



Oregon

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To: Energy Facility Siting Council

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

Date: June 10, 2022

Subject: Agenda Item B (Hearing): Protected Area, Scenic Resources, and Recreation Standards Rulemaking Hearing for the June 23-24, 2022, EFSC Meeting

Attachments: 1. Notice of Proposed Rulemaking

SUMMARY

At its meeting on May 27, 2022, the Council initiated formal proceedings to adopt amendments to the Protected Areas, Scenic Resources, and Recreation Standards and associated rules. Staff issued a Notice of Proposed Rulemaking containing the proposed rules under consideration by Council on June 1, 2022. The notice is included as **Attachment 1** to this staff report.

The Notice of Proposed Rulemaking began a public comment period on the proposed rules. An opportunity for oral comments will be provided at a rulemaking hearing scheduled to be held on June 23, 2022, at 5:00 pm. All written comments must be received by 5:00 pm on July 21, 2022. The Council will not consider comments provided after the July 21 deadline unless the comment period is extended for everyone.

BACKGROUND

The legislature established the Energy Facility Siting Council to oversee a comprehensive program for the siting, monitoring and regulation of energy facilities in Oregon. To this end, the Council must establish rules and standards to ensure that the siting, construction and operation of energy facilities is accomplished in a manner consistent with the protection of public health and safety and in compliance with Oregon's energy, land use, and environmental protection policies.

ORS 469.501(1) identifies several subjects that may be addressed by the Council's siting standards, including areas designated for protection by the state or federal government and the impacts of a facility on recreation, scenic, and aesthetic values. The Council has adopted standards for addressing these subjects under its general standards for siting facilities found in OAR chapter 345, division 22. The Protected Areas and Scenic Resources Standards were last amended in 2007. The Recreation standard was last amended in 2002.

Over the past 15 years, numerous new protected areas have been designated by the state and federal government, and many previously designated areas have been renamed, re-organized, or re-designated. In addition, changes to state law surrounding the protection of scenic resources and recreational opportunities have created a need to address resources of statewide importance that are not otherwise located within a protected area within the siting process.

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

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,

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

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.

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. The Council reviewed the comments received and discussed staff's recommendations for draft proposed rules at its meeting on April 22, 2022. During that meeting, the Council requested that staff provide additional information on whether existing standards adequately address impacts to historic properties of religious and cultural significance to Indian tribes. Staff presented additional information on this issue to the Council at its May 27, 2022 meeting. Following staff's presentation, the Council approved proposed rules and authorized staff to initiate formal rulemaking proceedings by issuing a Notice of Proposed Rulemaking. Staff issued the Notice to the persons described in OAR 345-001-0000 on June 1, 2022.

SUMMARY OF PROPOSED RULES

The proposed rules contain changes intended to ensure that impacts to newly designated protected areas are addressed during the siting process and that the siting of energy facilities continues to be accomplished in compliance with Oregon's current land use and environmental protection policies. As described in the Notice of Proposed Rulemaking, the proposed rules would:

- 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 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 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.

The Council will consider additional changes to its public notification procedures in a future rulemaking, but as an interim policy to facilitate the notification of and coordination with federal and state land managing agencies that administer protected areas, the Council will

require any public notice issued by the Department during the review of an Application for Site Certificate or Request for Amendment of a Site Certificate be provided to the managing agency of any Protected Area within the applicable study or analysis area for the project.

PUBLIC COMMENTS & RULEMAKING HEARING

The Notice of Proposed Rulemaking establishes a public comment period on the proposed rules and schedules a rulemaking hearing to begin at 5:00 pm on June 23, 2022. The purpose of the hearing is to take public comment on the Council's proposed rule, including any questions, concerns, or support, the public may have about the proposed rule language. In particular, the Council invites public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business. The hearing will be conducted by the Council's Rules Coordinator. The Council will not respond to questions or comments during the hearing but may ask commenters clarifying questions.

In addition to the opportunity to provide oral comments at this hearing, the Council will accept written comments on the proposed rules until 5:00 pm on July 21, 2022. Information about how interested members of the public may submit written public comment is provided in the attached Notice of Proposed Rulemaking, and on the Council's rulemaking webpage: www.tinyurl.com/EFSCRulemaking.

Any comments received prior to this deadline will be added to the "[Siting Docket](#)" and will be provided to the Council before it considers the adoption of permanent rules.