



Oregon

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To: Energy Facility Siting Council

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

Date: April 8, 2022

Subject: Agenda Item C (Action Item):
Protected Area, Scenic Resources, and Recreation Standards Rulemaking for
the April 22, 2022 EFSC Meeting

Attachments: Attachment 1: Issues Analysis Document
Attachment 2: Draft Proposed Rules
Attachment 3: Comments submitted since Feb. 25, 2022 (Forthcoming)

STAFF RECOMMENDATION

Staff requests Council's authorization to issue a Notice of Proposed Rulemaking and initiate formal proceedings to adopt the proposed amendments to the Protected Areas, Scenic Resources, and Recreation Standards and associated rules, as shown in Attachment 2.

BACKGROUND

The Council initiated a rulemaking project to address issues related to the Council's Protected Areas, Scenic Resources, and Recreation Standards at its October 23, 2020 meeting. Since that time, staff solicited informal advice from stakeholders in writing and through a series of rulemaking workshops and through the submission of written comments. Staff also received additional direction on policy issues from the Council at its February 25, 2022 meeting.

Staff developed the rulemaking recommendations provided in Attachment 1 based on staff's analysis, advice provided by stakeholders, and direction from the Council. Draft proposed rule language based on these recommendations are provided in Attachment 2.

Procedural History

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

¹ See Administrative Order EFSC 10-2019, effective October 7, 2019.

At its October 23, 2020 meeting, the Council initiated informal rulemaking proceedings and directed staff to seek informal recommendations from stakeholders on issues related to the Protected Areas and Scenic Resources Standards. The Council also revised the scope of the rulemaking project to include issues related to the Recreation Standard. As approved by Council, the objective of the rulemaking is to review the standards and associated rules to ensure that the areas, designations, and resources protected by rules are up to date, and that rules are clear and consistent with the Council's review process.

On November 6, 2020, staff issued a request for rulemaking recommendations to all persons on the Council's rulemaking mailing list. The request asked interested stakeholders to submit suggestions for policy issues or rule changes they would like to be considered in the rulemaking by December 31, 2020. Staff received eight responses to the request as of that date.

Staff revised its analysis based on the responses and provided an update to the Council at its meeting on April 23, 2021. At the meeting, the Council authorized staff to conduct rulemaking workshops to refine the draft proposed rules and further discuss issues related to the project. The first workshop was held on July 28, 2021 and focused on issues related to the applicability and scope of potential rule revisions. The second workshop was held on August 18, 2021 and focused on issues related to the Protected Areas Standard. The final workshop was held on October 14, 2021 and focused on issues related to the Scenic Resources and Recreation Standards.

During the rulemaking update presented to Council at its December 17, 2021 meeting, the Council heard concerns from interested members of the public regarding the extended timeframe for this project. Staff and the Council acknowledged the urgency associated with the project and directed staff to provide an update at the February 2022 meeting.

At the February 25, 2022 meeting, staff presented a summary of feedback provided by stakeholders to the Council as well as preliminary rulemaking recommendations and draft proposed rules. Based on the feedback on policy direction provided by Council at that meeting, staff revised the recommendations and draft proposed rules. In particular, staff revised its recommendation related to the effective date of protected areas and protected area designations and amended the draft proposed revisions to OAR 345-022-0040 accordingly.²

Staff issued a request for additional informal comments on the draft proposed rules on March 7, 2022. Stakeholders were asked to provide comments by April 11, 2022. All comments received will be provided to the Council prior to the April 22, 2022 meeting.

SUMMARY OF RECOMMENDATIONS

During these rulemaking proceedings, staff and stakeholders have identified several issues related to the Protected Areas, Scenic Resources, and Recreation Standards and the associated rules. When considering policy alternatives associated with these issues, staff considered the objectives of ensuring that the language of the Standards clearly identifies important resources

² See Attachment 1, Issue 3, pages 10-12.

and values the standards are intended to protect, ensuring that the standards are consistent with the policy set forth in ORS 469.310, and improving the efficiency and effectiveness of the Council's review processes and procedures by resolving ambiguity, lack of clarity, and inconsistency in rule.

Based on staff's analysis, and on feedback provided by stakeholders through written comment and during the rulemaking workshops, staff recommends the Council consider the following rulemaking actions:

- Adopt an interim policy to specify that any public notice issued by the Department during the review of an Application for Site Certificate or Request for Amendment of a Site Certificate is to be provided to the managing agency of any Protected Area within the applicable study or analysis area for the project. Amend public notice rules to reflect this change in future rulemaking proceedings.
- To facilitate notification of protected areas managers, amend information requirements to require an applicant to identify the managing agency of any protected area in the applicable study or analysis area for the project, as well as a mailing address and any other reasonably available contact information, in the notice of intent and application for site certificate.
- Amend the Recreation and Scenic Resources Standards to allow the Council to consider evidence introduced into the record related to impacts to scenic resources and recreational opportunities outside the analysis area.
- Amend the Protected Areas Standard to remove the effective date for designations, allowing the Council to consider impacts to protected areas that are designated prior to the filing of a complete application.
- Update and simplify the list of designations that are considered "protected areas" under the Protected Areas Standard and remove specific examples to reduce the need for future rulemaking.
- Clarify exception for when a linear facility may be located within a Protected Area.
- Amend Scenic Resources Standard to require assessment of visual impacts to State Scenic Resources.
- To avoid disruption of projects that are currently under review, specify that amended standards will only be applicable to the review of applications or requests for amendment filed on or after the effective date of the rules.

A detailed analysis of these issues and staff's recommendations for rulemaking are provided in the Issues Analysis Document provided as Attachment 1. Draft proposed rule language based on these recommendations is provided as Attachment 2.

Needs for Future Rulemaking

While staff believes it has identified an appropriate resolution to most of the issues raised during this rulemaking, we believe two issues in particular would benefit from additional opportunities for stakeholder engagement.

First, during rulemaking workshops, numerous stakeholders expressed concern about the Council’s current standards for the protection of scenic resources and recommended that the Council establish evidence-based study and analysis areas for visual impacts, enhance opportunities for public participation in the identification of significant and important scenic resources, and require the use of established methodologies to conduct visual impacts assessments. Staff agrees that there could be significant improvements to the way visual impacts are identified and evaluated within the siting review process, but due to the highly technical nature of visual impacts assessments and lack of consensus on what methods are appropriate, believes that a separate rulemaking process to identify and fully vet appropriate methods is warranted.

Second, multiple stakeholders noted that while many protected areas are designated to protect important wildlife habitat or other ecological values, the Protected Areas Standard does not specifically take impacts to wildlife, wildlife habitat, or habitat connectivity, into account. Staff agrees that the Protected Areas standard could be better targeted to address impacts to the specific values or resources that a designation is intended to protect but believes that additional work is needed to understand how such a change would interact with existing wildlife related rules and standards.

NEXT STEPS AND PROJECTED RULEMAKING TIMELINE

Staff will provide any comments received on the recommendations and draft proposed rules received by April 11, 2022, as Attachment 3 to this staff report, prior to the April 22, 2022 Council meeting. The Council will have the opportunity to review the comments and decide whether any additional changes to the draft proposed rules are warranted. Once Council is satisfied with the draft proposed rules, staff will request authorization to issue a Notice of Proposed Rulemaking and initiate formal proceedings to adopt the proposed amendments to the Protected Areas, Scenic Resources, and Recreation Standards and associated rules. Staff recommends that Council schedule a rulemaking hearing as part of the formal public comment period. The table below presents the procedural history and projected timeline for the remainder of this project based on these recommendations.

Procedural History and Projected Rulemaking Timeline

Council initiates rulemaking	October 22, 2020
Staff solicits written advice from stakeholders	Nov – Dec 2020
Staff conducts rulemaking workshops	July – October 2021
Council provides feedback on preliminary analysis and recommendations	February 25, 2022
Staff publishes revised analysis and recommendations, requests additional informal stakeholder comments	March 7, 2022
Council approves proposed rules and authorizes Notice of Proposed Rulemaking	April 22, 2022
Rulemaking hearing & comment deadline	June 23, 2022
Council adoption of permanent rules	June 24, 2022