

BEFORE THE ENERGY FACILITY SITING COUNCIL OF OREGON

In the Matter of the Proposed Adoption of an Energy Facility Siting Standard for Wildfire Prevention and Risk Mitigation.

Summary of Public Comments and Recommended Responses

At its meeting on May 27, 2022, the Council initiated formal proceedings for the adoption of a new energy facility siting standard for wildfire prevention and risk mitigation. Staff issued a Notice of Proposed Rulemaking containing the proposed rules under consideration by the Council on June 1, 2022.

The Notice of Proposed Rulemaking began a public comment period on the proposed rules. An opportunity for oral comments was provided at a rulemaking hearing on June 23, 2022. The Notice also established 5:00 pm on July 21, 2022, as the deadline for written comments. The Council will not consider comments provided after the deadline unless the comment period is extended for everyone.

This Document contains excerpts representing major issues and recommendations raised in the written comments received on this rulemaking as of the deadline well as recommended responses.

Comment: *"In [OAR 345-001-0010](6)(d) All measurements must be made using appropriate instruments, properly calibrated, and in sufficient number to determine compliance with requirements.*

There is no definition (actual or referenced) for 'appropriate instruments'." Ex. 1.

Response: OAR 345-001-0010(6) provides the definition of "background radiation" and describes how radiological measurements must be taken during decommissioning of a nuclear installation. While commentator is correct that "appropriate instruments" is not defined in rule, this issue is outside of the scope of this rulemaking.

Comment: *"EFSC's rulemaking effort is intended to address potential regulatory gaps related to wildfire risk and mitigation with a stated objective of maintaining consistency with the OPUC's rules to avoid the creation of conflicting or inconsistent requirements. To this end, proposed OAR 345-022-0115 borrows language from the OPUC's corresponding wildfire mitigation rules.*

Because the OPUC's rulemaking effort is ongoing, however, there is the potential that the language in the OPUC rules could change. As such, the Joint Utilities believe that the interest of consistency and congruity would best be served by EFSC delaying a final rulemaking until after the OPUC has adopted its final wildfire mitigation rules." Ex. 2.

Response: Staff recommends that the Council move forward with the adoption of permanent rules. While the PUC rulemaking is ongoing, the remaining issues in that proceeding are related to the adoption of amended safety rules and other specific requirements which are not likely to affect the Council's rules.

Comment: *"...the Joint Utilities appreciate EFSC Staff's acknowledgment that the proposed rules will apply prospectively. As noted in the July 8, 2022 Staff Report: 'the new standard would apply to the review of any application for site certificate or request for amendment of a site certificate that is filed on or after the effective date of permanent rules.' The proposed Division 22 rule revision, OAR 345-022-0115(3), states:*

'This Standard does not apply 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 on or before the effective date of this rule.' The Joint Utilities believe the provision could be more clearly stated by replacing 'This Standard' with 'The requirements of this section.'

In addition, for added clarity and consistency, the Joint Utilities recommend that EFSC extend the approach in the Division 22 rules to the other associated rule revisions being considered and add similar language regarding the applicability of the new rules to proposed OAR 345-001-0010, OAR 345-020-0011, and OAR 345-021-0010. In the event EFSC declines to adopt this proposal, the Joint Utilities respectfully request that EFSC provide clarity that rule definitions, notice of intent, and ASC information requirements do not apply to currently pending projects and explain its rationale either in its rulemaking order or on the record during its deliberation." Ex. 2.

Response: Staff recommends that the term "standard" is appropriate in the quoted section of OAR 345-022-0115(3). ORS 469.501, which is implemented by this rule, specifically authorizes the Council to adopt "standards."

OAR 345-022-0115(3) is intended to avoid disruption of projects that are currently under review by the Council and for which an application for site certificate or Request for Amendment has been determined to be complete. Under ORS 469.503(1), in order to issue a site certificate, the Council must determine that the preponderance of the evidence on the record supports the conclusion 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. Staff interprets the phrase "applicable standards adopted by the council" in ORS 469.503(1) to mean any standards adopted and in effect at the time the Council makes its decision to approve or deny a site certificate under ORS 469.370(7), including any provisions specifying whether a standard is applicable to decisions that are pending before the Council.

Staff recommends that similar applicability provisions are not needed for the amended information requirements, definitions, and other non-substantive provisions of the amended rules. For example, the rules in Division 020 and 021 apply to the submission of a Notice of Intent and Application for Site Certificate, respectively. The new standard would not apply to the review of an application or request for amendment that had already been determined to be complete on or before their effective date, and the applicant, by necessity, would have already satisfied all submission requirements related to the Notice of Intent or Application as of the effective date to have a complete application in place.

Comment: *"...an approach requiring discrete WMPs may reduce the amount of capital and operational dollars available for wildfire reduction activities and conflict with timelines and processes underway. With that lens applied, the Joint Utilities support the section in the proposed rule that would allow EFSC to "issue a site certificate without making the findings under section (1) if it finds that the facility is subject to a Wildfire Protection Plan that has been approved in compliance with OAR chapter 860, division 300." While existing facilities with a site certificate would already be accounted for in a utility's OPUC-filed WMP within the associated wildfire mitigation risk assessment, it is feasible that applications for new site certificates would not be, depending on their location. The Joint Utilities propose to meet the exemption requirement by revising proposed rule 345-021-0010(1)(v), Contents of an Application, to provide for submittal of either an OPUC-approved Wildfire Protection Plan that addresses the specific facility at issue or a wildfire risk assessment within the utility's application for a new site certificate that maps back to corresponding risk-based mitigation efforts within existing mitigation plans for comparable areas that would be used to*

address potential identified risk. Under the latter scenario, the proposed facility would then be formally added into the utility's WMP prior to construction commencing, thereby capturing additional risk mitigation measures prior to the facility becoming operational." Ex. 2.

Recommended Response: OAR 345-022-0115(2) would allow the Council to issue a site certificate without making the other findings required by the standard if it finds that the facility is subject to a Wildfire Protection Plan that has been approved in compliance with OAR chapter 860, division 300. While an approved plan that does not specifically reference a proposed facility may be acceptable, it would be incumbent upon the applicant to demonstrate that the plan provides an adequate description of the risk analysis and mitigation measures that will be used to ensure that wildfire risk is addressed at the proposed site. The Council retains the discretion to reject a request to rely solely on such a Wildfire Protection Plan if the plan does not meet this criteria.