recommends that Alternative 4 would provide protected area managers with reasonable notice of a notice of intent, application, or amendment request without imposing unnecessary additional costs or obligations associated with automatically establishing the manager as a reviewing agency.

Alternative 4 could be implemented in a number of ways. In some ways the most obvious way would be to amend every rule requiring public notice to specify that the protected area managers in the vicinity of a proposed facility receive notice. Staff notes that there are currently at least 14 separate rules containing public notification procedures and while it would be possible to amend them all, consolidating the procedures to a centralized rule or rules may improve the overall consistency and readability of the rules. This type of change, however, may be better suited for the Application Process Review Rulemaking scheduled to begin later this year.

To avoid duplication with the Application Process Review rulemaking, staff recommends that as an interim measure, Council adopt a policy directive requiring a special mailing list containing the protected area managers identified in the study or analysis area applicable to a facility be established for any Notice of Intent, Application, or Request for Amendment received by the Department until the rule changes described above can be fully considered.

We also recommend that the Council amend OAR 345-020-0011 and 345-021-0010 to require an Applicant to identify the agency or organization that manages a protected area identified in the applicable study or analysis area, as well as a mailing address and any other reasonably available contact information for the protected area manager.

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: The Scenic Resources and Recreation Standards 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 in the analysis area identified in the Project Order. The Protected Areas Standard similarly requires findings on the likelihood that a proposed facility will result in a significant adverse impact to the protected areas identified in the rule but makes no reference to the Project Order.

The Project Order is a document issued by the Department that establishes the statutes, administrative rules, council standards, local ordinances, application requirements and study requirements for the site certificate application. The Project Order is initially based on the information provided in the Notice of Intent but may be amended by the Council or Department at any time.[9]

In establishing the study requirements for the application, the project order establishes the area for which the applicant must describe the proposed facility's impacts on resources protected by Council standards. These analysis areas may be the same as the "study areas" required for the NOI or may be adjusted based on the information provided in the NOI and any comments from reviewing agencies or the public. Different analysis areas may be established for different types of resources.[10]

The Council must ultimately evaluate the application and other information provided on the record and determine if the preponderance of the evidence supports the conclusion that the facility complies with all applicable Council standards or the overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by the applicable standards the facility does not meet.

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 to allow, but not require, the Council to make findings for impacts on scenic resources and recreational opportunities outside the analysis area described in the Project Order.

Discussion:

Alternative 1 would maintain the current standards. While the current language of the Protected Areas Standard is not consistent with the Scenic Resources and Recreation Standards, in most cases the findings that result may be similar in scope because the information an applicant is required to provide to demonstrate compliance with the standards under OAR 345-021-00010 is limited to the analysis area established in the Project Order. A difference could arise if evidence related to impacts to a Protected Area outside of the established analysis area was voluntarily introduced into the record by the applicant, a reviewing agency, or an interested member of the public. Under the current rules, the Council would likely be required to consider such evidence where the scope of evidence that may be considered under the Scenic Resources and Recreation Standards is limited by the standard.

Alternative 2 would impose a similar limitation on Council's consideration of evidence and resulting findings of compliance with the Protected Areas Standard, to evidence related to Protected Areas within the analysis areas established by the Project Order.

Alternative 3 would remove the limitation on Council's consideration of evidence, and resulting findings, related to impacts to Scenic Resources and Recreational opportunities outside of the established analysis areas. This alternative would not impose new study or application requirements on applicants or certificate holders, but could result in some additional analysis or evaluation being required if impacts to scenic

[9] ORS 469.330(4)

[10] We note that a previous version of this document incorrectly stated that the study area for the NOI is the default analysis area. This is true in the expedited review process described under ORS 469.373, but not in the standard application review.

resources or recreational opportunities outside of the analysis area were identified after the Notice of Intent phase and issuance of the Project Order.

In responses to the Department's request for comments on this issue, many stakeholders agreed that there should be consistency in the scope of findings required by Council Standards, but there was not consensus on which approach should be pursued. Some stakeholders supported Alternative 2 because it would add some additional certainty for applicants and because they argued that the analysis areas are adequate to identify reasonably foreseeable impacts to resources. We also note that if an analysis area was found to be inadequate, the Project Order can be amended by the Council or the Department at any time. Other stakeholders supported Alternative 3, arguing that it was inappropriate for the scope Council's findings to be limited by the Department's Project Order.

Recommendation: Staff recommends the Council amend the Scenic Resources and Recreation Standards, as identified in Alternative 3. Under ORS 469.330(3) the primary functions of the project order is to establish the statutes, administrative rules, council standards, local ordinances, application requirements and study requirements for the site certificate application. While the project order does play an important role in shaping the evidentiary record for the Council's evaluation and the scope of findings related to compliance with applicable laws and rules other than those adopted by the Council, it is not clear that it should play a similar role in limiting the Council's findings on impacts to resources protected under its own standards.

OAR 345-022-0080(1) Except for facilities described in section (2), to issue a site certificate, the Council must find that the design, construction and operation of the facility, taking into account mitigation, are not likely to result in significant adverse impact to scenic resources ~~and~~or values identified as significant or important in a local, tribal, state*, or federal land use or land management plan~~s, tribal land management plans and federal land management plans for any lands located within the analysis area described in the project order~~. (*See Issue 7)

OAR 345-022-0100(1) Except for facilities described in section (2), to issue a site certificate, 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~~. * * *"

Issue 2.1 – Study Areas for Protected Areas, Recreation, and Scenic Resources Standards

Issue description: Some stakeholders recommend that the study areas for impacts to Protected Areas, Recreation, and Scenic Resources are too large, especially for renewable energy facilities.

Background: Under OAR 345-001-0010(59), the current study area for impacts to Protected Areas is 20 miles; for to scenic resources, 10 miles, and for impacts to recreational opportunities, 5 miles.

In establishing the study requirements for the application, the project order establishes the area for which the applicant must describe the proposed facility's impacts on resources protected by Council standards. These analysis areas may be the same as the "study areas" required for the NOI or may be adjusted based on the information provided in the NOI and any comments from reviewing agencies or the public. Different analysis areas may be established for different types of resources.

In response to the Department's request for advice on this rulemaking, one Stakeholder recommended Council consider reducing the study area for protected areas from 20 miles to 10 miles, consistent with the analysis area for scenic resources and public services. The stakeholder argued that the most long-distance

impact category that must be analyzed for Protected Areas are visual impacts, and that the analysis area set for the Scenic Resources standard would be sufficient. Another stakeholder stated that the study areas for all three standards were too large for solar photovoltaic facilities and should be reduced to 1 mile from the site boundary.

Another stakeholder stated that they felt the current study areas were appropriate, but suggested that the Council explicitly limit the application of analysis area to exclude impacts to resources outside of the State of Oregon to avoid confusion where a project under review is located close to Oregon's borders.

Alternatives:
1. Make no changes
2. Reduce the study area for protected areas to 10 miles, or another distance, for all facilities
3. Reduce the study areas for impacts to protected areas, scenic resources, and recreational opportunities to 1 miles, for solar photovoltaic facilities
4. In lieu of, or addition to, one of the above, specify that study areas and analysis areas only extend to Oregon's borders.

Discussion: Staff notes that the study area requirements in current rule are not specific to any type of energy facility, and while current trends indicate that the majority of applications for generating facilities moving forward will be for proposed renewable energy facilities, the Council may still review applications for facilities that produce air emissions that may have impacts over greater distances. The Council will also likely review applications for non-generating facilities that have a different impact profile, and it would be inappropriate to set general study requirements based solely on the impacts associated with renewable energy facilities.

It may be appropriate to base study area requirements on the assumed impact profiles of the type of facility being proposed, but the Department does not have the empirical basis to determine what those distances would be appropriate at this time. We do note that one 2012 study of wind turbine visibility in Wyoming and Colorado conducted by the Argonne National Laboratory concluded that an appropriate radius for visual impact analyses for wind energy facilities would be 30 miles.

Recommendation: Because staff does not have an appropriate empirical basis to recommend changes to the study areas currently in rule at this time, staff recommends Council make no changes, as described under Alternative 1. Staff recommends Council consider this issue further in Phase 2 or 3 of the Application Process Review rulemaking.

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 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.[11]

[11] P.L. 116-9, Mar. 12, 2019

Alternatives:

1. Amend rule to update the rule to reference the date of adoption of the new rules.

2. Amend rule to remove the date.

3. Amend rule to specify that Council must make findings based on designations in effect on the date the Project Order is issued.

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 for this issue.

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 1 would provide some certainty to certificate holders by clearly establishing the areas that are protected under the standard, but more frequent rulemaking would be required to keep the rule up to date.

Alternative 2 would likely reduce the need for future rulemaking to keep the rule current but would require the Council to determine how to address protected areas that are designated or established while a facility is under review. We note that the designation of new protected areas occurs infrequently, and due to the significance of both the resources and the level of protected afforded to them, an area that may be designated is identified well in advance of the formal designation in most cases.

To reduce this uncertainty, the Council could specify that the standard only applies to areas designated before a certain point in the review process, such as before the submission of the Notice of Intent, the preliminary application, or the complete application. This would be consistent with the way applicable substantive criteria under ORS 469.504(1)(b)(A) are determined but it is not clear that it would be appropriate to limit Council's review of protected areas in the same way.[12] One stakeholder recommended that, rather than basing the applicability of the standard based on the timing of applicant submissions, it would be more consistent with other standards if protected areas were identified based on the date the Project Order is issued. We note that this would still allow some flexibility to consider newly protected areas, as the Council or the Department can amend the Project Order at any time.[13] We have incorporated this recommendation in Alternative 3.

As noted elsewhere in this document, the primary function of the project order is to establish the statutes, administrative rules, council standards, local ordinances, application requirements and study requirements for the site certificate application. As such, it does appear that it would be appropriate to limit the protected areas for which the applicant must provide information and impact analyses to those established on the date the project order is issued, but it is not clear that the project order should play a similar role in limiting the Council's findings or consideration of evidence that a protected area was established after that date.

Recommendation: Staff recommends that Council remove the date, as described in Alternative 2. Staff acknowledges that this may cause some uncertainty in how the Council will address protected areas that are designated or established while a project is under review. We do not, however, believe the issue of how to account for resources that arise or are identified during the Council's review of an application is unique to the protected areas standard, and as such, resolving this issue may be outside of the scope of this rulemaking and would be more appropriately addressed as part of the Application Process Review Rulemaking.

[12] OAR 345-020-0000(9)
[13] 469.330(4).

Issue 4 – Lists of Protected Areas

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

Issue description: The Protected Areas Standard contains a list of designation categories 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. Some of the listed categories contain lists identifying specific areas within the categories that appear to be incomplete or out of date. We have provided additional background on each of the categories of protected area designations included in the current rule, as well as additional categories that provide comparable protections to resources and values in the recommendations section below.

Alternatives:

1. Make no changes.

2. Amend rule to provide updated lists that identify all current protected areas.

3. Amend rule to remove specific protected areas and list only specific categories and designations.

Discussion: Because the lists in the rule are not exhaustive the Council may choose to make no changes, or only make limited changes to remove outdated references at this time, as described in Alternative 1.

The Council may also choose to update the lists to reflect all currently designated areas as described in Alternative 2. Several stakeholders recommend the Council retain the non-exclusive lists of specific protected areas because they help facilitate understanding of which types of areas are intended for each category; however, as one stakeholder pointed out, the updated list would also be out of date soon after a new rule is adopted.

Removing the lists as described in Alternative 3 would reduce the need to update the rule, by relying solely on specific designation categories. Several commenters supported this approach as not having outdated lists in the rule would reduce confusion.

Recommendation: Staff acknowledges that some stakeholders find the illustrative, non-exhaustive lists currently provided in rule to be helpful, but the inclusion of outdated information in rule can be problematic. Because protected areas may be added, renamed, or redesignated at any time, staff recommends Council remove the specific protected areas from the rule as described in Alternative 3. If Council wishes to continue making lists identifying specific protected areas available to stakeholders, we recommend providing this information as an informational resource that can be updated outside of the formal rulemaking process.

In addition to removing the specific examples of protected areas from the rule, staff recommends additional changes to align the rule with current law, clarify ambiguity, and to add additional categories that are comparable in the level of protection and types of resources and values protected to those protected areas included on the current list. We document the rationale for the recommended changes, we discuss each category individually below.

National Parks

Under OAR 345-022-0040(1)(a), National Parks are considered protected areas under the Council's Standard. National Parks are designated by Congress to protect "superlative" natural, historic, and recreation areas. The term "national park" is also commonly used to describe areas with other titles that are administered by the National Parks Service for park, monument, historic, parkway, recreational, or other purposes as units of the National Park System.[14] These other areas include national preserves, national memorials, and national historic parks and sites.

The current rule lists Crater Lake National Park and Fort Clatsop National Memorial as protected areas. As mentioned above, the Fort Clatsop National Memorial was re-designated as the Lewis and Clark National Historical Park in 2004. Several sites within the Nez Perce National Historic Park and the McLoughlin House, which is part of the Fort Vancouver National Historic Site, are also located within Oregon. While they are formally designated as National Monuments, both the John Day Fossil Beds National Monument and the Oregon Caves National Monument and Preserve are administered as units of the National Park System. Since the rule was last amended, approximately 4,000 acres of land previously included in the Rogue River-Siskiyou National Forest were transferred to the Oregon Caves National Monument and Preserve.

Updating the rule would ensure that any new park areas are included, and staff does not believe any other changes to the scope of the category are necessary; however, to clarify that all units of the National Park System are included we recommend the rule language be amended as follows:

> (a) A ~~N~~national parks, ~~including but not limited to Crater Lake National Park and Fort Clatsop National Memorial~~ or another component of the National Park System described under 54 U.S.C. 100501;

National Monuments

Subsection (1)(b) of the rule provides that National Monuments are protected areas under the Council's Standard. The Antiquities Act of 1906 authorizes the President to declare federal lands containing significant historic scientific resources or values to be national monuments. National monuments may also be established through an act of congress.[15] As described above, a national monument may be administered by the National Park Service as a unit of the National Park System. Other national monuments are administered by the Bureau of Land Management (BLM) as components of the National Landscape Conservation System.[16]

The rule currently lists the John Day Fossil Bed National Monument, Newberry National Volcanic Monument and Oregon Caves National Monument. The BLM administered Cascade-Siskiyou National Monument was established by presidential proclamation in 2000, and expanded to include an additional 48,000 acres (including 43,000 acres in Oregon) in 2017.

Because national monuments are already included in the current rule, staff does not believe any changes to the scope of the category are necessary, but to clarify that all units of the National Park System are included we recommend the rule language be amended as follows:

Updating the rule would ensure that the new areas included in the Cascade-Siskiyou National Monument and the Oregon Caves National Monument and Preserve areas are included in the rule. Staff does not recommend other changes to the scope of the rule; however, for consistency we recommend a citation to the Antiquities Act be included in the rule language:

[14] 54 U.S.C. 100101 and 100501.
[15] 54 U.S.C. 320301 to 320303
[16] 16 U.S.C. 7202

(b) A ~~N~~national monument~~s~~ established under 54 U.S.C. 320201 or an act of Congress~~including but not limited to John Day Fossil Bed National Monument, Newberry National Volcanic Monument and Oregon Caves National Monument~~;

Wilderness Areas

Subsection (1)(c) of the rule provides that wilderness areas and "areas recommended for designation as wilderness areas" are protected areas under the Council's standard. Wilderness Areas are congressionally designated areas which are protected and managed to preserve their natural conditions as well as ecological, geological, or other features of scientific, educational, scenic, or historical value. Under the Wilderness Act of 1964, only congress can establish a wilderness area. Wilderness areas may be administered by the US Forest Service, the Bureau of Land Management, Parks Service or other federal agency. Once established, all wilderness areas are considered to be components of the National Wilderness Preservation System.[17]

Since the rule was last amended, the Omnibus Public Lands Management Act of 2009 established several new Wilderness Areas in Oregon and expanded several more. In total this added over 100,000 acres to the National Wilderness Preservation System in Oregon alone.[18] The John D. Dingell, Jr. Conservation, Management, and Recreation Act added the 30,621 acre Devil's Staircase Wilderness Area in 2019.[19] As of 2019, there were approximately 2.5 million acres of designated wilderness in Oregon, representing about 8 percent of federal lands in this state.

Updating the rule would ensure that the new wilderness areas established by congress are included in the rule. Staff does not recommend other changes to the scope of the rule; however, staff does recommend Council make administrative changes intended to increase consistency with the language used in federal law. First, subsection (1)(c) of the rule currently includes wilderness areas "and areas recommended for designation as wilderness areas pursuant to 43 U.S.C. 1782." We recommend the Council amend the rule to address these wilderness study areas in a separate subsection to reflect their administrative status, as described below. Second, to be consistent with terminology used in federal law, we recommend Council add reference to the National Wilderness Preservation System" in the rule. Neither of these changes are intended to expand the scope of the types of areas included in the rule.

(c) A component of the National Wilderness Preservation System ~~areas established pursuant to The Wilderness Act,~~ described under 16 U~~.~~S~~.~~C~~.~~ 1131 et seq. ~~and areas recommended for designation as wilderness areas pursuant to 43 U.S.C. 1782~~;

Wilderness Study Areas

As described above, subsection (1)(c) of the rule provides that wilderness areas and "areas recommended for designation as wilderness areas under 43 U.S.C. 1782" are protected areas under the Council's standard. The Federal Land Policy and Management Act of 1976 required the BLM to conduct a study of all roadless areas with sufficient wilderness characteristics to be considered for designation by Congress as wilderness areas, and to make recommendations to the President regarding their suitability or nonsuitability for preservation as wilderness. The law provides that the President may then recommend that Congress designate any of these wilderness study areas as wilderness areas.

The BLM completed the Final Wilderness EIS and Wilderness Study Report for Oregon in 1989. The Wilderness Study Report includes recommendations for 92 wilderness study areas in Oregon. The report recommended approximately 1.3 million acres in 49 wilderness study areas as suitable for preservation, and 1.5 million acres in 76 wilderness study areas as nonsuitable. Presidential recommendations were made to congress in the early

[17] 16 U.S.C. 1131 et seq.
[18] P.L. 111-11
[19] P.L. 116-9

1990's, but many recommendations remain pending. We note that regardless of the BLM or presidential recommendation, the BLM is required to manage all wilderness study areas "in a manner so as not to impair the suitability of such areas for preservation as wilderness" until Congress either establishes the area as a component of the National Wilderness Preservation System or withdraws the area from consideration.[20]

There is some ambiguity as to whether the rule is intended to include all wilderness study areas, areas recommended by the BLM as suitable for preservation as wilderness, or wilderness study areas that were recommended for designation to Congress. Because a wilderness study area must be managed to preserve its wilderness characteristics until Congress acts to withdraw it from consideration, we recommend that council resolve any ambiguity in the rule by amending the rule to include all BLM Wilderness Study Areas. As noted above, this would potentially include an additional 1.5 million acres of WSA lands (minus any areas that have been designated as wilderness or released by congress since 1989) as protected areas under the Council's standards, however most of these areas were identified as WSAs because they are located in remote areas, and would likely be not suitable for most energy development.

Based on a stakeholder recommendation we also considered whether additional changes should be made to include proposed or recommended wilderness areas on other federal lands. The Wilderness Act of 1964 required the US Forest Service to conduct a similar review of areas suitable for wilderness on National Forest lands, and while there is still considerable controversy around its outcomes, this process has largely been completed. There is currently a proposal to designate 500,000 acres surrounding Crater Lake as a wilderness area, but this land is within the boundaries of Crater Lake National Park and as such, is already included as a protected area under the Council's Standard.

For this reason, we do not believe additional changes to the scope of this category are necessary. Based on the analysis above, we recommend that Council establish a new subsection of the rule as follows:

(h) A wilderness study area established under 43 U.S.C. 1782;

National Wild and Scenic Rivers

Subsection (1)(k) of the rule provides that Oregon Scenic Waterways and National Wild and Scenic Rivers are protected areas under the Council's Standard. While rivers protected under these designations may overlap, staff recommends Council amend the rule to address these state and federal designations separately, and accordingly, Oregon Scenic Waterways are discussed separately below.

The Wild and Scenic Rivers Act of 1968 established the National Wild and Scenic Rivers System, which protects designated free-flowing rivers for the benefit and enjoyment of present and future generations. Designated rivers or river segments are commonly referred to as wild and scenic rivers, although there are three classes of wild and scenic river designations, reflecting the characteristics of a river at the time of designation and affecting the type and amount of development that may be allowed afterward:

- Wild rivers are free from impoundments (dams, diversions, and so forth) and generally inaccessible except by trail. The watersheds are primitive, and the shorelines are essentially undeveloped.
- Scenic rivers are free from impoundments and in generally undeveloped areas but are accessible in places by roads.
- Recreational rivers are readily accessible by road, with some shoreline development, and may have been subject to some impoundment or diversion in the past.

[20] 43 U.S.C. 1782(c)

New wild and scenic rivers may be added through an act of congress or designated by the Secretary of Interior through administrative action if a river that is protected under a similar designation by state statute is nominated for inclusion by that state's governor.[21] The Wild and Scenic Rivers Act designated 84.5 miles of the Rogue River as components of the National Wild and Scenic River System. Since then, Congress has included approximately 1,900 additional miles of wild and scenic rivers in Oregon. Notably, the Omnibus Oregon Wild and Scenic Rivers Act of 1988 added more than 1,400 miles in 40 new Wild and Scenic Rivers to the National Wild and Scenic River System in Oregon.[22] Several additional wild and scenic rivers have been designated by Congress since the rule was last amended, through the Omnibus Public Land Management Act of 2009 and the John D. Dingell, Jr. Conservation, Management, and Recreation Act of 2019.

The only wild and scenic river designations made through the state nomination process are an 11 mile segment of the Klamath River and a 10 mile segment of the Wallowa River which were nominated for inclusion in the system by Governor Roberts in 1994 and 1996, respectively.

National Wild and Scenic Rivers are administered by one of four federal land management agencies: the US Forest Service, the BLM, the National Parks Service, and the US Fish and Wildlife Service. Section (5)(d) directs these agencies to identify potential additions to the National Wild and Scenic Rivers System during their resource management planning processes, but no special protection is given to these potential additions unless a study is authorized by Congress.

Congress may direct a federal agency to conduct a study to determine if a specific river is suitable for wild and scenic designation. The Wild and Scenic Rivers Act affords the same level of protection to these study rivers as designated rivers during the study process and for three-years following the transmittal of the final study report by the President to Congress.[23] The current rule provides that waterways listed as potentials for designation are also considered protected areas under the Council's standard.

Updating the rule would ensure that the new wild and scenic rivers established by congress are included in the rule. Other than establishing a new subsection to address wild and scenic rivers separately from state scenic waterways, staff does not recommend other changes to the scope of the category; however, staff does recommend Council make administrative changes intended to increase consistency with the language used in federal law:

> (d) A river designated as a component of, or potential addition to, the National Wild and Scenic River System under 16 U.S.C. 1271 et seq.;

National Wildlife Refuges

Section (1)(d) of the rule provides that national and state wildlife refuges are considered protected areas under the current rule. We recommend that Council amend the rule to address these state and federal designations separately, and accordingly State Wildlife Refuges are discussed separately below.

National wildlife refuges include wildlife refuges, wildlife ranges, wildlife management areas, game preserves, and conservation areas. These areas are managed for the conservation, managements, and restoration of fish and wildlife, with priority given to wildlife-dependent recreation. Congress, the President, or the Secretary of the Interior may establish new Wildlife Refuges, which are administered by the US Fish and Wildlife Service as units of the National Wildlife Refuge System under the National Wildlife Refuge System Administration Act of 1966.[24]

[21] 16 U.S.C. 1273(a)
[22] P.L. 100-557
[23] 16 U.S.C. 1278(b)
[24] 16 U.S.C. 668dd-668ee

US Fish and Wildlife Service currently administers 21 wildlife refuges in Oregon. Since the rule was last amended, over 10,000 acres have been added to the National Wildlife Refuge System in Oregon, and the Wapato Lake National Wildlife Refuge was established from lands that had been added to the Tualatin River National Wildlife Refuge in 2007.

Updating the rule would ensure that new National Wildlife Refuge System lands are included as protected areas under the Council's Standard. Staff does not recommend other changes to the scope of the category; however, staff does recommend Council make administrative changes intended to increase consistency with the language used in federal law:

> (~~d~~e) A unit of the National and state wildlife refuge~~s~~ System described under 16 U.S.C. 668dd~~, including but not limited to Ankeny, Bandon Marsh, Baskett Slough, Bear Valley, Cape Meares, Cold Springs, Deer Flat, Hart Mountain, Julia Butler Hansen, Klamath Forest, Lewis and Clark, Lower Klamath, Malheur, McKay Creek, Oregon Islands, Sheldon, Three Arch Rocks, Umatilla, Upper Klamath, and William L. Finley~~;

National Coordination Areas

A national coordination area is a wildlife management area that is made available to a state either by cooperative agreement between the United States Fish and Wildlife Service and a State under the Fish and Wildlife Coordination Act, or by long-term leases or agreements pursuant to title III of the Bankhead-Jones Farm Tenant Act.[25] Like national wildlife refuges, coordination areas are units of the National Wildlife Refuge System, but these units are mostly administered by state wildlife agencies.

There are currently three coordination areas in Oregon: The Government Island Game Management Area is a 1.79 acre parcel in the Government Island State Recreation Area. The Ochoco Reservoir Public Fishing Area includes 40 acres which are adjacent to the Ochoco Lake State Park (administered by Crook County). The Summer Lake Coordination Area consists of 7,128 acres of federal land within the larger Summer Lake Wildlife Area administered by the Oregon Department of Fish and Wildlife. No new national coordination areas have been established in more than 20 years.

Because coordination areas are considered units of the National Wildlife Refuge System, and because they are generally within the boundaries of another protected area, staff recommends Council eliminate this category from the list. This change is not expected to remove any existing protected areas from protection under the Council standard.

> ~~(e) National coordination areas, including but not limited to Government Island, Ochoco and Summer Lake;~~

National Fish Hatcheries

Subsection (1)(f) of the current rule provides that national and state fish hatcheries are protected areas under the Council Standard. Consistent with other categories discussed in this document, staff recommends Council amend the rule to address these state and federal facilities separately, and accordingly, state fish hatcheries are discussed separately below.

National fish hatcheries promote and maintain healthy populations for fish and other aquatic species, provide resources to help conserve imperiled species, and conduct scientific research. In addition to National Fish Hatcheries, the US Fish and Wildlife Service administers fish technology centers and fish health centers as units of the National Fish Hatcheries System.

[25] 16 U.S.C. 668ee(5)

No new National Fish Hatcheries have been established since the rule was last amended. While there are not fish technology centers or fish health centers located in Oregon, staff does recommend changing the scope of the rule to include all units of the National Fish Hatcheries System, such as the Abernathy Fish Technology Center in Longview, WA, to increase consistency with federal law:

> (f) National ~~and state~~ fish hatcheries, and other units of the National Fish Hatchery System described under 16 U.S.C. 760aa~~including but not limited to Eagle Creek and Warm Springs~~;

National Recreation and Scenic Areas

National Recreation Areas are established through acts of congress. As the name suggests the sites have a recreation focus, and their establishing legislation often authorizes activities such as boating, fishing, and hunting. National Recreation Areas may be established on lands administered by the National Parks Service (often surrounding Bureau of Land Reclamations reservoirs), Forest Service, or BLM. Since the rule was last updated, Congress designated the one new National Recreation Area, the Mount Hood NRA, through the Omnibus Public Lands Management Act of 2009.

Congress has also established a number of scenic areas on lands administered by the Forest Service. National Scenic Areas may also be designated as National Scenic Research Area, National Scenic Recreation Area, or National Scenic and Wildlife Areas. These areas generally contain outstanding scenic characteristics; recreational values; and geologic, ecological, and cultural resources.

In additional to national scenic and recreation areas, congress has also designated a number of other special resources management units on lands administered by the Forest Service to protect specific resources and special scenic, natural, cultural, and wildlife values. This includes the Crystal Springs Watershed Special Resources Management Unit, which congress designated through the Omnibus Public Lands Management Act of 2009 to protect the Crystal Springs Watershed as a source of clean drinking water for the residents of Hood River, Oregon. Like national scenic and recreation areas, special management units are generally withdrawn from mining and mineral leasing, subject to valid existing rights at the time of designation, and from commercial timber harvest.

One stakeholder recommended that the Council consider amending the rule to include special management unit areas as protected areas under the Council's Standard. While the management emphasis is somewhat different than national recreation and scenic areas, this designation generally provides a similar level of protection to resources and values that are protected under the Council's standard. As such, we agree that it would be appropriate to include congressionally designated special resources management units as protected areas under the Council's standard.

Updating the rule would ensure that the Mt. Hood NRA, and any other new national recreation and scenic areas established by congress are included in the rule. Staff also recommends that Council amend the rule to include congressionally designated special resources management units as follows:

> (g) A congressionally designated ~~N~~ national recreation area, ~~and~~ national scenic area~~s~~, or special resources management unit~~ including but not limited to Oregon Dunes National Recreation Area, Hell's Canyon National Recreation Area, and the Oregon Cascades Recreation Area, and Columbia River Gorge National Scenic Area~~;

The Steens Mountain Cooperative Management and Protection Area

The Steens Mountain Cooperative Management and Protection Area (CMPA) was established by the Steens Mountain Cooperative Management and Protection Act of 2000 to conserve, protect and manage the long-

term ecological integrity of Steens Mountain for future and present generations.[26] The CMPA is a unique management designation that emphasizes collaboration with private landowners and resource interests within the larger CMPA boundary.

The stakeholder that raised this issue did not recommend the council consider the CMPA specifically, however, because the CMPA is managed as part of the National Landscape Conservation System which includes many lands under special designations that are included as protected areas under the Council's standard, we have provided additional background here. We note that in 2010, the Council denied a petition from the Oregon Natural Desert Association to conduct rulemaking to add the CMPA to the list of protected areas.[27]

The CMPA boundary includes around 500,000 acres in Harney County, Oregon, but the CMPA designation only applies to the 428,156 acres of BLM land within the CMPA boundary. While the BLM works with private landowners to preserve lands on a voluntary basis, the CMPA designation does not affect the management of private lands within the boundary. Within the CMPA, 174,287 acres are designated Wilderness Areas and dedicated State Natural Area. An additional 118,637 acres are managed as Wilderness Study Areas. The CMPA also contains two Areas of Critical Environmental Concern (ACEC), six Research National Areas (RNA), and 12 designated Wild and Scenic River segments but most of these are entirely within the designated Wilderness Area. As a result, approximately 70 percent of public lands within the CMPA boundary are considered to be protected areas under the current rule.

The wilderness and other protected areas in the CMPA are also designated as exclusion or avoidance areas for renewable energy development under the Steens Mountain Resource Management Plan. The remaining portions of the CMPA are also withdrawn from mineral and geothermal exploration and development, but solar and wind development is recognized as a valid use in some areas.

Because the majority of public land within the CMPA are already considered to be protected areas under the Council's Standard, and because it is not clear that the remaining portions were intended to be precluded from renewable energy development, we do not recommend the Council make additional changes to the rule to include the CMPA as a protected area.

<u>Areas of Critical Environmental Concern, Outstanding Natural Areas, and Research Natural Areas</u>

ACECs are BLM administered areas where special management attention is required to protect and prevent irreparable damage to important values, resources, systems or processes, or to protect life and safety from natural hazards.[28] ACECs are generally identified and established through the BLM's resource planning process.[29] There are 49 designated ACECs identified in the draft 2020 Oregon Natural Areas Plan. Because the ACEC designation is only applicable to BLM administered lands, all ACECs are considered to be protected areas under the current rule.

Outstanding Natural Areas (ONAs) are established to protect areas of unusual natural characteristics. The BLM has administratively designated two ONAs in Oregon, and Congress established a third, the Yaquina Head Outstanding Natural Area.

[26] P.L. 106-399
[27] Energy Facility Siting Council Denial of Petition for Rulemaking, June 28, 2010.
[28] 43 U.SC §1702(a)
[29] 43 CFR 1610.7-2

Because the ACECs and ONA designations are only applicable to BLM administered lands, so all of these areas are considered to be protected areas under the current rule.

RNAs are areas that are permanently protected and maintained in natural condition to preserve unique ecosystems or ecological features; rare or sensitive species of plants and animals and their habitat; or high-quality examples of widespread ecosystems.

Other federal land management agencies may also identify and designate Research Natural Areas. There are 153 established and 31 proposed RNAs identified in the draft 2020 Oregon Natural Areas Plan. The BLM administers 83 of these RNAs, which are included as protected areas under the current standard.[30] Another 13 RNAs administered by the National Parks Service, US Fish and Wildlife Service, or Army Corps of Engineers would also be considered protected areas because they are within the boundaries of another protected area, such as a National Park, National Monument, National Wildlife Refuge, or State Wildlife Area.

The 88 remaining RNAs consist of the Boardman RNA, which is located on Department of Defense Lands in the Boardman Bombing Range, and 57 established and 30 proposed RNAs administered by the US Forest Service. While some of these RNAs may be within the boundaries of another protected area, it is likely that many would be excluded from the current rule.

While there are some differences in the procedures for establishment of RNAs depending on the managing agency, all RNA's are managed for similar purposes, and the ecosystems and species that are prioritized for protection under RNA designation are coordinated through the Pacific Northwest Interagency Natural Areas Network.

In addition to RNAs, the Forest Service may designate other Experimental Areas for long term ecological research, currently designated Forest Service Experimental Areas include four experimental forests, and one experimental forest and range in Oregon. We note that subsections (1)(l) and (n) of the existing rule includes experimental areas and research forests established by Oregon State University as protected areas under the Council's Standard. As one stakeholder pointed out in their response to the Department's request for comments on this rulemaking, it is not clear if this is intended to include areas that are owned and administered solely by OSU, or if forest service experimental areas that are collaboratively managed by OSU would also be included. For example, OAR 345-022-0040(1)(l) refers to "the Starkey site and the Union site" as experimental areas established by the OSU Rangeland Resources Program. This likely refers to the Eastern Oregon Agricultural Research Center's Union location and the Starkey Experimental Forest and Range where the research center's cattle herd is grazed for part of the year. Other areas, such as the H.J. Andrews Research Forest, a USFS Research Forest that is collaboratively managed by the Pacific Northwest Research Station, Oregon State University, and Willamette National Forest, are not referenced in the rule.

The Forest Service may also administratively establish special areas to protect areas with important scenic, historical, geological, botanical, zoological, paleontological or other recreational and scientific values through the forest planning process.[31]

Staff recommends the Council amend the rule to include all RNA's because it is not clear why the rule would treat RNAs administered by the USFS or another agency differently than an RNA administered by the BLM. We also recommend the Council include experimental areas and administratively designated special areas on

[30] This includes the Dry Mountain RNA, which is jointly administered by the BLM and USFS.
[31] 36 CFR 294.1 and FSM 2372

forest service lands as protected areas under the Council Standard because they are designated to protect resources and values that are similar to those protected under the ACEC designation. Amending the rule to include these areas could significantly expand the area of land considered to be "protected areas" under the Council's Standard, but these areas would likely be in forested areas away from most energy development. To include these areas, we recommend the Council amend the rule as follows:

(~~o~~i) ~~Bureau of Land Management~~ A federally designated:

(A) ~~a~~ Area~~s~~ of critical environmental concern~~,~~;

(B) ~~o~~ Outstanding natural area~~s~~; ~~and~~

(C) ~~r~~ Research natural area~~s~~;

(D) Experimental forest of range; or

(E) Scenic, geological, botanical, zoological, paleontological, historica, or recreational area;

State Parks and Waysides

Subsection (1)(h) of the current rule lists State Parks and waysides listed by the Oregon Parks and Recreation Department (OPRD) as protected areas.

OPRD manages a park system that encompasses 113,142 acres, which includes over 250 park areas, including state parks, waysides, and scenic, historic, and recreation areas.[32] OPRD also manages the 362 miles of ocean shores and 3,838 acres of the Willamette River Greenway (3,838 OPRD-managed acres.

The current language of the rule is somewhat ambiguous in that it only identifies "listed" state parks and waysides as protected areas. Staff believes this terminology is likely not intended to exclude other park areas managed by OPRD, but rather, reflects the categories of park areas in existence in 1980 when the rule language was originally drafted. At that time, the Oregon Parks System was managed by the Oregon Department of Transportation.

To ensure that all areas of Oregon's State Park System are included as protected areas under the Council's rules, staff recommends the Council amend the rule as follows:

(~~h~~i) A ~~S~~ state park~~s and,~~ wayside~~s as listed by~~ or other area managed by the Oregon ~~Department~~ of Parks and Recreation Department for scenic, historic, natural, cultural or recreational purposes under ORS 390.121; ~~and~~

(k) ~~t~~ The Willamette River Greenway created under ORS 390.310 to 390.368;

State Natural Heritage Areas

Subjection (1)(i) of the current rule lists state natural heritage areas listed in the Oregon Register of Natural Heritage Areas under ORS 273.581 as protected areas.

The Oregon Natural Areas Program was established to provide a framework for decision making related to the identification and conservation of areas that have substantially retained their natural character or that are valuable as habitat for plant and animal species or for the study and appreciation of the natural features.[33] The

[32] ORS 390.3111

[33] ORS 273.566

program is intended to be complementary to and consistent with the research natural area program on federal lands in Oregon.[34]

In 2007, when the rule was last amended, the Natural Areas Program was administered by the Department of State Lands, and the Oregon Register of Natural Heritage Areas was maintained by the Natural Heritage Advisory Council. In 2011, the legislature transferred administration of the Natural Areas Program and maintenance of the Registry to OPRD and abolished the Natural Heritage Advisory Council. The bill also renamed the Oregon Register of Natural Heritage Areas as the Oregon Register of Natural Areas.[35] A stakeholder recommended that the Council amend the rule to refer to "state natural areas" instead of "state natural heritage areas," consistent with this change.

OPRD and the Oregon Biodiversity Information Center maintain the Oregon Natural Areas Plan, which identifies areas of land or water in Oregon that are managed for scientific research and education, containing important biological or geological attributes. The natural areas identified in the plan include state and federal lands managed under protective designations, as well as private property that is voluntarily designated as a natural area by its owner.

Not all natural areas identified in the plan are included in the Oregon Register of Natural Areas. The register is used to identify significant natural areas that are managed in ways that protect one or more natural heritage resources. Natural Areas can be included in the Oregon Register of Natural Areas either through the process of "registration" or "dedication," with dedication resulting in the more permanent creation of a "state natural area." The Oregon Parks and Recreation Commission makes final decisions on whether or not to include a property on the register.

The statutory scheme in place before 2011 differentiated between registered "natural areas" and dedicated "natural heritage conservation areas", creating some ambiguity about whether the rule intended to limit the Council's Standard to the protection of dedicated areas or include that all areas included on the register by the Parks and Recreation Commission as protected areas. Because the existing language of the Council's rule does not reference "dedicated" areas and because the more liberal construction appears to be consistent with the policy underlying the Natural Areas Program under ORS 273.566, it seems more likely that all natural areas included on the register were intended to be included as protected areas.

Staff recommends Alternative 2, to be consistent with current law. To avoid ambiguity about whether or not the rule includes all areas on the Oregon Register of Natural Areas, staff specifically recommends the Council amend OAR 345-022-0040(1)(i) as follows:

> "(~~i~~l) ~~State~~ natural ~~heritage~~ areas listed in the Oregon Register of Natural ~~Heritage~~ Areas ~~pursuant to~~under ORS 273.581;"

State Estuarine Sanctuaries

Subsection (1)(j) of the current rule lists state estuarine sanctuaries as protected areas under the Council's standard.

[34] ORS 273.576

[35] See 2011 Oregon Laws, chapter 319. To implement the bill, the Oregon Parks and Recreation Department also adopted rules under OAR chapter 736, division 045. These replaced the Department of State Lands rules.

The South Slough of Coos Bay was the first National Estuarine Sanctuary in the United States to be created under the Coastal Zone Management Act of 1972. The sanctuary was redesignated as the South Slough National Estuarine Research Reserve by the Coastal Zone Management Reauthorization Act of 1985.[36]

Today there are 29 National Estuarine Research Reserves, which are administered through partnerships between the National Oceanic and Atmospheric Administration (NOAA) and the coastal states. As such, the South Slough National Reserve is administered by both NOAA and the Oregon Department of State Lands (DSL). The Reserve's governing body is the South Slough National Estuarine Research Reserve Management Commission whose members are appointed by the Governor.

Since the rule was last amended, an additional 1,660 acres have been acquired for the reserve. Legislation that would allow the DSL to expand estuarine research reserve management area to include this, and other land acquired by DSL for the reserve, is currently under consideration by the legislature.[37]

To ensure any new lands added to the reserve are included as protected areas under the Council Standard, and to reflect the formal designation provided in law, staff recommends the Council amend the rule as follows:

> (~~j~~m) The ~~State estuarine sanctuaries, including but not limited to~~ South Slough National Estuarine ~~Sanctuary, OAR chapter 142~~ Research Reserve described under ORS 273.251;

State Scenic Waterways

Subsection (1)(k) of the rule provides that Oregon Scenic Waterways and National Wild and Scenic Rivers are protected areas under the Council's Standard. While rivers protected under these designations may overlap, staff recommends Council amend the rule to address these state and federal designations separately, and accordingly, National Wild and Scenic Rivers are discussed separately above.

The Oregon Scenic Waterways System was established through a voter initiative in 1970. The system is intended to protect the natural setting and water quality of Waldo Lake and other rivers with outstanding scenic, fish, wildlife, geological, botanical, historic, archaeologic, and outdoor recreation values.[38] Oregon Scenic Waterways are administered by the Oregon Parks and Recreation Department.

The initial legislation that established the system designated segments of 6 rivers as scenic waterways. The legislation authorized the governor, with the concurrence of the Oregon Water Resources Commission, to designate additional waterways identified as suitable by the Oregon Parks and Recreation Department as scenic waterways.[39] The governor added several new scenic waterways to the system between 1970 and 1988, when a second initiative expanded the system to include the waterways identified in ORS 390.826.

No new scenic waterways were designated from 1988 to 2016, when the Governor designated portions of the Chetco and Molalla Rivers as scenic waterways for their outstanding scenic, fish, wildlife, geological, botanical, cultural, and outdoor recreation opportunities. A segment of the Nehalem River was designated as a state scenic waterway in 2019. A candidate study is currently underway for a 27-mile section of the South Umpqua River.

To ensure that the new state scenic waterways are included as protected areas under the Council Standard, staff recommends the Council amend the rule as follows:

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[36] P.L. 99-272
[37] SB 126 (2021)
[38] ORS 390.815
[39] ORS 390.855

(~~k~~n) A component of the Oregon Scenic ~~w~~Waterways System designated ~~pursuant to~~ under ORS 390.~~826~~805 to 390.925~~, wild or scenic rivers designated pursuant to 16 U.S.C. 1271 et seq., and those waterways and rivers listed as potentials for designation~~;

State Wildlife Areas and Refuges

Subsection (1)(p) of the current rule provides that state wildlife areas and management areas identified in OAR chapter 635, division 008 are protected areas under the Council's Standard.

The Oregon Fish and Wildlife Commission is authorized to establish and develop wildlife refuge and management areas and prescribe rules governing the use of wildlife refuge and management. ODFW manages 20 wildlife areas across the state, each with a unique blend of fishing, hunting and wildlife viewing opportunities.

Staff does not recommend any changes to the scope of this category, but recommends Council amend the rule as follow to improve consistency with other sections.

(~~p~~o) A ~~S~~ state wildlife area~~s and~~, refuge, or management areas identified in established under ORS 496.146~~identified in OAR chapter 635, division 8.~~;

State Fish Hatcheries

Subsection (1)(f) of the current rule provides that national and state fish hatcheries are protected areas under the Council Standard. Consistent with other categories discussed in this document, staff recommends Council amend the rule to address these state and federal facilities separately, and accordingly, national fish hatcheries are discussed separately above.

As of 2019, ODFW managed 32 hatcheries, 5 off site rearing ponds, and 8 smolt acclimation / adult trapping facilities. Many of ODFW's hatcheries have been in continuous operation from the early 1900's. ODFW's fish hatchery programs are guided by the Native Fish Conservation Policy, the Oregon Fish Hatchery Management Policy and the Fish Health Management Policy. Fish management goals and hatchery program planning respond to the Oregon Plan for Salmon and Watersheds and other local, tribal, state, and federal watershed interests and guidelines.

To address state fish hatcheries, staff recommends the Council amend the rule to add a new subsection:

(p) A state fish hatchery established under ORS chapter 496 or 506;

OSU Agricultural Experimental Areas, Experiment Stations, and Research Centers

Subsections 1(l) and (m) of the rule provide that experimental areas and agricultural experimental stations established by Oregon State University College of Agriculture are included as protected areas under the Council's Standard.

The Hatch Act of 1887 provided federal funding for agricultural experiment stations at land-grant colleges in each state and territory. The Oregon Agricultural Experiment Station was created the following year, and the first branch station in Union, Oregon was opened in 1901. Since then the program has expanded to include experimental areas, stations, and research centers across the state. ORS chapter 567 codifies Oregon State University's authority to establish and operate the experiment station and branch stations and centers, which includes both the experimental areas and experiment station listed in the current rule.

No new areas have been added since the rule was last amended, but some of the branch stations have reorganized. For clarity, staff recommends Council combine the two subsections related to the OSU experiment station and associated areas as follows:

~~(l) Experimental areas established by the Rangeland Resources Program, College of Agriculture, Oregon State University: the Prineville site, the Burns (Squaw Butte) site, the Starkey site and the Union site;~~

(m) Agricultural experimental areas, experiment stations, and research centers established by the College of Agriculture, Oregon State University~~, including but not limited to:~~

~~Coastal Oregon Marine Experiment Station, Astoria.~~

~~Mid-Columbia Agriculture Research and Extension Center, Hood River.~~

~~Agriculture Research and Extension Center, Hermiston.~~

~~Columbia Basin Agriculture Research Center, Pendleton.~~

~~Columbia Basin Agriculture Research Center, Moro.~~

~~North Willamette Research and Extension Center, Aurora.~~

~~East Oregon Agriculture Research Center, Union.~~

~~Malheur Experiment Station, Ontario.~~

~~Eastern Oregon Agriculture Research Center, Burns.~~

~~Eastern Oregon Agriculture Research Center, Squaw Butte.~~

~~Central Oregon Experiment Station, Madras.~~

~~Central Oregon Experiment Station, Powell Butte.~~

~~Central Oregon Experiment Station, Redmond.~~

~~Central Station, Corvallis.~~

~~Coastal Oregon Marine Experiment Station, Newport.~~

~~Southern Oregon Experiment Station, Medford.~~

~~Klamath Experiment Station, Klamath Falls.~~

OSU Research Forests

Section (1)(p) of the current rule provides that research forests established by Oregon State University's College of Forestry are protected areas under the Council's Standard. Oregon State University currently manages ten forest tracts spread throughout Oregon, totaling 15,000 acres. This includes two new research forests which were added since the rule was last amended. The College of Forestry also collaborates on research and management activities on Federal Experimental Forests, which we have recommended be added to the category describing administratively designated federal protected areas above. Staff does not recommend changes to the scope of this category other than removing the list of specific research forests and tracts:

(n) Research forests established by the College of Forestry, Oregon State University~~, including but not limited to McDonald Forest, Paul M. Dunn Forest, the Blodgett Tract in Columbia County, the Spaulding Tract in the Mary's Peak area and the Marchel Tract~~;

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 Outstanding Resource Water policy is part of the state's antidegradation policy, and as such, its implementation is part of the Department of Environmental Quality's delegated authority to issue Non-Point Discharge Elimination System Permits and water quality certifications under section 401 of the Clean Water Act.

Oregon's 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.[40] The North Fork Smith River is considered a Protected Area as a Wild & Scenic River. On Jan. 21, 2021, the Oregon Environmental Quality Commission designated Crater Lake and Waldo Lake as Outstanding Resource Waters in the state of Oregon. These are also considered protected areas under the Council's standard.

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 likely that many Outstanding Resource Waters would be considered protected areas under the current rule.

Alternatives:

1. Make no changes.

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

Discussion: Amending the rule to add Outstanding Resource Waters to the list of protected areas under section 2 would ensure that the Council's standard includes all areas identified by the Environmental Quality Commission as having exceptional water quality, ecological, cultural and recreation values. However, because EQC prioritizes waters that are already likely to be considered Protected Areas under the current rule, it may not be necessary for the Council to change the rule to accomplish this goal.

In addition, while the Council is responsible for ensuring that an energy facility siting is generally consistent with state environmental policies, and that a proposed facility complies with state laws and rules, the Council does not make decisions on compliance in areas where authority has been delegated by the federal government to another state agency. Because the protection of Outstanding Resource Waters is implemented as part of the state's antidegradation policy under the Clean Water Act, it may not be appropriate for the Council to separately require compliance under its Standard.

Recommendation: Because Oregon's Outstanding Resource Water policy is part a federally delegated program under the Clean Water Act, staff recommends Council make no changes at this time, as described in Alternative 1.

[40] See OAR 340-041-0004(8)(d).

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 rule language 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.

*3. 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 "other **reasonable** routes or sites have been studied and determined to have greater impacts."*

Discussion: An applicant for a site certificate for a facility that is or includes a transmission line or natural gas pipeline that qualifies as an "energy facility" under ORS 469.300 is required to provide an alternatives analysis of at least two corridors, 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.[41] The Applicant must expand on this analysis in its Application, by providing a corridor selection assessment that explains its reasons for selecting the corridors based on an evaluation of relative impacts to resources protected under the Council standards.[42]

Given that these rules require a least impact analysis, it is likely that application of the protected areas standard would result in only the routes shown to have lesser impacts being approved to cross a protected area, however, the rule does still allow for multiple routes to be approved as long as at least one alternative considered would have greater impacts. The rule is also ambiguous as to whether impacts to all resources protected by Council standards should be considered, or just impacts to protected areas. The requirements of the alternatives analysis above suggests the former, but this is not clear in the rule. Alternative 2 could resolve this ambiguity, but it could also restrict the ability of the Council to approve multiple alternative routes located in a protected area that have differing levels of impact.

In response to the Department's request for rulemaking recommendations, one stakeholder commented that amending the rule recommended in alternative 2 could be problematic as it could potentially require an applicant to study "an infinite number of alternatives" in order to prove that there is no alternative route with lesser impacts. The stakeholder recommended the Council consider amending the existing language to require

[41] OAR 345-020-0011(1)(d)
[42] OAR 345-021-0010(1)(b)(D)

a finding that "other *reasonable* routes or sites have been studied and determined to have greater impacts" instead. Based on this recommendation we have added Alternative 3. Other stakeholders raised concerns that the current requirements for alternatives analyses were generally insufficient, and that it would be appropriate to expand the alternatives applicant is required to study.

Staff agrees that requiring an applicant to study an infinite number of alternatives to definitively identify the least impact alternative is not a desirable outcome, and that, regardless of whether the determination is based on the least impact alternative, or the presence or greater impact alternatives, only requiring consideration of "reasonable alternatives" may be more appropriate.[43]

Recommendation: To clarify ambiguity in the existing rule, and to specify that an applicant must have studied reasonable alternatives to qualify for the exception from the Protected Areas standard under OAR 345-022-0040(2), staff recommends the Council amend the rule as follows:

> (2) Notwithstanding section (1), the Council may issue a site certificate for:
>
> (a) ~~a~~ A facility that includes 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 ~~identified in section (1)~~, if the Council determines that other reasonable alternative routes or sites have been studied and ~~determined by the Council to have greater impacts~~ that the proposed route is likely to result in fewer adverse impacts to resources or interests protected by Council standards.
>
> (b) ~~Notwithstanding section (1), the Council may issue a site certificate for s~~ Surface facilities related to an underground gas storage reservoir that have pipelines and injection, withdrawal or monitoring wells and individual wellhead equipment and pumps located in a protected area, if other alternative routes or sites have been studied and determined by the Council to be unsuitable.

Staff acknowledges that some stakeholders raised issues with the requirements for alternative analyses in the Council's rules in general, but we believe these issues have implications that go beyond the standards that are within the scope of this rulemaking. Regardless of whether Council makes staff's recommended change now, we recommend Council consider these issues further in the Council's Application Process Review rulemaking.

Issue 7 – State Scenic Resources

Affected rules: OAR 345-022-0080

Issue description: The Scenic Resources standard 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

[43] Within the siting context, "reasonable alternatives" refer to alternatives that are fair, proper, just, moderate and suitable under circumstances, not merely alternatives that have some likelihood of success. See *Friends of Parrett Mountain v. Northwest Natural Gas Co.*, 336 Or 93 (2003)

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.

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

4. Amend rule to specify that any scenic resource identified as significant or important by a reviewing agency is 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 state 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.

In response to the Department's request for recommendations on this rulemaking, one stakeholder recommended that State management should not be included, because unlike local land use plans, tribal land management plans, and federal land management plans, state park plans or state byway corridor management plans are not comprehensive in scope, are not subject to public review and input, and are not regularly revised. The stakeholder also noted that state lands that meet the definition of a protected area or recreational opportunity are already evaluated for potential visual impacts.

One stakeholder recommended that the Council consider expanding what is considered to be a "significant or important scenic resource" by also allowing resources identified in multi-state or regional plans. Staff believes that some of these plans, such as multi-state plans that implement a federal designation or land use plans adopted by a "regional" local government such as metro, would likely be considered under the current rule, but this determination would be made on a case-by-case basis. However, because the rules are not clear on this matter, staff added Alternative 3 for Council's consideration.

As an alternative approach, a different stakeholder recommend the Council amend the rule to allow scenic resources that are not identified in a land use or resource management plan but are identified as significant or important by a reviewing agency, local government, or environmental justice community, to be considered. Based on this recommendation, staff added Alternative 4 for Council's consideration.

Expanding the scope of the rule could result in some 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.

Recommendation: At a minimum, Staff recommends Council amend the rule to include significant or important scenic resources identified in state or regional land management plans, to ensure that these resources are protected under the Council's Scenic Resources Standard as described in Alternative 2:

> **OAR 345-022-0080(1)** Except for facilities described in section (2), to issue a site certificate, the Council must find that the design, construction and operation of the facility, taking into account mitigation, are not likely to result in significant adverse impact to scenic resources ~~and~~or values identified as significant or important in a local, tribal, state, or federal land use or land management plan~~s, tribal land management plans and federal land management plans for any lands located within the analysis area described in the project order~~.

Staff acknowledges that relying on land use plans and land resource management plans to identify significant or important scenic resources presents some challenges. This is further complicated by the fact the under Statewide Planning Goal 5, Local governments are only encouraged, but not required, to identify scenic views and sites in a comprehensive plan.[44] As such, staff believes that further consideration of Alternative 3 or 4 may be appropriate, but we do not have enough information at this time to recommend their adoption to Council. Staff recommends Council either conduct a rulemaking workshop to gather additional stakeholder input on this, and other issues, or consider further revisions to the way significant and important scenic resources are identified in the application process review rulemaking.

Issue 8 – Applicability of Updated Rules and Standards

Issue description: A stakeholder recommended that the application of new rules or standards to an Application for Site Certificate that is under review on or before the effective date of the rules could prejudice the applicant.

Background: In response to the Department's request for recommendations on this rulemaking, a stakeholder raised concerns that applicants could be prejudiced if procedural rules or amended standards resulting from this process were applied the review of their Application for Site Certificate, and recommended the Council avoid applying new rules to projects currently under review when doing so would require the Applicant to return to earlier stages of process in order to comply.

Under ORS 469.503(1), to issue a site certificate, the Council must find that the facility complies with the applicable standards adopted by the council pursuant to ORS 469.501 or the overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by the applicable standards the facility does not meet. This requirement is further codified in OAR 345-022-0000, the Council's General Standard of Review.

As noted elsewhere in this document, in making the finding of compliance with the statewide planning goals required under ORS 469.504(1)(b)(a), the Council must apply substantive applicable criteria and local land use regulations in effect on the date the application is submitted. There is not a similar "goal post" associated with other findings required under ORS 469.503, however, as referenced in ORS 469.503(3) the scope of laws, rules, and standards the Council must make findings on is controlled by the Project Order.

[44] OAR 660-015-0000(5)

As described in ORS 469.330, the primary function of the project order is to establish the statutes, administrative rules, council standards, local ordinances, application requirements and study requirements for the site certificate application.

While it is clear that the Project Order is intended to control which laws, rules, and standards apply to the review of an application, it is less clear if it controls the version of laws, rules, and standards that are applicable as well. We note that under the Administrative Procedures Act, a "rule" is defined to include any amendment of a prior rule, so it may be implied that this is the case.[45] Because the Project Order can be amended by the Council or Department at any time, this would allow new rules or standards to be applied to a facility if the Council found it to be appropriate.

While the Council's rules are silent on how applicability should be determined, it does appear that the Council contemplated the application of new rules or standards to a facility under review:

> **OAR 345-001-0020**(3) When the Council deems appropriate, it may adopt additional rules on matters within its jurisdiction. The Council shall adopt any additional rules relating to site certificates sufficiently in advance of the close of testimony in a contested case proceeding on a site certificate to allow parties to address the rule, or if after the close of testimony, in sufficient time to allow the parties an opportunity to supplement their testimony to offer evidence relating to the new rule.

OAR 345-001-0020 has not been amended since 2007, and it is unclear how, or if, this rule has been applied in the past.

Alternatives:
1. Adopt a provision in each affected rule or division of rules explaining that applicability of rules and Council standards is determined by the date of submission of the pASC
2. Specify, in the rulemaking record, that the provisions of the rule will not apply to the review of applications currently before the Council; or
3. Specify, by rule or in the rulemaking record, that the applicability of rules or Council standards is determined by the date the project order

Discussion: Neither the rule, nor statute, are clear on the issue of applicability, but this is an issue that goes well beyond the scope of the three standards under consideration as part of this rulemaking. That said, staff acknowledges that applying new procedural requirements or substantive standards to the review of an application that is before the Council could result in substantial additional time and costs for applicants. For this reason, and because the rules lack clarity on the issue of applicability more generally, staff does not recommend that a no action alternative is appropriate.

Considering the purpose stated in OAR 345-001-0020, it appears that Council intended to reserve the discretion to apply newly adopted standards or rules to the review of an application for site certificate up until a certain point in the contested case process, if it deems it to be appropriate. While it is not clear that a situation where rulemaking was being conducted independently and concurrently with the review of multiple applications, the conditionality suggests that a newly adopted rule should not be automatically applied to an application. While it is not clear that it has been used in this manner in the past, it is likely that using the Project Order to determine what version of a rule or standard applies.

[45] ORS 183.310(9) (9) "Rule" means any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency. The term includes the amendment or repeal of a prior rule * * *"

Recommendation: Staff recommends that Council specify, in the rulemaking record, that the applicability of rules or Council standards is determined by the date the project order. Staff recommends that additional rulemaking to codify this interpretation of ORS 469.330 is likely needed and should be considered as part of the application process review rulemaking.

Issue 9 – Methodology for Impact Analyses

Issue description: A stakeholder recommended that more specificity is needed in how the Council evaluates impacts to scenic and recreation resources, and protected areas.

Background: Under ORS 469.501, the Council is required to adopt standards for the siting, construction, operation and retirement of facilities. Among the subjects these standards may address are the impacts of the facility on recreation, scenic, and aesthetic values. The Council has adopted standards requiring the Council to find that the design, construction and operation of a facility, taking into account mitigation, is not likely to result in significant adverse impact to certain protected areas, scenic resources and values, or recreational opportunities under OAR 345-022-0040, 345-022-0080 and 345-022-0100 respectively. The applicant is required to describe potential impacts to these resources in the Application, and while some specificity is given to the types of impacts that must be considered, no specific methodology for conducting an impact analysis is prescribed.

In response to the Department's request for recommendations on this rulemaking, some stakeholders recommended that the Council adopt specific methodologies or standards to provide better direction on how impacts to scenic resources, recreation resources, and protected areas will be evaluated under the Council's rules.

A stakeholder suggested that Council could either adopt its own substantive standards or could adopt standards used by other agencies to evaluate impacts to these resources by reference. As an example, the stakeholder suggested that the Council could adopt, in whole or in part, the standards of the U.S. Forest Service's Scenery Management System or the Bureau of Land Management's Visual Resource Management System for evaluating visual impacts. Another stakeholder suggested that methods used by the National Oregon Trail Association may also be appropriate. The stakeholder recommends that adopting these more objective systems providing more clarity, direction, and certainty to the Council's siting decisions.

Alternatives:
1. Make no changes
2. Adopt one or more impact evaluation methodologies

Discussion: As described above, the application requirements under OAR 345-021-0010 and the applicable Council standards do not prescribe or require specific methodologies for impact assessments, but the applicant is required to conduct an assessment, and while the Department does not choose particular methodologies for an evaluation, it may provide comment or request additional information if the assessment is not sufficient. This system allows some flexibility to the applicant in the development of a methodology that is appropriate for the type of facility and site being evaluation but could result in some inconsistencies in the evaluations performed.

The Council could provide a preferred or required methodology by rule, or could provide additional guidance on acceptable methods or assumptions. This would likely improve the consistency and transparency of both applications and Council decisions.

Recommendation: Staff believes that further consideration of this issue may be appropriate, but we do not have enough information at this time to recommend any specific rule changes to Council. Staff recommends Council either conduct a rulemaking workshop to gather additional stakeholder input on this, and other issues, or consider further revisions to the way impacts to scenic resources, recreational opportunities, and protected areas are evaluated as part of the application process review rulemaking.

Issue 10 – Criteria for Important Recreational Opportunities

Issue description: A stakeholder recommended the Council clarify the criteria for identifying important recreational opportunities.

Background: Under ORS 469.501, the Council is required to adopt standards for the siting, construction, operation and retirement of facilities. Among the subjects these standards may address are the impacts of the facility on recreation, scenic, and aesthetic values. The Council has adopted a standard requiring the Council to find that the design, construction and operation of a facility, taking into account mitigation, is not likely to result in significant adverse impact to important recreational opportunities under OAR 345-022-0100.

Under the standard, the Council retains the discretion to identify "important recreational opportunities":

> OAR 345-022-0100(1): "* * * The Council shall consider the following factors in judging the importance of a recreational opportunity:
>
> (a) Any special designation or management of the location;
>
> (b) The degree of demand;
>
> (c) Outstanding or unusual qualities;
>
> (d) Availability or rareness;
>
> (e) Irreplaceability or irretrievability of the opportunity."

In the Application for Site Certificate, and applicant must identify all recreational opportunities in the analysis area, including information on factors listed above.

In response to the Council's request for recommendations for this project, a stakeholder recommended the Council consider clarifying the definition of important recreational opportunities and the factors used to judge importance. The stakeholder recommended that clarification of these terms may increase the consistency of analysis conducted for potential recreational opportunities.

Alternatives:
1. Make no changes
2. Clarify the criteria used to judge importance
3. Adopt an alternative definition for important recreational opportunities

Discussion: The stakeholder that raised this issue did not specify how the factors in rule are unclear, but staff acknowledges that the type of multi-factorial analysis in rule is somewhat subjective, and there could be disagreement on how they should be interpreted and applied. While it is not clear if additional rulemaking is needed to address this issue, developing additional guidance based on stakeholder input and past Council Orders may reduce ambiguity in the rule.

Recommendation: Staff believes that further consideration of this issue may be appropriate, but we do not have enough information at this time to recommend any specific rule changes to Council. Staff recommends Council either conduct a rulemaking workshop to gather additional stakeholder input on this, and other issues, or consider further revisions to the way important recreational opportunities are identified as part of the application process review rulemaking.

Bibliography

Bureau of Land Management. (1991). Wilderness Study Report, Statewide Overview for Oregon. Available from: https://www.blm.gov/learn/blm-library/agency-publications/select-state-publications/state-wilderness-documents

Bureau of Land Management. (2005). Steens Mountain Cooperative Management and Protection Area Record of Decision and Resource Management Area. Available from: https://www.blm.gov/or/districts/burns/plans/files/Steens%20ROD-RMP.pdf

Congressional Research Service. (2010). Congressionally Designated Special Management Areas in the National Forest System. CRS Report R41285. Available from: https://crsreports.congress.gov/product/pdf/download/R/R41285/R41285.pdf/

Congressional Research Service. (2015). National Park System: What Do the Different Park Titles Signify?, CRS Report R41816. Available from: https://crsreports.congress.gov/product/pdf/download/R/R41816/R41816.pdf/

Congressional Research Service (2015). The National Wild and Scenic Rivers System: A Brief Overview. CRS Report R42614. Available from: ttps://crsreports.congress.gov/product/pdf/download/R/R42614/R42614.pdf/

Congressional Research Service (2018). National Monuments and the Antiquities Act. CRS Report R41330. Available from: https://crsreports.congress.gov/product/pdf/download/R/R41330/R41330.pdf/

Congressional Research Service. (2019). Wilderness: Overview, Management, and Statistics. RL 31447. Available from: https://fas.org/sgp/crs/misc/RL31447.pdf

Congressional Research Service. (2020). The National Trails System: A Brief Overview. CRS Report R43868. Available from: https://crsreports.congress.gov/product/pdf/download/R/R43868/R43868.pdf/

Congressional Research Service (2021). The Federal Land Management Agencies. CRS In Focus IF10585. Available from:https://crsreports.congress.gov/product/pdf/download/IF/IF10585/IF10585.pdf/

National Parks Service. (2016). The National Parks Index 1916-2016. Available from: https://www.nps.gov/aboutus/upload/npindex2012-2016.pdf

Oregon Department of Fish and Wildlife. (2020). Fish Propagation Annual Report for 2019. Available from: https://www.dfw.state.or.us/fish/hatchery/docs/2019_Fish_Propagtion_Annual_Report.pdf

Oregon Department of Fish and Wildlife. (2021). ODFW Hatcheries. Accessed April 8, 2021 at: https://www.dfw.state.or.us/fish/hatchery/

Oregon Natural Areas Program. (2015.) Oregon Natural Areas Plan 2015. Oregon Parks and Recreation Department and the Oregon Biodiversity Information Center. Available from: https://inr.oregonstate.edu/sites/inr.oregonstate.edu/files/2015_or_natural_areas_plan.pdf

Oregon Natural Areas Program. (2020.) Draft Oregon Natural Areas Plan. Oregon Parks and Recreation Department and the Oregon Biodiversity Information Center. Available from: https://inr.oregonstate.edu/sites/inr.oregonstate.edu/files/2020_nap_draft.pdf

Oregon State University, College of Agricultural Sciences. (2021). Eastern Oregon Agricultural Research Station - Union/Hall Ranch. Accessed April 8, 2021 at: https://anrs.oregonstate.edu/anrs/beef-cattle-ranches/eastern-oregon-agricultural-research-station-unionhall-ranch

Oregon State University, College of Agricultural Sciences. (2021). OAES History. Accessed April 6, 2021 at: https://agsci.oregonstate.edu/home/research/oaes-history
Oregon State University, College of Forestry. (2021). Our Forests. Accessed April 8, 2021 at: https://cf.forestry.oregonstate.edu/our-forests.

Oregon Legislative Policy and Research Office. (2018). State Parks and Recreation Background Brief. Available from: https://www.oregonlegislature.gov/lpro/Publications/Background-Brief-State-Parks-and-Recreation-2018.pdf

Sullivan, R. G., Kirchler, L., Lahti, T., Roché, S., Beckman, K., Cantwell, B., & Richmond, P. (2012). Wind turbine visibility and visual impact threshold distances in western landscapes. In National Association of Environmental Professionals 37th Annual Conference. Available from: https://blmwyomingvisual.anl.gov/docs/WindVITD.pdf

United States Fish and Wildlife Service. (2019). Annual Lands Report. Available from https://www.fws.gov/refuges/land/PDF/

Wilson, T.M.; Schuller, R; Holmes, R; Pavola, C; Fimbel, R.A.; McCain, C.N.; Gamon, J.G..; Speaks, P.; Seevers, J. I.; DeMeo, T.E.; Gibbons, S. (2009). Interagency strategy for the Pacific Northwest Natural Areas Network. Gen. U.S. Department of Agriculture, Forest Service, Pacific Northwest Research Station. PNW-GTR-798. Available from: https://www.fs.fed.us/pnw/pubs/pnw_gtr798.pdf