



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: February 25, 2010

TO: Robert Shiprack, Chair
Energy Facility Siting Council

FROM: Janet L. Prewitt, Senior Assistant Attorney General
Natural Resources Section

CC: Andrea Simmons, Assistant Director of Energy Policy Development
Oregon Department of Energy
Tom Stoops, Assistant Director of Energy Facility Siting
Oregon Department of Energy

SUBJECT: Oregon Natural Desert Association, et al. Petition for Rulemaking

On February 5, 2010, Oregon Natural Desert Association, Audubon Society of Portland and Defenders of Wildlife (ONDA) filed a joint petition for rulemaking with the Energy Facility Siting Council (Council) and the Oregon Department of Energy (ODOE). The petition requests that the Council amend OAR 345-001-0010 to add a definition of "Single energy facility." ONDA further petitioned the Council to amend OAR 345-021-0000 (3) to add a requirement that any person seeking a conditional use permit for a renewable energy facility less than 35 MW provide information demonstrating to the Council that the proposed facility is not a "single energy facility" as defined by the proposed addition to the definition section of the rules.

You have asked for advice regarding the Council's authority to adopt the rules proposed by ONDA. First, ORS 469.470(2) gives the Council the authority to "adopt standards and rules to perform the functions vested by law in the council including the adoption of standards and rules for the siting of energy facilities pursuant to ORS 469.501 * * * ." Thus, as a general matter, the Council may adopt rules to implement and interpret the siting statutes. In addition, a rule adopted by an agency is within its statutory authority if the agency's rules are within the range of discretion allowed by and are consistent with the legislative policy. *Salem Police Employees Union v. City of Salem*, 308 Or 383, 781 P2d 335 (1989). As a practical matter, rulemaking authority generally will be upheld so long as a rule is constitutional, and does not conflict with a statute or with another applicable rule.

This advice does not address the specific rule language proposed by ONDA because that analysis is premature. The Council must first determine whether to grant or deny the petition for rulemaking. If the Council decides to grant the petition, the Council will undertake a rulemaking process as required by ORS Chapter 183. In the course of that proceeding, the rule that the Council decides to adopt may change substantially from the language proposed by ONDA.