**BEFORE THE ENERGY FACILITY SITING COUNCIL OF OREGON**

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| **Protected Areas, Scenic Resources, and Recreation Standards Rulemaking Project** | Public Comments Received as of December 8, 2022 |

This packet contains public comments received in response to the Council's Amended Notice of Proposed Rulemaking issued on November 18, 2022. All previously submitted comments are included in Attachment 1 to the Staff Report for Agenda Item B of the October 28, 2022, Council Meeting.

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OREGON SOLAR + STORAGE INDUSTRIES ASSOCIATION

December 8th, 2022

Energy Facility Siting Council
Oregon Department of Energy
550 Capitol St. NE, 1st Floor
Salem, OR 9730

TO: Energy Facility Siting Council

FROM: Jack Watson, Policy Director, Oregon Solar + Storage Industries Association

FILED ELECTRONICALLY

**RE: Comments on Amendment of Protected Areas, Scenic Resources, and Recreation Standards and Associated Rules**

The Oregon Solar + Storage Industries Association (OSSIA) is a trade association founded in 1981 to promote clean, renewable, solar technologies. OSSIA provides a unified voice of the solar industry; OSSIA members include businesses, non-profit groups, and other solar industry stakeholders. OSSIA and our members have been actively engaged in the Energy Facility Siting Council ("EFSC" or the "Council") Protected Areas (OAR 345-022-0040), Scenic Resources (OAR 345-022-0080), and Recreation (OAR 345-022-0100) rulemaking ("Rulemaking") and OSSIA previously submitted comments in October 2021, April 2022, and July 2022. OSSIA offers the following comments on the Amended Notice of Proposed Rulemaking ("Amended Notice") filed on November 18, 2022.[1]

We appreciate Oregon Department of Energy ("Department") Staff's recommendation to convene a Fiscal Impact Advisory Committee ("FIAC") in response concerns raised by OSSIA and other stakeholders. OSSIA and our members participated in the FIAC to determine the impact the Rulemaking will have on small businesses and units of local government.[2] The only feedback the Department received from the FIAC was that the Rulemaking *will* have a significant adverse impact on small businesses. The Amended Notice does include more substantive discussion of the cost of compliance impact on small businesses, recognizing that at least 12 energy developers could be considered "small businesses" under ORS 183.335(2)(b)(E) and that the Rulemaking may increase costs of professional services, equipment, supplies, labor, and increased administration related to application

[1] EFSC, *Amended Notice of Proposed Rulemaking Including Statement of Need & Fiscal Impact* (2022), https://www.oregon.gov/energy/Get-Involved/rulemakingdocs/2022-11-17-R184-Amended-Notice-of-Proposed-Rulemaking-FINAL.pdf.
[2] To our knowledge, the participating members of the FIAC included OSSIA, Obsidian Renewables, NewSun Energy, and Friends of the Gorge.

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preparation.[3] The Amended Notice ultimately concludes, however, that the impact on small businesses will not be significantly adverse merely because "the impact of the rules is related to . . . the size and location of the project being proposed" and because the increase in costs "would be relatively small compared to costs of compliance under the current rules."[4]

We disagree with the Department's determination that the impact will not be significantly adverse and will not disproportionately impact small businesses as compared to large businesses. The relevant inquiry is whether the Rulemaking imposes "disproportionately burdensome demands . . . on small businesses as a result of uniform regulatory requirements."[5] The Department's conclusion omits that increasing the costs on small businesses reduces their ability to even apply for a siting permit at EFSC. While larger applicants can pay compliance costs, margins for small businesses are much smaller and any increase in costs reduces the probability that the projects will be permitted and built. The Department's findings that the Rulemaking imposes a uniform regulatory requirement on both small and large businesses therefore demonstrates that there will be a disproportionate effect on small businesses due to the increase in cost of compliance.

We reiterate that the members of the FIAC recommended that the Rulemaking will significantly impact small businesses and suggested the following changes to the Rulemaking:

> (1) Fully exempt small businesses from compliance with the Rulemaking;
> (2) Exempt small businesses from compliance with the requirement to provide names, addresses, phone numbers, and email addresses of any land management agency or organization with jurisdiction over the protected areas proposed to be added to Exhibit L of an Application for Site Certificate;[6]
> (3) Provide a mechanism to assist small businesses with compliance with the Rulemaking, such as allowing small businesses to submit a project area map for the Department to undertake the analysis of impacted protected areas.

OSSIA requests that the Council amend the Rulemaking to reduce the economic impact of the rule on small businesses as required by ORS 183.540.

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[3] Amended Notice, at 4.
[4] *Id.*
[5] *Oregon Cable Telecommunications Ass'n v. Department of Revenue*, 237 Or App 628, 641 (2010).
[6] The Department did state that it will publish "a list of websites where the contact information typically can be located" but determined that exempting small businesses from the contact information requirements proposed under OAR 345-020-0011 is not justified because it would shift the cost to the Department and costs are recoverable under ORS 469.421. The inclusion of a cost-recovery mechanism in ORS 469.421 does not absolve EFSC of their duty to reduce the impact on small businesses.

In addition, we strongly recommend that EFSC direct the Department to undertake efforts to better measure the impact of rulemakings on small businesses, including:

- **Report:** Issuing a report withing 6 months, with 12-month updates thereafter, documenting: (1) the number of solar permits issued by EFSC to small businesses, as compared to the number of EFSC applicants; (2) the average timeline from application submittal to permit issuance; (3) the fallout rate of applications; and (4) the average costs to applicants including both estimates of reimbursable costs pursuant to ORS 469.421 and non-reimbursable costs, with an opportunity for companies to voluntarily provide expense data.
- **Committee**: Convening a special advisory group to examine standards and process changes that could reduce burdens on potential and actual EFSC applicants that are small businesses.
- **Guidance**: Preparing an agency guidance document that: (1) outlines the Department's approach to conducting a small business impact analysis; (2) explains how the Department ensures compliance with ORS 183.336(1)(d) to involve small businesses in the development of rules; and (3) provides a statement of the agency's legal interpretation of the definition of "small business" under ORS 183.310(10)(a).
- **Recommendations**: Based on those inputs, examining and preparing rulemaking and legislative recommendations to alleviate burdens on small businesses related to obtaining an EFSC permit, and considering expected increases in the number of permit applications to meet Clean Energy Targets under HB 2021.

We appreciate the Department's attention to these issues and thank the Council for considering these comments.

Sincerely,

Jack Watson
Director of Policy and Regulatory Affairs
Oregon Solar+Storage Industries Association

Max Yoklic
In-House Council, Permitting and Real Estate
NewSun Energy

MSlater

Michelle Slater
Legal and Project Manager
Obsidian Renewables, LLC

*SUBMITTED VIA E-MAIL*

December 8, 2022

Oregon Energy Facility Siting Council
c/o EFSC Rules Coordinator
*Via email to EFSC.rulemaking@oregon.gov*

**Re: Protected Areas, Scenic Resources, and Recreation Resources Rulemaking**

Dear Chair Grail and Council Members:

Friends of the Columbia Gorge ("Friends") submits the following supplemental comments regarding the 2022 Protected Areas, Scenic Resources, and Recreation Resources Rulemaking. These comments supplement the comments submitted by Friends on July 21, 2022 as part of a large coalition of fifteen nonprofit public interest organizations with more than 275,000 collective members and supporters, with strong interests in responsible energy generation and the proper implementation of state law governing the approval, construction, and modification of large energy facilities in Oregon ("July 21, 2022 Comments").

Except as noted below, Friends hereby readopts by reference the July 21, 2022 Comments, especially on issues for which the proposed rules have not changed since then. Unfortunately, the latest version of the proposed rules does not satisfactorily resolve many of Friends' concerns with these rules. The same is true of the recommended responses to public comments, as drafted by the Department. Although in some places the proposed rules would improve and clarify existing law, in many other places the proposed rules would violate applicable statutes and decisions of the Oregon Supreme Court, would decrease and frustrate public participation (both by governmental agencies and nongovernmental organizations), and would overall fail to adequately protect Oregon's special places and sensitive resources from the harmful effects of large energy projects. Friends refers the Council to our original July 21, 2022 Comments, rather than repeating our comments herein.

**1. The Council should further extend the comment period on the proposed rules.**

Although the public comment period on the proposed rules was extended, the extension occurred over the Thankgiving holiday. Frankly, Friends of the Columbia Gorge has not been given sufficient time to review the latest versions of the proposed rules. Friends requests that the Council further extend the public comment period in order to allow the public to assist the Council with developing and adopting rules that fully comply with the applicable law and protect the public interest.

**2. The proposed definition of "Protected Area" will not adequately protect Oregon's special places and sensitive resources from the harmful effects of large energy projects.**

As discussed at length in Friends' prior comments, the proposed definition of "Protected Area" will not adequately protect Oregon's special places and sensitive resources from the harmful effects of large energy projects. (*See* July 21, 2022 Comments at 3–14.) The new version of the proposed rules does not address and resolve Friends' concerns with this definition. Friends refers the Council to pages 3 through 14 of our July 21, 2022 Comments and asks that the Council revise the definition of "protected area" as requested.

The Department's draft recommended responses to Friends' comments also does not address and resolve Friends' concerns, and would also supply the Council with arbitrary and improper bases for denying Friends' requests. For example, the Department recommends excluding National Trails from the definition of "Protected Areas" because "unlike other protected areas, [National T]rails cross multiple jurisdictions and may include lands under both public and private ownership." This is not a valid basis to exclude National Trails from the definition of "Protected Areas," given that National Scenic Areas, such as the Columbia River Gorge National Scenic Area, *also* cross multiple jurisdictions and include both public and private lands. For both National Scenic Areas and National Trails, what matters is that the federal government (usually Congress) has designated these places for special protections because of their sensitive and important resources. Given these important federal designations, the Council should ensure the protection of National Trails from adverse effects by designating them as Protected Areas.

**3. The Department has misinterpreted the comments of the Columbia River Gorge Commission as well as Friends' comments regarding the requests to designate agencies that manage protected areas as "reviewing agencies" in the Council's rules.**

In the draft recommended response to public comments, the Department has misinterpreted the comments of the Columbia River Gorge Commission ("Commission"). Although it is true that the Gorge Commission's comment included language that "the Gorge Commission should be included as a reviewing agency," the Commission was not literally proposing rule language that the Commission should *always* be deemed a reviewing agency by rule for every application for a large energy facility across the state of Oregon. Rather, the Commission was asking to be deemed (by rule) a reviewing agency for all energy projects that may adversely affect the Columbia River Gorge National Scenic Area. That is why the Commission specifically requested that the Council "add [to the definition of "reviewing agency" at OAR 345-001-0010(52) a new] letter (s) to include a public agency (not identified in the list) that manages a protected area within the study area."

The Department appears to have missed that critical sentence in the Gorge Commission's comments, and as a result has misinterpreted what the Commission is asking of the Council. The Department and Council should further consult with the Commission and make sure to respond to the specific requests that the Commission is actually making.

Here, Friends agrees with and supports the Commission's request that the Council's rules should include within the rule definition of "reviewing agencies" all managing agencies of protected areas. The Department's draft response to the Commission's comments is inadequate. Agencies that manage potentially affected protected areas need to be guaranteed a seat at the table for the decision-making processes on applications for large energy facilities, and that will not happen if these agencies are not designated by rule as reviewing agencies. Merely providing *notice* of pending applications to these agencies is completely insufficient because it does not guarantee these agencies' participation as reviewing agencies, and importantly, it does not provide the requisite reimbursement of agency costs available to reviewing agencies—which is often necessary given the complexity of these applications for large-scale energy facilities. We also note that the Gorge Commission was not the only agency concerned about this issue—other agency representatives made similar comments during the Council's informal meetings that preceded this rulemaking.

Similarly, the Department also misinterpreted Friends' comments on this same issue. The Department has drafted the recommended responses to comments to read as follows: "Commenters recommend that the *land management entity* with jurisdiction over the protected areas (public, *private or nonprofit*) within the study area must be 'noticed' and invited to be a 'reviewing agency.'" The italicized words were added by the Department and did not appear in Friends' July 21, 2022 Comments. (*See* July 21, 2022 Comments at 14–15.) Rather, Friends' comments specifically focused on "governments" and "agencies" and requested that "The agencies that directly manage Protected Areas should also be deemed reviewing agencies under the Council's rules in order to ensure their meaningful input and participation in the energy facility siting review process, and to comply with the Siting Act." (*Id.*) Friends' request did not encompass private or nonprofit entities, and it is unclear why the Department is misinterpreting the words "governments" and "agencies" to encompass nongovernmental, nonprofit, and private entities.

Again, *government agencies* that manage protected areas should be included in the decision-making process as reviewing agencies. Merely providing notice to these agencies is insufficient, especially because it does not guarantee that their costs will be reimbursed as would happen if they are included as reviewing agencies.

In sum, the Council should include all managing agencies of protected areas within the definition of "reviewing agenc[ies]." Specifically, the Council should adopt the following language within that definition: "Any managing agency of any Protected Area within the study area." (*See* July 21, 2022 Comments at 14–15.)

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**4. The Council should continue to require applicants for large energy facilities to identify the potential visual impacts of their proposed projects on protected areas, scenic resources, and recreation resources; and should clarify within its rules that the required assessments of impacts to these resources must identify any potential changes in landscape character or quality and must assess the significance of any impacts.**

As Friends previously stated in our July 21, 2022 Comments, the Council should continue to require applicants for large energy facilities to identify the potential impacts of proposed facilities on protected areas, scenic resources, and recreation resources. (July 21, 2022 Comments at 17–18.) Specifically, the Council's existing rules already require applicants to include within their applications descriptions and analyses of "[v]isual impacts of facility structures or plumes." OAR 345-021-0010(1)(L)(C)(v) (Exhibit L, protected areas), 345-021-0010(1)(r)(C)(ii) (Exhibit R, scenic resources), 345-021-0010(1)(t)(B)(iv) (Exhibit T, recreation resources). All of this existing rule language should be retained. (July 21, 2022 Comments at 17–18.)

In addition, as Friends previously stated in our July 21, 2022 Comments, Friends supports the proposed addition of language to the rules clarifying that as part of addressing potential impacts of proposed energy facilities to protected areas, scenic resources, and recreation resources, applications must address any "changes in landscape character or quality," but *only* if this new language is added to clarify that "changes in landscape character or quality" is *part of* the required visual impacts analysis, and not in a way that would entirely replace such analyses. (*Id.*) Accordingly, Friends recommends adopting the language "Visual impacts of facility structures or plumes, including changes in landscape character or quality" for all three types of resources involved (protected areas, scenic resources, and recreation resources). (*Id.*)

Similarly, Friends supports the proposed rule language clarifying that the required visual impact assessment will include "[a]n assessment of the significance of the visual impacts." Currently, this language is only proposed for Proposed Rule 345-021-0010(1)(r)(E) (Exhibit R, scenic resources). The same or similar rule language should also be adopted as part of OAR 345-021-0010(1)(L) (Exhibit L, protected areas) and OAR 345-021-0010(1)(t) (Exhibit T, recreation resources). Adding this language in all three places will help ensure that visual impact assessments address potential impacts in a uniform way regardless of whether the resource involved is a designated protected area, a scenic resource, or a recreational resource. (In many cases, a resource will fit into two or all three of these categories.)

In comments to the Department dated November 16, 2022, NewSun Energy asserted that the proposed clarifying rule language reading "changes in landscape character or quality" and "an assessment of the significance of the visual impacts" would be "*new* requirements" and "*new* compliance standards." (NewSun Energy Comments at 4–5 (emphasis added).) These assertions are incorrect.

Any visual impact assessment of a proposed energy facility must evaluate the potential impacts of the facility on scenic resources, recreation resources, and protected areas, and in order

for such an assessment to be valid and usable, it must address the degree to which any impacts will or will not be significant as well as any impacts to landscape character or quality. All of this is not only inherently part of any assessment of visual impacts, it is required by ORS 469.501(1)(i), OAR 660-015-0000(5), as well as the above-cited existing Council rules. (*See* July 21, 2022 Comments at 17–18.) If applicants for energy facilities were to withhold this critical information from their applications, they would be rendering their visual impact assessments (and, as a result, their applications) practically useless, noncompliant with the Council's existing rules, and lacking in substantial evidence that the protected areas, scenic resources, and recreation resources will not be adversely affected by the proposed facilities. The inevitable result would be that their applications would need to be denied as inadequate and incomplete.

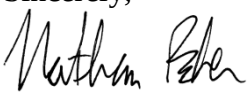
NewSun Energy appears to be confusing the significance of the *impacts* of proposed facilities with the significance of the protected resources themselves. (*See* NewSun Energy Comments at 4.) NewSun Energy is apparently missing the fact that applicants must already include within their applications "[a] description of significant potential impacts" on scenic resources and protected areas, plus "[a] description of any significant potential adverse impacts" to recreational resources. OAR 345-021-0010(1)(L)(C) (Exhibit L, protected areas); 345-021-0010(1)(r) (Exhibit R, scenic resources); 345-021-0010(1)(t)(B) (Exhibit T, recreation resources). Thus, contrary to NewSun Energy's statements, assessments and disclosures of potentially significant impacts *are* already required. And it would be impossible to assess and disclose such impacts without evaluating whether the impacts will or will not be significant.

Again, the Council should simply clarify within its rules that applications for energy facilities must include assessments of the significance of any impacts to protected areas, scenic resources, and recreation resources. The rules already require disclosures and descriptions of any significant potential adverse impacts. It would be advisable and entirely appropriate to further clarify that assessments will in fact include disclosures of the significance of any impacts to these resources.

By adopting rule language clarifying and explaining the requirements for a complete application, the Council will be assisting new applicants who may be unfamiliar with the standard components of any visual impact assessment. The Council should proceed with the recommendation in Friends' comments.

Specifically, the Council should ensure that its rules continue to require applicants for large energy facilities to identify the potential visual impacts of their proposed projects on protected areas, scenic resources, and recreation resources, and should clarify within its rules (in all three places—involving its rules for protected areas, scenic resources, and recreation resources) that the required assessments of impacts to these resources must identify any potential changes in landscape character or quality and must assess the significance of any impacts.

Sincerely,



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