



Oregon

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To: Energy Facility Siting Council

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

Date: October 14, 2022

Subject: Agenda Item B (Action Item): Protected Area, Scenic Resources, and Recreation Standards Rulemaking – Review of Public Comments for the October 28, 2022, EFSC Meeting

Attachments:

1. Public Comments
2. Staff Summary of Comments & Recommended Responses
3. Draft Amended Notice of Proposed Rulemaking

RECOMMENDED ACTION

Staff recommends that the Council authorize staff to convene a fiscal impact advisory committee to review the fiscal impact statement included in the Notice of Proposed Rulemaking issued on June 1, 2022, for proposed amendments to the Protected Areas, Scenic Resources, and Recreation Standards and associated rules. Staff further requests authorization to issue an Amended Notice of Proposed Rulemaking following the review with modifications to the proposed rules based on public comments as presented in **Attachment 3**.

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 importance of moving the project forward in a timely fashion and Council 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 and policy direction provided by Council at that meeting, staff revised the recommendations and draft proposed rules. In particular, staff

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

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 a Notice of Proposed Rulemaking containing the proposed rules under consideration by Council on June 1, 2022. The Notice of Proposed Rulemaking began a public comment period on the proposed rules and scheduled a rulemaking hearing for June 23, 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.

SUMMARY OF PUBLIC COMMENTS

Three persons provided comments at the hearing. Major issues and recommendations raised in the commenters' testimony are described below.

Angela Crowley-Koch, Oregon Solar plus Storage Industries Association (OSSIA): Ms. Crowley-Koch recommended that the Council wait until the EFSC program evaluation and Application Process Review rulemaking are concluded before moving forward with the Protected Areas Rulemaking. She explained that she recognized that there are some dates in the current rules that are out of date and need to be addressed and suggested that if rulemaking cannot wait until the entire application process review is concluded that the Council should move forward only on that particular issue by changing or removing the date and making a date certain for when new protected areas would be included. Ms. Crowley-Koch explained that OSSIA has great concerns that the rest of the rules create uncertainty and make things not clear for applicants as they move through the application process.

Ms. Crowley-Koch raised the additional concern that the Notice of Proposed Rulemaking says there are no small business concerns, which they believe is "blatantly false." She explained that OSSIA believes there are many small business concerns that were not fully investigated in the proposal of the draft rules.

Brian Kelly, Greater Hells Canyon Council (GHCC): Mr. Kelly emphasized the need for the Council to take the rules for protected areas, scenic resources and recreation very seriously. He agreed that climate change is a huge concern and noted that he has seen the effects of climate change on wildlands in Eastern Oregon and has also seen negative effects from energy development and increases in population. He explained that energy developments impact wildlife habitat, open space, and the natural world and that GHCC wants the impacts to be minimized. He recommended that the rules for protected areas, scenic resources and recreational values can contribute to that goal.

Jake Stephens, NewSun Energy: Mr. Stephens stated that NewSun supports OSSIA's earlier comments in their entirety. He explained that the rules that EFSC adopts have high impact to NewSun in the terms of potential business standards, numbers, and investments and that the rules moving in the wrong direction creates additional challenges in terms of EFSC's efficiency.

He explained that Governor Brown's Executive Order 20-04 and HB 2021 have their own standards and policies regarding clean energy targets, the elimination of greenhouse gas

emissions from the retail electricity sector and maximizing the production of nonemitting electricity and recommended that rules considered by EFSC going forward need to be evaluated on whether the rules facilitate the ability of the state to succeed in meeting HB 2021's policies, requirements, and obligations.

Mr. Stephens recommended that the rulemaking be delayed, consistent with OSSIA's recommendation. He explained that habitat impacts are undeniable and unavoidable in achieving the objectives of HB 2021 but that there is "a bigger job at hand." He also encouraged ODOE staff to provide testimony in legislative proceedings and LCDC rulemakings to support the ability of Counties and other jurisdictions to balance considerations related to renewable energy development in their own proceedings to ensure that projects get permitted.

The Notice of Proposed Rulemaking also established 5:00 pm on July 21, 2022, as the deadline for written comments. As of the July 21, 2022 deadline, the Council had received 77 written comments on the proposed rules. Exact copies of these comments are included as **Attachment 1** to this staff report. All comments are also available from the "[Siting Docket](#)" on the Department's Website. A summary of all major issues raised in public comments and staff's recommended responses is included as **Attachment 2** to this staff report.

Staff recommends the proposed rules be amended in response to several of the public comments:

- Several commenters argue that the "goal post" provisions in the proposed OAR 345-022-0040(4), 345-022-0080(4), and 345-022-0100(4) are unclear and would violate ORS 469.401(2). Staff disagrees, but recommends Council add clarifying language.
- Commenters provide several recommended substantive and editorial changes to the proposed definition of "protected area." Staff recommends Council make a number of these changes.
- Commenters recommend that land management plans adopted by interstate, bi-state, or regional entities be reviewed to identify significant or important visual resources. Staff recommends the Council amend the proposed scenic resources standard to include "regional" land management plans.
- Commenters suggest that the rules should retain requirements for applicants to consider visual impacts other than just changes in landscape character or quality. Staff recommends that the proposed rules be modified consistent with commenters' recommended language

A draft Amended Notice of Proposed Rulemaking, which reflects modifications to the proposed rules recommended in the summary, is included as **Attachment 3**.

In addition to substantive comments on the rules, two commenters raised objections to the fiscal impact statement and associated statement of costs of compliance on small business that were included in the June 1, 2022 Notice of Proposed Rulemaking. Staff notes that the commenters did not raise their objections in the manner required by ORS 183.333; however,

staff recommends that Council appoint a Fiscal Impact Advisory Committee to review the statements and authorize staff to issue an amended Notice of Proposed Rulemaking following the review.

PROCEDURE FOR ISSUING AMENDED NOTICE OF PROPOSED RULEMAKING

Under 183.333(5), if an agency does not appoint a rulemaking advisory committee to assist in the development of proposed rules and 10 or more persons likely to be affected by the rule, or an association with at least 10 members likely to be affected by the rule, objects to the agency's statement of fiscal impact within 14 days after the Notice of Proposed Rulemaking is issued, the agency must appoint a fiscal impact advisory committee to provide recommendations on whether the rule will have a fiscal impact and what the extent of that impact will be.

The membership of the fiscal impact advisory committee must represent the interests of persons and communities likely to be affected by the rule. If after consulting with the fiscal impact advisory committee, the agency determines that the statement does not adequately reflect the rule's fiscal impact, the agency must file an amended Notice of Proposed Rulemaking and extend the public comment period by at least 20 days. The agency must include any recommendations from the committee in the rulemaking record.

Staff notes that the commenters objecting to the fiscal impact statement did not raise their objections in the manner required by ORS 183.333 and the implementing rules in OAR 137-001-0087, however, staff recommends that Council appoint a Fiscal Impact Advisory Committee to review the statements and authorize staff to issue an amended Notice of Proposed Rulemaking following the review. To ensure that the committee represents the interests of persons and communities likely to be affected by the rule, staff recommends that all persons who commented on the proposed rules be invited to participate in the Fiscal Impact Advisory Committee.

Staff has included amended statements in the draft Amended Notice of Proposed rulemaking included as Attachment 3, although we note that additional changes to the statements may be needed in response to the recommendations of the fiscal impact advisory committee.