

Item D: Protected Areas, Scenic Resources, and Recreation Rulemaking Project
Attachment 1: Rulemaking Workshop Summaries

At its April 23, 2021 meeting, the Council authorized staff to conduct a series of rulemaking workshops to obtain recommendations on issues related to the Protected Areas, Scenic Resources, or Recreation Standard or associated rules.

The first workshop was held on July 28, 2021 and focused on issues related to the applicability and scope of potential rule revisions. The second workshop was held on August 18, 2021 and focused on issues related to the Protected Areas Standard. The final workshop was held on October 14, 2021 and focused on issues related to the Scenic Resources and Recreation Standards.

This document contains staff's summary of the discussions at each workshop. Recordings of the workshops as well as exact copies of written comments are also available from the Council's rulemaking website at: <https://www.oregon.gov/energy/Get-Involved/Pages/Energy-Facility-Siting-Council-Rulemaking.aspx#PASRR>



ENERGY FACILITY SITING COUNCIL

Public Workshop #1: Scoping and Procedural Issues
Wednesday, July 28, 2021 at 1:00 p.m. to 4:00 pm
WebEx Webinar

Workshop Summary

Participants:

Elaine Albrich, Davis Wright Tremaine LLP; Diane Brandt, Renewable Northwest; Lenna Cope, Portland General Electric Company; Angela Crowley-Koch, Oregon Solar + Storage Industries Association; Andrea Fogue, Oregon Refuse & Recycling Association; Susan Geer; Matthew Hutchinson, Avangrid Renewables; Rachael Katz, Tetra Tech; Fuji Kreider, Stop B2H Coalition; Jeff Maffuccio, Idaho Power Company; Brendan McCarthy, Portland General Electric Company; Tim McMahan, Stoel Rives LLP; Jocelyn Pease, McDowell Rackner Gibson PC; Lara Rozzel, National Parks Service; Mark Salvo, Oregon Natural Desert Association; David Stanish, Idaho Power Company; Paul Stern, New Sun Energy; Mike Totey, Oregon Hunters Association

Staff Present:

Christopher Clark, EFSC Rules Coordinator; Todd Cornett, Assistant Director for Siting; Sarah Esterson, Senior Policy Advisor; Patrick Rowe, Legal Counsel; Kellen Tardaewether, Senior Siting Analyst; Kate Sloan, Senior Siting Analyst

Mr. Clark provided an overview of the rulemaking process, the rulemaking project, and the issues identified by staff before inviting meeting participants to introduce themselves.

Mr. Clark invited participants to provide general comments and asked if anyone had additional issues they would like to be considered during the rulemaking.

- Ms. Geer raised concerns that the current standards do not adequately address impacts to local parks and did not provide consideration to private lands managed under conservation easements.
- Ms. Kreider commented that it is important that local interests, including concerned citizens, local governments, and non-profit organizations like land trusts, The Nature Conservancy, the Rocky Mountain Elk Foundation, are represented in the siting process.

Mr. Clark explained that a stakeholder had raised concerns that the application of newly adopted rules or standards to a project that is under review could prejudice the applicant. He explained that while this issue was raised in the context of the Protected Areas, Scenic Resources, and Recreation Rulemaking, the Department was looking for an approach that could be carried forward into future rulemakings as well.

He explained that the Department was considering three alternatives to address issue

1. Taking no action, which would result in the standard in effect at the time the Council issues its final order being applied to a Council Decision.
2. Specifying that newly adopted criteria or requirements would not apply to the review of any application which is determined to be complete on or before the effective date of the new rule.

3. Providing the Council the discretion to apply a new standard to a project that is under review through amendment of the Project Order.

Ms. Crowley-Koch suggested a fourth alternative, which would specify that any newly adopted criteria or requirements would only apply to a new application. She explained that this alternative would help Oregon achieve its greenhouse reduction goals by providing additional regulatory certainty to solar developers.

- Mr. Clark asked if this alternative would be similar to the second alternative but would specify that newly adopted criteria or requirements would not apply to the review of any project for which a preliminary application was filed on or before the effective date of the new rule.
- Ms. Pease stated that regulatory certainty was hugely important for Idaho Power, and that the submission of a preliminary application would be an appropriate milestone to use as the basis for determining what rules and standards would apply to the review.
- Ms. Albrich supported establishing a goal post for the applicability of rules, and agreed that the preliminary application, or an earlier point, such as the issuance of the project order, could be appropriate.

Ms. Pease and Ms. Albrich raised concerns that allowing Council to have the discretion to choose what standard to apply, as described in Alternative 3, could lead to arbitrary decisions.

Ms. Kreider stated that she understood the developers' need for regulatory certainty but felt that it should be balanced with the need to protect natural resources. She recommended that the rules should retain some flexibility to apply newly adopted rules when needed.

Mr. McCarthy asked if the application of a new rule or standard would require an applicant to resubmit application materials or go back in the review process, or if the Council would apply the new standard to the existing application, and if the latter, if the applicant would have the opportunity to amend the application if the new standard was not met.

- Mr. Clark stated that he believed the Council would be able to move forward with the review of the existing application as long as there was sufficient evidence in the existing record for the Council to determine compliance with the newly adopted rule or standard. He stated that whether or not an applicant would be required to repeat steps of the process would likely depend on the details of the case, but that OAR 345-001-0020(3) suggested that additional evidence could also be submitted during the contested case phase of the review if needed.

Mr. Clark introduced the second issue related to an inconsistency the scope of Council findings required by the Protected Areas, Scenic Resources, and Recreation Standards. He explained that the Scenic Resources and Recreation standards require the Council to make findings on the likelihood of significant adverse impacts on resources within the analysis areas described in the Project Order, and that the Protected Areas standard did not limit the scope of findings to the analysis area in the same way.

Ms. Crowley-Koch asked if the inconsistency has resulted in any problems in processing applications in the past.

- Mr. Clark explained that he was not aware of a specific situation where this had come up, but that the Council had received comments that the rules should be more consistent with each other.

Ms. Crowley-Koch stated that this issue provided an opportunity to streamline the process, and that OSSIA would support the alternative to amend the Protected Areas Standard to limit the scope of findings to the analysis area established by the Project Order.

- Ms. Pease stated that Idaho Power Company would also support this option to improve regulatory certainty. She also suggested that this change should be limited to existing projects.
- Ms. Albrich agreed that consistency among the rules is good, and that the option to provide a defined analysis area provides regulatory certainty.
- Mr. Katz supported these comments.
- Mr. Clark asked if all 3 standards were based on the analysis area in the Project Order, what the comfort level would be with amending the project order to incorporate additional resources identified during the review. Ms. Albrich stated not comfortable. Ms. Crowley-Koch stated that if a new recreation area is designated, then it should only be considered in any new applications submitted after that point.

Ms. Crowley-Koch recommended that the scope of findings under all three standards should be limited to impacts to resources within 1 mile of a proposed solar facility. She stated that this would be consistent with the directives of Executive Order 20-04 and the PUC's regulations for renewable energy facilities.

Ms. Kreider recommended that consistency was not as important as ensuring the rules were clear. She also stated that while it is important to establish the analysis area as early as possible, there needs to be the opportunity to expand the analysis area if a new resource, such as a new recreation opportunity or newly designated protected area is identified during the review. She emphasized that any process for identifying and updating analysis areas should be clear to ensure that the public can provide input.

Ms. Katz commented that if the analysis area is appropriately sized and includes all areas where impacts are likely to occur, then it should follow that ODOE, and the Public can expect that no significant impacts are likely to occur outside of that area. She stated that rightsizing the analysis areas is a good opportunity to streamline the review process, because currently application include a lot of information that is interesting but does not contribute to findings or measures to apply to a project.

Ms. Rozzell recommended that analysis areas could also be much larger. She commented that the Parks Service was reviewing a project in Idaho with Wind Turbines that were over 700 feet tall, and that a 50-mile analysis area had been used for the Vineyard Wind Project which includes turbines with similar height located off the East Coast.

Mr. Clark confirmed that the next workshop was scheduled for August 18, 2021 and requested input to assist in scheduling the third workshop.

Ms. Pease requested that the Department provide an opportunity for written feedback after the final workshop has been conducted and draft proposed rules are available. Mr. Clark stated that he believed that would be appropriate.

Mr. Clark thanked the meeting participants on behalf of the Department and concluded the meeting at approximately 2:30 pm.



**Protected Areas, Scenic Resources, and Recreation Rulemaking
Public Workshop #2: Protected Areas
Wednesday, August 18, 2021 at 1:00 p.m. to 4:00 pm
WebEx Webinar**

Workshop Summary

Participants:

Elaine Albrich, Davis Wright Tremaine LLP; Nathan Baker, Friends of the Columbia Gorge; Diane Brandt, Renewable Northwest; Angela Crowley-Koch, Oregon Solar + Storage Industries Association; Matthew Hutchinson, Avangrid Renewables; Rachael Katz, Tetra Tech; Jeff Maffuccio, Idaho Power Company; Carl Merkle, Confederated Tribes of the Umatilla Indian Reservation; Becky Moores, Environmental Resources Management; Mini Ogle, Portland General Electric Company, Jocelyn Pease, Idaho Power Company; Lara Rozzel, National Parks Service; Mark Salvo, Oregon Natural Desert Association; David Stanish, Idaho Power Company; Sarah Stauffer Curtiss, Stoel Rives LLP; Joe Stippel, Idaho Power Company; Mike Totey, Oregon Hunters Association

Staff Present:

Christopher Clark, EFSC Rules Coordinator; Todd Cornett, Assistant Director for Siting; Sarah Esterson, Senior Policy Advisor; Kellen Tardaewether, Senior Siting Analyst; Kate Sloan, Senior Siting Analyst

Mr. Clark provided an overview of the agenda before opening the discussion to a round of introductions. Mr. Clark provided an overview of the rulemaking project and explained that the workshop was focused on issues related to the Council's Protected Areas Standard.

- Ms. Pease asked the Department to provide a brief recap of what was accomplished at the first workshop. Mr. Clark reviewed the issues that had been discussed and Department staff explained that the Department had not completed its review or reached a final recommendation.

Mr. Clark introduced the first issue, which is whether or not the department should be required to provide notice to the manager of a protected area that is in the vicinity of a proposed energy facility. He explained that the Department was considering several alternatives to address the issue, including (1) Taking no action; 2) Specifying that protected area managers are "reviewing agencies"; 3) Specifying that protected areas managers will be included in the distribution list for the Notice of Intent; and 4) Providing public notice to the managers of a protected area identified in the Notice of Intent, Application, or Request for Amendment. Mr. Clark explained that the Department's preliminary recommendation was amend rules to provide public notice as described in Alternative 4.

Ms. Rozzell from the National Parks Service stated that she agreed that the Department's recommended alternative would help the Service protect congressional designated resources for the American people and help applicants create a fully accurate, informed, and defensible analysis. She explained that there was a gap

between the analysis area and landowner notification area and that the resulting lack of notification resulted in applicants conducting analyses of impacts to protected areas without information from the administering agency. She explained that this had occurred in 2013 when technical and biological reports regarding the John Day Fossil Beds National Monument were omitted from the record because the Parks Service was not consulted and only learned of a proposed project a few days before the close of the public comment period.

- Mr. Clark asked who the appropriate person within an agency would be to get the notice. Ms. Rozzell stated that COVID had made this question more difficult because there is not a person available at the administrative offices to open and route paper notices to the appropriate person at all times. She commented that she believed it was the managing agency's responsibility to provide the Department with current information, but for the Parks Department, ideally notice would be sent both to the Service's Regional Headquarters as well as the park itself.
- Mr. Clark explained that the Department was considering making it the applicant's responsibility to reach out to the Protected Area Manager to obtain contact information.
 - Ms. Rozzell asked if it would be possible for the Department to maintain contact information for the managing agencies and provide it to applicants to reduce additional administrative burdens. Mr. Clark explained that it was difficult for the Department to maintain individual contacts, but that it likely could maintain general contact information for each Protected Area Manager.
 - Ms. Katz supported the recommendation for ODOE support the development and maintenance of a list of protected area contacts as a way to reduce burdens on applicants.

Ms. Crowley-Koch asked if, under the Department's recommended alternative, the persons receiving notice would become reviewing agencies.

- Mr. Clark responded that under that alternative, the protected area manager would receive public notice, and wouldn't automatically become a reviewing agency. He added that the siting analyst could still add them to the list of reviewing agencies if they determined that a higher level of involvement was warranted.
- Ms. Rozzell commented that it was her understanding that federal agencies had previously been told that reviewing agencies were primarily state and local agencies, and that federal agencies had a more limited role. Mr. Clark confirmed that this was generally how the process worked unless a NEPA review triggered greater levels of coordination between state and federal reviews.

Ms. Pease commented that the recommended approach could work if there were some safeguards to prevent projects that are already under review from being set back in the process for not having provided notice if a new protected area was established or identified.

- Mr. Clark explained that the Department would be asking the applicant to provide contact information for the protected areas managers, and if there wasn't demonstration that an applicant had reasonably tried to obtain contact information from a protected area manager, there might be a request for additional information as part of the completeness review. He explained that the noticing requirement

itself would be the Department's responsibility. He explained that if someone was missed, his understanding is that the remedy for failure to notice somebody as required by the rules is typically that that person can't be prohibited from joining the contested case for not making a comment on the DPO.

Ms. Crowley-Koch commented that amending rules to include protected area managers in the distribution list for the notice of intent would be a little more streamlined than giving public notice at multiple points in the review, and that it would be sufficient to give the manager notice of the project. She emphasized the importance of streamlining applications for renewables and not adding unnecessary steps.

- Mr. Clark commented that staff agreed that including the manager in the distribution list would give early notice, but that earlier in the process a stakeholder had pointed out that sometimes applicants change the proposed site boundary between the NOI stage and the application stage, and those new areas can shift the analysis areas to include additional protected areas.
- Ms. Rozzell commented that the Parks Service was not interested in creating any kind of gotcha situation, and only wanted to ensure that they learn early enough about projects to provide information during the siting review process. She commented that if notice wasn't given early on because a designation hadn't been made or the facility layout changed, they would just expect that notice be given when it becomes clear that the protected area could be impacted.

Ms. Rozzell asked for clarification of the siting review process, and whether the protected area manager could be added to a mailing list to continue receiving notices after the initial notice was given.

- Mr. Clark confirmed that the Protected Area Manager could elect to be added to the notification list for a project to continue to receive public notices.
- Mr. Cornett confirmed that any person can elect to receive notices on a project through the electronic mailing lists. He also commented that only providing notice at the NOI phase could have some drawbacks because there could be up three years between the time the Department receives an NOI and the time the preliminary application is submitted, and that there could be staff turnover or other changes during that time.

Mr. Salvo commented that ONDA supports staff's recommendation and also appreciates the need to streamline processes for renewable energy siting. He suggested that ensuring that all potentially affected parties receive early notice can help support the streamlining of planning and permitting by avoiding delays associated with extending comment periods or reopening the record to get more information.

Mr. Clark explained the second issue related to how the council should address a protected area that's designated after an application is received. He explained that the current standard refers to designations in effect, as of May 11th, 2007, and that there have been some new protected areas designated since that time. He explained that the Department had eliminated a no action alternative from consideration and had identified three alternative approaches to amending the rules: 1) Amend the rule to update the rule to reference the date of adoption of the new rules; 2) remove the date and require the council to consider all protected areas designated as of the date of the council's final decision; and 3) limit the council's findings to

protected areas designated on the date of the project order or identify the protected areas that need to be analyzed in a project order itself.

Mr. Baker commented that Friends of the Columbia Gorge strongly supported the Alternative 2, which would require the Council to consider impacts to all protected areas established on the date the Council makes its decision. He recommended that, at least for some protected areas that are designated under state law, that this is required under the siting law in general and ORS 469.401(2) in particular. He noted that because that subsection requires the Council to ensure compliance with local ordinances, state laws, and rules in effect at the time the site certificate is executed, it would require the certificate holder to comply with any legislative action establishing new protected areas that occurred during the review process. He provided the example of State Scenic Waterways, which are designated under ORS chapter 390, to illustrate this point. He explained that while it was unclear if this legal obligation extended to protected areas established solely by administrative action, it was best to be consistent and would not be appropriate to treat them differently. Mr. Baker also explained that the goal post rule for local land use ordinances was not applicable to other applicable laws and council standards or administrative rules.

Ms. Crowley-Koch recommended that maintaining the current rule structure, as described in Alternative 1 would give applicants a specific list to work from and would avoid any unnecessary complications and lack of clarity and cost.

Ms. Albrich commented that Alternative 2, would be difficult from an applicant's perspective given how the process for introducing evidence into the record works. She noted that it would be difficult to develop evidence in order to respond to a new protected area and demonstrate that the Applicant can meet the condition or the standard when the protected area wasn't evaluated in the original application materials or exhibits. She noted that there's a considerable amount of work that goes into the technical analyses required to demonstrate that the Protected Areas, Scenic Resources and Recreation standards are met, and all three analyses relate to one another. She encouraged the Department to consider Alternative 1 and include a grandfather clause for applications that are currently under review. She commented that Alternative 3, could potentially work since the project order sets the path for the project's application, but that having a locked in date was preferred.

Ms. Katz commented that Alternative 1, with an updated date set in rule is the most straightforward option. She commented that Tetra Tech had initially supported Alternatives 3, but now had concerns since the project order could be amended and the goal was to lock in the requirements early on in the process. Ms. Katz agreed with earlier statements that it was a long process to develop adequate evidence for the council is able to make a defensible decision, and that it was not clear to her that this would be possible if a new protected area needed to be evaluated in the middle of a review.

Mr. Clark clarified that it wasn't the Department's intent to require an applicant to go back and provide additional evidence every time a new protected area was designated, but rather, to allow the Council to consider new evidence that's presented as the process moves forward, including evidence about impacts to newly established protected areas that is submitted by the applicant, the Department, or a member of the public.

Ms. Pease commented that using the project order to set a date for protected areas, as described in Alternative 3, wouldn't provide any more certainty to developers since the project order can be amended at the time. She commented that updating the rules with a new date could also work but recommended that

there be some provisions to exclude applications that are currently under review so that those processes wouldn't be disrupted by the rule change. She also stated that from a practical standpoint, there are concerns that someone could wait until the DPO hearing to introduce evidence of impacts to a protected area that the person believes should be analyzed. She commented that the DPO hearing is almost the end of the record building process, and that would require the applicant to put together evidence, such as visual impacts assessments, to rebut or respond to that DPO evidence in a short amount of time, which could disadvantage the applicant.

Mr. Baker commented that it's not uncommon for siting review processes to last two years or more, and that it would be unfair to lock in the areas that are protected at some early point in time, especially for projects that take a while to go through the process. He explained that when a protected area is designated, the entity that designates the area expects that it will be protected and that there needs to be some way to ensure that if a new area is designated while an application is pending, it can be addressed in a timely fashion and not just at the end of the process.

Ms. Brandt agreed that streamlining and providing regulatory certainty are important for helping Oregon meet its 100% clean energy goals. She stated that if there already was consideration given to newly established protected areas in the Council's final decision that her inclination would be to maintain the current standard.

Mr. Clark introduced the next issue, related to the ways protected areas are listed in this standard. He explained that the current list contains categories of protected areas followed by specific examples, and that the specific examples are incomplete, and in some cases, refer to protected areas that have been renamed or redesignated. He explained that staff has recommended to remove the examples and update the categories.

A stakeholder asked if archaeological areas were included. Staff responded that there was a separate standard that deals with archaeological resources, and that some of the federal designations protected historic areas.

Mr. Salvo commented that ONDA supported staff's recommended changes and that the proposal to remove the list of examples, which can become outdated, would reduce the need for future rulemaking. He suggested that the Council consider adding historic and recreational units of the National Trails System to the list of categories.

- Mr. Clark explained that the draft rule language was intended to capture units of the National trail System that are owned and administered by a federal agency, including the Parks Service, but the trail system itself is more expansive includes private lands.
- Ms. Rozzell explained the Parks Service had little ownership over National Historic Trails in Oregon, and that the trails typically would not fall into the category of a federal protected areas, except where they run through federal land. She commented that potentially high potential sites could be included.
- Mr. Salvo suggested that he thought that because National Trails do extend across land ownership that it may be more efficient to just recognize the trails and trail corridors as distinct protected areas.
- Ms. Katz commented that National Historic trails and other national trails do get considered in the evaluation of the Recreation Standard quite frequently depending on proximity to a proposed project and may already be sufficiently addressed under other standards. Ms. Pease and Mr. Hutchinson expressed support for this point.

Ms. Katz asked for clarification on the department's recommendation to include federally listed scenic, geological, botanical, zoological, paleontological, historic, or recreational areas in the list of protected areas.

She said it would be very difficult for us to figure out what refers to specifically without a reference to the appropriate statute or regulation. Ms. Pease raised similar concerns with the proposed inclusion of Special Management Units.

- Mr. Clark commented that these were specific administrative designations used by the US Forest Service in their land management plans and would revisit the draft proposed language to see if it could be made more specific.
- Ms. Pease added that she was not clear that these administrative designations were intended to confer the same level of protection as other designations and would err on the side of not including them without additional information.
- Mr. Salvo commented that he had experience with Forest Planning and that those types of management designations were the Forest Service equivalent of BLM Areas of Critical Environmental Concern.
- Ms. Rozzell commented that she was checking in with a contact from the Forest Service to see if she can give us any more specific input.

On the question of whether local resources and conservation easements should potentially be included in the standard, Ms. Pease commented that the authorizing statute only mentions areas that are designated for protection by the state or federal government, and that there may be some practical challenges associated with identifying conservation easements during the development of an application. She mentioned that she also believed that impacts to local resources would likely be addressed through the Land Use Standard. Ms. Crowley-Koch also recommended limiting the standard to areas designated for protection by the state and federal government.

Ms. Katz stated that for the structure of the rules, having a list of specific examples of protected areas is helpful. Mr. Hutchinson agreed.

- Ms. Crowley-Koch added that having a specific list provided in rule provides the most clarity, and that it could be confusing if a list was maintained separately and updated periodically if an applicant did not include all the listed protected areas in their application.
- Mr. Salvo commented that there are dozens of protected areas in some categories, and that it would not be practical for the rule to contain an exhaustive list.

Mr. Baker commented that the current rule is unclear and inconsistent and expressed support for staff's recommendation.

Ms. Rozzell said she believed staff's recommendation made sense and reflected the types of resources they wanted people analyzing in the areas near National Parks Service lands in particular. She emphasized that contacting federal land managers early in the process could assist in identifying and analyzing resources.

Mr. Cornett and Ms. Crowley-Koch discussed the applicability of Executive Order 20-04 to the Council's rulemaking in general, and to this rulemaking in particular.

Mr. Clark and Ms. Katz discussed use of the US Protected Areas Database to identify protected areas. Ms. Katz cautioned that while it is a great resource, it does use a more expansive definition of Protected Areas than what is protected under the Council standard.

Mr. Clark introduced the final issue on the agenda, which relates to whether or not the exception for linear facilities should be clarified. He explained that the current rules allow a linear facility to be sited within a protected area if the Council finds that other alternative routes or sites have been studied and determined by the councils have greater impacts. He explained that the Department believed the intent of the rule is to allow the exception when evidence provided by the applicant demonstrates that it's necessary to go through the protected area to avoid some other impacts to other resources, and that the Council had previously found that this intent was not clear.

Ms. Crowley-Koch recommended that changes to the rule could result in additional costs to developers and could delay the siting of transmission lines which are necessary to reach the State's greenhouse gas emission goals.

Ms. Pease commented that adding a reasonableness standard to the current rule would ensure that any alternatives studied to avoid the protected area were reasonable and were determined to have greater impacts than the proposed route. She commented that she would have some pretty significant concerns about staff's recommended option to require the Council to find that the proposed route would have fewer adverse impacts on resources or interests protected by Council standards because there are so many resources and interests and that it is not clear how the applicant would be expected to balance them.

Mr. Clark asked if Ms. Pease believed the current standard only accounted for impacts to the Protected Areas. Ms. Pease confirmed that was how the standard was interpreted in preparing the application for the Boardman to Hemingway Transmission line.

Mr. Baker recommended that staff consider use of a practicability standard, as had been included in earlier versions of the issues analysis. He explained that the "no practicable alternative" standard is used frequently for protection of wetlands and the National Scenic Area. And that it's a familiar standard that can rule out alternatives are not practical, so it can actually limit the consideration of alternatives.

- Ms. Rozell commented that the reasonableness standard proposed by staff could also be seen to protect the applicant from having to consider unreasonable alternatives. She also commented that to approve a transmission line across National Parks Service lands, the service has to find that there is no practicable alternative, so the practicability standard may be more consistent.

Mr. Clark stated that the Department had identified Thursday, October 14th as the potential date for the next meeting, and that that meeting would have an option for remote attendance.

Mr. Clark thanked the workshop participants and concluded the meeting at approximately 3:47 pm.



**Protected Areas, Scenic Resources, and Recreation Rulemaking
Public Workshop #3: Scenic Resources and Recreation
Thursday, October 14, 2021 at 1:00 p.m. to 4:00 pm
WebEx Webinar**

Workshop Summary

Participants:

Elain Albrich, Davis Wright Tremaine LLP; Dean Apostol; Becky Blanchard, US Forest Service; Diane Brandt, Renewable NW; Lenna Cope, Portland General Electric; Angela Crowley-Koch, Oregon Solar + Storage Industries Association; Scott Currens, Trade Wind Energy; Meg Frisbie, National Parks Service; Susan Geer; Irene Gilbert, Friends of the Grande Ronde Valley; Nicholas Goldstein, US Forest Service; Matt Hutchinson, Avangrid Renewables; Jimmy Kagan, Institute for Natural Resources; Rachael Katz, Tetra Tech; Brian Kelly, Greater Hells Canyon Council; Chris Knauf, Bureau of Land Management; Fuji Kreider, Stop B2H Coalition; Jeff Maffucio, Idaho Power Company; Jocelyn Pease, Idaho Power Company; Natalie Rodriguez, Enel Green Power America; Mark Salvo, Oregon Natural Desert Association; Anneke Solsby, NextEra Energy; David Stanish, Idaho Power Company; Paul Stern; New Sun Energy; Chad Stidham, Enel Green Power North America; Mike Totey, Oregon Hunters Association

Staff Present:

Christopher Clark, EFSC Rules Coordinator; Sarah Esterson, Senior Policy Advisor; Kellen Tardaewether, Senior Siting Analyst; Kate Sloan, Senior Siting Analyst

Mr. Clark welcomed participants and provided an overview of the workshop agenda.

Mr. Clark introduced the first issue, related to whether the study areas for impacts to protected areas, recreation, opportunities, and scenic resources are appropriately sized.

Ms. Crowley-Koch commented that it would be appropriate to reduce the size of the study areas for solar facilities, especially for things like noise, since solar facilities create minimal noise.

- Mr. Clark asked if study areas should be based on the maximum extent of impacts and there were any sources of information related to solar facility impacts. Ms. Crowley-Koch stated she would look for some.

Mr. Apostol provided his qualifications and background in evaluating the visual impacts of various renewable energy projects. He commented that there is research, including his own, showing that renewable facilities, including solar photovoltaic facilities, can have a visual impacts that extend out quite a way.

Ms. Kreider asked if the Department planned to differentiate by resource or type of facility. Mr. Clark responded that that was something the Department was seeking feedback on.

Ms. Crowley-Koch stated that having different processes and standards for different types of facilities was discussed in the Department's Implementation Plan for EO 20-04, and that OSSIA supports that proposal.

Ms. Gilbert stated that she would be concerned with making the study area for wind farms smaller, in part because wind turbines are getting taller and taller, resulting in greater impacts. She stated that for solar facilities, she could understand why developers would be interested in establishing smaller areas, but because the technology is relatively new, thought that there may not be sufficient evidence to determine the actual extent of visual and other impacts.

- Ms. Crowley-Koch commented that the first utility scale solar project was built in 2009, and more projects were being developed every year, so that there was some experience with the types of impacts associated with it.
- Ms. Gilbert also commented that while this may be true, the exponential growth in solar development in recent years is new and raises concerns.

Mr. Kelly agreed with the concerns others had expressed about reducing study areas. He stated that while the Greater Hells Canyon Council is in favor of renewables, the extent of impacts are being discovered as development happens and recommended being fairly cautious about restricting analysis areas for potential impacts. He supported the idea of looking for additional research and data.

Mr. Kagan recommended that even if the right size to assess impacts for different types of facilities was unknown, it seemed obvious that they study areas may need to be different for different types of facilities. He suggested that the extent of impacts depends on both the type of protected area being impacted and the type of facility causing the impact; and strongly recommended that study areas should be different for different types of facilities and should be both resource and impact based. He also recommended that study areas should extend at least a bit beyond the borders of Oregon if the facility is located at the edge of the State.

Ms. Geer stated that she was concerned that there does not appear to be legal protections in place for insects in Oregon and thought that impacts on insects from energy facilities should be given consideration.

- Mr. Clark confirmed that he believed that there are not specific protections for invertebrates under Oregon's wildlife laws. He also commented that the three standards under consideration do not have specific study requirements for impacts to wildlife, and do not differentiate between protected areas that are protected for their biodiversity or ecological value and protected areas that are protected for recreational or aesthetic values.
- Mr. Kagan explained that the Oregon Natural Heritage Act, which passed in 1979 and has since become the Oregon Natural Areas Act, allows the Oregon Parks and Recreation Department to enter into agreements with the US Fish and Wildlife Service the Endangered Species Act. These agreements provide funding for the conservation of rare, threatened, and endangered invertebrates in Oregon. He explained that lists of rare, and at-risk invertebrates are developed and maintained by the Oregon Biodiversity Information Center in collaboration with the US Fish and Wildlife Service and could be used by the Department in the assessment of impacts on resources if there was interest.

Angela Crowley-Koch asked if study areas could legally extend beyond the borders of Oregon, and if that occurred in other states?

- Mr. Clark stated that he was not aware of what the requirements were in other states, but that he did not believe Oregon law limited the Council to only considering impacts within the borders of the State. He said the Department would look into both questions further.
- Mr. Apostol commented that he had worked on the analysis of a wind energy project located just outside of the Columbia Gorge National Scenic Area. He commented that while the project was located in Washington state, most of the visual impacts occurred on the Oregon side of the Columbia river. He recommended against precluding the consideration of impacts to impacts that may occur outside of the borders of Oregon for this reason.
- Mr. Clark commented that the regional agreement establishing the Columbia Gorge National Scenic Area was a good reminder that Oregon may a policy interest in protecting certain resources outside of the state.
- Ms. Gilbert agreed that protected areas are public resources, and that impacts should be considered regardless of their location.

Ms. Gilbert raised concerns that the protected area standard lists a number of impacts that should be considered, but in application, EFSC has only been looking the issues that are listed in the management plan. Ms. Gilbert recommended that all potential impacts on a protected area should be considered even if there is a specific component or focus that was the reason for protection.

Several Stakeholders raised concerns that the Protected Areas Standard did not adequately address impacts to wildlife and wildlife habitat.

- Ms. Gilbert cited concerns about impacts on eagles as an example, noting that they have a large hunting territory that can span several miles and could be impacted by a solar facility.
- Ms. Geer raised similar concerns about migratory birds.
- Mr. Kelly commented that migratory animals depend on habitat in protected areas often have needs that extend beyond the boundaries of the protected areas. He provided the example of elk and mule deer that spend part of the year in the Ladd Marsh Wildlife Area but then range out of it at other times. He recommended that impacts on habitat connectivity should also be considered under the protected areas standard.

Ms. Crowley-Koch asked how a solar facility could result in negative impacts on birds. Mr. Salvo commented that there could be different impacts on different species. He noted that greater sage grouse are particularly sensitive to disturbance within particular parts of their habitats so any development could affect species use and movement through that area. Mr. Clark added that there is literature describing several, at least hypothetical impacts on habitat and species, including the availability of foraging and nesting habitat, and the potential for strikes when hunting insects congregating near the surface of panels or mistaking the panels for water. Ms. Crowley-Koch said she believed some of these hypotheses had been disproven and emphasized the importance of using science as a basis for making decisions.

Ms. Katz commented that there is a separate standard and separate analysis for wildlife and wildlife habitat and these issues may already be adequately addressed under that standard. Ms. Esterson commented that these impacts would be considered if the protected area was within the analysis area for fish and wildlife habitat which is one-half mile from the site boundary, or for threatened and endangered species which is 5 miles from the site boundary. Ms. Esterson did not know if specific species or uses of protected areas, like migration corridors or nesting grounds, would be considered.

Ms. Gilbert commented that even within the analysis area for wildlife and wildlife habitat, indirect impacts to habitat were not always considered. She commented that aside from sage grouse and elk, which have a management plan that addresses some indirect impacts, but by and large indirect impacts are ignored

Ms. Gilbert recommended that habitat mitigation sites should also be listed as Protected Areas.

Ms. Pease recommended that the Council would want to retain that flexibility to adjust the analysis area depending on the particular circumstances of the project. Mr. Clark confirmed that removing the Council's ability to establish analysis areas based on the NOI was not under consideration. Ms. Albrich commented that if study area sizes were reduced, that flexibility would mean that the Department could also establish a larger analysis area if needed.

Ms. Gilbert raised concerns with the proposed alternative to reduce study areas to one mile would not sufficiently capture direct and indirect impacts.

Mr. Apostol raised concerns with any alternative that would reduce study or analysis areas. He commented that there was no empirical basis for reducing the analysis area when it comes to scenic resources and that most renewable energy projects and transmission lines have potential visual impacts that extend out quite a ways from the project area. He commented that 10 miles may be appropriate for photovoltaic facilities but was already too small for other kinds of projects like wind turbines.

Ms. Kreider agreed with these concerns and thought that there was evidence to suggest study areas should be larger to ensure all impacts are considered. Ms. Kreider recommended against the alternative to limit consideration of impacts to areas within Oregon's borders because the resources and impacts are not limited by geopolitical borders.

Mr. Clark introduced the second issue, related to methods used to evaluate impacts to scenic resources.

Mr. Apostol commented that this was a big topic for many jurisdictions. He explained that the Forest Service, for example, had just started a process to update its system for visual assessment, and that the Federal Highway Administration updated their system in 2015. He explained that he was currently working on a handbook for California Department of Transportation, and that BOEM has just completed a handbook for offshore wind specific to offshore wind, which I think it's easily adaptable to other energy projects, including onshore wind.

Mr. Apostol recommended that the EFSC rules are wholly inadequate. He suggested that the Council should consult with resource experts to identify a method that would best fit. He commented that, as a quick recommendation, he believed the BLM methodology was much more adaptable than the Forest Service methodology is, and that the BLM manual specifically addresses renewable energy projects, and it goes through an entire best management practices.

Ms. Kreider agreed that the lack of clear standards was egregious, and that the Council needed to improve the clarity of rules and consistency of the visual assessment process, even if there was some flexibility in allowing applicants to pick from different manuals and methodologies. She stated that she thought applicants had cherry picked the methods and standards they used and used outdated or alternate methods or standards when those better supported their application. She recommended that use of an independent evaluator to either conduct the assessment or verify the applicant's methods and conclusions were sound would also help

improve trust in the process. Mr. Apostol agreed that the use of an independent evaluator to see if the assessment was done properly and see if the findings are defensible might be a good a good process to consider.

Ms. Frisbie recommended the Council look to the Argonne National Laboratory's Visual Impact Assessment Guide. She also suggested that there should be some flexibility in allowing different methods for different contexts as each methodology had their own strengths.

Ms. Gilbert commented that there needed to be more specificity in what was considered to be "significant impacts." She commented that there were wind turbines within a quarter of a mile of a wild and scenic river or within 50 feet of the Oregon trail that were determined to be less than significant for no clear reason. Ms. Gilbert also suggested that the use of key observation points was not appropriate for resources like wild and scenic rivers or Oregon Trail areas. She recommended that there needs to be a specific process with measurable indicators, and objective criteria for when impacts are significant. She commented that the US Forest Service has some standards that state if infrastructure is within a certain distance of a resource, it's considered a high impact, and that similar standards could be adopted by the Council.

Mr. Apostol commented that the Council should consider amending the standard so that significant adverse impacts on visual resources don't automatically result in denial of a project. He commented that this type of standard undermined the validity of visual impacts assessments because developers will not necessarily allow an honest assessment of visual impacts because if they do, and they find it's significantly adverse, they're derailing their project. He suggested that some kind of clause allowing additional mitigation, including offsite mitigation or payments to the community, or the people affected, would allow for a more honest assessment that doesn't deliberately downplay the impacts.

Ms. Pease commented that it was important to allow flexibility because some projects, such as large-scale linear facilities, cross multiple land management jurisdictions and it can be difficult to come up with an approach that satisfies their requirements as well as the Council's.

Ms. Crowley-Koch agreed that having a menu of options would be good way to address the different impacts facilities may have on different types of resources.

Mr. Clark introduced the next issue related to consideration of scenic resources identified in state and regional land management plans in the rule.

Mr. Goldstein commented that, with regards to the recommendation to add regional plans to ensure things like the Colombia River Gorge National Scenic Area, that the Columbia River Gorge National Scenic Area Management Plan was, to his mind, a federal land management plan.

Ms. Geer commented that there are a lot of situations where scenic areas, especially privately owned areas or areas owned by land trusts are not covered by any land management plans and that those areas should also be captured somehow.

- Ms. Crowley-Koch suggested that it's very difficult for developers to know where those privately owned areas are because they're not necessarily reported or inventoried anywhere and recommend against their inclusion in the standard.
- Ms. Geer commented that some of these areas that were available to the public could easily identified.

Mr. Apostol commented that federal land management agencies had gone through the process of inventorying scenic resources and deciding what level of protection they deserve, which could be anything from preservation down to modification, which allows quite a bit of development, but that only approximately 3 counties in Oregon and a few cities had gone through a similar process so there wouldn't be too much available under the local land use review process. He recommended that a better approach would be to require developers to identify scenic resources that are designated, but also scenic resources that have not been designated and that can be mountains rock out crops, sections of rivers, sage brush, step landscapes.

Mr. Clark asked if Mr. Apostol would recommend that the Council include criteria, or categories of things that would need to be inventoried. Mr. Apostol confirmed that there was literature describing a discrete list of what people find to be scenic, such as undisturbed, natural, vegetation, complex, topography, seasonal color landscapes with seasonal color, and water features.

Mr. Kelly suggested that National Forests were established more than 100 years ago and that conservation easements were a more recent form of landscape protections that should be protected. He commented that he was not sure if there was a directory or inventory available but that he did not think it was unreasonable to require developers to identify them.

Ms. Crowley-Koch stated that there was a process in place for designating scenic areas and protected areas and if private landowners or trusts have land that they feel should be designated they should go through that process. She thought that it may be inappropriate for the Council to make those determinations.

Ms. Gilbert commented that County land use plans have very different quality. She recommended that the public should have the opportunity to weigh in on the identification of areas having important scenic qualities or values during the review process before the issuance of the draft proposed order. She also stated that a proposed facility should not be allowed to impact a resource in a way that would affect the values or qualities that are or could be the basis for a protective designation, including the environment or setting of the resources.

Ms. Kreider agreed that reliance on land use plans was not sufficient and that there should be opportunities for public participation in identifying scenic resources before issuance of the draft proposed order. She commented that other local organizations, such as Travel Oregon and local Chambers of Commerce should also be consulted.

Ms. Blanchard commented that National Scenic Trails are not Protected Areas, and while the components that are on federal land would be included in a federal land management plan, the components that are not may not necessarily be captured under the Scenic Resources Standard either. She asked if a trail corridor management plan would be considered to be a federal land management plan under the rule or not.

- Mr. Clark commented that he thought it would but would have to confirm.
- Ms. Frisbie added that National Trails were complicated in that they all have congressional designated corridors but do cross over many different land jurisdictions and fall under different land management plans also cross over private land. She explained that her office administered nine National Historic trails, including the Oregon Trail and the California National Historic Trail which both cross through Oregon, but doesn't actually manage any of the land. She commented that the discussion at the previous meeting had ended on protecting high potential, historic sites, and high potential root

segments, which are defined in the National trail systems act as parts of the trails that really convey the historic significance.

- Ms. Blanchard commented that there really was no equivalent to high potential sites and segments for National Scenic trails.
- Ms. Kreider commented that regional trails, such as the Oregon Desert Trail and Blue Mountain Trail should be considered in addition to National Trails.
- Mr. Goldstein commented that if they are not considered already, comprehensive management plans for trails and wild and scenic river corridor management plans should be considered, and that reviewing agencies could play a role in helping the state navigate the overlapping layers.

Mr. Stanish cautioned against moving away from land management plans to identify resources. He stated that different resources are recognized for different types of values, and that the plans were the best way to identify those values since they are developed through a very public process with substantial public input.

Mr. Stanish commented that while there were some conservation easement inventories out there the only way to identify many private property designations is to do a title search on actual property, which would be expensive and time consuming for large linear projects.

Ms. Crowley-Koch recommended that there are parts of trails and other corridors that are scenic and parts that are not, and that there should be a way to protect the important scenic segments without prohibiting development along the entire corridor. She also stated that taking the time to conduct a scenic resources inventory would be time consuming and subjective and that would impede progress to addressing the climate crisis.

Ms. Gilbert commented that she felt there needed to be more independence in the state review process and that there were ethical concerns with the applicant providing the analysis and the state receiving funds from the applicant to conduct its review. She stated that this was particularly problematic when final analyses or mitigation plans were reviewed and approved outside of public processes.

Ms. Katz raised concerns with the suggestion to ask applicants to identify resources as significant or important on a case-by-case basis stating that this could lead to subjective and inconsistent conclusions that are not vetted by public processes.

Mr. Apostol responded that there are established methods that break landscapes into roughly 3 categories of A, B and C, with A being deserving of the highest level of protection and C being deserving of virtually no protection. He stated that in his experience, most of the energy proposals in Oregon had been on either C or B type landscapes, and that type A landscapes were pretty well protected. He stated that the kind of inventory he suggested is not endless, is not time consuming, and is not without purpose and he thought such an inventory would facilitate development of renewable energy because it would set out clear standards.

Mr. Clark introduced the final issue related to the identification of Recreation Opportunities. Ms. Kreider commented that she thought that recreation opportunities may even be easier to deal with than scenic, but that she thought that local consultation with the tourism industry and hospitality sector was important.

Mr. Clark discussed the next steps for the rulemaking and concluded the meeting at approximately 3:59 pm.