

Protected Areas, Scenic Resources, and Recreation Standards Rulemaking Project
Issues Analysis Document
March 4, 2022

This document summarizes staff’s preliminary analysis and recommendations for the Energy Facility Siting Council’s Protected Areas, Scenic Resources and Recreation Standards Rulemaking Project. The document and associated draft rule language are for information only and are not notice of rulemaking action by the Council and are subject to change based on input from the 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 the department or applicant to give notice to or request comment from the manager of a protected area that may be affected by a proposed facility.

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 rule.

An applicant must provide evidence to support this finding in both the notice of intent and application. The Notice of Intent must identify all protected areas within twenty miles of the proposed facility.¹ This information is used by the department to establish the study requirements for the application, including the analysis areas for impacts to protected areas, in the project order. In the application, the applicant must describe any potential significant impacts that the proposed facility may have on protected areas in the analysis area.²

To further develop the record and assist the Council and Department in the evaluation of compliance with the Protected Areas Standard, the Department must also seek input from the public and request comment and recommendations from reviewing agencies at several points in the application review process. The current rules do not specifically require the Department to provide public notice to or request comment from the manager of a protected area that may be affected by a proposed facility.

OAR 345-022-0040 identifies the categories of designations that qualify an area as a “protected area” under the standard. Most of these areas are located on public lands, and are owned and managed by state or federal agencies including, but not limited to the:

- U.S. National Parks Service (NPS)
- U.S. Forest Service (USFS)
- U.S. Bureau of Land Management (BLM)
- U.S. Fish and Wildlife Service (USFWS)
- Oregon Department of Fish and Wildlife (ODFW)
- Oregon Parks and Recreation Department (OPRD)
- Oregon Department of State Lands (DSL)

¹ OAR 345-020-0011(1)(g)

² OAR 345-021-0010(1)(L)

Some protected areas are managed by other public bodies, such as experimental forests and agricultural research stations operated by Oregon State University.³ State Natural Areas are designated by the Oregon Parks and Recreation Commission but are generally owned or managed by other agencies or by private individuals or organizations such as The Nature Conservancy.⁴

Table 1. Managing Agencies for Protected Areas in Oregon

Designation	Subsection	NPS	USFS	BLM	USFWS	ODFW	OPRD	DSL	OSU
National Parks	(a)	X							
National Monuments	(b)	X	X	X					
Wilderness Areas	(c)	X	X	X	X				
Wilderness Study Areas	(c)			X					
Areas of Critical Environmental Concern, Outstanding Natural Areas and Research Natural Areas	(o)			X					
National Recreation and Scenic Areas	(g)	X	X	X	X				
Wild and Scenic Rivers	(k)	X	X	X	X				
National Wildlife Refuges	(d)				X				
State Wildlife Areas	(d),(p)					X			
National Coordination Areas	(e)				X	X			
National Fish Hatcheries	(f)				X				
State Fish Hatcheries	(f)					X			
State Parks and Waysides	(h)						X		
State Natural Areas*	(i)						X		
National Estuarine Research Reserves	(j)							X	
State Scenic Waterways	(k)						X		
Agricultural experimental areas, experiment stations, and research centers	(L), (m)								X
State Research Forests	(n)								X
*Designated by OPRD but may be owned and administered by other agencies, organizations, and individuals.									

A protected area manager requested the Council consider amending the rules to ensure that the manager of a protected area in the vicinity of a proposed facility receives notice of a proposed facility early enough in the siting review process to be able to participate.

Alternatives:

1. Take no action. Rely on existing public notification requirements to provide information to managers of protected areas.
2. Amend OAR 345-001-0010(51) or provide policy direction to specify that the managing agency of a protected area that could be impacted by a proposed facility is a “reviewing agency.”
3. Amend rules to require public notice to be given to the managers of a protected area identified in the Notice of Intent, application, or Request for Amendment.

Discussion:

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

The current rules provide a number of pathways for a protected area manager to receive public notice of a proposed facility. Public notice must be provided upon receipt of a notice of intent, upon filing of a complete

³ ORS 345-022-0040(1)(L), (m), and (n)

⁴ OAR 345-022-0040(1)(i).

application, and upon the Department's issuance of its draft proposed order and the Council's proposed order. Similar notifications are given during the site certificate amendment process. Generally, when public notice is given, it must be published in a local newspaper and must also be mailed or emailed to the Council's general mailing list, any special mailing list for the proposed facility, and to the owners of property within close proximity to the site boundary.⁵

This alternative would rely on these existing public notification procedures to provide information to the manager of a protected area in the vicinity of a proposed facility. This approach does not guarantee that all protected area managers would receive notice. Notice is typically only given to property owners within 500 feet of the property a facility is proposed to be sited on, which is a much smaller area than the analysis area used to determine the extent of potential visual and noise impacts from a proposed facility on protected areas.

While a protected area manager could potentially sign up to receive notices or find them in a local newspaper, these actions assume the manager has some previous knowledge of or familiarity with the Council and the state energy facility siting process, which may be somewhat unlikely in areas of the state where energy development is less common.

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."

Reviewing agencies include state agencies with regulatory or advisory responsibility over a proposed facility, local and tribal governments affected by an application, and federal land management agencies with jurisdiction over any federal lands on which the facility is proposed to be located. The Council could specify that the manager of any protected area that could be affected by the construction of a proposed facility (i.e. within the 20-mile study area or otherwise identified in the project order) is a "reviewing agency" for the project.

The Department consults with reviewing agencies during the review of both the notice of intent and application to ensure that potential impacts to important resources are identified and addressed during the siting review process. A request for comments and recommendations must be sent to reviewing agencies upon receipt of a notice of intent, a preliminary application, and a complete application.

Under OAR 345-001-0010(51), the Oregon Department of Fish and Wildlife and the Department of State Lands are already included as reviewing agencies for every project. If a facility is proposed to be located, in whole or part, on federal lands, the land management agency with jurisdiction over those lands is included as a reviewing agency for that project as well. The rules provide the Department with some discretion to identify additional reviewing agencies, and to add persons to the distribution list for requests for comment and recommendation. As a result, this alternative could potentially be implemented without a rule amendment although without a rule, ensuring consistent implementation could be challenging.

Several stakeholders have expressed support for this alternative, and the Department agrees that implementing this alternative would go far to ensure that the manager of a protected area in the vicinity of a proposed facility receives notification but there would also be some challenges. Not all protected area managers may be interested in participating in the review and adding a state agency to the list of reviewing agencies could raise concerns about their legal obligation to respond under ORS 469.350. In addition, while the Department generally makes application materials available from its website, an applicant may still be

⁵ OAR 345-015-0110; 345-015-0190(7); 345-020-0016

required to provide electronic and paper copies of application materials to reviewing agencies at multiple stages in the process which may also result in additional costs of compliance. Some of these challenges could be mitigated by only requiring that the protected area managers be added to the distribution list for the project, and allowing the Department, in consultation with the applicant, the discretion to remove a protected area manager from the list if it failed to respond to a request for comments or stated that it was not interested in participating further.⁶

Alternative 3. Amend rules to provide public notice to the managers of a protected area identified in the Notice of Intent, application, or Request for Amendment.

In lieu of appointing a protected area manager as a reviewing agency, the Council could amend its public noticing requirements to include notice to protected area managers. During the application process, public notice must be given at several points in the review process, including after receipt of a notice of intent. Requiring public notices to be sent to the managers of protected areas that could be impacted by a proposed facility would ensure that they are made aware of the project early in the review process, while avoiding some of the costs and challenges that could result from automatically making them a reviewing agency. If the protected area manager was interested in being more involved in the preliminary review of a facility, it could still provide public comment or request to be included on the list of reviewing agencies or distribution list for the project, as appropriate.

Recommendation: Staff recommends that providing public notice, as described in Alternative 3, would provide protected area managers with reasonable notice of a notice of intent, application, or amendment request without imposing unnecessary additional costs or obligations associated with automatically appointing protected area managers as reviewing agencies.

Staff notes that there are multiple rules containing public notification procedures, and while it would be possible to amend them all, consolidating the procedures to a centralized rule may improve the overall consistency and readability of the rules. This type of change, however, may be better addressed through the Application Process Review Rulemaking Project. In the interim, staff recommends that Council adopt a policy directive requiring a special mailing list containing the protected area managers identified in the study or analysis area applicable to a proposed facility to be established for any notice of intent, application, or request for amendment received by the Department until the rule changes described above can be fully implemented.

Because the Department may have difficulties identifying and maintaining appropriate contacts at each managing agency, staff further recommends that the Council amend OAR 345-020-0011 and OAR 345-021-0010 to require an applicant to identify the agency or organization that manages a protected area identified in the applicable study or analysis area, as well as a mailing address and any other reasonably available contact information for the protected area manager, in its NOI and application. During the rulemaking workshops, some stakeholders requested that the Department collect and publish at least some of this information to reduce burdens on stakeholders and facilitate better communication between applicants and state and federal agencies. Staff will explore this recommendation further outside of the rulemaking process.

⁶ An earlier version of this analysis contained an alternative that would have required an initial request for comments to be sent to a protected area manager during the NOI phase, allowing the Department to then appoint them as a reviewing agency or not. A stakeholder pointed out that changes to a proposed facility's proposed site boundary can occur after the NOI phase and could shift the analysis areas to include new protected areas. Based on these comments, this approach has been eliminated as a separate alternative in this analysis.

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 both limit the scope of Council’s findings to resources in the appropriate analysis area identified in the project order. This is inconsistent with the Protected Area Standard, which contains no similar limitation. Because there is considerable overlap between the resources and impacts considered under these three standards, there may be some benefits to improving consistency between the three standards.

Background: To issue a site certificate, the Council must evaluate the application and other information provided on the record and find that the preponderance of that evidence supports the conclusion that the facility complies with all applicable Council standards or the overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by any applicable standards the facility does not meet.

The department, through its review of the notice of intent and preliminary application, ensures that the application contains sufficient evidence for the Council to make these findings. One of the primary tools used to establish what information is considered to be sufficient is the project order. The project order establishes the statutes, administrative rules, council standards, local ordinances, application requirements and study requirements that must be addressed in the application. The project order is initially based on the information the applicant provides in the notice of intent but may be amended by the Council or department at any time.⁷ The project order defines the “analysis areas” in which the applicant must identify resources protected by Council standards, and describe the potential impacts the construction and operation of the proposed facility may have. These analysis areas may be the same as the “study areas” used to identify resources in the notice of intent or may be set based on the type of facility being proposed, its proposed location, or other factors.⁸

The Scenic Resources and Recreation Standards require the Council to find that the design, construction, or operation of a facility will not result in a significant adverse impact to certain scenic resources and values or recreational opportunities in the analysis area identified in the project order. The Protected Areas Standard similarly requires the Council to find that a proposed facility will not result in a significant adverse impact to the protected areas identified in the rule but makes no reference to the project order.

Alternatives:

1. *Make no changes.*
2. *Amend the Protected Areas Standard (OAR 345-022-0040) to limit the scope of Council’s findings to impacts to protected areas located within the analysis area described in the project order.*
3. *Amend the Recreation and Scenic Resources Standards (OAR 345-022-0080 and 345-022-0100) to remove the limitation on the scope of Council’s findings to allow the Council to consider impacts to scenic resources and recreational opportunities outside the analysis area described in the project order.*

Discussion:

Alternative 1: Make no changes

While the construction of the current standards is not consistent, in most cases the resulting findings and conclusions are similar in scope because the applicant is only required to provide information related to

⁷ ORS 469.330(4)

⁸ We note that a previous version of this document incorrectly stated that the study area for the NOI is the default analysis area. This is true in the expedited review process described under ORS 469.373, but not in the standard application review.

resources and impacts within the analysis area. There could be differences, however, if evidence suggesting that the construction or operation of a proposed facility could result in significant impacts to a scenic resource or recreation opportunity outside of the established analysis areas was introduced into the record by the applicant, a reviewing agency, or an interested member of the public. Under the current rules, the Council would only be able to consider that evidence if the scenic resource or recreation opportunity was a designated protected area, or if it took the additional procedural step of amending the project order.

Alternative 2. Amend the Protected Areas Standard (OAR 345-022-0040) to limit the scope of Council's findings to impacts to protected areas located within the analysis area described in the project order.

The Council could amend the Protected Areas Standard to limit findings to protected areas within the analysis areas established by the project order. This would make the standard more consistent with the scenic resources and recreation standards, and as some stakeholders noted, would add some additional certainty on for applicants on the potential scope of the siting review. As described above, there could be some challenges in addressing evidence suggesting that there may be impacts to protected areas outside of the analysis area, but this should not be an issue if analysis areas are large enough to capture all reasonably foreseeable impacts to resources from a project. In the event that an analysis area was found to be inadequate, the project order could also be amended by the Council or the Department to include the resource. We note that there is no clear procedures or criteria for amending a project order, and it is not entirely clear what, if any, responsibility the applicant would have to provide additional information if the project order was amended late in the review process.

Alternative 3. Amend the Recreation and Scenic Resources Standards (OAR 345-022-0080 and 345-022-0100) to remove the limitation on the scope of Council's findings to allow the Council to consider impacts to scenic resources and recreational opportunities outside the analysis area described in the project order.

The Council could amend the Recreation and Scenic Resources Standards to align with the construction of the Protected Areas standard. This would require that the Council find that the construction or operation of the proposed facility would not result in unmitigated significant adverse impacts to any significant or important scenic resources or recreation opportunities, rather than a finding on just resources within the analysis area. This change would not necessarily impose new study or application requirements on applicants or certificate holders, because the extent of required analysis would still be controlled by the project order. It would, however, allow for the consideration of evidence related to impacts outside of the analysis area without the additional procedural step of amending the project order. If a third party believed that there were impacts to a resource outside of the analysis area, it would be their burden to raise the issue during the hearings on the draft proposed order for the project with sufficient specificity for the applicant and department to be able to respond. If the issue wasn't resolved in the proposed order, the proponent could then introduce additional evidence to support their position through the contested case hearing.

Recommendation: In response to the Department's request for comments on this issue, many stakeholders agreed that there should be consistency in the scope of findings required by Council Standards, but there was not consensus on which approach should be pursued. Staff recommends that amending the Scenic Resources and Recreation Standards, as identified in Alternative 3, would result in more robust findings and would not result in undue burdens on the applicant because the required analysis would still be controlled by the project order.

OAR 345-022-0080(1) ~~Except for facilities described in section (2), to~~ issue a site certificate, the Council must find that the design, construction and operation of the facility, taking into account mitigation, are not likely to result in significant adverse visual impacts to significant or important 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.~~

(3) A scenic resource is considered to be significant or important if it is identified as significant or important in a land use management plan adopted by one or more local, tribal, state, or federal government or agency. (NOTE: Also see recommendation for Issue 7.)

~~**OAR 345-022-0100(1)** Except for facilities described in section (2), to issue a site certificate, the Council must find that the design, construction and operation of a facility, taking into account mitigation, are not likely to result in a significant adverse impact to important recreational opportunities in the analysis area as described in the project order. * * *~~

Issue 2.1 – Size of Study Areas for Protected Areas, Recreation, and Scenic Resources Standards

Issue description: Some stakeholders recommend that the study areas for impacts to Protected Areas, Recreation, and Scenic Resources are too large, especially for renewable energy facilities.

Background: In its notice of intent, the applicant must provide an initial description of the impacts that could result from construction or operation of the proposed facility within designated study areas. Under OAR 345-001-0010(59), the “study area” for impacts to Protected Areas is 20 miles; for impacts to scenic resources, 10 miles, and for impacts to recreational opportunities, 5 miles. This information is used to inform the “analysis areas” for the application. These analysis areas may be the same as the “study areas” required for the notice of intent or may be adjusted based on the information provided in the notice of intent and any comments from reviewing agencies or the public.

In response to the Department’s request for advice on this rulemaking, one stakeholder recommended Council consider reducing the study area for protected areas from 20 miles to 10 miles, consistent with the analysis area for scenic resources and public services. Another stakeholder stated that the study areas for all three standards were too large for solar photovoltaic facilities and should be reduced to 1 mile from the site boundary.

Alternatives:

- 1. Make no changes*
- 2. Reduce the study area for protected areas to 10 miles, or another distance, for all facilities*
- 3. Reduce the study areas for impacts to protected areas, scenic resources, and recreational opportunities to 1 miles, for solar photovoltaic facilities*

Discussion:

Alternative 1. Make no changes

The current study areas have been in place since 2002, when the study area for impacts to scenic areas and public services was reduced from 30 miles to 10 miles. That change appears to have been based on the recommendation of a wind energy developer that claimed its visual simulations demonstrated that wind turbines had limited visibility at distances over 10 miles. The study areas for protected areas and recreation standards were not amended during the 2002 rulemaking and date back to at least the mid-1990s. Staff was unable to determine the initial basis for setting these distances as the appropriate area to analyze impacts.

Alternative 2. Reduce the study area for protected areas to 10 miles, or another distance, for all facilities

A stakeholder recommended the Council consider reducing the study area for impacts to protected areas to 10 miles, consistent with the study area for impacts scenic resources. The recommendation was based, in part, on the rationale that visual impacts have the most long-ranging extent of any impact that must be analyzed for Protected Areas, and that the analysis area set for the Scenic Resources standard would be sufficient. In workshops for this meeting, several other stakeholders disagreed, noting that the current study area for scenic resources may in fact be too small. Much of the conversation focused on wind facilities, and many noted that wind turbines have grown both in terms of rotor diameter and total height since the 10-mile scenic resources study area was set. For example, when the Council issued the initial site certificate for the Stateline Wind Project in 2001, it authorized the construction of turbines with a hub height of approximately 165 feet and with blades, a total height of approximately 242 feet. In 2018, the Council approved an amendment to the Golden Hills Wind Project site certificate that authorized the construction of turbines with a hub height of approximately 404 feet and a total height of approximately 650 feet, more than two and a half times as tall as the original Stateline turbines. In part due to this increasing size, recent studies by the BLM and others have suggested that there is a potential for significant visual impacts from wind facilities in the 20–30-mile range.⁹ While increasing consistency between the standards requiring visual impacts analyses may be a desirable outcome, it may also be reasonable for the protected areas standard to maintain a larger study area than the scenic resources standard as the protected areas standard applies to resources designated under state or federal law, which may imply their statewide or regional significance.

Alternative 3. Reduce the study areas for impacts to protected areas, scenic resources, and recreational opportunities to 1 mile, for solar photovoltaic facilities

A stakeholder representing the solar industry recommended that it may be appropriate to reduce the study areas under protected areas, scenic resources, and recreational opportunities to 1 mile for solar photovoltaic facilities. This recommendation was based in part on the claim that solar photovoltaic facilities have limited visual or noise impacts outside beyond the facility site boundary. While staff does not generally object to establishing different study areas for different types of facilities or facility components, we do not believe there is evidence to support reducing the study areas for solar photovoltaic facilities to 1 mile.

A 2016 study of the visual impacts of several solar facilities in California and Nevada found that a thin-film solar photovoltaic facility was visible at a distance of up to 22 miles, and that in addition to the photovoltaic arrays, related and supporting facilities such as buildings, grid connection facilities, fences, roads, lighting, and cleared soil also contributed significantly to observed visual contrasts.¹⁰ We also note that noise impacts from the construction and operation of a proposed facility do have the potential to be significant beyond the site boundary. Constructing a solar facility involves the use of heavy equipment to grade ground and drive post, and while operating solar facilities are sometimes thought to be silent because they involve few, if any, moving parts, they do include noise sources such as tracking equipment, transformers, inverters, and high-voltage transmission lines.

Recommendation: Because staff does not have an appropriate empirical basis to recommend changes to the study areas at this time, staff recommends Council make no changes, as described under Alternative 1. Staff recommends Council consider this issue further in future rulemaking.

⁹ Sullivan et al., 2012a.

¹⁰ Sullivan et al., 2012b.

Issue 2.2 – Extent of Study Areas for Facilities near State borders

Issue description: A stakeholder recommended that the Council limit study areas for impacts to Protected Areas, Recreation, and Scenic Resources to areas within the borders of Oregon.

Background: In its notice of intent, the applicant must provide an initial description of the impacts that could result from construction or operation of the proposed facility within designated study areas. Under OAR 345-001-0010(59), the “study area” for impacts to Protected Areas is 20 miles; for impacts to scenic resources, 10 miles, and for impacts to recreational opportunities, 5 miles. If the facility is proposed to be located near Oregon’s borders, the study area may extend into Washington, Idaho, or California. It is not always clear if a protected area designated by one of these neighboring states is protected under the protected areas standard, or if a scenic resource identified in the land use plan for a local government with jurisdiction outside of Oregon should be given consideration in determining what scenic resources or recreation opportunities are significant or important.

Alternatives:

1. Make no changes
2. Amend rules to specify that study and analysis areas only extend to Oregon’s borders.

Discussion:

Alternative 1. Make no changes

The Council has reviewed and approved numerous facilities near the border with neighboring states, and applicants are generally able to provide information about resources in those states that may be impacted. During rulemaking workshops, several stakeholders recommended that the Council can and should consider impacts to protected areas, scenic resources, and recreational opportunities in neighboring states, noting that these are public resources that may be used and enjoyed by people on either side of the border. The Columbia Gorge National Scenic Area was cited in particular as an example of a resource where impacts on one side of the border could have significant impacts on residents on the other side.

Alternative 2. Limit the study areas to areas within Oregon.

In response to the Department’s request for advice on this rulemaking, one stakeholder recommended that the Council consider limiting the extent of both study and analysis areas to the Oregon Border and exclude consideration of impacts to resources outside of this State. As noted above, it is not always clear if resources located in neighboring states are protected under the standards. As an example, the Protected Areas Standard includes all federally designated protected areas, but only gives consideration to Oregon State Parks and State Wildlife Areas managed by the Oregon Department of Fish and Wildlife. It is less clear if the rules intend for an applicant to review local land use for jurisdictions outside of Oregon to identify scenic resources or recreation opportunities. During the rulemaking workshops, some stakeholders suggested that this ambiguity was potentially problematic, and one questioned whether the Council has the authority to consider impacts on resources outside of this state. While the Council does not appear to be required to limit its evaluation to just impacts on resources within this state, it likely could do so if it wanted to for some or all standards. For example, if the Council does not believe it is appropriate to require an applicant to review the land use plans for local governments with jurisdiction in neighboring states, it could limit the study areas for scenic resources and recreation opportunities to areas within this state and continue to require the applicant to identify federally designated protected areas in Washington, Idaho, or California. In the alternative, the Council could amend the standards themselves to clarify what resources are protected and defer to the siting analyst to establish appropriate analysis areas after the notice of intent has been submitted.

Recommendation: Because the standards under consideration in this rulemaking protect resources that may be used and valued by Oregonians, regardless of their location, staff does not recommend changes based on this issue.

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 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 2019.¹¹

Alternatives:

1. *Amend rule to update the rule to reference the date of adoption of the new rules.*
2. *Amend rule to remove the date.*
3. *Amend rule to specify that Council must make findings based on designations in effect at a specific point in the siting review process.*

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 for this issue.

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

This alternative would adhere to the current construction of the rule by maintaining the date of adoption of a new rule as a “cut-off” date for designated protected areas. If a new protected area was established after the rule as adopted, an applicant or certificate holder would not be required to evaluate impacts to demonstrate compliance with the Council’s standard, although it would still likely need to ensure that the facility did not conflict with laws or rules for management of the area. The Council could update the rule to incorporate newly protected areas, as needed, although there is risk that the rule would become outdated relatively quickly if rulemaking did not occur on a regular basis. Some stakeholders have expressed support for this alternative as it clearly identifies what areas an applicant will be required to avoid or evaluate as part of the application review process.

2. Amend rule to remove the date.

Alternative 2 would likely reduce the need for future rulemaking to keep the rule current but would require the Council to determine how to address protected areas that are designated or established while a facility is under review. We note that the designation of new protected areas occurs infrequently, and due to the significance of both the resources and the level of protection afforded to them, an area that may be designated is identified well in advance of the formal designation in most cases.

This alternative could result in some uncertainty for applicants, but the level of planning and public engagement that is typically involved in the designation of protected areas would likely mitigate the potential for unfair surprise. There are also sufficient opportunities to develop the record after submittal of the

¹¹ P.L. 116-9, Mar. 12, 2019

complete application to avoid the need for an applicant to go back in the process if supplemental analysis or modifications to a proposed facility were needed to address potential impacts to a newly established protected area.

3. Amend rule to specify that Council must make findings based on designations in effect at a specific point in the siting review process.

Several stakeholders commented that the possibility that rules requiring an applicant to evaluate impacts to a protected area established during the middle of the review process would be onerous, as the exhibits required to demonstrate compliance with the Protected Areas Standard involve highly technical analyses. To provide some certainty to developers, while reducing the need for future rulemaking to keep the rule up to date, the Council could specify that the standard only applies to areas designated before a certain point in the review process, such as before the submission of the notice of intent, the preliminary application, or the complete application. Staff believes that if this alternative was pursued, filing of the complete application would be the appropriate milestone, although some stakeholders have recommended that an earlier goalpost such as the filing of the preliminary application would be preferred and more consistent with the goal post for local applicable substantive criteria under OAR 345-021-0000(10).

One stakeholder recommended that, rather than basing the applicability of the standard based on the timing of applicant submissions, it would be more consistent with other standards if protected areas were identified based on the date the project order is issued. We note that this would still allow some flexibility to consider newly protected areas, as the Council or the Department can amend the project order at any time.¹² During discussion of this issue, a stakeholder commented that due to this flexibility this option would not provide the additional regulatory certainty desired by developers.

Several stakeholder commented that it would not be appropriate to limit Council's ability to consider impacts to protected areas that are designated during the review, and one stakeholder noted that at least for some protected areas, this limitation is inconsistent with the requirements of ORS 469.401, which requires a site certificate or amended site certificate to require both the Council and applicant to abide by local ordinances, state laws, and the rules of the Council in effect on the date the site certificate or amended site certificate is executed.

Recommendation: To allow rules to remain up to date while minimizing uncertainty for applicants, staff recommends that Council amend the rule to specify that Council must make findings based on designations in effect at the time a complete application is filed, as described in Alternative 3. The proposed rule language, with additional clarifying changes, is provided below:

OAR 345-022-0040(1) ~~Except as provided in sections (2) and (3),~~ To issue a site certificate, the Council shall
must find:

(a) The ~~not issue a site certificate for a proposed facility~~ will not be located within the boundaries of a protected areas listed below ~~designated on or before the date the application for site certificate or request for amendment was determined to be complete under OAR 345-015-0190 or 345-027-0363.~~

(b) ~~To issue a site certificate for a proposed facility located outside the areas listed below, the Council must find that,~~ taking into account mitigation, the design, construction and operation of the facility

¹² 469.330(4).

are not likely to result in significant adverse impacts to ~~the areas listed below~~ a protected area designated on or before the date the application for site certificate or request for amendment was determined to be complete under OAR 345-015-0190 or 345-027-0363.

Issue 4 – Lists of Protected Areas

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

Issue description: The Protected Areas Standard contains a list of designation categories 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. Some of the listed categories contain lists identifying specific areas within the categories that appear to be incomplete or out of date. We have provided additional background on each of the categories of protected area designations included in the current rule, as well as additional categories that provide comparable protections to resources and values in the recommendations section below.

Alternatives:

1. *Make no changes.*
2. *Amend rule to provide updated lists that identify all current protected areas.*
3. *Amend rule to remove specific protected areas and list only specific categories and designations.*

Discussion:

1. *Make no changes.*

Because the lists in the rule are not exhaustive the Council may choose to make no changes, or only make limited changes to remove outdated references at this time.

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

The Council may also choose to update the lists to reflect all currently designated areas as described in Alternative 2. Several stakeholders recommend the Council retain the non-exclusive lists of specific protected areas because they help facilitate understanding of which types of areas are intended for each category; however, as one stakeholder pointed out, the updated list would soon be out of date, and could lead to additional confusion.

3. *Amend rule to remove specific protected areas and list only specific categories and designations.*

Removing the lists as described in Alternative 3 would reduce the need to update the rule, by relying solely on specific designation categories. Several commenters supported this approach as not having outdated lists in the rule would reduce confusion.

Recommendation: Staff acknowledges that some stakeholders find the illustrative, non-exhaustive lists currently provided in rule to be helpful, but the inclusion of outdated information in rule can be problematic. Because protected areas may be added, renamed, or redesignated at any time, staff recommends Council remove the specific protected areas from the rule as described in Alternative 3. If Council wishes to continue making lists identifying specific protected areas available to stakeholders, we recommend providing this information as an informational resource that can be updated outside of the formal rulemaking process.

In addition to removing the specific examples of protected areas from the rule, staff recommends additional changes to align the rule with current law, clarify ambiguity, and to add additional categories that are comparable in the level of protection and types of resources and values to those protected areas included on the current list. We document the rationale for the recommended changes, we discuss each category individually below. Finally, as a housekeeping change, staff recommends the list be moved from its current location in the standard to the definitions rule in OAR 345-001-0010.

National Parks

Under OAR 345-022-0040(1)(a), National Parks are considered protected areas under the Council’s Standard. National Parks are designated by Congress to protect “superlative” natural, historic, and recreation areas. The term “national park” is also commonly used to describe areas with other titles that are administered by the National Parks Service for park, monument, historic, parkway, recreational, or other purposes as units of the National Park System.¹³ These other areas include national preserves, national memorials, and national historic parks and sites.

The current rule lists Crater Lake National Park and Fort Clatsop National Memorial as protected areas. As mentioned above, the Fort Clatsop National Memorial was re-designated as the Lewis and Clark National Historical Park in 2004. Several sites within the Nez Perce National Historic Park and the McLoughlin House, which is part of the Fort Vancouver National Historic Site, are also located within Oregon. While they are formally designated as National Monuments, both the John Day Fossil Beds National Monument and the Oregon Caves National Monument and Preserve are administered as units of the National Park System. Since the rule was last amended, approximately 4,000 acres of land previously included in the Rogue River-Siskiyou National Forest were transferred to the Oregon Caves National Monument and Preserve.

Updating the rule would ensure that any new park areas are included, and staff does not believe any other changes to the scope of the category are necessary; however, to clarify that all units of the National Park System are included we recommend the rule language be amended as follows:

(a) A national parks or another component of the National Park System described under 54 U.S.C. 100501; including but not limited to Crater Lake National Park and Fort Clatsop National Memorial

National Monuments

Subsection (1)(b) of the rule provides that National Monuments are protected areas under the Council’s Standard. The Antiquities Act of 1906 authorizes the President to declare federal lands containing significant historic scientific resources or values to be national monuments. National monuments may also be established through an act of congress.¹⁴ As described above, a national monument may be administered by the National Park Service as a unit of the National Park System. Other national monuments are administered by the Bureau of Land Management (BLM) as components of the National Landscape Conservation System.¹⁵

The rule currently lists the John Day Fossil Bed National Monument, Newberry National Volcanic Monument and Oregon Caves National Monument. The BLM administered Cascade-Siskiyou National Monument was established by presidential proclamation in 2000, and expanded to include an additional 48,000 acres (including 43,000 acres in Oregon) in 2017.

¹³ 54 U.S.C. 100101 and 100501.

¹⁴ 54 U.S.C. 320301 to 320303

¹⁵ 16 U.S.C. 7202

Updating the rule would ensure that the new areas included in the Cascade-Siskiyou National Monument and the Oregon Caves National Monument and Preserve areas are included in the rule. Staff does not recommend other changes to the scope of the category; however, for consistency we recommend a citation to the Antiquities Act be included in the rule language:

(b) ~~A National monuments established under 54 U.S.C. 320201 or an act of Congress including but not limited to John Day Fossil Bed National Monument, Newberry National Volcanic Monument and Oregon Caves National Monument;~~

Wilderness Areas

Subsection (1)(c) of the rule provides that wilderness areas and “areas recommended for designation as wilderness areas” are protected areas under the Council’s standard. Wilderness Areas are congressionally designated areas which are protected and managed to preserve their natural conditions as well as ecological, geological, or other features of scientific, educational, scenic, or historical value. Under the Wilderness Act of 1964, only congress can establish a wilderness area. Wilderness areas may be administered by the US Forest Service, the Bureau of Land Management, Parks Service or other federal agency. Once established, all wilderness areas are considered to be components of the National Wilderness Preservation System.¹⁶ Since the rule was last amended, the Omnibus Public Lands Management Act of 2009 established several new Wilderness Areas in Oregon and expanded several more. In total this added over 100,000 acres to the National Wilderness Preservation System in Oregon alone.¹⁷ The John D. Dingell, Jr. Conservation, Management, and Recreation Act added the 30,621 acre Devil’s Staircase Wilderness Area in 2019.¹⁸ As of 2019, there were approximately 2.5 million acres of designated wilderness in Oregon, representing about 8 percent of federal lands in this state.

Updating the rule would ensure that the new wilderness areas established by congress are included in the rule. Staff does not recommend other changes to the scope of the category; however, staff does recommend Council make administrative changes intended to increase consistency with the language used in federal law. First, subsection (1)(c) of the rule currently includes wilderness areas “and areas recommended for designation as wilderness areas pursuant to 43 U.S.C. 1782.” We recommend the Council amend the rule to address these wilderness study areas in a separate subsection to reflect their administrative status, as described below. Second, to be consistent with terminology used in federal law, we recommend Council add reference to the National Wilderness Preservation System” in the rule. Neither of these changes are intended to expand the scope of the types of areas included in the rule.

(c) ~~A component of the National Wilderness Preservation System areas established pursuant to The Wilderness Act, described under 16 U.S.C. 1131 et seq. and areas recommended for designation as wilderness areas pursuant to 43 U.S.C. 1782;~~

Wilderness Study Areas

As described above, subsection (1)(c) of the rule provides that wilderness areas and “areas recommended for designation as wilderness areas under 43 U.S.C. 1782” are protected areas under the Council’s standard. The Federal Land Policy and Management Act of 1976 required the BLM to conduct a study of all roadless areas with sufficient wilderness characteristics to be considered for designation by Congress as wilderness areas, and to make recommendations to the President regarding their suitability or unsuitability for preservation as

¹⁶ 16 U.S.C. 1131 et seq.

¹⁷ P.L. 111-11

¹⁸ P.L. 116-9

wilderness. The law provides that the President may then recommend that Congress designate any of these wilderness study areas as wilderness areas.

The BLM completed the Final Wilderness EIS and Wilderness Study Report for Oregon in 1989. The Wilderness Study Report includes recommendations for 92 wilderness study areas (WSA) in Oregon. The report recommended approximately 1.3 million acres in 49 wilderness study areas as suitable for preservation, and 1.5 million acres in 76 wilderness study areas as nonsuitable. Presidential recommendations were made to Congress in the early 1990's, but many recommendations remain pending. We note that regardless of the BLM or presidential recommendation, the BLM is required to manage all wilderness study areas "in a manner so as not to impair the suitability of such areas for preservation as wilderness" until Congress either establishes the area as a component of the National Wilderness Preservation System or withdraws the area from consideration.¹⁹

There is some ambiguity as to whether the rule is intended to include all wilderness study areas, areas recommended by the BLM as suitable for preservation as wilderness, or wilderness study areas that were recommended for designation to Congress. Because a wilderness study area must be managed to preserve its wilderness characteristics until Congress acts to withdraw it from consideration, we recommend that Council resolve any ambiguity in the rule by amending the rule to include all BLM Wilderness Study Areas. As noted above, this would potentially include an additional 1.5 million acres of WSA lands (minus any areas that have been designated as wilderness or released by congress since 1989) as protected areas under the Council's standards, however most of these areas were identified as WSAs because they are located in remote areas and would likely be not suitable for most energy development.

Based on a stakeholder recommendation we also considered whether additional changes should be made to include proposed or recommended wilderness areas on other federal lands. The Wilderness Act of 1964 required the US Forest Service to conduct a similar review of areas suitable for wilderness on National Forest lands, and while there is still considerable controversy around its outcomes, this process has largely been completed. There is currently a proposal to designate 500,000 acres surrounding Crater Lake as a wilderness area, but this land is within the boundaries of Crater Lake National Park and as such, is already included as a protected area under the Council's Standard.

For this reason, we do not believe additional changes to the scope of this category are necessary. Based on the analysis above, we recommend that Council establish a new subsection of the rule as follows:

(h) A wilderness study area established under 43 U.S.C. 1782;

National Wild and Scenic Rivers

Subsection (1)(k) of the rule provides that Oregon Scenic Waterways and National Wild and Scenic Rivers are protected areas under the Council's Standard. While rivers protected under these designations may overlap, staff recommends Council amend the rule to address these state and federal designations separately, and accordingly, Oregon Scenic Waterways are discussed separately below.

The Wild and Scenic Rivers Act of 1968 established the National Wild and Scenic Rivers System, which protects designated free-flowing rivers for the benefit and enjoyment of present and future generations. Designated rivers or river segments are commonly referred to as wild and scenic rivers, although there are three classes of

¹⁹ 43 U.S.C. 1782(c)

wild and scenic river designations, reflecting the characteristics of a river at the time of designation and affecting the type and amount of development that may be allowed afterward:

- Wild rivers are free from impoundments (dams, diversions, and so forth) and generally inaccessible except by trail. The watersheds are primitive, and the shorelines are essentially undeveloped.
- Scenic rivers are free from impoundments and in generally undeveloped areas but are accessible in places by roads.
- Recreational rivers are readily accessible by road, with some shoreline development, and may have been subject to some impoundment or diversion in the past.

New wild and scenic rivers may be added through an act of congress or designated by the Secretary of Interior through administrative action if a river that is protected under a similar designation by state statute is nominated for inclusion by that state's governor.²⁰ The Wild and Scenic Rivers Act designated 84.5 miles of the Rogue River as components of the National Wild and Scenic River System. Since then, Congress has included approximately 1,900 additional miles of wild and scenic rivers in Oregon. Notably, the Omnibus Oregon Wild and Scenic Rivers Act of 1988 added more than 1,400 river miles and 40 new Wild and Scenic Rivers to the National Wild and Scenic River System in Oregon.²¹ Several additional wild and scenic rivers have been designated by Congress since the rule was last amended, through the Omnibus Public Land Management Act of 2009 and the John D. Dingell, Jr. Conservation, Management, and Recreation Act of 2019.

The only wild and scenic river designations made through the state nomination process are an 11-mile segment of the Klamath River and a 10-mile segment of the Wallowa River which were nominated for inclusion in the system by Governor Roberts in 1994 and 1996, respectively.

National Wild and Scenic Rivers are administered by one of four federal land management agencies: the US Forest Service, the BLM, the National Parks Service, and the US Fish and Wildlife Service. Section (5)(d) directs these agencies to identify potential additions to the National Wild and Scenic Rivers System during their resource management planning processes, but no special protection is given to these potential additions unless a study is authorized by Congress.

Congress may direct a federal agency to conduct a study to determine if a specific river is suitable for wild and scenic designation. The Wild and Scenic Rivers Act affords the same level of protection to these study rivers as designated rivers during the study process and for three-years following the transmittal of the final study report by the President to Congress.²² The current rule provides that waterways listed as potentials for designation are also considered protected areas under the Council's standard.

Updating the rule would ensure that the new wild and scenic rivers established by Congress are included as protected areas under the Council's Standard. Other than establishing a new subsection to address wild and scenic rivers separately from state scenic waterways, staff does not recommend other changes to the scope of the category; however, staff does recommend Council make administrative changes intended to increase consistency with the language used in federal law:

(d) A river designated as a component of, or potential addition to, the National Wild and Scenic River System under 16 U.S.C. 1271 et seq.;

²⁰ 16 U.S.C. 1273(a)

²¹ P.L. 100-557

²² 16 U.S.C. 1278(b)

National Wildlife Refuges

Section (1)(d) of the rule provides that national and state wildlife refuges are considered protected areas under the current rule. We recommend that Council amend the rule to address these state and federal designations separately, and accordingly State Wildlife Refuges are discussed separately below.

The National Wildlife Refuge System includes wildlife refuges, wildlife ranges, wildlife management areas, game preserves, and conservation areas. These areas are managed for the conservation, managements, and restoration of fish and wildlife, with priority given to wildlife-dependent recreation. Congress, the President, or the Secretary of the Interior may establish new Wildlife Refuges, which are administered by the US Fish and Wildlife Service as units of the National Wildlife Refuge System under the National Wildlife Refuge System Administration Act of 1966.²³

US Fish and Wildlife Service currently administers 21 wildlife refuges in Oregon. Since the rule was last amended, over 10,000 acres have been added to the National Wildlife Refuge System in Oregon, and the Wapato Lake National Wildlife Refuge was established from lands that had been added to the Tualatin River National Wildlife Refuge in 2007.

Updating the rule would ensure that new National Wildlife Refuge System lands are included as protected areas under the Council's Standard. Staff does not recommend other changes to the scope of the category; however, staff does recommend Council make administrative changes intended to increase consistency with the language used in federal law:

~~(d) A component of the National and state wildlife refuges System described under 16 U.S.C. 668dd, including but not limited to Ankeny, Bandon Marsh, Baskett Slough, Bear Valley, Cape Meares, Cold Springs, Deer Flat, Hart Mountain, Julia Butler Hansen, Klamath Forest, Lewis and Clark, Lower Klamath, Malheur, McKay Creek, Oregon Islands, Sheldon, Three Arch Rocks, Umatilla, Upper Klamath, and William L. Finley;~~

National Coordination Areas

A national coordination area is a wildlife management area that is made available to a state either by cooperative agreement between the United States Fish and Wildlife Service and a State under the Fish and Wildlife Coordination Act, or by long-term leases or agreements pursuant to title III of the Bankhead-Jones Farm Tenant Act.²⁴ Like national wildlife refuges, coordination areas are units of the National Wildlife Refuge System, but these units are mostly administered by state wildlife agencies.

There are currently three coordination areas in Oregon: The Government Island Game Management Area is a 1.79 acre parcel in the Government Island State Recreation Area. The Ochoco Reservoir Public Fishing Area includes 40 acres which are adjacent to the Ochoco Lake State Park (administered by Crook County). The Summer Lake Coordination Area consists of 7,128 acres of federal land within the larger Summer Lake Wildlife Area administered by the Oregon Department of Fish and Wildlife. No new national coordination areas have been established in more than 20 years.

Because coordination areas are considered units of the National Wildlife Refuge System, and because they are generally within the boundaries of another protected area, staff recommends Council eliminate this category

²³ 16 U.S.C. 668dd-668ee

²⁴ 16 U.S.C. 668ee(5)

from the list. This change is not expected to remove any existing protected areas from protection under the Council standard.

~~(e) National coordination areas, including but not limited to Government Island, Ochoco and Summer Lake;~~

National Fish Hatcheries

Subsection (1)(f) of the current rule provides that national and state fish hatcheries are protected areas under the Council Standard. Consistent with other categories discussed in this document, staff recommends Council amend the rule to address these state and federal facilities separately, and accordingly, state fish hatcheries are discussed separately below.

National fish hatcheries promote and maintain healthy populations for fish and other aquatic species, provide resources to help conserve imperiled species, and conduct scientific research. In addition to National Fish Hatcheries, the US Fish and Wildlife Service administers fish technology centers and fish health centers as units of the National Fish Hatcheries System.

No new National Fish Hatcheries have been established since the rule was last amended. While there are not fish technology centers or fish health centers located in Oregon, staff does recommend changing the scope of the category to include all units of the National Fish Hatcheries System, such as the Abernathy Fish Technology Center in Longview, WA, to increase consistency with federal law:

~~(f) A component of the National and state fish hatcheries Fish Hatchery System described under 16 U.S.C. 760a including but not limited to Eagle Creek and Warm Springs;~~

National Recreation and Scenic Areas

National Recreation Areas are established through acts of congress. As the name suggests the sites have a recreation focus, and their establishing legislation often authorizes activities such as boating, fishing, and hunting. National Recreation Areas may be established on lands administered by the National Parks Service (often surrounding Bureau of Land Reclamations reservoirs), Forest Service, or BLM. Since the rule was last updated, Congress designated one new National Recreation Area, the Mount Hood NRA, through the Omnibus Public Lands Management Act of 2009.

Congress has also established a number of scenic areas on lands administered by the Forest Service. National Scenic Areas may also be designated as a National Scenic Research Area, National Scenic Recreation Area, or National Scenic and Wildlife Areas. These areas generally contain outstanding scenic characteristics; recreational values; and geologic, ecological, and cultural resources.

In addition to national scenic and recreation areas, congress has also designated a number of other special resources management units on lands administered by the Forest Service to protect specific resources and special scenic, natural, cultural, and wildlife values. This includes the Crystal Springs Watershed Special Resources Management Unit, which congress designated through the Omnibus Public Lands Management Act of 2009 to protect the Crystal Springs Watershed as a source of clean drinking water for the residents of Hood River, Oregon. Like national scenic and recreation areas, special management units are generally withdrawn from mining and mineral leasing, subject to valid existing rights at the time of designation, and from commercial timber harvest.

One stakeholder recommended that the Council consider amending the rule to include special management unit areas as protected areas under the Council’s Standard. While the management emphasis is somewhat different than national recreation and scenic areas, this designation generally provides a similar level of protection to resources and values that are protected under the Council’s standard. As such, we agree that it would be appropriate to include congressionally designated special resources management units as protected areas under the Council’s standard.

Updating the rule would ensure that the Mt. Hood NRA, and any other new national recreation and scenic areas established by congress are included in the rule. Staff also recommends that Council amend the rule to include congressionally designated special resources management units as follows:

(g) A congressionally designated national recreation area, and national scenic areas, or special resources management unit including but not limited to Oregon Dunes National Recreation Area, Hell's Canyon National Recreation Area, and the Oregon Cascades Recreation Area, and Columbia River Gorge National Scenic Area;

The Steens Mountain Cooperative Management and Protection Area

The Steens Mountain Cooperative Management and Protection Area (CMPA) was established by the Steens Mountain Cooperative Management and Protection Act of 2000 to conserve, protect and manage the long-term ecological integrity of Steens Mountain for future and present generations.²⁵ The CMPA is a unique management designation that emphasizes collaboration with private landowners and resource interests within the larger CMPA boundary.

The stakeholder that raised this issue did not recommend the Council consider the CMPA specifically, however, because the CMPA is managed as part of the National Landscape Conservation System which includes many lands under special designations that are included as protected areas under the Council’s standard, we have provided additional background here. We note that in 2010, the Council denied a petition from the Oregon Natural Desert Association to conduct rulemaking to add the CMPA to the list of protected areas.²⁶

The CMPA boundary includes around 500,000 acres in Harney County, Oregon, but the CMPA designation only applies to the 428,156 acres of BLM land within the CMPA boundary. While the BLM works with private landowners to preserve lands on a voluntary basis, the CMPA designation does not affect the management of private lands within the boundary. Within the CMPA, 174,287 acres are designated Wilderness Areas and dedicated State Natural Area. An additional 118,637 acres are managed as Wilderness Study Areas. The CMPA also contains two Areas of Critical Environmental Concern (ACEC), six Research National Areas (RNA), and 12 designated Wild and Scenic River segments but most of these are entirely within the designated Wilderness Area. As a result, approximately 70 percent of public lands within the CMPA boundary are considered to be protected areas under the current rule.

The wilderness and other protected areas in the CMPA are also designated as exclusion or avoidance areas for renewable energy development under the Steens Mountain Resource Management Plan. The remaining portions of the CMPA are also withdrawn from mineral and geothermal exploration and development, but solar and wind development is recognized as a valid use in some areas.

²⁵ P.L. 106-399

²⁶ Energy Facility Siting Council Denial of Petition for Rulemaking, June 28, 2010.

Because the majority of public land within the CMPA are already considered to be protected areas under the Council's Standard, and because it is not clear that the remaining portions were intended to be precluded from renewable energy development, we do not recommend the Council make additional changes to the rule to include the CMPA as a protected area.

Areas of Critical Environmental Concern, Outstanding Natural Areas, and Research Natural Areas

Areas of Critical Environmental Concern (ACECs) are BLM administered areas where special management attention is required to protect and prevent irreparable damage to important values, resources, systems or processes, or to protect life and safety from natural hazards.²⁷ ACECs are generally identified and established through the BLM's resource planning process.²⁸ There are 49 designated ACECs identified in the draft 2020 Oregon Natural Areas Plan. Because the ACEC designation is only applicable to BLM administered lands, all ACECs are considered to be protected areas under the current rule. Outstanding Natural Areas (ONAs) are established to protect areas of unusual natural characteristics. The BLM has administratively designated two ONAs in Oregon, and Congress established a third, the Yaquina Head Outstanding Natural Area. Because the ACECs and ONA designations are only applicable to BLM administered lands, all of these areas are considered to be protected areas under the current rule.

Research Natural Areas (RNAs) are areas that are permanently protected and maintained in natural condition to preserve unique ecosystems or ecological features; rare or sensitive species of plants and animals and their habitat; or high-quality examples of widespread ecosystems. Currently, only the 83 RNAs managed by the BLM are included as protected areas under this subsection.²⁹ The 2020 Oregon Natural Areas Plan identifies 101 established and proposed RNAs administered by other federal land management agencies including the Forest Service and the US Fish and Wildlife Service. Some of these RNAs, such as those administered by the National Parks Service, US Fish and Wildlife Service, or Army Corps of Engineers would also be considered protected areas because they are within the boundaries of another category of protected area, such as a National Park, National Monument, or National Wildlife Refuge.

While there are some differences in the procedures for establishment of RNAs depending on the managing agency, all RNA's are managed for similar purposes, and the ecosystems and species that are prioritized for protection under RNA designation are coordinated through the Pacific Northwest Interagency Natural Areas Network.

In addition to RNAs, the Forest Service may designate other Experimental Areas for long term ecological research, currently designated Forest Service Experimental Areas include four experimental forests, and one experimental forest and range in Oregon. We note that subsections (1)(l) and (n) of the existing rule includes experimental areas and research forests established by Oregon State University as protected areas under the Council's Standard. As one stakeholder pointed out in their response to the Department's request for comments on this rulemaking, it is not clear if this is intended to include areas that are owned and administered solely by OSU, or if forest service experimental areas that are collaboratively managed by OSU would also be included. For example, OAR 345-022-0040(1)(l) refers to "the Starkey site and the Union site" as experimental areas established by the OSU Rangeland Resources Program. This likely refers to the Eastern Oregon Agricultural Research Center's Union location and the Starkey Experimental Forest and Range where the research center's cattle herd is grazed for part of the year. Other areas, such as the H.J. Andrews Research

²⁷ 43 U.S.C §1702(a)

²⁸ 43 CFR 1610.7-2

²⁹ This includes the Dry Mountain RNA, which is jointly administered by the BLM and USFS.

Forest, a USFS Research Forest that is collaboratively managed by the Pacific Northwest Research Station, Oregon State University, and Willamette National Forest, are not referenced in the rule.

The Forest Service may also administratively establish Special Interest Areas to protect areas with important scenic, historical, geological, botanical, zoological, paleontological or other recreational and scientific values through the forest planning process.³⁰ There was considerable discussion about whether or not these areas warranted the same level of protection as other “protected areas” during rulemaking workshops, but one stakeholder suggested that Special Interest Areas are the functional equivalent to ACECs for lands administered by the Forest Service.

Staff recommends the Council amend the rule to include all RNA’s because it is not clear why the rule would treat RNAs administered by the USFS or another agency differently than an RNA administered by the BLM. We also recommend the Council include experimental areas and administratively designated Special Interest Areas on forest service lands as protected areas under the Council Standard because they are designated to protect resources and values that are similar to those protected under the ACEC designation. Amending the rule to include these areas could significantly expand the area of land considered to be “protected areas” under the Council’s Standard, but these areas would likely be in forested areas away from most energy development. To include these areas, we recommend the Council amend the rule as follows:

- (e) ~~Bureau of Land Management~~ Land designated in a federal land management plan as:
 - (A) ~~An~~ Areas of eCritical eEnvironmental eConcern;
 - (B) ~~An eOutstanding nNatural aAreas; and~~
 - (C) ~~A rResearch nNatural aAreas;~~
 - (D) An Experimental forest of range; or
 - (E) A Special Interest Area;

State Parks and Waysides

Subsection (1)(h) of the current rule lists State Parks and waysides listed by the Oregon Parks and Recreation Department (OPRD) as protected areas.

OPRD manages a park system that encompasses 113,142 acres, which includes over 250 park areas, including state parks, waysides, and scenic, historic, and recreation areas.³¹ OPRD also manages the 362 miles of ocean shores and 3,838 acres of the Willamette River Greenway (3,838 OPRD-managed acres). The current language of the rule is somewhat ambiguous in that it only identifies “listed” state parks and waysides as protected areas. Staff believes this terminology is likely not intended to exclude other park areas managed by OPRD, but rather, reflects the categories of park areas in existence in 1980 when the rule language was originally drafted. At that time, the Oregon Parks System was managed by the Oregon Department of Transportation.

To ensure that all areas of Oregon’s State Park System are included as protected areas under the Council’s rules, staff recommends the Council amend the rule as follows:

- (h) ~~A S state parks and, waysides as listed by~~ or other area managed by the Oregon Department of Parks and Recreation Department for scenic, historic, natural, cultural or recreational purposes under ORS 390.121; and

³⁰ 36 CFR 294.1 and FSM 2372

³¹ ORS 390.3111

(k) ~~the~~ The Willamette River Greenway created under ORS 390.310 to 390.368;

We note that like the current rule, this language excludes consideration of State Parks established in neighboring states and additional amendments would be needed if the Council wished to allow consideration of Washington, Idaho, or California State Parks near the Oregon border. (See discussion in Issue 2.2 for more information).

State Natural Heritage Areas

Subjection (1)(i) of the current rule lists state natural heritage areas listed in the Oregon Register of Natural Heritage Areas under ORS 273.581 as protected areas.

The Oregon Natural Areas Program was established to provide a framework for decision making related to the identification and conservation of areas that have substantially retained their natural character or that are valuable as habitat for plant and animal species or for the study and appreciation of the natural features.³² The program is intended to be complementary to and consistent with the research natural area program on federal lands in Oregon.³³

In 2007, when the rule was last amended, the Natural Areas Program was administered by the Department of State Lands, and the Oregon Register of Natural Heritage Areas was maintained by the Natural Heritage Advisory Council. In 2011, the legislature transferred administration of the Natural Areas Program and maintenance of the Registry to OPRD and abolished the Natural Heritage Advisory Council. The bill also renamed the Oregon Register of Natural Heritage Areas as the Oregon Register of Natural Areas.³⁴ A stakeholder recommended that the Council amend the rule to refer to “state natural areas” instead of “state natural heritage areas,” consistent with this change.

OPRD and the Oregon Biodiversity Information Center maintain the Oregon Natural Areas Plan, which identifies areas of land or water in Oregon that are managed for scientific research and education, containing important biological or geological attributes. The natural areas identified in the plan include state and federal lands managed under protective designations, as well as private property that is voluntarily designated as a natural area by its owner.

Not all Natural Areas identified in the plan are included in the Oregon Register of Natural Areas. The register is used to identify significant natural areas that are managed in ways that protect one or more natural heritage resources. Natural Areas can be included in the Oregon Register of Natural Areas either through the process of “registration” or “dedication,” with dedication resulting in the more permanent creation of a “state natural area.” The Oregon Parks and Recreation Commission makes final decisions on whether or not to include a property on the register.

The statutory scheme in place before 2011 differentiated between registered “natural areas” and dedicated “natural heritage conservation areas”, creating some ambiguity about whether the rule intended to limit the Council’s Standard to the protection of dedicated areas or include all areas included on the register by the Parks and Recreation Commission as protected areas. Because the existing language of the Council’s rule does not reference “dedicated” areas and because the more liberal construction appears to be consistent with the policy

³² ORS 273.566

³³ ORS 273.576

³⁴ See 2011 Oregon Laws, chapter 319. To implement the bill, the Oregon Parks and Recreation Department also adopted rules under OAR chapter 736, division 045. These replaced the Department of State Lands rules.

underlying the Natural Areas Program under ORS 273.566, it seems more likely that all natural areas included on the register were intended to be included as protected areas.

To avoid ambiguity about whether or not all areas on the Oregon Register of Natural Areas are included, staff recommends the Council amend the rule as follows:

~~“(l) A State natural heritage areas listed in the Oregon Register of Natural Heritage Areas pursuant to under ORS 273.581;”~~

State Estuarine Sanctuaries

Subsection (1)(j) of the current rule lists state estuarine sanctuaries as protected areas under the Council’s standard.

The South Slough of Coos Bay was the first National Estuarine Sanctuary in the United States to be created under the Coastal Zone Management Act of 1972. The sanctuary was redesignated as the South Slough National Estuarine Research Reserve by the Coastal Zone Management Reauthorization Act of 1985.³⁵ Today there are 29 National Estuarine Research Reserves, which are administered through partnerships between the National Oceanic and Atmospheric Administration (NOAA) and the coastal states. As such, the South Slough National Reserve is administered by both NOAA and the Oregon Department of State Lands (DSL). The Reserve's governing body is the South Slough National Estuarine Research Reserve Management Commission whose members are appointed by the Governor.

Since the rule was last amended, an additional 1,660 acres have been acquired for the reserve. Legislation that would allow the DSL to expand estuarine research reserve management area to include this, and other land acquired by DSL for the reserve, is currently under consideration by the legislature.³⁶

To ensure any new lands added to the reserve are included as protected areas under the Council Standard, and to reflect the formal designation provided in law, staff recommends the Council amend the rule as follows:

~~(jm) The State estuarine sanctuaries, including but not limited to South Slough National Estuarine Sanctuary, OAR chapter 142 Research Reserve described under ORS 273.553;~~

State Scenic Waterways

Subsection (1)(k) of the rule provides that Oregon Scenic Waterways and National Wild and Scenic Rivers are protected areas under the Council’s Standard. While rivers protected under these designations may overlap, staff recommends Council amend the rule to address these state and federal designations separately, and accordingly, National Wild and Scenic Rivers are discussed separately above.

The Oregon Scenic Waterways System was established through a voter initiative in 1970. The system is intended to protect the natural setting and water quality of Waldo Lake and other rivers with outstanding scenic, fish, wildlife, geological, botanical, historic, archaeological, and outdoor recreation values.³⁷ Oregon Scenic Waterways are administered by the Oregon Parks and Recreation Department.

³⁵ P.L. 99-272

³⁶ SB 126 (2021)

³⁷ ORS 390.815

The initial legislation that established the system designated segments of 6 rivers as scenic waterways. The legislation authorized the governor, with the concurrence of the Oregon Water Resources Commission, to designate additional waterways identified as suitable by the Oregon Parks and Recreation Department as scenic waterways.³⁸ The governor added several new scenic waterways to the system between 1970 and 1988, when a second initiative expanded the system to include the waterways identified in ORS 390.826.

No new scenic waterways were designated from 1988 to 2016, when the Governor designated portions of the Chetco and Molalla Rivers as scenic waterways for their outstanding scenic, fish, wildlife, geological, botanical, cultural, and outdoor recreation opportunities. A segment of the Nehalem River was designated as a state scenic waterway in 2019. A candidate study is currently underway for a 27-mile section of the South Umpqua River.

To ensure that the new state scenic waterways are included as protected areas under the Council Standard, staff recommends the Council amend the rule as follows:

~~(kn) A component of the Oregon Scenic Waterways System designated pursuant to under ORS 390.826805 to 390.925, wild or scenic rivers designated pursuant to 16 U.S.C. 1271 et seq., and those waterways and rivers listed as potentials for designation;~~

State Wildlife Areas and Refuges

Subsection (1)(p) of the current rule provides that state wildlife areas and management areas identified in OAR chapter 635, division 008 are protected areas under the Council's Standard.

The Oregon Fish and Wildlife Commission is authorized to establish and develop wildlife refuge and management areas and prescribe rules governing the use of wildlife refuge and management. ODFW manages 20 wildlife areas across the state, each with a unique blend of fishing, hunting and wildlife viewing opportunities.

Staff does not recommend any changes to the scope of this category, but recommends Council amend the rule as follow to improve consistency with other sections.

~~(po) A state wildlife areas and, refuge, or management areas identified in OAR chapter 635, division 8 established under ORS chapter 496;~~

We note that like the current rule, this language excludes consideration of wildlife areas established by neighboring states and additional amendments would be needed if the Council wished to allow consideration of wildlife areas administered by the State of Washington, Idaho, or California near the Oregon border. (See discussion in Issue 2.2 for more information.)

State Fish Hatcheries

Subsection (1)(f) of the current rule provides that national and state fish hatcheries are protected areas under the Council Standard. Consistent with other categories discussed in this document, staff recommends Council amend the rule to address these state and federal facilities separately, and accordingly, national fish hatcheries are discussed separately above.

³⁸ ORS 390.855

As of 2019, ODFW managed 32 hatcheries, 5 off site rearing ponds, and 8 smolt acclimation / adult trapping facilities. Many of ODFW's hatcheries have been in continuous operation from the early 1900's. ODFW's fish hatchery programs are guided by the Native Fish Conservation Policy, the Oregon Fish Hatchery Management Policy and the Fish Health Management Policy. Fish management goals and hatchery program planning respond to the Oregon Plan for Salmon and Watersheds and other local, tribal, state, and federal watershed interests and guidelines.

To address state fish hatcheries, staff recommends the Council amend the rule to add a new subsection:

(p) A state fish hatchery established under ORS chapter 496 or 506;

We note that like the current rule, this language excludes consideration of state fish hatcheries established in neighboring states and additional amendments would be needed if the Council wished to allow consideration of hatcheries administered by the State of Washington, Idaho, or California near the Oregon border. (See discussion in Issue 2.2 for more information).

OSU Agricultural Experimental Areas, Experiment Stations, and Research Centers

Subsections 1(l) and (m) of the rule provide that experimental areas and agricultural experimental stations established by Oregon State University College of Agriculture are included as protected areas under the Council's Standard.

The Hatch Act of 1887 provided federal funding for agricultural experiment stations at land-grant colleges in each state and territory. The Oregon Agricultural Experiment Station was created the following year, and the first branch station in Union, Oregon was opened in 1901. Since then the program has expanded to include experimental areas, stations, and research centers across the state. ORS chapter 567 codifies Oregon State University's authority to establish and operate the experiment station and branch stations and centers, which includes both the experimental areas and experiment station listed in the current rule.

No new areas have been added since the rule was last amended, but some of the branch stations have reorganized. For clarity, staff recommends Council combine the two subsections related to the OSU experiment station and associated areas as follows:

~~(l) Experimental areas established by the Rangeland Resources Program, College of Agriculture, Oregon State University: the Prineville site, the Burns (Squaw Butte) site, the Starkey site and the Union site;~~
~~(m) An agricultural experimental stations, experimental area or research center established by the College of Agriculture, Oregon State University under ORS chapter 567, including but not limited to:~~
~~Coastal Oregon Marine Experiment Station, Astoria.~~
~~Mid-Columbia Agriculture Research and Extension Center, Hood River.~~
~~Agriculture Research and Extension Center, Hermiston.~~
~~Columbia Basin Agriculture Research Center, Pendleton.~~
~~Columbia Basin Agriculture Research Center, Moro.~~
~~North Willamette Research and Extension Center, Aurora.~~
~~East Oregon Agriculture Research Center, Union.~~
~~Malheur Experiment Station, Ontario.~~
~~Eastern Oregon Agriculture Research Center, Burns.~~
~~Eastern Oregon Agriculture Research Center, Squaw Butte.~~
~~Central Oregon Experiment Station, Madras.~~
~~Central Oregon Experiment Station, Powell Butte.~~

~~Central Oregon Experiment Station, Redmond.
Central Station, Corvallis.
Coastal Oregon Marine Experiment Station, Newport.
Southern Oregon Experiment Station, Medford.
Klamath Experiment Station, Klamath Falls;~~

OSU Research Forests

Section (1)(p) of the current rule provides that research forests established by Oregon State University's College of Forestry are protected areas under the Council's Standard. Oregon State University currently manages ten forest tracts spread throughout Oregon, totaling 15,000 acres. This includes two new research forests which were added since the rule was last amended. The College of Forestry also collaborates on research and management activities on Federal Experimental Forests, which we have recommended be added to the category describing administratively designated federal protected areas above. Staff does not recommend changes to the scope of this category other than removing the list of specific research forests and tracts:

~~(nr) A r~~ Research forests established by ~~the College of Forestry, Oregon State University~~ under ORS 526.215, including but not limited to McDonald Forest, Paul M. Dunn Forest, the Blodgett Tract in Columbia County, the Spaulding Tract in the Mary's Peak area and the Marchel Tract;

We note that the legislature is currently considering a proposal to establish the Elliott State Research Forest, which would be administered by an independent public body rather than OSU. If this proposal passes while this rulemaking is ongoing, staff recommends that the rule be amended to include it as a protected area as well.

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 Outstanding Resource Water policy is part of the state's antidegradation policy, and as such, its implementation is part of the Department of Environmental Quality's delegated authority to issue Non-Point Discharge Elimination System Permits and water quality certifications under section 401 of the Clean Water Act.

Oregon's 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 2017.³⁹ The North Fork Smith River is considered a Protected Area as a Wild & Scenic River. On Jan. 21, 2021, the Oregon Environmental Quality Commission designated Crater Lake and Waldo Lake as Outstanding Resource Waters in the state of Oregon. These are also considered protected areas under the Council's standard.

³⁹ See OAR 340-041-0004(8)(d).

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 likely that many Outstanding Resource Waters would be considered protected areas under the current rule.

Alternatives:

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

Discussion:

1. *Make no changes.*

The Environmental Quality Commission prioritizes waters with existing protections for consideration as Outstanding Resources Waters, and as such, most new designations are likely to be for waters that are already Protected Areas. As such, these waters may already be adequately addressed under the current rule.

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

Amending the rule would ensure that all future waters designated for protection by the EQC are protected under the Council standard. We note that while this would improve consistency between the two agencies, the Council generally does not make decisions on compliance in areas where authority has been delegated by the federal government to another state agency and because the protection of Outstanding Resource Waters is implemented as part of the state’s antidegradation policy under the Clean Water Act, it may not be appropriate for the Council to separately require compliance under its Standard.

Recommendation: Because Oregon’s Outstanding Resource Water policy is part a federally delegated program under the Clean Water Act, staff recommends Council make no changes at this time, as described in Alternative 1.

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.

An applicant for a site certificate for a facility that is or includes a transmission line or natural gas pipeline that qualifies as an “energy facility” under ORS 469.300 is required to provide an alternatives analysis of at least two corridors, 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.⁴⁰ The Applicant must expand on this analysis in its application, by providing a corridor selection assessment that explains its reasons for selecting the corridors based on an evaluation of relative impacts to resources protected under the Council standards.⁴¹

⁴⁰ OAR 345-020-0011(1)(d)

⁴¹ OAR 345-021-0010(1)(b)(D)

Staff believes the standard is intended to allow a transmission line or pipeline to pass through a protected area when the corridor selection assessment shows that greater impacts to resources cannot be avoided, but the rule language could be interpreted to provide that a linear facility may be sited in a protected area when other lesser impact alternatives are available as long as there is at least one alternative that would have greater impacts. The rule is also ambiguous as to whether impacts to all resources protected by Council standards should be considered when determining whether the exception is justified, or just impacts to protected areas.

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.*
3. *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 “other **reasonable** routes or sites have been studied and determined to have greater impacts.”*

Discussion:

Alternative 1. Make no changes.

Some stakeholders have commented that while there may be some ambiguity about the extent and nature of the analysis required to demonstrate that a linear facility qualifies for the exemption, the risk of abuse by an applicant are largely theoretical and could be addressed by the Council if they were to arise. For this reason, the Council may wish to resolve the potential ambiguity in the rule through the siting review process if an issue were to arise rather than through prior rulemaking.

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 reasonable alternative routes or sites have been studied and that the proposed route would result in lesser impacts on resources protected by Council’s standards.

The Council could resolve some of the ambiguity in rule by requiring evidence that alternatives that avoid the protected have been considered and that the selected route has the least impact. A stakeholder raised concerns that this approach would be problematic as it could potentially require an applicant to study “an infinite number of alternatives” in order to prove that there is no alternative route with lesser impacts. Staff agreed that this is not the intent and amended the proposed alternative to include a reasonableness standard for the required alternatives assessment. Some stakeholders noted that federal processes require avoidance of impacts “when practicable” and recommended that the Council utilize a similar standard for determining when the route selection analysis for a linear facility is adequate. While staff believes the reasonableness standard would largely accomplish the same goal, we note that Council could amend this proposed alternative to more closely match the practicability language found in the National Environmental Policy Act if it wished.

*3. 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 “other **reasonable** routes or sites have been studied and determined to have greater impacts.”*

A stakeholder recommended that rather than significantly altering the construction of the current standard the Council could consider amending the existing language to require a finding that “other *reasonable* routes or sites have been studied and determined to have greater impacts.” This would address the potential for abuse of the exemption by only allowing consideration of reasonable routes, and staff assumes that the reasonableness of the routes considered could be determined through the information provided in the corridor selection assessment. Some stakeholders raised concerns that the current requirements for

alternatives analyses were generally insufficient, and that it would be appropriate to expand the alternatives applicant is required to study.

Recommendation: To clarify ambiguity in the existing rule, and to specify that an applicant must have studied reasonable alternatives to qualify for the exception from the Protected Areas standard under OAR 345-022-0040(2), staff recommends that consistent with Alternative 2, the Council amend the rules as follows:

(2) Notwithstanding section (1)(a), the Council may issue a site certificate for:

~~(a) a facility that includes 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 identified in section (1), if the Council determines that other reasonable alternative routes or sites have been studied and determined by the Council to have greater impacts that the proposed route or site is likely to result in fewer adverse impacts to resources or interests protected by Council standards; or~~

~~(b) Notwithstanding section (1), the Council may issue a site certificate for s~~ Surface facilities related to an underground gas storage reservoir that have pipelines and injection, withdrawal or monitoring wells and individual wellhead equipment and pumps located in a protected area, if the Council determines that other alternative routes or sites have been studied and determined by the Council to be are unsuitable.

Staff acknowledges that some stakeholders raised issues with the requirements for alternative analyses in the Council's rules in general, and that additional changes to the rules for the corridor selection assessment in division 020 may be warranted. We also note that the proposed change largely mirrors the balancing determination allowed under OAR 345-022-0000, and that this rule may actually be redundant. Staff does not recommend amending these rules without additional stakeholder engagement as it could impact issues that extend beyond the scope of this rulemaking. As a result, the Council may wish to forgo amending the rule now and consider these issues further in the Council's Application Process Review rulemaking.

Issue 7 – State Scenic Resources

Affected rules: OAR 345-022-0080

Issue description: The Scenic Resources standard 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 plans. While some state scenic resources, such as state scenic waterways, are already considered to be protected areas, others, such as state scenic byways designated by the Oregon Department of Transportation, or Oregon Scenic Trails or Bikeways designated by the Oregon Parks and Recreation Department, are not.

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.*
3. *Amend rule to specify that scenic resources identified as significant or important in state and regional land management plans are protected by the Scenic Resources Standard.*
4. *Amend rule to specify that any scenic resource identified as significant or important by a reviewing agency is protected by the Scenic Resources Standard.*

Discussion:

Alternative 1. Make no changes

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. We do note, however, that many counties have not completed a scenic resources inventory as this is not required for compliance with the statewide planning goals.

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.

Some scenic resources which are identified in state land management plans are either not included in a local plan or are located 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. One stakeholder recommended that state plans should not be included in the standard, because unlike other land use plans, the state plans are not comprehensive in scope, are not subject to public review and input, and are not regularly revised. The stakeholder also noted that state lands that meet the definition of a protected area or recreational opportunity are already evaluated for potential visual impacts.

Alternative 3. Amend rule to specify that scenic resources identified as significant or important in state and regional land management plans are protected by the Scenic Resources Standard.

A stakeholder recommended that in addition to adding state plans to the rule as described in Alternative 2, the Council also add regional plans to ensure that plans adopted by multiple jurisdictions are included.

Alternative 4. Amend rule to specify that any scenic resource identified as significant or important by a reviewing agency or member of the public is protected by the Scenic Resources Standard.

A stakeholder recommend the Council amend the rule to use an alternative approach to identify significant or important scenic resources. This approach would allow scenic resources that are not identified in a land use or resource management plan but are identified as significant or important by a reviewing agency, local government, or interested member of the public to be considered under the rule. Staff notes that a more open process would likely result in a more comprehensive assessment of what scenic resources could be impacted by a proposed facility, but that additional work may be needed to develop procedures and criteria for the nomination and evaluation of scenic resources.

Recommendation: Staff recommends Council amend the rule to include significant or important scenic resources identified in state or regional land management plans, to ensure that these resources are protected under the Council’s Scenic Resources Standard as described in Alternative 3:

OAR 345-022-0080(1) ~~Except for facilities described in section (2), to~~ To issue a site certificate, the Council must find that the design, construction and operation of the facility, taking into account

mitigation, are not likely to result in significant adverse visual impacts to significant or important 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.

(3) A scenic resource is considered to be significant or important if it is identified as significant or important in a land use management plan adopted by one or more local, tribal, state, or federal government or agency. (NOTE: Also see recommendation for Issue 2.)

Staff acknowledges that relying on land use plans and land resource management plans to identify significant or important scenic resources presents some challenges. This is further complicated by the fact the under Statewide Planning Goal 5, local governments are only encouraged, but not required, to identify scenic views and sites in a comprehensive plan.⁴² As such, staff believes that further consideration of Alternative 4 may be appropriate, but we do not have enough information at this time to recommend Council pursue this option and recommend it be considered further in future rulemaking.

Issue 8 – Applicability of Updated Rules and Standards

Issue description: A stakeholder recommended that the application of new rules or standards to an application for Site Certificate that is under review on or before the effective date of the rules could prejudice the applicant.

Background: In response to the Department’s request for recommendations on this rulemaking, a stakeholder raised concerns that applicants could be prejudiced if procedural rules or amended standards resulting from this process were applied during the review of their application, and recommended the Council 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.

Under ORS 469.503(1), to issue a site certificate, the Council must find that the facility complies with the applicable standards adopted by the council pursuant to ORS 469.501 or the overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by the applicable standards the facility does not meet. This requirement is further codified in OAR 345-022-0000, the Council’s General Standard of Review.

As noted elsewhere in this document, in making the finding of compliance with the statewide planning goals required under ORS 469.504(1)(b)(a), the Council must apply substantive applicable criteria and local land use regulations in effect on the date the application is submitted. There is not a similar “goal post” associated with other findings required under ORS 469.503, however, as referenced in ORS 469.503(3) the scope of laws, rules, and standards the Council must make findings on is controlled by the project order.

As described in ORS 469.330, the primary function of the project order is to establish the statutes, administrative rules, council standards, local ordinances, application requirements and study requirements for the site certificate application. While it is clear that the project order is intended to control which laws, rules, and standards apply to the review of an application, it is less clear if it controls the version of laws, rules, and standards that are applicable as well. We note that under the Administrative Procedures Act, a “rule” is

⁴² OAR 660-015-0000(5)

defined to include any amendment of a prior rule, so it may be implied that this is the case.⁴³ Because the project order can be amended by the Council or Department at any time, this would allow new rules or standards to be applied to a facility if the Council found it to be appropriate.

While the Council's rules are silent on how applicability should be determined, it does appear that the Council contemplated the application of new rules or standards to a facility under review:

OAR 345-001-0020(3) When the Council deems appropriate, it may adopt additional rules on matters within its jurisdiction. The Council shall adopt any additional rules relating to site certificates sufficiently in advance of the close of testimony in a contested case proceeding on a site certificate to allow parties to address the rule, or if after the close of testimony, in sufficient time to allow the parties an opportunity to supplement their testimony to offer evidence relating to the new rule.

OAR 345-001-0020 has not been amended since 2007, and it is unclear how, or if, this rule has been applied in the past.

Alternatives:

1. *Take no specific action*
2. *Amend OAR 345-001-0020 to clarify that the Council will review an application based on the rules in effect on the date of filing.*
3. *Adopt a provision in each affected rule or division of rules explaining that applicability of rules and Council standards is determined by the date of filing.*

Discussion:

Alternative 1. Take no specific action

Neither the rule, nor statute, are clear on the issue of applicability, but this is an issue that goes well beyond the scope of the three standards under consideration, so the Council may wish to address this issue through subsequent rulemaking. With no specific action, the Council would likely be required to apply any newly adopted standards or rules to the review of any applications or requests for amendment currently before the Council. This could be problematic for projects that have already submitted applications or for which the Department has already issued a Draft Proposed Order.

Alternative 2. Amend OAR 345-001-0020 to clarify that the Council will review an application based on the rules in effect on the date of filing.

The Council could adopt a rule of general applicability specifying that the Council will only apply rules in effect at the time that an application is submitted to the review of a proposed facility. As noted above, this would likely have implications beyond the scope of the three standards under consideration, and it is not clear if such a rule would be consistent with ORS 469.401.

Alternative 3. Adopt a provision in each affected rule or division of rules explaining that applicability of rules and Council standards is determined by the date of filing.

Staff acknowledges, however, that applying the new procedural requirements or substantive standards recommended in this rulemaking to the review of an application that is before the Council could result in substantial additional time and costs for applicants. To limit disruptions associated with this rulemaking, the

⁴³ ORS 183.310(9) (9) "Rule" means any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency. The term includes the amendment or repeal of a prior rule * * *

Council could specify that any newly adopted substantive rules will only apply prospectively, and that the previous version of the rule will continue to apply to any application which was complete as of the date of adoption.

Recommendation: Staff recommends Council adopt a provision in each affected rule specifying that changes only apply to applications filed on or after the effective date of the rule, as described in Alternative 3. As an example, staff recommends the following section be added to OAR 345-022-0040:

(4) The Council shall apply the standard adopted under Administrative Order EFSC 1-2007, filed and effective May 15, 2007, to the review of any Application for Site Certificate or Request for Amendment that was determined to be complete under OAR 345-015-0190 or 345-027-0363 before the effective date of this rule.

Staff recommends the Council consider adopting a general applicability rule in future rulemaking.

Issue 9 – Methodology for Visual Impact Analyses

Issue description: Several stakeholders recommended that more specificity is needed in how the Council evaluates visual impacts under the Protected Areas, Scenic Resources, and Recreation Standards.

Background: To demonstrate compliance with the Protected Areas, Scenic Resources and Recreation Standards, the applicant is required to describe and evaluate potential visual impacts to protected resources in the application. While some specificity is given to the types of impacts that must be considered, no specific methodology for conducting the analysis is prescribed. Several stakeholders have recommended that the Council require specific methodologies or standards for the visual impact assessments used to demonstrate compliance with the standards.

Alternatives:

- 1. Make no changes*
- 2. Specify that one or more established methodologies must be used for visual impacts assessments*
- 3. Adopt new rules specifying methods for assessing the visual impacts of energy facilities.*

Discussion:

Alternative 1. Make no changes

As described above, the application requirements under OAR 345-021-0010 and the applicable Council standards do not prescribe or require specific methodologies for impact assessments, but the applicant is required to conduct an assessment that provides sufficient evidence for the Council to determine compliance with the applicable standard. While the Council or Department have established clear expectations or guidelines for what that entails, the applicant would be required to provide additional information if the assessment was determined to be inadequate. Most applicants have chosen to adapt one of the established methods for their review, but there can be significant variation in how the application is applied.

Alternative 2. Specify that one or more established methodologies must be used for visual impacts assessments.

Several stakeholders recommended that the methodologies developed by federal agencies, including the U.S. Forest Service's Scenery Management System or the Bureau of Land Management's Visual Resource Management System, may be suitable for assessing visual impacts in the siting process. The stakeholders commented that requiring use of one of these established methodologies would improve consistency of the

evaluations provided to Council and make the process easier to understand for the public. While stakeholders expressed a strong preference that the selected methodology be used without significant alteration, most agreed that some flexibility should be granted, and that applicants should be able to choose which established methodology or methodologies were appropriate for their project. It should be noted that these methodologies were developed within the context of existing federal land management programs, and not all elements may translate to the siting review process. For example, both the U.S. Forest Service and BLM have conducted extensive assessments of the baseline conditions and visual qualities of lands within their jurisdiction, and it is very unlikely that similar information is available for the private lands on which the majority of energy facilities are located.

Alternative 3. Adopt new rules specifying methods for assessing the visual impacts of energy facilities.

As an alternative, the Council could develop its own methods for assessing the visual impacts of energy facilities. This would ensure the use of evidence-based and standardized methods that were tailored specifically to the siting review process. Several stakeholders have pointed out that, while there could be some benefits to this approach, the Council would likely need extensive technical assistance to development and implement such a system, and there is a high risk that the methods could become obsolete.

Recommendation: Staff agrees that there could be significant improvements to the way visual impacts are identified and evaluated within the siting review process. Ultimately, requiring one or more established methodologies to be used in visual impact assessments prepared for an application for site certificate, as described in Alternative 2, would provide the most clarity, consistency, and durability, of the alternatives considered, but due to the highly technical nature of visual impacts assessments and lack of consensus on what methods are appropriate, staff believes that a separate rulemaking process to identify and fully vet appropriate methods is warranted. In lieu of significant changes, staff has proposed some clarifying changes to OAR 345-021-0010(1)(r) to outline the basic visual assessment process:

(r) Exhibit R. An analysis of ~~significant~~ potential visual impacts of the proposed facility, if any, on significant or important scenic resources 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, providing evidence to support a finding by the Council as required by under OAR 345-022-0080, including:

(A) An list of the inventory of scenic resources identified as significant or important in a land use management plan adopted by one or more local, tribal, state, or and federal government or agency plans that address applicable to lands within the analysis area for scenic resources. The applicant must provide a list of the land management plans reviewed in developing the inventory and;

~~(B) Identification and description of the scenic resources identified as significant or important in the plans listed in (A), including a copy of the relevant portions of the management plans that identifies the resource as significant or important;~~

(B) A map or maps showing the location of the scenic resources described under paragraph (A) in relation to the site of the proposed facility;

(C) A description of the methodology the applicant used to identify and assess significant potential adverse visual impacts to the scenic resources identified in paragraph (A);

(D) Identification of potential visual impacts to the scenic resources identified in paragraph (A), including, but not limited to, impacts such as:

(i) Loss of vegetation or alteration of the landscape as a result of construction or operation; and

(ii) Changes in landscape character or quality due to Visual impacts of facility structures or plumes; and

(iii) Loss of visibility due to air emissions or other pollution resulting from facility construction or operation of the proposed facility;

(E) An assessment of the significance of the visual impacts described under paragraph (D);

~~(D)~~ A description of the measures the applicant proposes to avoid, reduce or otherwise mitigate any potential significant adverse visual impacts; and

~~(E)~~ A map or maps showing the location of the scenic resources described under (B); and

~~(F)~~ The applicant's proposed monitoring program, if any, for impacts to scenic resources.

Issue 10 – Criteria for Important Recreational Opportunities

Issue description: A stakeholder recommended the Council clarify the criteria for identifying important recreational opportunities.

Background: Under ORS 469.501, the Council is required to adopt standards for the siting, construction, operation and retirement of facilities. Among the subjects these standards may address are the impacts of the facility on recreation, scenic, and aesthetic values. The Council has adopted a standard requiring the Council to find that the design, construction and operation of a facility, taking into account mitigation, is not likely to result in significant adverse impact to important recreational opportunities under OAR 345-022-0100.

Under the standard, the applicant must identify all recreational opportunities in the analysis area and make recommendations as to their importance. The Council retains the discretion to determine which recreational opportunities are “important” based on the criteria in rule, including: (a) Any special designation or management of the location; (b) The degree of demand; (c) Outstanding or unusual qualities; (d) Availability or rareness; (e) Irreplaceability or irretrievability of the opportunity.”

In response to the Council’s request for recommendations for this project, a stakeholder recommended the Council consider clarifying the definition of important recreational opportunities and the factors used to judge importance. The stakeholder recommended that clarification of these terms may increase the consistency of analysis conducted for potential recreational opportunities.

Alternatives:

- 1. Make no changes*
- 2. Clarify the criteria used to judge importance*

Discussion:

1. Make no changes

Staff is unaware of any significant disagreements that have arisen in the application of the rule, but we acknowledge that the type of multi-factorial analysis that is used to determine the importance of a recreational opportunity is somewhat subjective, and there could be disagreement on how the criteria should be interpreted and applied.

2. Clarify the criteria used to judge importance

The Council could amend or clarify the criteria, however, the stakeholder that raised this issue did not specify which criteria are unclear or how they could be improved and staff did not receive further input on this issue.

Recommendation: Staff believes that further consideration of this issue may be appropriate, but we do not have enough information at this time to recommend any specific rule changes to Council at this time.

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