BEFORE THE ENERGY FACILITY SITING COUNCIL OF OREGON

Protected Areas, Scenic Resources, and Recreation Standards Rulemaking Project	Public Comments Received as of February 23, 2022

This packet contains:

- The Issues Analysis Document reviewed by Council at its October 2020 Meeting.
- 8 comments received in response to the Department's November 6, 2020 request for initial written comments on this project. These comments were reviewed by the Council at its April 23, 2021 meeting.
- 2 comments received in response to the Department's proposed 2022-2024 Rulemaking Schedule. These comments were reviewed by the Council at its December 17, 2021 meeting.
- 5 comments received in response to rulemaking workshops conducted in 2021. These comments have not been reviewed by the Council at a previous meeting.

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

This document provides a summary of the Department's preliminary analysis of issues recommended to be addressed in the Protected Areas, Scenic Resources and Recreation Rulemaking Project. The document and associated draft rules are for information only and are not notice of rulemaking action by the Energy Facility Siting Council. The analysis and recommendations within are subject to change based on input from the Energy Facility Siting Council, staff, and stakeholders.

Issue 1 – Notification of Protected Area Land Managers

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

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

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

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

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

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

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

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

[1] OAR 345-020-0011(1)(g)
[2] OAR 345-021-0010(1)(L)

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

Alternatives:

1. Take no action and rely on existing public notification requirements to provide information to managers of protected areas.

2. Amend OAR 345-001-0010(51) to specify that the managing agency of a protected area in the study area for impacts to protected areas for the proposed facility is a "reviewing agency."

3. Amend rules or provide policy directive to specify that any agency that manages a protected area within the study area for impacts to protected areas will be included in the distribution list for the Notice of Intent.

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

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

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

[3] ORS 345-022-0040(1)(L), (m), and (n)
[4] OAR 345-022-0040(1)(i), the Register is available from: https://inr.oregonstate.edu/orbic/natural-areas-program/register-natural-heritage-resources.
[5] See OAR 345-015-0110(1), 345-015-0190(7), 345-015-0220(2).

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

Issue 2 – Scope of Required Findings

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

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

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

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

Alternatives:

1. Make no changes.

2. Amend OAR 345-022-0040(1) to limit the scope of Council's findings for impacts to protected areas located within the analysis area described in the Project Order.

3. Amend OAR 345-022-0080(1) and 345-022-0100(1) to remove the limitation on the scope of Council's findings and include resources in all areas.

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

[6] OAR 345-020-0040, 345-021-0050, 345-021-0055.
[7] OAR 345-020-0011(1)(g)
[8] OAR 345-021-0010(1)(L)

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

Issue 3 – Effective Date of Areas and Designations

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

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

Background: The Protected Areas Standard under OAR 345-022-0040(1) refers to "designations in effect as of May 11, 2007." A small number of new areas have been designated for protection or expanded since that time such as the Devil's Staircase Wilderness Area, which was designated in 2019.[9]

Alternatives:

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

2. Amend rule to remove references to specific publications and remove the date.

3. Amend rule to specify that Council must make findings based on designations in effect on the date the preliminary application is submitted.

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

Issue 4 – Lists of Protected Areas

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

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

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

[9] P.L. 116-9, Mar. 12, 2019
[10] OAR 345-020-0000(9)

Some of the listed categories contain lists identifying specific areas within the categories that appear to be incomplete or out of date. For example, the rule lists the Fort Clatsop National Memorial under the subsection for National Parks, but the memorial was redesignated as the Lewis and Clark National Historical Park with expanded jurisdiction over multiple sites in 2004.[11] The rule also does not list the Nez Perce National Historic Park, the Cascade-Siskiyou National Monument, and a number of National and State Wildlife Areas and State Fish Hatcheries.

Alternatives:

1. Make no changes.

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

3. Amend rule to remove lists of specific protected areas and rely on categories and designations.

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

Issue 5 – Outstanding Resource Waters

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

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

Background: Outstanding Resource Waters are high quality waters that constitute an outstanding state resource due to their extraordinary water quality or ecological values, or where special protection is needed to maintain critical habitat areas. Outstanding Resource Waters are nominated by the Oregon Department of Environmental Quality and designated by the Environmental Quality Commission. Oregon's only current Outstanding Resource Waters are the North Fork Smith River and its tributaries and associated wetlands, as listed in OAR 340-041-0305(4), which were designated by the Commission in 2017.[12] The North Fork Smith River is considered a Protected Area as a Wild & Scenic River.

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

Alternatives:

[11] P.L. 108–387, Oct. 30, 2004
[12] See OAR 340-041-0004(8)(d).

1. Make no changes.

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

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

Issue 6 – Linear Facilities Located in Protected Areas

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

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

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

Alternatives:

1. Make no changes.

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

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

Issue 7 – State Scenic Resources

Affected rules: OAR 345-022-0080

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

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

Alternatives:

1. Make no changes

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

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

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December 30, 2020

VIA EMAIL

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Oregon Department of Energy
550 Capitol Street NE
Salem, Oregon 97301
Email: EFSC.rulemaking@oregon.gov

Re: Protected Areas, Scenic Resources and Recreations Standard Rulemaking

Attention Rulemaking Coordinator:

On October 23, 2020, the Energy Facility Siting Council ("EFSC" or "Council") approved the recommendation of Staff of the Department of Energy ("Department Staff" or "Staff") to initiate rulemaking to develop proposed revisions to the Council's Protected Areas, Scenic Resources, and Recreation Standards and associated rules. In its October 9, 2020 Report to the Council, Staff had noted that the Protected Areas and Scenic Resources Standards were last amended in 2007 and that the Recreation standard was last amended in 2002, and explained that these standards needed revision to clarify and update the rules, and to address certain inconsistences among the application of the individual rules.

Idaho Power supports the Council's decision to update and improve its rules implementing the Protected Area, Scenic Resources and Recreation Standards. However, in adopting new rules, the Council must ensure parties with applications for site certificates ("ASC") currently before the Council are not prejudiced by any rule updates resulting from this process. As will be detailed below, the data collection, analysis and drafting that go into preparing an ASC reflects an enormous effort that, for large projects, can be many years in the making. By the time a Preliminary ASC is filed, the Applicant has already expended enormous resources to research, evaluate and demonstrate compliance with Council standards. And once a Final ASC is made, ODOE Staff and reviewing agencies will have also typically invested a very significant amount of time and effort in the process. For these reasons, the Council should take care to ensure that the new rules will not apply to ASCs currently in process when application of the rules would change the goalposts for an Applicant by requiring new analyses, reverting to earlier stages of the process, or even filing an entirely new application.

I. RULES THAT IMPOSE NEW REQUIREMENTS SHOULD NOT BE RETROACTIVELY APPLIED TO EXISTING APPLICATIONS

Under Oregon law, new administrative rules should not apply retroactively if such application would be unreasonable, under the circumstances.[1] Retroactive application of the rules may be at issue where new rules require changes to notice requirements or new analysis, if such new requirements apply to projects past the preliminary stages of the permitting process. Moreover, regardless of whether application of new rules to existing projects would qualify as "retroactive" in a technical sense under Oregon law, the Council should 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.

As the Council and Staff are aware, the process for the development, review, and evaluation of an ASC for any proposed project is time-consuming and expensive. Most applications take at least 12-18 months to process, from the filing of a Notice of Intent ("NOI") to the issuance of a site certificate. For that reason, any retroactive application of new requirements to existing ASCs is always to be avoided. However, the stakes are even higher in the case of linear facilities like Idaho Power's Boardman to Hemingway Transmission Line Project ("B2H") that by their very nature will raise more issues and involve more analysis.

Idaho Power initiated the EFSC permitting process for B2H over 10 years ago. In the early stages of development, the Company conducted a Community Advisory Process that included nearly 1,000 stakeholders comprised of elected officials, business owners, opposition groups, landowners, environmental groups, and community members. Nearly 50 different routes in 11 different counties were considered in that process. Since filing its NOI in July of 2010, the Company has continued to work closely with Department Staff and other stakeholders to select a route that will meet the Company's critical energy and capacity needs while avoiding, minimizing and, if necessary, mitigating any impacts to the resources protected by state, local and federal law. The project location and design reflected in the Final ASC, which was submitted on September 28, 2019, is the culmination of years of work by scores of Idaho Power employees and consultants, and over $100 million in permitting costs. Thus, the application to B2H of any new substantive or procedural requirements that might be adopted in this rulemaking could result in an enormous waste of time and resources, if Idaho Power were forced to produce new analysis, or worse yet, to amend its Final ASC, which would require a new Draft Preliminary Order and Proposed Order and a new contested case process.

The Council can avoid the harm that would result from the retroactive application of its rules by including explicit direction in each rule that any new requirements would not apply to projects that have already submitted a Preliminary ASC. Alternatively, the Council could issue a specific exemption from new requirements for B2H and any other projects for which the exemption may be appropriate.

[1] *Gooderham v. Adult & Family Servs. Div.*, 64 Or App 104, 108 (1983) (quoting Davis, 2 Administrative Law Treatise 109, § 7:23 (2nd ed 1979)).

II. COMMENTS ON SPECIFIC PROPOSALS

Issue 1: Notification of Protected Area Land Managers

Summary of Issue: In its NOI, an Applicant for a site certificate must identify all Protected Areas in the twenty-mile study area. However, the current rules do not require that the Department or Applicant notify the managers of the Protected Areas unless the Protected Area falls within the notification distances for property owners. One managing agency has requested that the Council consider amending the rules to provide notification to ensure that a Protected Area manager is able to participate in the siting process when a facility is proposed to be located near a Protected Area it manages.

Staff's Proposed Alternatives:

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

Idaho Power's Comments:

Idaho Power supports a revision to the rules that would result in the managers of Protected Areas within a project's study area receiving notification of the filing of an NOI and serving as a reviewing agency. While the current processes do provide several pathways for information about a proposed facility to be communicated to managers of Protected Areas, these methods do not guarantee that notification with be effective. For this reason, Idaho Power supports a rule revision that would require Protected Area managers be a Reviewing Agency that would receive both a copy of the NOI and the Preliminary ASC, consistent with Alternative 2. Idaho Power believes that Alternative 3, which requires that managers receive a copy of the NOI, would also improve the rules. However, in the case of linear facilities, there may be route changes between the NOI and Preliminary ASC—which may also shift the study area and Protected Areas to be analyzed—and so Idaho Power believes that the approach in Alternative 2 is more likely to ensure that all affected managers receive notice.

Importantly however, this rule should not be applied to any project that has already submitted its Preliminary ASC, and therefore the following language should be included in the new rule:

Projects in the Council permitting process that have already submitted a Preliminary Application as of the date of adoption of this rule will not be subject to the new rule, and instead will be required to comply with the version of the rule in place as of the date the Preliminary Application was submitted.

Issue 2: Scope of Required Findings

Summary of Issue: Under current rules, the study area for Scenic Resources and Recreation Standards are limited to the analysis area in the project order, while the Protected Area Standard has no similar limitation. Because the analyses under all three standards are very similar, the question has arisen as to whether the study area for Protected Resources should also be limited to the analysis area in the project order.

Staff's Proposed Alternatives:

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

Idaho Power's Comments:

Idaho Power supports the approach in Alternative 2 to harmonize the scope of analysis in these three standards by limiting the Council's evaluation for the Protected Area Standard to the analysis area in the project order. Idaho Power believes that the default analysis area of 20 miles from the site boundary is adequate to capture any reasonably foreseeable impacts to Protected Areas. The Company would oppose the approach in Alternative 3 to remove reference to the study areas for Scenic Resources and Recreations standards, as this approach would inject uncertainty as to the appropriate scope of analysis and potentially create additional work for both the Department and the Applicant, while at the same time being unlikely to capture additional reasonably foreseeable impacts to these resources. To avoid confusion where a project under review is located close to Oregon's borders, Idaho Power recommends that the Council explicitly limit the application of the analysis area to exclude impacts to resources outside of the State of Oregon.

In the event that the Council is inclined to adopt Alternative 3 and remove the study area limitations for Scenic Resources and Recreation standards, these revisions should not apply to any project that has already filed its Preliminary ASC, by including the following language into the rule:

Projects in the Council permitting process that have already submitted a Preliminary Application as of the date of adoption of this rule will not be subject to the new rule, and instead will be required to comply with the version of the rule in place as of the date the Preliminary Application was submitted.

Issue 3: Effective Date of Areas and Designations

Summary of Issue: The current Protected Area Standard requires an evaluation of impacts to "designations in effect as of May 11, 2007." There have been a small number of new areas designated since that time.

Staff's Proposed Alternatives:

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

Idaho Power's Comments:

Idaho Power agrees that the Council should revise its rules to include consideration of new areas designated after 2007. However, in doing so, it is crucial that the Commission ensure that the new rule will not be applied retroactively to projects that have already submitted a Preliminary Application. For this reason, Idaho Power recommends that the Council adopt Alternative 3. Alternatively, Idaho Power requests that if the Council is inclined to adopt Alternative 1, and update the rule to reference the date of adoption of the new rules, that it expressly exempt B2H and other projects currently in the Preliminary ASC review or contested case process from the revised rule.

As discussed above, an enormous amount of work is expended by an Applicant and the Department to move an ASC through the permitting process and it would be exceptionally prejudicial to an Applicant to be forced back to earlier stages in the process in the event a new protected area were designated after its Preliminary ASC is filed. Indeed, an Applicant could repeatedly be forced back to earlier stages in the process if several new designations were made consecutively. Moreover, if an Applicant that was already well into the permitting process were subject to new designations, other parties might be encouraged to game the system by seeking designations in the study areas for a proposed project. The recent designation of the Rice Glass Hill Natural Area is a case in point.

In May of 2019, the Department issued a Draft Proposed Order ("DPO") in the B2H proceeding recommending that the Council approve a route for B2H that would cross certain property owned by Joel Rice in an area known as Glass Hill. Around that same time in April 2019, Mr. Rice (via Susan Geer) initiated the process with the Oregon Parks and Recreation Department ("OPRD") to have his land registered and designated as a State Natural Area. As a result of that process, Mr. Rice's land—including a portion that will be crossed by B2H—was registered as the Rice Glass Hill Natural Area in September 2019, which was after the close of the record for comments on the DPO. The Proposed Order was issued in July 2020, and Mr. Rice (again via Ms. Geer) subsequently sought a more formal dedication of the Rice Glass Hill Natural Area, which was approved by the Oregon Parks and Recreation Commission in November of 2020, after the Proposed Order was issued and the contested case commenced.

Importantly, based on the record available from OPRD, it appears that at no time during the registration or designation process did Ms. Geer or Mr. Rice notify either Idaho Power or the Department of its efforts, and Ms. Geer and Mr. Rice also failed to inform OPRD that a transmission line critical to the region's energy grid was recommended by the Department to cross the very land for which he sought registration and dedication under the Natural Areas Program. Nonetheless, one of the limited parties to the B2H contested case requested that the Rice Glass Hill Natural Area be evaluated as a Protected Area in the B2H contested case, and

that issue was included in the case by the Administrative Law Judge—despite the fact that Idaho Power pointed out that the current rules require the evaluation of only those natural areas designated as of 2007. To be clear, B2H is now the subject of a contested case process and one of the issues in the case is to evaluate a route that crosses the newly designated natural area. If the Council were to decide, at this late date, that impacts to the Rice Glass Hill Natural Area were to be evaluated under the Protected Area Standard, it could be prejudicial to Idaho Power.

As noted above, Idaho Power supports the Council updating its rule to include recently designated Protected Areas. However, in doing so it must avoid the retroactive or prejudicial application of the new rule to projects that have already submitted their preliminary applications. For this reason, Idaho Power supports the Department's Alternative 3. In the event the Council were to require the evaluation of impacts to Protected Areas as of the date of the rulemaking, B2H—and other projects that, like B2H, are well into the permitting process—should be explicitly exempted from the application of the rule by including the following language into the new rule:

Projects in the Council permitting process that have already submitted a Preliminary Application as of the date of adoption of this rule will not be subject to the new rule, and instead will be required to comply with the version of the rule in place as of the date the Preliminary Application was submitted.

Issue 4: Lists of Protected Areas

Summary of Issue: The rule contains lists of categories of protected areas, as well as specific protected areas that may be out of date.

Staff's Proposed Alternatives:

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

Idaho Power's Comments:

Idaho Power believes that it is less than optimal for the rule to include an out-of-date list of Protected Areas. However, the approach in Alternative 2 of updating the list to include all current Protected Areas is similarly problematic, given that that list will be out of date as soon as the new rule is adopted. For this reason, Idaho Power supports Alternative 3, under which the rule would not purport to list all specific Protected Areas and instead would rely on categories and designations.

To the extent the Council is inclined to include a new list of Protected Areas in the rule, the rule must clarify that to the extent that any new Protected Areas are added after the date a project submitted its Preliminary Application, the Applicant will not be required to consider impacts to

such new Protected Areas. Accordingly, Idaho Power recommends that the following language be added:

Projects in the Council permitting process that have already submitted a Preliminary Application as of the date of adoption of this rule will not be subject to the new rule, and instead will be required to comply with the version of the rule in place as of the date the Preliminary Application was submitted.

Issue 5: Outstanding Resource Waters

Summary of Issue: The current rules do not include Outstanding Waters as Protected Areas.

Staff's Proposed Alternatives:

1. Make no changes.
2. Amend OAR 345-022-0040(1) to add Outstanding Resource Waters to the list of protected areas.

Idaho Power's Comments:

Idaho Power does not have a position as to whether the current rules should be updated to include Outstanding Waters. However, if the Council were to adopt Alternative 2, it is critical that Applicants that have already submitted a Preliminary ASC be exempted from complying with any new requirements resulting from the rule. In that case, Idaho Power would recommend that the following language be added:

Projects in the Council permitting process that have already submitted a Preliminary Application as of the date of adoption of this rule will not be subject to the new rule, and instead will be required to comply with the version of the rule in place as of the date the Preliminary Application was submitted.

Issue 6: Linear Facilities in Protected Areas

Summary of Issue: The current rule allows the Council to permit a linear facility in a Protected Area where other alternative routes have been determined by the Council to have greater impacts—and so could allow such permitting even if there are alternative routes that could have a lesser impact.

Staff's Proposed 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.

Idaho Power's Comments:

Idaho Power recognizes the potential concern—that the current rule would theoretically allow an

Applicant to cross a Protected Area simply by showing there is one potential alternative route that would have greater impacts than the proposed rule. That is, the Applicant could set up a "straw man" proposal that has greater impacts, even if there were a reasonable and practical alternative route with lesser impacts. Idaho Power agrees that this result should be avoided. However, Staff's proposed Alternative 2 overcorrects for the issue and therefore should be rejected. Under Alternative 2, the Council would need to find that there is ***no alternative route*** that could have lesser impacts; in order to demonstrate compliance, and the Applicant would be required to essentially prove a negative by studying an infinite number of alternatives to prove that there is no alternative route with lesser impacts. If the Council wishes to revise the rule to require a more robust analysis by the Applicant, Idaho Power suggests that the Council amend the rule by adding the word "reasonable" to the existing language so that the provision allows for a linear facility to be sited in a Protected Area if the Council finds that "other reasonable routes or sites have been studied and determined to have greater impacts."

Importantly, if the Council were to make this change, it should not be applied to any project for which the Preliminary ASC has been submitted, and therefore Idaho Power proposes that the following language be added to the rule:

Projects in the Council permitting process that have already submitted a Preliminary Application as of the date of adoption of this rule will not be subject to the new rule, and instead will be required to comply with the version of the rule in place as of the date the Preliminary Application was submitted.

Issue 7: State Scenic Resources

Summary of Issue: While the Scenic Resources Standard requires the Council to find that the project is not likely to result in significant adverse impacts to scenic resources and values identified in local, tribal and federal land management plans, it omits state land management plans.

Staff's Proposed 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.

Idaho Power's Comments:

Idaho Power does not take a position as to whether the Scenic Resources Standard should be revised to include consideration of scenic resources identified in state plans. However, in the event that the Council is inclined to update the rule to include scenic resources identified in state plans, this new rule should not be applied to projects that have already submitted a Preliminary ASC, and therefore Idaho Power proposes that the following language be added:

Projects in the Council permitting process that have already submitted a Preliminary Application as of the date of adoption of this rule will not be subject to the new rule, and instead will be

required to comply with the version of the rule in place as of the date the Preliminary Application was submitted.

Sincerely,

Lisa Rackner

United States Department of the Interior
NATIONAL PARK SERVICE
Interior Region 9
333 Bush Street, Suite 500
San Francisco, CA 94104-2828

IN REPLY REFER TO:
1.B. (PWRO)

FOR ELECTRONIC DELIVERY ONLY

December 30th, 2020

Mr. Christopher Clark
Energy Facility Siting Council
Oregon Department of Energy
EFSC_rulemaking@oregon.gov

RE: National Park Service recommendations for upcoming rule revisions regarding Protected Areas, Scenic Resources, and Recreation Standards

Dear Mr. Clark,

The National Park Service (NPS) appreciates the opportunity to recommend rule revisions for Protected Areas, Scenic Resources, and Recreation Standards and associated rules in the Oregon energy facility siting process.

The Energy Facility Siting Council's ("the Council") existing standards require analysis of impacts to Protected Areas within the Project Study Area, but do not require that the Council notify federal land managers (FLM's) of the Project application or provide opportunities for early coordination. The NPS realizes that the Council publicizes permitting processes through other avenues, but FLM's may not be attuned to those publicity efforts.

The NPS recommends that the Council carry forward Staff Alternatives 2 and 3 for "**Issue 1: Notification of Protected Area Land Managers."** Alternative 2 would give a new opportunity for FLM's to coordinate early in the process, and Alternative 3 would add FLM's to the distribution list for Notices of Intent when the federally protected area is within a Project Study Area.

We look forward to working with the Oregon Department of Energy to increase efficiency of the permitting process and continue to protect federal lands, scenic resources and recreation opportunities. If you have any questions, please contact Lara Rozzell, NPS Interior Region 9 External Energy & Minerals Coordinator, at (415) 825-0245 or at lrozzell@nps.gov.

Sincerely,

Randy Lavasseur
Deputy Regional Director

Oregon Solar Energy Industries Association

Energy Facility Siting Council
Oregon Department of Energy
550 Capitol St. NE
Salem, OR 97301

December 30, 2020

Dear Members of the Energy Facility Siting Council,

Thank you for the opportunity to comment on the proposed revisions to the Council's Protected Areas, Scenic Resources, and Recreation Standards. It is important for Oregon, in order to both meet the state's greenhouse gas reduction goals and to spur economic development, that any revisions have input from those with the most knowledge about how to develop projects that reduce carbon and create Oregon jobs.

The Oregon Solar Energy Industries Association (OSEIA) has strong concerns with the premise of this process. It is unclear *why* staff decided to conduct a rulemaking review project. The October 9, 2020 memo does not explain what problem the revision project is seeking to solve. Revisions take time and money away from other agency and state activities and if there are no existing problems to solve with the revisions, it is unclear why the project was undertaken.

In addition, the proposed revisions would add cost and delay to developing new renewable projects in Oregon, which goes directly against Governor Brown's Climate Executive Order 20-04. In fact, the Oregon Department of Energy (ODOE) 20-04 implementation report says that the objective of Energy Facility Siting Council (EFSC) rulemaking would be to "…simplify procedures for review where necessary" and to "Evaluate standards and application requirements to determine if requirements should be adjusted for different types of energy facilities, including facilities which generate energy from renewable resources." The report goes on to say, "These rulemakings are intended to create efficiencies and reduce the time and costs associated with state jurisdictional reviews while having no negative effect on public participation." However, most of the proposed revisions do not simplify procedures, increase costs and time, and do not recognize the unique nature of renewables projects.

Our first recommendation is to hold off on this rulemaking revision project until either a problem arises or the state budget has enough funding to sustain such a project. In a time of budget cuts, spending scare resources on unnecessary rulemaking raises large concerns. Instead, we ask that EFSC focus on rulemaking that would *reduce costs*, streamline applications and eliminate current requirements that are not applicable to solar projects, as the ODOE EO-20-04 report describes.

PO Box 14927, Portland, OR 97293-0927
Email: admin@oseia.org
www.oseia.org

OSEIA recommends against initiating formal rulemaking proceedings. However, should the Council move forward with rulemaking, OSEIA has the following comments on the seven issues raised:

Issue 1 – Notification of Protected Area Land Managers

It is unclear why this change is being proposed. Is there a problem with the current process? Have any parties been inadvertently left out of the process in the past? Without a clear need for a change, OSEIA recommends alternative one, take no action. Alternative two and three would both lead to increased costs, as staff has described in their discussion, and potentially additional time. OSEIA believes that alternatives two and three do not follow the Governor's Climate Executive Order 20-04, which instructs agencies to *accelerate* greenhouse gas (GHG) reductions in a *cost-effective manner*.

Issue 2 – Scope of Required Findings

OSEIA prefers that alternative two be adopted in order to align scopes and streamline analysis requirements. Alternative one, no action, would be acceptable as there does not seem to be an existing problem. Alternative three is the worxst option since it would increase costs and create confusion for applicants and agencies alike.

However, a better option would be a fourth alternative, to limit the scope of the protected area for both Scenic Resources and Recreation Standards and the Protected Area standard. An area of 20 miles from the project site is too large of an area for solar projects. Solar projects do not have impacts beyond the immediate project site – they cannot be seen or heard 20 miles away and have no emissions. The project area should be reduced to one mile surrounding the project.

Issue 3 – Effective Date of Areas and Designations

OSEIA recommends alternative one, which will give applicants a specific list to work from. OSEIA agrees with staff that alternatives two and three would make things very confusing, especially for projects currently under review. While alternative three would eliminate the need for future rulemaking, the uncertainty it would create would result in extra costs and delays. If an area was added and current applicants had to take it into consideration mid-process, it would also add costs.

OSEIA questions if a "no change" alternative should be considered. While staff did not consider a no action alternative, if there have not been problems in the past with including new areas, or if other existing methods are currently used to address this issue, a no action alternative should be considered.

Issue 4 – Lists of Protected Areas

Since the current lists are either incorrect or out of date, OSEIA recommends alternative two, which will give applicants a specific list to work from. Similar to Issue three, alternative three to remove dates would result in confusion for applicants, and potentially cost increases and delays. While there

are publicly available lists, if agencies and the applicant are not working from the same lists, there could be confusion and delay.

Issue 5 – Outstanding Resource Waters

OSEIA recommends alternative one and agrees with staff analysis that alternative two is not necessary since Outstanding Resource Waters are likely to be considered Protected Areas under the current rule and that a change could increase costs. In addition, consideration of water resources should not be an issue in siting solar projects, as solar does not use water, does not create run-off, and erosion is rarely an issue. In addition, erosion control and site stability are already regulated by the Department of Environmental Quality NPDES 1200-C (Stormwater Construction Permit) process. Requirements include site-specific DEQ-approved Erosion and Stormwater Control Plans, monitoring and reporting of the implementation and efficacy of the ESCP, and DEQ site-inspection.

Issue 6 – Linear Facilities Located in Protected Areas

OSEIA recommends alternative one and agrees with staff analysis that alternative two is not necessary and that a change could increase costs. Oregon's lack of transmission lines seriously limits the amount of renewable projects that can be built in Oregon; any new rules that could increase costs or delays to new transmission lines would be in opposition to the Governor's Climate EO 20-04.

Issue 7 – State Scenic Resources

OSEIA recommends alternative one and agrees with staff analysis that alternative two is not necessary and that a change could increase costs. Scenic byways present a good example of why changing this rule would not result in good outcomes. Some scenic byways are quite long and every spot along the entire length would not be considered "scenic" by most. If the scenic resources are already inventoried in state management plans, there is no need to add new barriers for applications. Any new rules that could increase costs or delays to new renewables projects would be in opposition to the Governor's Climate EO 20-04.

While OSEIA is appreciative of the opportunity to provide comments, we believe the best option is not to move forward with formal rulemaking, since it directly contradicts the agency's own report regarding the Governor's Climate Executive Order 20-04.

Respectfully,

Angela Crowley-Koch
Executive Director

FRIENDS OF THE COLUMBIA GORGE

HOOD RIVER | PORTLAND | WASHOUGAL

GORGEFRIENDS.ORG

SUBMITTED VIA E-MAIL ONLY

December 31, 2020

Oregon Energy Facility Siting Council
c/o EFSC Rules Coordinator
Via email to EFSC.rulemaking@oregon.gov

Re: Rulemaking Recommendations – Protected Areas, Scenic Resources, and Recreation Resources

Dear Chair Grail and Council Members:

Friends of the Columbia Gorge ("Friends") submits the following initial recommendations for potential revisions to the Council's rules regarding protected areas, scenic resources, and recreation resources. Friends is a nonprofit organization with approximately 6,000 members dedicated to protecting and enhancing the resources of the Columbia River Gorge, and with strong interests in responsible energy generation and the proper implementation of state law governing the approval, construction, and modification of large energy facilities in Oregon.

Friends has reviewed the October 9, 2020 "Issues Analysis Document" by the Oregon Department of Energy ("ODOE") for the Protected Areas, Scenic Resources, and Recreation Rulemaking Project ("ODOE Memo"). This ODOE Memo provides potential alternatives for seven enumerated issues. Friends will respond to those seven issues below, and will also raise one additional issue for consideration.

ODOE Issue 1 – Notification of Protected Area Land Managers

The Council should pursue Alternative 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.'"). This rule already expressly designates as "reviewing agencies" numerous other types of agencies, such as "[t]he governing body of any incorporated city or county in Oregon within the study area" and "[t]he federal land management agency with jurisdiction if any part of the proposed site is on federal land." OAR 345-001-0010(51)(p), (51)(r). The agencies that directly manage protected areas should also be deemed reviewing agencies under the Council's rules in order to ensure their meaningful input and participation in the energy facility siting review process. Alternative 2 is a prudent and appropriate approach that should be pursued.

ODOE Issue 2 – Scope of Required Findings

The Council should pursue Alternative 3 ("Amend OAR 345-022-0080(1) and 345-022-0100(1) to remove the limitation on the scope of Council's findings and include resources in all areas."). This change would harmonize the various geographic scopes for review of potential impacts to scenic resources, recreational resources, and protected areas. It is already standard operating procedure for proposed energy projects to evaluate potential impacts to these types of resources far outside of the designated analysis areas, for example evaluating the potential impacts of air pollution caused by proposed thermal combustion power plants to protected areas (such as the Columbia River Gorge National Scenic Area) as far away as 75 or more miles from each proposed power plant site—an issue that can affect all three of these resources in question (scenic resources, recreation resources, and protected areas), and in many cases these three resources will be intertwined (e.g., recreation opportunities at scenic locations within protected areas). To improve consistency in the review process, the Council should pursue Alternative 3.

On a related note, the ODOE Memo states at page 3 that "[t]he study area for protected areas under OAR 345-001-0010(58)(e) . . . is the default analysis area for the Project Order." This statement is accurate for projects reviewed under the expedited review process: "In such expedited reviews, analysis areas addressed in this rule are the study areas defined in OAR 345-001-0010, subject to later modification in the project order." OAR 345-021-0010(1); *see also* OAR 345-001-0010(2) ("For the purpose of submitting an application for a site certificate in an expedited review granted under 345-015-0300 or 345-015-0310, the analysis areas are the study areas defined in this rule, subject to modification in the project order."). However, for other, non-expedited review processes, Friends is unable able to identify any Council rule requiring that the study area under OAR 345-001-0010(58)(e) must be used as the default analysis area for the Project Area. Instead, the Council rules appear to simply require ODOE staff to "establish[] . . . "[t]he analysis area(s) for the proposed facility" in the project order, with no parameters in the rules as to what that analysis area should be. OAR 345-015-0160(1)(f). The ODOE Memo may be describing a standard practice, rather than a requirement of the Council's rules.

At any rate, Friends is troubled by the existing language in OAR 345-022-0080(1) and 345-022-0100(1) that limits the Council's findings for impacts to recreation resources and scenic resources to only those resources located within the analysis area(s) unilaterally designated by ODOE staff via the issuance of the project order. Such limitations are inconsistent with both the text and spirit of the Energy Facility Siting Act ("Siting Act"), which requires the protection of "recreation, scenic and aesthetic values," and "[a]reas designated for protection by the state or federal government, including but not limited to monuments, wilderness areas, wildlife refuges, scenic waterways and similar areas"—regardless of whether such resources, values, and areas happen to be located within any analysis area arbitrarily chosen and designated by ODOE staff. ORS 469.501(1)(c), (1)(i). The Council should pursue Alternative 3 here and remove these limitations in order to harmonize the various requirements for protecting scenic resources, recreation resources, and protected areas.

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ODOE Issue 3 – Effective Date of Areas and Designations

For this issue, the Council should pursue Alternative 2 ("Amend rule to remove references to specific publications and remove the date."). There is no reason to limit the types of protected areas identified in OAR 345-022-0040(1) to only such areas established by a specific date. As ODOE has pointed out, new protected areas have been designated since the current specified date (May 11, 2007), and new areas can and likely will be designated in the future. For example, in 2009, as part of the Omnibus Public Land Management Act of 2009, Congress established new Wilderness areas and Wild and Scenic Rivers in numerous locations across the state of Oregon, created the Mount Hood National Recreation Area, created the Crystal Springs Watershed Special Resources Management Unit, and authorized potential land exchanges that would modify the boundaries of the Mount Hood National Forest and the Cascade-Siskiyou National Monument. *See* Pub. L. No. 111-11, §§ 1201–06, 1301–03, 1401–06, 123 Stat. 1007–23, 1025–32. Because changes like this occur often, it would make little sense to refer to a specific date within the rules themselves for the existence of such areas.

Nor do we recommend Alternative 3, which would impose the date that a preliminary application is submitted as the date for defining the protected areas to be protected. Alternative 3 would be contrary to the Council's rules, which do not generally limit applicable laws and rules to early points in time. *See, e.g.*, OAR 345-015-0160(1)(a), 345-015-0085. The only exception is local land use standards, for which the Council must apply the standards in effect on the date the application is submitted. *See* ORS 469.504(1)(b)(A); OAR 345-022-0030(3); OAR 345-027-0375(3)(a). But for state standards and designations like the ones addressed in OAR 345-022-0040(1), the appropriate date is the date the site certificate is executed (or the date the Council's final order is issued, which is typically on the same day the site certificate is executed). *See* ORS 469.401(2); OAR 345-015-0085; OAR 345-027-0375(3)(b). Because these dates are already generally supplied in these statutes and rules, there is no need to include a date in OAR 345-022-0040(1). To do so would only create confusion as to which date possibly supersedes the other.

ODOE Issue 4 – Lists of Protected Areas

For this issue, the Council should pursue Alternative 2 ("Amend rule to provide update[d] lists that identify all current protected areas."). We agree with ODOE that the lists and categories in OAR 345-022-0040(1) are somewhat inaccurate and out of date.

For example, the current language at OAR 345-022-0040(1)(i) refers to "state natural heritage areas" rather than the more comprehensive and current term "state natural areas."[1] Similarly, the current language at OAR 345-022-0040(1)(o) refers solely to the Bureau of Land Management ("BLM"), yet numerous other federal agencies manage various types of natural areas. For more information on these various types of natural areas and other areas, please see the following materials:

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[1] *See* OAR141-050-0500(12) ("natural area"), 736-045-0011(13) ("natural area"), 736-045-0011(19) ("state natural area").

- Oregon Register of Natural Heritage Resources (status as of June 30, 2015[2])
  https://inr.oregonstate.edu/orbic/natural-areas-program/register-natural-heritage-resources

- Oregon Natural Areas Plan (2015)
  https://inr.oregonstate.edu/sites/inr.oregonstate.edu/files/2015_or_natural_areas_plan.pdf

- Pacific Northwest Interagency Natural Areas Network, Frequently Asked Questions
  http://www.fsl.orst.edu/rna/FAQ.html

- Pacific Northwest Natural Areas List
  http://www.fsl.orst.edu/rna/rna_list.html

- Federal Research Natural Areas in Oregon and Washington: A Guidebook for Scientists and Educators (1972)
  https://www.fs.fed.us/outernet/pnw/publications/pnw_1972_franklin001/index.shtml

- Research Natural Areas in Oregon and Washington (1986)
  https://www.fs.fed.us/pnw/pubs/pnw_gtr197.pdf

To update and clarify the Council's rules on these points, we suggest making the following changes to two rule subsections:

- OAR 345-022-0040(1)(i): "State natural ~~heritage~~ areas listed in the Oregon Register of Natural Heritage Areas[3] pursuant to ORS 273.581;"

- OAR 345-022-0040(1)(o): "~~Bureau of Land Management~~ Federally managed[4] areas of critical environmental concern, outstanding natural areas, ~~and~~ research natural areas, special resources management units,[5] and experimental areas[6];"

Alternative 3 could potentially work as well. However, Alternative 2 is preferred, because it would retain the rule's current structure of specifying general categories of areas, followed by non-exclusive lists of examples of these areas. The examples are helpful because they facilitate understanding of which types of areas are intended for each category.

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[2] This 2015 online list may not be up to date. For instance, it appears that Glass Hill in Union County may have recently been dedicated as a natural area. *See* https://www.oregon.gov/oprd/CAC/Documents/2020-11-08b.pdf.

[3] This register is referred to in ORS 273.581 and OAR 736-045-0011(17) as the "Oregon Register of Natural Areas," but in OAR 141-050-0450 and OAR 141-050-0500(17) as the "Oregon Register of Natural Heritage Resources." It is unclear which name for this register should be used here.

[4] This change is recommended to encompass not only the BLM but also other federal agencies that manage these types of areas, including the U.S. Forest Service, U.S. Fish and Wildlife Service, U.S. Department of Energy, U.S. Army Corps of Engineers, and the U.S. Army. See http://www.fsl.orst.edu/rna/FAQ.html for more information.

[5] This addition would include the aforementioned Crystal Springs Watershed Special Resources Management Unit, as well as the Bull Run Watershed Management Unit.

[6] This addition would include experimental forests and ranges such as the Cascade Head Experimental Forest, Starkey Experimental Forest and Range, and South Umpqua Experimental Forest. For more information, see https://www.fs.fed.us/research/efr/. It is unclear whether the "Starkey site" currently referred to at OAR 345-022-0040(1)(l) is the same as the Starkey Experimental Forest and Range, or some other site.

ODOE Issue 5 – Outstanding Resource Waters

The Council should pursue Alternative 2 ("Amend rule to provide update lists that identify all current protected areas."). As with the changes recommended above, this specific type of area designated for special management should be recognized in the Council's rules in order to ensure consistency with ORS 469.501(1)(c), which requires the Council to ensure the protection of "[a]reas designated for protection by the state or federal government, including but not limited to monuments, wilderness areas, wildlife refuges, scenic waterways *and similar areas*" (emphasis added). Outstanding resources waters should be added to the list.

ODOE Issue 6 – Linear Facilities Located in Protected Areas

The Council should pursue Alternative 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."). Friends agrees with ODOE that the likely original intent of the language in question at OAR 345-022-0040(2) was to ensure that routes through protected areas will not be allowed if alternative routes that could avoid these areas are practicable and would have lesser impacts. Alternative 2 would simply clarify the original intent of the rule.

ODOE Issue 7 – OAR 345-022-0040(2)

The Council should pursue Alternative 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."). This change would fix OAR 345-022-0080, which currently references "local land use plans, tribal land management plans and federal land management plans," but for some reason does not also reference state land management plans. As ODOE notes, it is unclear why state land management plans was omitted, but this was probably just an oversight. The likely oversight should be corrected by pursuing Alternative 2.

In addition, OAR 345-022-0080 should also be revised to expressly list "interstate land use plans" and "regional land use plans." Expressly mentioning interstate land use plans would better capture the Management Plan for the Columbia River Gorge National Scenic Area ("Gorge Management Plan"), which is arguably a federal land management plan and thereby already included within the current language of OAR 345-022-0080, but is better described as an interstate land use plan. As state agencies, EFSC and ODOE are required to comply with the requirements and standards of the Gorge Management Plan. *See* ORS 196.155 ("[A]ll state agencies . . . are hereby directed and provided authority to carry out their respective functions and responsibilities in accordance with the [Columbia River Gorge Compact] and the Columbia River Gorge National Scenic Area Act."). One important mandatory aspect of protecting scenic resources within the National Scenic Area is to ensure that air pollution from new thermal power plants does not reduce visibility and thereby mar the Gorge's natural scenic resources and values. *See* Gorge Management Plan at I-3-34 ("Air quality [in the Columbia River Gorge National Scenic Area] shall be protected and enhanced, consistent with the purposes of the Scenic Area Act. . . . [T]he States shall develop and implement a regional air quality strategy to carry out the

purposes of the Scenic Area Act . . . ."). Expressly mentioning interstate land use plans (such as the Gorge Management Plan) would clarify and improve the language of the Council's rule.

Similarly, OAR 345-022-0080 should be revised to expressly list "regional land use plans." That clarifying change would better capture plans adopted by regional governments such as Oregon Metro and any other metropolitan service districts. *See* ORS Chapter 268; ORS 197.015(14). In the alternative, the existing "local land use plans" language in OAR 345-022-0080 could be revised to instead expressly refer to land use plans adopted by "local governments" as that term is defined by ORS 197.015(13) ("any city, county or metropolitan service district formed under ORS chapter 268 or an association of local governments performing land use planning functions under ORS 195.025"). Either way, regional plans should be better captured by the Council's rule language.

Friends Issue 1 – Substantive Standards for Protecting Scenic Resources, Recreation Resources, and Protected Areas

In addition to the rule changes recommended above, Friends also recommends that the Council pursue as part of this rulemaking new substantive standards that would provide better direction to applicants, other agencies, and the general public how scenic resources, recreation resources, and protected areas will be protected. Currently, there is very little in the way of substantive standards for protecting these resources and areas expressly spelled out within the Council's rules themselves. Instead, the rules typically only specify that the Council shall ensure that energy facilities are not likely to result in significant adverse impact to these resources and areas. Better specificity should be provided.

The Council could either adopt its own substantive standards for these resources and areas, or it could provide that standards from other agencies' plans for protecting these resources will be applied by the Council in its decisions. As an example of adopting substantive standards within its rules, the Council could better protect scenic resources by borrowing from or adopting in total the standards of the U.S. Forest Service's Scenery Management System and/or the Bureau of Land Management's Visual Resource Management System. Adopting such an objective system for protecting scenic resources would better serve the Council, ODOE, other agencies, applicants, and the public at large by providing more clarity, direction, and certainty for how to ensure compliance with the Siting Act and the Council's rules.

Thank you for your courtesy and consideration. Friends of the Columbia Gorge looks forward to working with the Council and ODOE on this important project. If you have any questions or comments, please do not hesitate to contact me.

Sincerely,

Nathan Baker
Senior Staff Attorney
Friends of the Columbia Gorge

December 31, 2020

To: Energy Facilities Siting Council

EFSC.rulemaking@oregon.gov

The following is in response to Energy Facility Siting Council request for the public's assistance in the development of revisions to its Protected Areas (OAR 345-022-0040), Scenic Resources (OAR 345-022-0080), and Recreation (OAR 345-022-0100) Standards. The website posting about the 10/23 meeting stated the goal of revision is, "to ensure that each of these standards clearly identifies the resources the standard intends to protect and is consistent with the policy set forth in ORS 469.310." First are my responses to some of the Issues and Alternatives in the document Agenda item D Attachment 1 dated October 9, 2020:

1. *Issues Analysis Document Issue 1 – Notification of Protected Area Land Managers*. As a manager of a State Natural Area (Rice Glass Hill Private Natural Area), Alternative 2 seems the most appropriate and on par with existing practice, since almost any other land manager is already included as a "reviewing agency". Alternative 3, providing notification only at the "Notice of Intent" stage--just does not cut it. Alternative 1 also is inadequate.
2. *Issues Analysis Document Issue 2 – Scope of Required Findings*. This is really confusing. It is not clear what the implications are. The Council should run through an actual example.
3. *Issues Analysis Document Issue 3 – Effective Date of Areas and Designations.* The Analysis Document interprets the wording of OAR 345-022-0040(1) as the date a protected area was designated, "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". Alternatives 1 and 2 both seem like viable alternatives. It is really unclear why a date of 2007 (13 years ago!) is attached to this rule. Alternative 3 falls flat because "the date the preliminary application is submitted" can be literally YEARS if not DECADES, so that important areas that should be protected are not, because no one could forsee a day when they would be threatened. The statute is meaningless unless all areas that fall under the Protected Areas statute are truly protected. This law should reflect the State of Oregon's commitment to protecting natural areas, as voiced not only in the Natural Areas Plan and related legislation, but in the Oregon Conservation Strategy. The date of an area's designation should not preclude important conservation areas from being protected. **Wording should be amended to leave no doubt that all Protected Areas no matter what type or date of adoption, are covered by OAR 345-022-0040.**
4. *Issues Analysis Document Issue 4 – Lists of Protected Areas. Issue description: The rule contains lists of designations and specific protected areas that may be incomplete or out of date.* No other choice but Alternative 3, "Amend rule to remove lists of specific protected areas and rely on categories and designations" makes any sense at all. If as the "Discussion" says, "the lists in the rule are not intended to be exhaustive", then that should be stated in the rule and wording about what other areas might be protected should be added. It really seems like this is a lack of coordination between State agencies in sharing lists or perhaps in updating them on internet sites. No Protected Area should be left out because someone forgot to update their list.

5. *Issues Analysis Document Issue 5 Outstanding Resource Waters. Issue Description: The current rule does not list Outstanding Resource Waters as Protected Areas.* They should definitely be included and the rule should make that clear.
6. *Issues Analysis Document 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.* From wording in OAR 345-022-0040(2), it is very obvious that a site certificate should only be issued for a protected area "* * * *if other alternative routes or sites have been studied and determined by the Council to have greater impacts."* If the Council believes this is unclear then the rule should be amended to clarify. Applicants should be required to **consider all possible Alternative Routes** that may be less impactful, not just "Alternative Routes" that they have cherry-picked for some other reason, to manipulate the results of the analysis. In the case of B2H we have seen the Applicant drop their Proposed Route analyzed by the federal government and apply to the EFSC with a different Proposed Route which is more impactful, with no good reason given for this bait and switch.
7. *Issue 7 State Scenic Resources. Issue description: The Scenic Resources does not specify that scenic resources and values identified as significant or important in state land management plans are protected under the standard*. It is painfully obvious that scenic resources identified in a state land management plan should be recognized by another state agency. "It is not clear why state plans were omitted from the rule."

Following are my additional comments and recommendations for rulemaking:

8. ORS 469.310 states policy is, "to establish in cooperation *with the federal government* a comprehensive system for the siting, monitoring and regulating of the location, construction and operation of all energy facilities in this state."
   Despite this policy, commenters in the B2H process have been told that compliance with federal laws is beyond the jurisdiction of the EFSC. This, despite the fact that the IPC's Proposed Route is now a different Route than when the BLM/USFS Record of Decision was issued in 2018. Clearly, accepting the Application from IPC containing a different Proposed Route—one not fully reviewed by the federal agencies--is a violation of ORS 469.310. **The Applicant should not be permitted to go through the State process with a different Proposed Route than that already approved in the Federal process.**
9. The wording of the Protected Areas Statute is unclear. OAR 345-022-0040 says "References in this rule to protected areas designated under federal or state statutes or regulations are to the designations in effect as of May 11, 2007." It makes no sense to only protect areas designated by a random date over 13 years ago. This seems really bizarre. No reason is given for this date. The intent was probably toward using the definitions of the various types of Protected Areas as the definition was understood in 2007, for example, the definitions terms such as "scenic waterway", "state natural heritage area" or "experimental areas established by the Rangeland Resources Program". **A full listing of the categories of places that should be Protected Areas should be made.**

10. OAR 345-022-0040 lists areas designated under federal or state statutes. There is no explanation for why County or City areas such as parks, wildlife areas, or monuments open to the public are not included. It is unclear how Oregon Department of Energy has decided what areas are worth protecting. It seems really arbitrary. Apparently just by how large the governing body is**? All areas that meet criteria for Protected Areas should be categorized and considered for status, regardless of land ownership. This process should be made completely clear and transparent to affected land owners and to the public who value these lands for Natural, Scenic, or Recreational values.**

11. OAR 345-022-0040 appropriately includes State Natural Areas as Protected Areas. The State Natural Areas Program is a great program, yet very few people outside of State government know about it. Land trusts and conservation organizations who issues conservation easements often work very hard to protect land that would meet criteria for a State Natural Area yet because they do not know about the program these areas are not Protected. For example, I contacted Wallowa Land trust and Blue Mountain Land trust here in Eastern Oregon and neither had heard of the Natural Areas program. The Natural Areas Program should conduct an outreach to land conservation groups. **Conservation Easements which meet criteria for a State Natural Area should be considered. Land trusts and conservation groups which hold conservation easements that meet the criteria for Natural Areas should be invited to the formal rulemaking process, as should County and City managers of areas such as as parks, wildlife areas, or monuments. This is assuming state and federal agency personnel concerned with Natural Areas, Scenic Areas, and Recreation Areas will of course be invited to the formal rule making.**

Respectfully submitted,

Susan Geer

susanmgeer@gmail.com

From: Irene Gilbert
Sent: Thursday, December 31, 2020 11:53 PM
To: EFSC Rulemaking * ODOE
Subject: Comments on proposed Rulemaking for Protected Areas, Scenic Resources, and Recreation Standards

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I believe there is a need for a Rules Advisory Committee for the above rules. It is important that the advisory committee have a balanced membership that includes experts in areas evaluated under the above rules. This should include expertise in fish and wildlife, expertise in protected areas, representation from the tribes, the public, developers and utilities.

The option 2 for item 6 is an improvement over the current standard.

I also recommend that the decision process for these three rules need to be objective, rather than subjective and subject to change and different interpretations. I suggest the council review current evaluation methods for BLM, the Forest Service or other agencies such as the National Oregon Trail Association as many of them use evaluation methods that are clearly defined and objective. It is also important that the rules include an assessment of the viewer perception of the significance of the changes.

From:	Fuji Kreider
Sent:	Thursday, December 31, 2020 7:03 PM
To:	EFSC Rulemaking * ODOE
Cc:	Fuji Kreider-CBD; Jim-campblackdog
Subject:	Rulemaking inputs: Protected, Scenic and Recreational Areas
Attachments:	EFSC rulemaking--Protected, Scenic, Rec, Areas.docx

December 31, 2020

To: Energy Facilities Siting Council
From: Fuji Kreider, citizen, La Grande
Re: Rulemaking—Protected Areas, Scenic Resources, and Recreation.

The following is in response to Energy Facility Siting Council request for the public's assistance in the development of revisions to its Protected Areas (OAR 345-022-0040), Scenic Resources (OAR 345-022-0080), and Recreation (OAR 345-022-0100) Standards.

I commend this step in the process, that is: to solicit public input prior to formal rulemaking. However, as I testified (very briefly) in October's meeting, I also think that convening a Rulemaking Advisory Committee (RAC) makes sense because these standards are very important to most people in Oregon and the wider the representation of involvement and participation the better! That said, please do not convene a RAC with only developer interests. If one is established, representation needs to be broad including: members of environmental justice communities, tourism specialists, realtors or other non-energy developers, in addition to the obvious: environmentalists, conservationists, academics, sportsmen/women, and other recreationists (RV-ers, mountain bikers, skiers…).

More specifically in terms of the staff report and alternative ideas, I have just a couple of comments at this point in time.

Issue 1–Notification of Protected Area Land Managers
Alternative 2 seems the most appropriate and on par with existing practice, since almost any other land manager is already included as a "reviewing agency." And as we know from past practices, if they do not need to be involved, they will limit their involvement. However, they are very busy people and my fear (and experience) of only providing them with notice means that the issue could fall through the cracks and that would not serve anyone.

Issue 2–Scope of Required Findings
I will reserve detailed comments because l need more time to consider—and I would like to hear the input of a committee or similar. The issue with this section, based on experience is that there are clearly confusing rules and standards because the scope should be different for the three of these but too often the three rules are treated with the same eye or analysis. The Project Orders seem to be subjective in nature and if there is too much reliance on project orders that doesn't work for the public. I think this issue #2 needs much more consideration.

Issue 3–Effective Date of Areas and Designations
This one clearly needs to have another alternative. Alternative 3 "the date the preliminary application is submitted" can be literally YEARS if not DECADES, as we have seen in many EFSC developments. The wording really needs to say—without a doubt—that the areas are covered under their respective OAR no matter what the date of adoption!

Issue 4–Lists of Protected Areas

Clearly lists get outdated! Even with best intentions to update annually, it doesn't work. No other choice but Alternative 3, "Amend rule to remove lists of specific protected areas and rely on categories and designations" is appropriate.

Issue 6–Linear Facilities Located in Protected Areas
Only Alternative 2 makes sense. Yet, the staff discussion is a little disheartening. It says that currently developers are "already required to provide an alternative analysis…" Yet in reality we know that this is done with subjective self-serving interests in mind; a great deal of information is often omitted and not shared in the applications. So, the Council staff needs to be allowed a wide berth to analyze and verify alternative route analyses, rather than what is ONLY in the application. This issue 6 may also need some alternative ideas brought forward during rulemaking.

Issue 7–State Scenic Resources
This one needs more alternatives too! Obviously, state scenic resources should be added to the list; however, many scenic resources are not identified in these land use or comprehensive plans either. There are many (especially rural) local areas with one-person planning departments that cannot keep up with their comprehensive planning requirements, and then when there is a development in their area, it's too late. I think this needs more review and discussions. Is it possible that with the notice of intent or during early stages—much before completeness review—that the local and regional jurisdictions could update or verify their resources/lists? And then there are the EJ communities that are often excluded and have scenic interests as well.

In terms of costs, the costs are not only the developers' costs! The communities' qualitative interests, property values and consequential tax revenues can be impacted, etc… Costs for developers should never be the only costs of consideration. Therefore, and because of the preceding paragraph, I think we need more alternatives developed under this issue 7.

Thank you for the opportunity to comment during this pre-rulemaking process. I think it's a good start but I hope that we can get this one right. Please do not rush and consider my recommendation for RAC committee work, or at a minimum longer comment periods and much wider solicitation for rulemaking than normal.

December 31, 2020

Christopher M. Clark, Siting Policy Analyst and Rules Coordinator

Oregon Department of Energy

550 Capitol St. NE

Salem, OR 97301

Subject: EFSC Protected Areas, Scenic Resources & Recreation Standards

Dear Christopher:

Tetra Tech, Inc. (Tetra Tech) submits this letter with comments to the Oregon Department of Energy (ODOE) and the Energy Facility Siting Council (EFSC, Council) in support of initiation of the Scenic Resources (OAR 345-022-0080), Protected Areas (OAR 345-022-0040), and Recreation (OAR 345-022-0100) rulemaking.

The October 9, 2020 ODOE Staff Report (EFSC October 22-23 Agenda Item D, Attachment 1) provides a preliminary analysis and recommendations for the "issues" listed below. Tetra Tech provides comments where applicable.

Issue 1 – Notification of Protected Area Land Managers

Recommendation: Issue 1, Alternative #1

Tetra Tech encourages the Council to select alternative #1, which would rely on existing public notification requirements to provide information about a proposed facility to a manager of a protected area. As described in the Staff Report, the existing public notification process offers multiple pathways to distribute information about a proposed facility. Specifically, a comprehensive list of "reviewing agencies" defined under OAR 345-001-0010(51), are provided the opportunity to review and comment on an application under ORS 469.350(2). Reviewing agencies, may also include any other agency identified by the Department, any tribe identified by the Legislative Commission on Indian Services, the governing body of any incorporated city or county in Oregon within 10 miles of the facility site boundary, any special advisory group designated by the Council, and the federal land management agency with jurisdiction if any part of the proposed site is on federal land (see OAR 345-001-0010(51)(n through r)). These notification procedures are adequate to capture review and comment from a manager of a protected area that could be directly or indirectly impacted by a proposed facility, without increasing the scope and cost of compliance to applicants or expanding the jurisdiction of reviewing agencies. For these reasons, Tetra Tech encourages the Council to select alternative #1.

Issue 2 – Scope of Required Findings

Recommendation: Issue 2, Alternative #2

Tetra Tech encourages the Council to select alternative #2, which would limit the scope of Council's findings for impacts to protected areas described in the Project Order consistent with how it is limited to the analysis area for scenic and recreational resources under OAR 345-022-0080(1) and 345-022-0100(1). Alternative #2 would provide consistency to the scope of findings considered under OAR 345-022-0040(1).

Issue 3 – Effective Data of Areas and Designations

Recommendation: Issue 3, Alternative #3 with modification

Tetra Tech encourages the Council to select alternative #3 with the modification identified below:

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

Applicants typically prepare analyses of the proposed facility based on the Project Order. The modification to alternative #3 allows for consistency in the application of analysis to designated projected areas at the time the Project Order is issued, and avoids a situation where the applicant would have to adjust mid-stream if a protected area was added after the Project Order but before a complete preliminary application is submitted. For this reason, Tetra Tech encourages the Council to consider a modification to alternative #3.

Issue 4 – Lists of Protected Areas

Recommendation: Issue 4, Alternative #1 with modification

Tetra Tech encourages the Council to select alternative #2, which would amend OAR 345-022-0040(1) to provide updated lists that identify current protected areas. Updated lists would provide added clarity for applicants regarding which protected areas should be incorporated in analysis of a proposed facility.

Issue 5 – Outstanding Resource Waters

Recommendation: Issue 5, Alternative #1

Tetra Tech encourages the Council to select alternative #1, which would not include Outstanding Resource Waters as protected areas under OAR 345-022-0040(1). As described in the Staff Report, the Environmental Quality 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. These resources, along with other water resources in the State, are already incorporated as protected areas under OAR 345-022-0040(1)(a), (c), (d), and (k), respectively. Therefore, it is not necessary to amend OAR 345-022-0040(1) with Outstanding Resource Waters.

Issue 6 – Linear Facilities Located in Protected Areas

Recommendation: Issue 6, Alternative #1

Tetra Tech encourages the Council to select alternative #1, which would not make changes to OAR 345-022-0040(2). As described in the Staff Report, the change proposed in alternative #2 is not necessary because applicants for "a site certificate for a transmission line or natural gas pipeline are already required to provide an alternatives analysis or an explanation of why alternate corridors are unlikely to better meet the applicant's needs and satisfy the Council's standards in its Notice of Intent." Current EFSC rules and processes are designed to result in the selection of routes with lesser impacts while maintaining sufficient siting flexibility for applicants. Therefore, no change to OAR 345-022-0040(2) is necessary.

Issue 7 – State Scenic Resources

Recommendation: Issue 7, Alternative #1

Tetra Tech encourages the Council to select alternative #1, which would not make changes to OAR 345-022-0080. The standard ensures that applicants for a site certificate must evaluate potential impacts to scenic resources and values identified as significant or important in local land use plans, tribal land management plans, and federal land management plans within the 10-mile analysis area. Examples of these types of land use and management plans include but are not limited to local Comprehensive Plans, Bureau of Land Management Resource Management Plans, and United States Forest Service Land Management Plans. These types of land management plans are distinct from state park plans or state byway corridor management plans, in that they are comprehensive in scope, typically adopted through legislation and subject to public review and input, and amended every 10 to 20 years in accordance with appliable local, state, and federal standards. In addition, state lands that meet the definition of a protected area or recreational opportunity are already evaluated for potential visual impacts under OAR 345-021-0010(l)(C)(v) and (vi) and OAR 345-021-0010(t)(B)(iv). For these reasons, existing standards capture the evaluation of potential visual impacts to state resources and changes to OAR 345-022-0080 are not necessary.

Additional Considerations

Tetra Tech provides the following comments on EFSC's protected areas, scenic resources, and recreational opportunities standards:

- Consider reducing the analysis area for protected areas from 20 miles to 10 miles, consistent with the analysis area for scenic resources. Based on the primary potential causes of impacts analyzed for protected areas – noise, traffic, and visual – a 20-mile analysis area seems to always exceed the true potential for impacts. The most distant potential impact source – visual – should be consistent with and not set at a greater distance than the scenic resources standard. At over 10 miles away, even for large wind turbines, it is highly unlikely a visual impact would ever be considered significant.

- Consider clarifying the definition of important recreational opportunities and the factors used to judge the importance of a recreational opportunity under OAR 345-022-100. Clarification of these terms may increase the consistency of analysis conducted for potential recreational opportunities within the 5-mile analysis area of a proposed facility.

We appreciate the opportunity to comment on the initiation of this important rulemaking. If you have any questions, please contact me at (503) 721-7225.

Sincerely,

Carrie Konkol

Senior Project Manager

CC: Paul Hicks, Tetra Tech
Anneke Solsby, Tetra Tech
Linnea Fossum, Tetra Tech

October 8, 2021

TO: EFSC Rulemaking Staff

FROM: Renewable Northwest
Oregon Solar + Storage Industries Association

RE: Comments on EFSC Rulemaking on Protected Areas, Scenic Resources, and Recreation, Workshops 1 and 2

Renewable Northwest is a regional, non-profit renewable energy advocacy organization based in Oregon, dedicated to the responsible development of renewable energy resources throughout the Pacific Northwest. Our members are a combination of renewable energy businesses and environment and consumer groups. The Oregon Solar + Storage Industries Association (OSSIA) is a trade association founded in 1981 to promote clean, renewable, solar technologies. OSSIA provides a unified voice of the solar industry; OSSIA members include businesses, non-profit groups, and other solar industry stakeholders.

Renewable Northwest, OSSIA and a group of our members are actively engaged in the ongoing Protected Areas (OAR 345-022-0040), Scenic Resources (OAR 345-022-0080), and Recreation (OAR 345-022-0100) rulemaking workshops at the Energy Facility Siting Council and would like to offer the following comments and concerns from the first two workshop sessions on July 28 and August 18. We appreciate the opportunity to participate in the process and offer inputs for consideration. Many of these concerns center around the two themes of avoiding regulatory uncertainty and unnecessary administrative burden for the applicant and EFSC.

Uncertainty Undermining Clean Energy Goals

Given Oregon's newly adopted 100% non-emitting electricity by 2040 goal which seeks to decrease carbon emissions and mitigate impacts of climate change, the process of siting renewable energy facilities in Oregon is an important topic for considered discussion. The unmitigated impacts of climate change present a primary threat to the Protected Areas, Scenic Resources, and Recreation Standards being discussed in this rulemaking, and the transition to decarbonized, renewable energy sources is a key move to address these impacts. Decarbonizing Oregon's energy system will require a significant buildout of renewable energy facilities, with models suggesting the most cost-effective time frame for this is before 2030.

The already lengthy timeline for renewable energy facility approval and permitting processes makes a 2030 generation date possible, but somewhat ambitious given the uncertainties in the existing siting and permitting process. These uncertainties are potentially exacerbated with some of the proposed solutions presented currently in the rulemaking process, adding questions around timelines, costs, and project scope.

While the need to keep regulations up to date is essential, we are concerned about changes that inject more uncertainty into the energy facility siting process and potential impacts on renewable energy development in Oregon. As EFSC applications rely on an evidence-based process, creating uncertainty or open-ended requirements through changes in regulation places greater burden on the applicant to "prove the negative" in its submissions. This additional burden not only adds cost and time, it is also in contradiction to the objectives set out by the Oregon Department of Energy's (ODOE) Executive Order 20-04 Implementation Report from May 2020 which aims to "prioritize and expedite and processes and procedures that could accelerate reductions in GHG emissions,"[1] and the stated Staff objective to "improve efficiency and effectiveness of Council's review processes and procedures by resolving ambiguity, lack of clarity, and inconsistency in rule."[2]

Unquestionably, we support responsible development of renewable energy facilities in a way that recognizes and honors Oregon's legacy of conservation and stewardship of its natural resources, and see the transition to a decarbonized electricity system as part of accomplishing this goal through decreasing carbon emissions and mitigating climate change impacts that directly threaten the areas and activities considered in this rulemaking. Please see more in-depth discussions of the issues covered to date at the rulemaking workshops below.

Administrative Load and Unclear Process

In addition to the uncertainty added to the process, it is also unclear how any expanded scope or moveable dates of accountability will be accommodated in the EFSC process. Of course, the burden on the applicant is of concern, however, it is also worth flagging the burden on staff time and efforts. With new state policies requiring Oregon to reduce climate pollution and increase renewable energy, the number of applications for EFSC review will only increase. Add this to the increased demands on the applicant for scoping areas or considering new regulations or areas up until the final approval will also create greater demands on staff and Council time and attention. We encourage staff and Council to consider the benefit derived from any increased workload.

[1] P. 10, Oregon Department of Energy's Executive Order 20-04 Implementation Report, May 2020, *General Directives to State Agencies: Expedited Agency Processes*.
[2] From Staff's July 28, 2021, Workshop #1 Presentation, Slide 4: Scope and Objectives.

Issue 1 - Protected Area Manager Notification

Alternative 1 – Maintain current rule.
Alternative 2 – Make protected area managers "reviewing agencies."
Alternative 3 – Include protected area managers in the Notice of Intent (NOI) distribution list.
Alternative 4 – Provide notice to protected area managers at the NOI, Application, and Request for Amendment stages.

The concerns raised by the National Park Service (NPS) in the August 18 meeting around the inconsistency in notification of Protected Area Managers and the potential complications this introduces to the application process are valid. We also recognize the potential value of early consultation with Protected Area Managers and support a revision to accommodate this. As such, we are **supportive of Alternative 4 with the addition of NPS' suggestion that Staff maintain a centralized list of contact information for Protected Area Managers**. Considering the added burden on applicants from informing this expanded group of individuals, having the contact information centrally located and maintained by EFSC would lessen the administrative burden of this added step.

While notification of Managers is a reasonable consideration that provides the potential benefit of early consultation, the inclusion of these Managers as Reviewing Agencies as proposed in Alternative 2 is, in our view, not a necessary step. Furthermore, federal agencies should not be reviewing agencies in a state permitting process. If a project proposes to cross land under federal jurisdiction, the respective agency conducts its own federal review and permitting process separately from EFSC.

Issue 2 - Scope of Required Findings

Alternative 1 – Maintain current rule.
Alternative 2 – Limit scope of Council's findings to Protected Areas within analysis area per Project Order.
Alternative 3 – Remove limitation of scope of Council's findings to allow, but not require, impact findings outside analysis area in Project Order.

Staff identified an inconsistency in the nature of findings Council is required to make when determining a facility's compliance with the Protected Area Standard (OAR 345-022-0040) versus the Scenic Resources Standard (OAR 345-022-0080) and the Recreation Standard (OAR 345-022-0100). Making the Protected Areas Standard consistent with the Scenic Resources Standard and Recreation Standard as Staff proposed in **Alternative 2 seems like the prudent approach**. Alternative 2 would make sure that the required findings for three standards are consistent, which is good given that these three standards typically rely on common underlying impacts analyses (e.g., the traffic impacts analysis, the ZVI or visual impacts analysis).

The increased scope of analysis and increased uncertainty presented in Alternative 3 does not seem warranted. We are unaware of any current problem arising from the required analysis under the existing Scenic Resource and Recreational Standards, which limit the findings to the area of analysis as set by the project order. Additionally, it is unclear how an applicant would

have reasonable opportunity to address areas outside of the project order's analysis area with sufficient time prior to close of the DPO. Considering that the analysis area for the Protected Areas Standard is commonly 20 miles from the facility site boundary, increasing this would add significant analysis burden on the applicant and staff while not providing a clear benefit to the process.

Issue 3 - Effective Date of Designations

Alternative 1 – Maintain current standard, amend to update date.
Alternative 2 – Consider all areas as of date of Final Decision.
Alternative 3 – Consider all areas as of date of Project Order.

Since it is ODOE's stated intention in rulemaking to "…create efficiencies and reduce the time and costs associated with state jurisdictional reviews while having no negative effect on public participation,"[3] the **alternative that aligns most clearly with that intention is Alternative 1.** Alternative 1 sets a clear date for designations, making it clear what areas should be included in the one-time analysis. Alternative 2 would allow for changes throughout the application process, which would most likely include re-studies and further analysis, which would increase both costs and delays. The ability of EFSC to essentially re-start the process mid-way through, setting the clock back by a year or more, would undermine the entire process.

Alternative 3 has potential to be a workable solution but would need a critical change to include the word "initial" before "Project Order." If the word "initial" is not included, alternative 3 is essentially no different than alternative 2, and would allow for changes at any point in the process, increasing both cost and delays. Including the word "initial" before Project Order still allows for new protected areas (i.e., those authorized after the rule adoption) to be considered during the EFSC review process, but it also provides certainty for an applicant at a critical time (e.g., prior to preparing the preliminary application for site certificate). The initial Project Order lays out the scope of analysis for the application, making it an appropriate point in the process to memorialize the effective date for protected areas to be evaluated in an application for site certificate. In addition, the Project Order comes after a round of public comment; if there is a potential new protected area that the public raises during that round of comment, EFSC can consider whether it is within their discretion to include in the initial Project Order.

Issue 4 - List of Protected Areas

Alternative 1 – Maintain current list.
Alternative 2 – Maintain current structure and update specific areas.
Alternative 3 – Amend rule to remove specific protected areas and list only specific categories and designations.

[3] P. 12 of Oregon Department of Energy, Executive Order 20-04 Implementation Report, May 2020, General Directives to State Agencies: Expedited Agency Processes Section 2 "Rule Alignment."

It is in all stakeholders' interests to have clarity and predictability in the EFSC process. We also acknowledge that Alternative 1, to maintain the current list with no changes, is insufficient to ensure all current protected areas are covered given the time that has passed since its adoption. **As such, we support Alternative 2 to maintain the current Protected Areas list structure with updates to specific areas and categories as needed.** This alternative would provide the most certainty to applicants that have the responsibility to identify all designated Protected Areas within the analysis area for their projects. It would also provide the greatest certainty to Protected Area Managers and members of the public that their specific areas of interest are not being left out of consideration. The specificity of the current structure promotes consistency across applications and efficiency during review. For these reasons, Alternative 2 is the most consistent with the intent of EO 20-04, and ODOE's implementation of EO 20-04, to promote streamlining and encourage renewable energy development.

Alternative 3, to list only categories and designations, may be workable *if* it is designed in a way that minimizes the administrative burden on applicants and ODOE to accurately identify all protected areas to include in any given application, and ensures consistency across applications. In particular, all included categories and designations should be identified with specific regulatory citations that enable applicants to correctly identify relevant protected areas and their legal state or federal status and spatial boundaries. For example, the draft revised OAR 345-022-0040(1)(g) does not include a regulatory citation. It appears the example of a "special resources management unit" provided in the staff issue paper, the Crystal Springs Watershed Special Resources Management Unit, is designated under 16 U.S.C. 539n. Under the full section 16 U.S.C 539, there are additional types of areas, such as "Special Management Area," "Recreation Management Area," and "Conservation Management Area," not all of which are located in Oregon, but some are. Without a citation and due to variations in area naming conventions used by the Forest Service or Congress in their designation, the proposed draft language requires further applicant research and interpretation, which can lead to inaccuracies and inconsistencies.

Similarly, the draft revised OAR 345-022-0040(1)(i) does not include a regulatory citation. This is particularly challenging for the newly proposed subsection "(E) Scenic, geological, botanical, zoological, paleontological, historical, or recreational area." In the staff issue paper, references include 36 CFR 294.1 and Forest Service Manual (FSM) 2372. From these sources, it appears that such administrative areas are intended to be designated by the Forest Service in the applicable forest plan for a given national forest. Is it ODOE's intent that only final, adopted administrative areas in forest plans are to be considered Protected Areas? Has it been confirmed that all such areas have clear administrative spatial boundaries available to the public? For potential utility right-of-ways, does the Protected Area Standard go above and beyond a given national forest's policies for evaluating such authorization requests? These would be important questions to resolve, as Staff acknowledges the change "could significantly expand the area of land considered to be 'Protected Areas' under the Council's Standard." While such lands may be away from most energy development, as Staff also states, there can

still be an increased administrative burden given that the Protected Areas analysis area is currently 20 miles and often encompasses a portion or edge of national forest lands. There are also linear transmission lines that may unavoidably need to cross national forest lands, and **the Council should not inadvertently increase the level of protection beyond what was intended by the Forest Service**.

At the second workshop on August 18, a discussion question was posed regarding the inclusion of local designations under the Council's Protected Areas Standard. **The inclusion of local designations appears contrary to the intent of Protected Areas per ORS 469.501(c)**, as "Areas designated for protection by the state or federal government, including by not limited to monuments, wilderness areas, wildlife refuges, scenic waterways and similar areas." Local designations would be a potentially substantial expansion of the protected areas standard beyond the state and federal intent. Furthermore, local recreational resources and important scenic resources are already evaluated under the Council's recreation and scenic resources standards, and local land use provisions are evaluated under the land use standard.

Another discussion question at the second workshop asked if private conservation easements should be included under the Council's Protected Areas Standard. **We do not support the inclusion of private conservation easements as Protected Areas.** Similar to the above, private conservation easements that have not been incorporated into a state or federal designation for protection are clearly outside the intent of ORS 469.501(c). Conservation easements are private agreements on private lands, and there is no method for an applicant to analyze the intent of a conservation easement (as one can with a public land management plan) or impacts to the conservation easement. The location and content of conservation easements are not publicly available, and may only be obtained by securing title reports for all properties in the 20-mile analysis area. This is not a reasonable proposal, especially with a goal of streamlining the application process. Moreover, current Oregon Department of Fish and Wildlife (ODFW) policy encourages mitigation sites, such as conservation easements, near proposed projects ("in proximity"), which hypothetically could lead to a conflict if a project's mitigation sites create a new Protected Area that would need to be analyzed for impact in the Final Order. Any direct use of land under a private conservation easement for energy development would have to be allowed by that particular easement and landowner or manager. For all of these reasons, including private conservation easements would result in significant additional administrative burden with no clear public benefit.

Issue 6 - Linear Facilities

Alternative 1 – Maintain current rule.
Alternative 2 – Reasonable routes determined to have greater impacts
Alternative 3 – Reasonable routes studied and Council determines proposed route has fewer adverse impacts

Given the complexities of transmission lines in the region, and the projected need for transmission upgrades and expansion, selecting an alternative for Issue 6 should support overall

objectives to streamline and create certainty in regulatory processes. **The current rule (Alternative 1) or Alternative 2 appear to support this streamlining and regulatory certainty goal**. Alternative 3 introduces a potentially ambiguous process. It is unclear how a "likely" determination would be made by the Council. Additionally, it appears that the burden of analysis determination would shift to Council and Staff, which is usually born by the applicant and affiliated experts who would provide a determination for Council and Staff review. The added efforts underlying Alternative 3 on behalf of all parties, do not seem to justify the benefit presented. The current rule (Alternative 1) or Alternative 2 seem to be sensible solutions which balance administrative burden with process benefit.

Issue 8 - Applicability of Updated Rules and Standards

Alternative 1 – No specific action, determination based on standard in effect at time of Council decision.
Alternative 2 – Not apply to applications determined complete on/before effective rule date.
Alternative 3 – Applicability of Council standards determined through Project Order.
Alternative 4 – Applicability of Council standards determined at preliminary Application for Site Certificate stage.

Having clear dates of applicability of updated rules and standards is important to establishing regulatory certainty and predictability, in effect setting "goal posts" for the applicant. Taking into consideration previous statements from EFSC Council members on April 23, 2021,[4] that the intent of any new rule change should be to ensure they do not apply retroactively to projects already well into the review process, we would like to **propose an Alternative 4: To set the date of applicability, or the "goal post," at the preliminary Application for a Site Certificate (pASC),[5] for new applications and amendments.** This is a practical solution as it sets expectations sufficiently early in the application process while also allowing for public comments after the Notice of Intent (NOI). This also accommodates the potential lengthy gaps between the Project Order and pASC stages and would capture any new designated areas in that time. Setting the date of applicability at the pASC stage would still allow for sufficient analysis time in preparing the complete Site Certificate Application (ASC).

A later date would not establish "goal posts" nor offer certainty as it allows for changes to the application at late stages of the process, potentially introducing significant analysis burden. This potential, undue burden would not only fall on the applicant, but also on the Council and Staff should it mean more review time of additional analysis materials added to the application. As the application process is evidence based, late-stage additions to an applicant's burden of proof would not allow sufficient nor reasonable opportunity to provide evidence for the record. Equally, last minute additions, or "moving goal posts," would add to the administrative burden on the Council and Staff.

[4] April 23, 2021 EFSC Meeting Notes, Agenda Item F discussion starting on page 11.
[5] As defined in "Energy Facility Site Certificate Project Guide" from July 2015

Setting the goal post firmly at the preliminary Application for Site Certificate stage would offer process certainty and set expectations early in the EFSC process. It would also strike a balance in allowing for new areas to be included in the analysis and public comments, while not overly burdening the applicant and Council with a drawn-out process that would result from setting the applicability date later.

12/16/2021

To: EFSC

From: Fuji Kreider, public

RE: EFSC Rulemaking schedule and prioritization for 2022

I am sorry to miss your meeting today but I wanted to be sure to comment on this agenda item. I would like to recognize that Christopher Clark is managing the process well and has a lot on his plate. It is obvious from the strong level of participation that the rulemaking process for Protected, Scenic and Recreation (P/S/R) areas is of great concern.

I'd also like to acknowledge the participation—especially by the public who are completely volunteers. The public has been very outnumbered by developers during the workshops, although I suspect this may be common. Developers have the ability to fund attorneys and lobbyist to be at the table, often at the public and ratepayers' expense. We, the public, come at our own personal expense.

We began the rulemaking processes for Protected, Scenic and Recreation areas, a year ago, with scoping comments due in December 2020. In 2021, we had three-- half-day workshops (some people taking time off of work) and some people have provided additional comments. Our last workshop was in October. We were under the impression –and to keep the momentum going-- that the draft rules and the formal rulemaking would be open this month (Dec) or by January: i.e.: 2-3 months after the last workshop.

Maintaining this level of interest and participation among the volunteering public, is difficult. And so, to not fuel more cynicism in our public institutions and processes, I would urge the Council to prioritize the rulemaking of Protected Areas, Scenic and Recreation areas for 2022.

We need to get through this process ASAP as the rules are very outdated; and staff and the Council have even more rules needing attention. In particular, the rules have old lists of (P/S/R) areas, which then exclude other, newer areas that need protections; and dates that do not serve anyone or any developer well. More important are the critical natural resources that are vulnerable because the rules as they currently stand are not useful.

I urge the Council not to delay the schedule on this particular rulemaking. Rather, keep the momentum going and adjust the schedule to prioritize Protected, Scenic and Recreational rulemaking by opening the formal rulemaking in Dec '21 or early January '22. With the proposed schedule, this rulemaking won't be taken up again for another 4 months—in April 2022?!

Our beloved resources are depending on you. I hope you can hear my urgency. Our current rules are ineffective and must be updated as quickly as possible.

Thank you for taking the time to read and consider this public comment.

Sincerely,

Fuji Kreider
60366 Marvin Rd
La Grande, Oregon 97850

12/17/2021

To: Energy Facility Siting Council and the EFSC Secretary Energy Siting Division/ODOE

From: Susan Geer, public

RE: public comment on EFSC Rulemaking schedule for 2022

I will only be able to attend the first hour of the EFSC meeting later this morning, so I am submitting a comment on Item H ahead of the meeting.

First of all, thank you Chris Clark for being well organized and providing rulemaking meeting materials far ahead of time.

The rulemaking process for Protected, Scenic and Recreation areas should be top priority. The lack of clarity in the rules is extreme and obvious. It would be a mistake to delay and extend the process. An entire year has passed since stakeholder and public comments were first submitted to the EFSC. Back then, the entire process was projected to take less than 4 months according to Staff Report of October 2020 meeting! Since then we had three lengthy half-day workshops, each spaced 3 or more months apart. Through the laborious length of the workshops and the discussions raised it has become apparent that considering Protected, Scenic and Recreation together is probably too much. Trying to consider Protected, Scenic, and Recreation Area rulemaking concurrently is confounding and confusing since they require very different considerations. Amplifying this are the long time lags between workshops, during which we lose focus.

Now in December that last October meeting seems long ago. It became evident during that third workshop that Scenic rulemaking is less explored than Protected or Recreation, and that different and new professional advice is at hand.

I urge the council to move forward with formal rulemaking this month, or January at the latest. If others think that Scenic needs more exploration, the Council could consider moving forward with Protected Areas and Recreation rulemaking ASAP and delaying Scenic. That being said, April seems like yet another unnecessarily long delay, and if the choice is to move forward with all three or delay all three, I advise the council to urgently move forward.

The delays and long times between workshops have been frustrating and I believe delays reduce public involvement and make it harder to engage at the next meeting. Also the length of the workshops is too long to maintain attendance, especially for those who have jobs.

The rules are very outdated and unclear; no one is served by keeping them in place. Valuable and unique natural resources, especially in protected areas, are vulnerable because the rules as they stand are not useful.

Please update the rules for Protected Areas, Recreation, and Scenic values as soon as possible. This is an urgent agenda item and long overdue.

Thank you for taking the time to read this public comment.

Sincerely,

Susan Geer
906 Penn Ave.
La Grande, Oregon 97850

From: Fuji Kreider
Sent: Friday, January 28, 2022 6:23 PM
To: CLARK Christopher * ODOE
Cc: 'Fuji Kreider'
Subject: RE: hi there!--more ideas on scenic rules

Follow Up Flag: Follow up
Flag Status: Flagged

Hey Chris,

Another thought on the qualitative analysis and some independence in "the reviews." The OPUC uses "IE's" independent evaluators for some of their reviews, usually on project costs or things that might be outside of their expertise. I Googled: "Oregon laws independent evaluators" and wow! A number of agencies use them and there are various OARs in place already. This could be something for deeper consideration?

The more I think about this, whether it's an identification of best practices, or a review with lots of subjective and qualitative analysis, it really needs some independence. There is no trust otherwise. Government doesn't need more mis-trust. And corporations, well IMHO they can't be trusted either! ;-) I hope this helps. -Fuji

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From: Fuji Kreider [mailto:fkreider@campblackdog.org]
Sent: Wednesday, January 26, 2022 3:22 PM
To: 'CLARK Christopher * ODOE'
Cc: 'Fuji Kreider'
Subject: RE: hi there!

Hi Chris,

First, thank you so much for taking the time to speak with me yesterday about the visual impact assessments and scenic area rulemakings. While I had no new or useful comments, I hope that it was helpful to share some of my main points or values.

Today, I made a list – but I'm afraid that I already forgot some of what we discussed? Nonetheless, I'm sharing this summary with you, in case it's helpful:

- Science is always developing and changing, therefore, use only the most updated and peer-reviewed approaches/methodologies;
- do not give developers too many options of methodologies to choose from; and don't let them make up their own;
- align methodologies to applicable resources;
- Be sure that constituent/user information and input is front-end loaded, rather than an add-on near middle or end of processes:
    - So, more emphasis after the NOI phase and before the first project order (input)
    - Utilize approaches to gather constituent inputs (surveys, focus gr's, etc) during the actual impact assessment—these should be within the updated, peer-reviewed, best practice methodologies. If not, ODOE may want to investigate more before including that methodology in its "basket of methods."
- Utilize multi-stakeholder and multi-disciplinary teams (independent of the developer) ***for analysis*** – especially for qualitative assessments. Or, better would be to have ODOE to sub-contract it out completely—not by the developer. Developers should not be in the role of "self-analysis" of our (people's) scenic, protected and recreational resources. It's a conflict of interest having them conduct their own assessments, really. Enough said.

- I didn't really talk about this, but inferred based on the SMS talk: but the concepts of scenic or visual *have evolved* into more than what's immediately in front of your eyes, but rather the "experiences and feelings that are perceived" at those locations; and so the impact assessment needs to consider the *full experience* of the "affected human population." I realize this is difficult. But, I also think you don't need to put it all on your shoulders; others have been grappling with this for a long time. **I am attaching the article that I mentioned**. It's an easy 7 page

read. You may want to reach out to her and ask more about how it *is being implemented*; what the best practices are in this context from her perspective; and/or anything else that you may need.

Good luck with drafting and again, thanks a lot for the time,
Fuji

McDOWELL RACKNER GIBSON PC
419 SW 11th Ave, Suite 400 | Portland, OR 97205

JOCELYN PEASE
Direct (503) 290-3620
jocelyn@mrg-law.com

February 3, 2022

VIA EMAIL

Christopher Clark
Energy Facility Siting Council Rules Coordinator
Oregon Department of Energy
550 Capitol Street NE
Salem, Oregon 97301
Email: EFSC.rulemaking@oregon.gov

Re: Protected Areas, Scenic Resources, and Recreation Standards Rulemaking - Idaho Power Comments re Issue 8

Attention Rulemaking Coordinator:

Idaho Power appreciated the opportunity to participate in the workshop series last year regarding the Protected Areas, Scenic Resources, and Recreation Standards Rulemaking Project ("Rulemaking"). As we discussed in those workshops, Idaho Power understands the need to update the rules, but at the same time, encourages the Oregon Department of Energy ("ODOE") and the Energy Facility Siting Council (the "Council") to avoid disrupting Application for Site Certificate ("ASC") proceedings that are already quite far along in the review process.

Throughout this rulemaking, Idaho Power raised concerns about potential prejudice to parties with ASCs currently under review that would result from changing the goalposts associated with the standards.[1] In its July 21, 2021 Issues Analysis Document ("Issues Analysis Document"), ODOE Staff labeled this concern as "Issue 8: The application of new rules or standards to an Application for Site Certificate that is under review may prejudice the applicant."[2] In the Issues Analysis Document, Staff identified 3 alternative approaches for addressing Issue 8:

> 1. Take no specific action (Council's determination of compliance is based on the standard in effect at the time the Council makes its decision).
>
> 2. Adopt provisions in each rule or standard affected by rulemaking that specifies that newly adopted criteria or requirements will not apply to the review of any applications which is determined to be complete on or before the effective date of the rule.

[1] *See* Idaho Power's December 30, 2020, Comments re Protected Areas, Scenic Resources, and Recreation Standard Rulemaking.
[2] These comments will focus on Issue 8; however Idaho Power may also provide comments on the other issues at a later point in the rulemaking process.

3. Amend general standard to specify the applicability of Council standards is determined through the project order.

Idaho Power urges that Alternatives 1 and 3 should be rejected because they will likely result in the prejudice that Idaho Power described in detail in its December 30, 2020 letter. Alternative 1, by applying the proposed new rules without any accommodations for pending ASCs, will undoubtedly result in delays and prejudicial obstructions to pending ASCs. For example, for those ASCs currently under review, the application of Alternative 1 likely will require substantial new analysis and an amendment to any final ASCs, and as a result, could require a new draft proposed order and a complete restart of pending contested case proceedings. Alternative 3 would also prejudice pending ASCs because of the regulatory uncertainty it would create. For instance, it's unlikely existing project orders specify the applicability of Council standards in the way that is contemplated under Alternative 3, and therefore, the project orders for pending ASCs likely would need to be amended, creating significant regulatory uncertainty as to what those changes might entail and creating delays in the ASC proceedings as the proposed orders are amended to address the new rules. Additionally, Alternative 3 also fails to provide any regulatory certainty for future projects, because ODOE may amend the project order at any time.

In light of the issues associated with Alternatives 1 and 3, Idaho Power urges ODOE and the Council to pursue Alternative 2. To that end, Idaho Power proposes the following rule language for consideration, which would be inserted into all of the standards or substantive rules that are amended through this rulemaking:

> **(X)** Notwithstanding OAR 345-001-0020(3), the above rules in OAR 345-XXX-XXXX (filed and effective on [DATE]) shall have prospective effect only and shall not apply to a proposed facility for which a preliminary application for site certificate has been submitted on or before the filed and effective date of this rule. Such applications shall be evaluated based upon the standards and criteria that were applicable on the date the preliminary application was first submitted to the Department or, for an amended application, the date such amended application was submitted to the Department provided it was submitted in accordance with OAR 345-021-0090.

Idaho Power appreciates this opportunity to provide informal comments and looks forward to continuing engagement in this rulemaking proceeding.

Regards,

Jocelyn Pease

GHCC GREATER HELLS CANYON COUNCIL

February 7, 2022

Todd Cornett, Oregon Department of Energy
todd.cornett@oregon.gov

CC: Christopher Clark, Oregon Department of Energy
christopher.clark@energy.oregon.gov

Re: Protected Areas, Scenic Resources, and Recreation Standards Rulemaking

To: The Energy Facility Siting Council of Oregon (EFSC)

I am writing on behalf of the Greater Hells Canyon Council (GHCC) to provide comments on the proposed Rulemaking for Protected Areas, Scenic Resources, and Recreation Standards.

Thank you for the opportunity to provide our perspective on this important process.

Greater Hells Canyon Council is a non-profit conservation organization based in La Grande. Our mission is to protect, connect, and restore the lands, waters, native species, and habitats of the Greater Hells Canyon Region, ensuring a legacy of wild ecosystems for generations.

We participated in the Protected Areas, Scenic Resources, and Recreation Rulemaking Workshop October 14, 2021. During the workshop, we provided comments about the importance of protecting these resources from potential negative impacts resulting from energy development. We remain particularly concerned about degradation of wildlife habitat and the need to protect our remaining high quality and connected habitats in Oregon. The cumulative effects of various developments on the landscape has led to fragmentation of habitat and disruption of migration. The documented decline of mule deer populations in Oregon is but one example.

Of course, the Protected Areas, Scenic Resources, and Recreation Rulemaking review involves much more than wildlife habitat. Each of these resource categories are essential to the economic, social, and ecological health of Oregon. We urge you to prioritize the necessary protection of each of these valuable resources as you proceed with the rulemaking process.

It will be important that all methodologies related to the revised rules shall be based on the best peer-reviewed science. Our collective understanding of the impacts to protected, scenic, and recreational resources has improved over time and it's important that the revised rules reflect this knowledge.

It is also essential that the citizens of Oregon will continue to be able to provide substantive input throughout the rulemaking process. Despite the complexities of these issues, members of the public have

provided substantive comments to the Oregon Department of Energy about the proposed rulemaking. During December, 2020, several members of the public and the Friends of the Columbia Gorge sent in comments providing recommendations and details about their concerns. GHCC urges that these comments be given serious consideration.

The current rules contain sections that are outdated and unclear. We encourage the Oregon Department of Energy to prioritize the rulemaking revision process and implement quality science-based protections as soon as possible. Protected areas, scenic resources, and recreation resources are vulnerable. Please ensure the protection of these attributes that are cherished here in Oregon.

Finally, we would like to commend Siting Policy Analyst and Rules Coordinator Christopher Clark for managing this complex task in an organized and respectful manner.

Please let us know if we may be of further assistance.

Thank you for considering our perspective.

Sincerely,

Brian Kelly

Brian Kelly
Restoration Director
Greater Hells Canyon Council

From: David Felley <dfelley@eoni.com>
Sent: Friday, February 11, 2022 1:30 PM
To: EFSC Rulemaking * ODOE
Subject: Comments on EFSC rule making

To Whom It May Concern,

It has been brought to my attention that the Energy Facility Siting Council requests rulemaking recommendations for Protected Areas, Scenic Resources, and Recreation Standards and associated rules. I realize this process has been ongoing for some time and I hope it is not too late to consider my comments. In response to issues raised at during
2021 EFSC meetings, regarding Protected Areas, Scenic Resources, and Recreation Rulemaking, I offer the following comments.

Issue 1. Managers of protected areas should definitely be notified about proposed energy facilities early in the review process. It is highly likely that the applicant will not be able to identify all resources potentially affected by a proposed project without information from a protected area's manager. I recommend alternative 2 from the Dec. 31 meeting notes, "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.”

Issue 3. Clearly, the intent of ORS 469.310 is to analyze and mitigate the potential impacts of energy facilities to all protected areas, not just those established before May 11, 2007. To correct this, Alternative 2, to amend the rule to remove reference to specific dates makes the most sense. Furthermore, to clarify the issue around protected areas designated after the initiation of environmental review of energy facilities but prior to approval, impacts to protected areas should be considered up until the energy facility is permitted. This is reasonable given the relatively infrequent designation of protected areas and the extremely long review period often seen for energy facilities.

Issue 4. Because the lists of protected areas are not meant to be exhaustive, they serve as much little better than no list and present an administrative challenge to remain up-to-date. Given that, Alternative
3 to amend the rule to remove lists of specific protected areas makes the most sense.

I appreciate your very organized effort to receive public comments on these important issues surrounding management of Oregon public resources. Thank you for the opportunity to comment.

Sincerely,

David Felley

807 Penn Ave, La Grande, OR 97850

From: Carol
Sent: Tuesday, February 22, 2022 12:59 PM
To: EFSC Rulemaking * ODOE
Subject: Comments on EFSC rule making

I would like to add my comments to the Energy Facility Siting Council requests for rulemaking recommendations for Protected Areas, Scenic Resources, and Recreation Standards and associated rules.

Issue 1. Managers of protected areas should definitely be notified about proposed energy facilities early in the review process. It is highly likely that the applicant will not be able to identify all resources potentially affected by a proposed project without information from a protected area's manager. I recommend alternative 2 from the Dec. 31 meeting notes, "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."

Issue 3. ORS 469.310 requires the analyasis and mitigation of the potential impacts of energy facilities to all protected areas, not just those established before May 11, 2007. To correct this, Alternative 2, to amend the rule to remove reference to specific dates makes the most sense. Furthermore, to clarify the issue around protected areas designated after the initiation of environmental review of energy facilities but prior to approval, impacts to protected areas should be considered up until the energy facility is permitted. This is reasonable given the relatively infrequent designation of protected areas and the extremely long review period often seen for energy facilities.

Issue 4. The lists of protected areas are not meant to be exhaustive and a list presents an administrative challenge to remain up-to-date. Given that, Alternative 3 to amend the rule to remove lists of specific protected areas makes the most sense.

Thank you for your consideration.
--
Carol Lauritzen
801 O Avenue
La Grande, OR 97850