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To: Energy Facility Siting Council

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

Date: April 9, 2021

Subject: Agenda Item F (Potential Action Item):
Scenic Resources, Protected Areas, and Recreation Rulemaking for the April 22-23, 2021, EFSC Meeting

Attachments: Attachment 1: Issues Analysis Document
Attachment 2: Responses to Request for Rulemaking Recommendations
Attachment 3: Draft Proposed Rule

STAFF RECOMMENDATION

Staff recommends Council authorize staff to conduct one or more public workshops to refine the draft proposed rules and further discuss the issues related to the Protected Areas, Scenic Resources, and Recreation Standards.

BACKGROUND

The Council authorized a rulemaking project to address issues related to the Council's Scenic Resources standard, Protected Areas standard, and property owner notification requirements as part of its 2018 rulemaking schedule. The issue related to property owner notification requirements included in this original scope was addressed through the Council's 2019 Housekeeping Rulemaking Project.¹

At its October 23, 2020 meeting, Staff presented its preliminary analysis and recommendations for the rulemaking project. Staff recommended that in addition to considering issues related to the Protected areas and Scenic Resources standards, Council consider additional issues related to the Recreation standard, which protects similar resources and values. The rulemaking is intended to review the standards and associated rules to ensure that the areas, designations, and resources protected by rules are up to date, and that rules are clear and consistent with the Council's review process.

The Council approved staff's request to initiate rulemaking and directed staff to seek informal recommendations from stakeholder on the rulemaking. Council also directed staff to provide recommendations on the conduct of the rulemaking proceedings, including whether additional

¹ See Administrative Order EFSC 10-2019, effective October 7, 2019.
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opportunities for public participation in the development of proposed rules, including opportunities for in-person meetings, are needed to obtain input on any issues under consideration and the potential extent of associated fiscal impacts associated with rule changes based on the advice received.

On November 6, 2020, staff issued a request for rulemaking recommendations to all persons on the Council's rulemaking mailing list. The request asked interested stakeholders to submit suggestions for policy issues or rule changes they would like to be considered in the rulemaking by December 31, 2020. Staff received eight responses to the request and revised the issues analysis document prepared for this rulemaking project based on the advice and recommendations therein. The updated issues analysis document is provided as Attachment 1 to this staff report, exact copies of the advice received are provided in Attachment 2.

The staff report provides staff's recommendations for the conduct of the rulemaking proceeding, in consideration of the advice received. Specifically, the report will provide an overview of:

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

Need and authority to adopt rules

ORS 469.470(2) authorizes the Council to adopt standards and rules to perform the functions vested in it by law, including the requirement for Council to adopt standards for the siting, construction, and operation of energy facilities. The statute specifies several subjects that may be addressed by standards, including areas designated for protection by the state or federal government, and impacts of the facility on recreation, scenic, and aesthetic values. ORS 469.501(1)(c) and (i). The Council has adopted standards for addressing potential impacts to Protected Area, Scenic Resources, and Recreational Opportunities under OAR 345-022-0040; 345-022-0080, and 345-022-0100 respectively.

In response to the Department's request for recommendations, one stakeholder commented that the need for this rulemaking was not clear, and recommended Council postpone this rulemaking until a problem is identified. As noted above, this rulemaking is intended to review the standards and associated rules to ensure that the areas, designations, and resources protected by rules are up to date, and that rules are clear and consistent with the Council's review process.

The Protected Areas and Scenic Resources Standards was last amended in 2007. The Recreation standard was last amended in 2002. While the vintage of a rule is not an issue in and of itself, the Protected Areas standard provides that it only applies to designations in effect as of May

11, 2007. A number of new areas have been designated since that time, and some of the references in the rule are outdated or obsolete.

The Council is charged with ensuring the siting, construction and operation of energy facilities is accomplished in a manner consistent with land use and other environmental protection policies of this state and with conducting site certificate reviews in a manner that is consistent with any federal agency review required under the National Environmental Policy Act. Amending the rule to ensure that all Protected Areas that have been designated since 2007 is needed to carry out these purposes.

Based on our initial review of the issues and recommendations received, staff also identified several areas of rule that are ambiguous, unclear, or inconsistent with the Council's review processes. Rules that are ambiguous or unclear can lead to disagreement on the applicability, interpretation, and application of the Council's standards and rules during the review of applications for site certificate and requests for amendment. Unclear standards and procedural rules can result in application materials being incomplete, increasing the need for Requests for Additional Information and extending the time needed to determine that an application or request is complete. Procedural rules that are inconsistent with the overall conduct of the siting review can also add substantial costs for the applicant if the methods or assumptions used to conduct impact assessments are found to be unacceptable or inadequate by the Council or Department and revision is required.

Rules that are ambiguous, unclear, or inconsistent with the Council's review processes may also increase the potential for issues to arise in the public review of the application, draft proposed order, and proposed order. These issues may be resolved through the Contested Case proceedings, but this process adds significant time and expense for the applicant. If issues are not resolved to the satisfaction of the parties, the issues may also be subject to judicial review which introduces additional time, cost, and uncertainty to the process. Staff recommends that rulemaking is needed to improve the efficiency and effectiveness of the Council's review processes and procedures by addressing these ambiguous, unclear, or inconsistent rules.

Recommended scope and objectives

Staff recommends that the scope of this rulemaking be limited to issues related to the Protected Areas, Scenic Resources, and Recreation Standards. These standards, and the associated information requirements in OAR chapter 345, division 20 and 21, protect similar resources and values, and require similar evaluations of impact and findings by the Council.

Staff identified several issues related to the standards in its preliminary review, and several new issues were identified in the responses to the Department's request for recommendations. These include:

- Evaluating options to provide notice of a proposed facility to protected area managers
- Addressing inconsistency in the scope of findings required to satisfy the standards
- Evaluating the study areas associated with the standards
- Updating and clarifying the categories and designations of protected areas
- Clarifying exceptions from the protected areas standard

- Evaluating the process for identifying significant and important scenic resources
- Evaluating the process and criteria for identifying important recreational opportunities
- Evaluating the process and methodologies used to evaluate impacts

These issues are discussed in detail in Attachment 1 to the staff report. When considering policy alternatives associated with issues, staff considered the objectives of ensuring that the language of the Standards clearly identifies important resources and values the standards are intended to protect, ensuring that the standards are consistent with the policy set forth in ORS 469.310, and improving the efficiency and effectiveness of the Council's review processes and procedures by resolving ambiguity, lack of clarity, and inconsistency in rule.

We note that a number of issues raised by stakeholders identify more systemic or structural issues with the rules that go beyond the three standards under consideration for this rulemaking. These issues largely deal with the processes for determining the applicability of newly adopted rules or protected areas designations or providing more refined information and application requirements for renewable energy facilities.

In the 2021-2023 Rulemaking Schedule, the Council approved a multi-year, multi-phase Application Process Review rulemaking which is scheduled to begin later this year. As discussed more below, we believe it may be appropriate to address some of these more systemic or structural issues. We have also recommended that some issues within the scope of this rulemaking be addressed through policy changes and codified in rule through this process.

Potential Fiscal and Economic Impacts on stakeholders

Changes to the Protected Areas, Scenic Resources and Recreation standards could result in some additional costs of compliance for applicants, particularly if the changes expand the type or number of resources protected under the standards or the evaluation required to assess impacts during the review. While these impacts would primarily be associated with increased information and analysis needed to satisfy the standard, there could also be increased costs associated with the mitigation of impacts to scenic or recreational resources. These costs would be highly dependent on the size, type, and location of a proposed facility.

Staff notes that there could also be some reductions in the overall costs associated with the application process review as resolving ambiguity, lack of clarity, and inconsistency in rules can improve the efficiency and effectiveness of the Council's review processes and procedures, and reduce the time and costs associated with addressing issues related to the interpretation and application of the standards through contested case proceedings.

Stakeholder input

Because of broad public interest in the resources protected by the Council's Protected Areas, Scenic Resources, and Recreation Standards, and because of the potential fiscal and economic impacts on energy developers and other stakeholders, the Council directed staff to solicit written recommendations and suggestions from the public on this rulemaking project and to provide further recommendations on whether additional opportunities for public participation in the development of proposed rules, including opportunities for in-person meetings, are needed based on the advice received. As discussed above, staff received eight letters

containing recommendations on the issues identified by staff in our preliminary review and raising several new issues.

As discussed in Attachment 1, staff reviewed the recommendations received and, in consideration of the advice and suggestions therein, identified a number of recommended rulemaking changes that we believe would improve the consistency of the rules with the policy set forth in ORS 469.310, and improve the efficiency and effectiveness of the Council's review processes and procedures by resolving ambiguity, lack of clarity, and inconsistency in rule. These recommended rule changes are provided in the draft proposed rules included as Attachment 3 to this staff report.

Several stakeholders recommended that additional opportunities for public participation in the development of proposed rules were needed and suggested that the Council appoint a Rulemaking Advisory Committee for that purpose. Staff agrees that the rulemaking may benefit from additional opportunities for stakeholder engagement, particularly in areas related to the identification of resources and values and evaluation of impacts associated with the standards.

RECOMMENDED COUNCIL ACTION

To address the outstanding issues related to the standards under consideration, staff requests Council's authorization to conduct one or more public workshops to refine the draft proposed rules and further discuss the issues described in Attachment 1, and other issues related to the Protected Areas, Scenic Resources, and Recreation Standards identified by stakeholders. We recommend use of public workshops, rather than Rulemaking Advisory Committees, to provide a less formal venue for stakeholders to engage in constructive conversations about challenges and opportunities related to standards and foster collaboration and innovative solutions and share of best practices. A workshop would also allow for greater flexibility in participation by allowing any interested person or organization to attend. In preparation for the workshops, staff will identify protected area managers, public interest groups, industry representatives, and other stakeholder groups to receive notice of the workshops in addition to the Council's rulemaking mailing list. Due to ongoing COVID-19 pandemic, staff recommends this workshop be held remotely, but the workshop could be delayed until an in-person workshop is possible if Council believes this would be appropriate.

A workshop would allow Staff to address issues related to the Protected Areas, Scenic Resources, and Recreation Standard, but we note that stakeholders also identified a number of additional systemic or structural issues that extend beyond the scope of this rulemaking. Staff recommends these issues be addressed as part of the Application Process Review Rulemaking. If Council believes it would be appropriate to address these systemic or structural issues before considering the outstanding issues in this rulemaking, an alternative approach would be to defer further consideration of all outstanding issues and initiate formal proceedings to adopt staff's draft proposed rules included as Attachment 3. This would allow for the updates and clarifications recommended by staff to move forward while additional input on the outstanding issues is gathered as part of the Application Process Review Rulemaking.