



Oregon

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June 7, 2010

Memo to EFSC Members

RE: Staff Summary of Petition Received to add the Steens Mountain Cooperative Management and Protected Area to the Councils list of Protected Areas (OAR 345-020-0040)

Council members,

This memo is to provide an overview of the Oregon Natural Desert Association, the Portland Audubon Society and Defender's of Wildlife (ONDA) petition to modify council rules to include the Steens Mountain Cooperative Management and Protected Areas (CMPA). The CMPA was established following Congressional Action on the Steens Mountain Cooperative Management and Protection Act of 2000 (Act). The purposes of the Act are many and include direction to the Bureau of Land Management regarding use of federal lands, establishment of a Wilderness Area, a Cooperative Management and Protection Area, an Advisory Council and to designate additional components to the National Wild and Scenic Rivers System. The Act also provides for voluntary compensated land exchanges, and voluntary conservation and non-development easements. A copy of the Act and the petition are attached for your reference.

Staff has reviewed the petition and public comments received prior to the May 28, 2010 deadline for written comments. The process for determining whether to adopt rules proposed by the requestor is outlined in ORS 183.390, and are set out below, followed by a brief summary of comments received on each section. Note that in the statutory provisions, the word "Agency" refers to the Energy Facility Siting Council (Council).

ORS 183.390(1) An interested person may petition an agency requesting the promulgation, amendment or repeal of a rule. The Attorney General shall prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition. Not later than 90 days after the date of submission of a petition, the agency either shall deny the petition in writing or shall initiate rulemaking proceedings in accordance with ORS 183.335.

Response: The Council must take action no later than June 30, 2010 to deny the petition in writing or initiate rulemaking. The petition was received on April 2, 2010.

ORS 183.390(2) If a petition requesting the amendment or repeal of a rule is submitted to an agency under this section, the agency shall invite public comment upon the rule, and shall

specifically request public comment on whether options exist for achieving the rule's substantive goals in a way that reduces the negative economic impact on businesses.

Response: Public comments were received at the April Council meeting, and the council further directed staff to solicit and collect written comments by May 28 for presentation to the council. The Council also determined to allow additional public comments at the June 11th, 2010 council meeting. The June 11th meeting was requested to be held in Harney County, near the Steens Mountain CMPA.

Numerous comments were received expressing concern over developers placing “industrial” wind turbines within the cooperative management area but did not formally address the six questions found in ORS 183.390(3). The comments fell into two general categories. Most of the comments focused on a wind project’s impacts on the iconic nature of Steens Mountain, the unique ecological systems, or nearby migratory flight paths and some referred to specific language from the Steens Act of 2000 to support the argument to adopt the protected area. Other comments recognized the existence of the CMPA, and stressed that private lands and land use rights were not usurped by the Act, that development of private lands could continue, and that prevention of allowed uses on private lands created a negative economic burden.

ORS 183.390(3) In reviewing a petition subject to subsection (2) of this section, the agency shall consider:

- (a) The continued need for the rule;
- (b) The nature of complaints or comments received concerning the rule from the public;
- (c) The complexity of the rule;
- (d) The extent to which the rule overlaps, duplicates or conflicts with other state rules or federal regulations and, to the extent feasible, with local government regulations;
- (e) The degree to which technology, economic conditions or other factors have changed in the subject area affected by the rule; and
- (f) The statutory citation or legal basis for the rule.

Response to ORS 183.390(3)(a) The continued need for the rule:

The petition proposes “to amend the current definition of “Protected Areas” outlined in OAR 345-022-0040(1) to include the Steens Mountain Cooperative Management Area (CMPA) designated by Congress within the Steens Act of 2000.” **The petitioner included the following rule language to be inserted in to OAR 345-022-0040(1)**

“(q) The Steens Mountain Cooperative Management and Protection Area designated by the Steens Mountain Cooperative Management and Protection Act of 2000, including all lands within the boundaries of the Cooperative Management and Protection Area depicted on the Steens Mountain Boundary Map.”

The proposed language adds a new section to an existing rule. The Cooperative Management and Protection Area (CMPA) is comprised of federal and private land holdings exclusively with Harney County. The Steens Mountain Cooperative Management and Protection Area was established by an act of Congress in 2000 (copy attached).

Response to ORS 183.390(3) (b) The nature of complaints or comments received concerning the rule from the public:

A compendium of the public comments received has been provided to you for your review. Commenters present arguments to both support the petition and to deny the petition. The petitioner and some commenters asserted that the act was applicable to all lands with the CMPA and that the CMPA should be added to the list of protected areas at OAR 345-020-0040.

As support for this view, numerous commenters cited Sec. 122(a) of the Act which states:

Policy – Development on public and private lands within the boundaries of the Cooperative Management and Protection Area which is different from the current character and uses of the lands is inconsistent with the purposes of this Act.

However, Sec. 122 (d) Relation to Property Right and State and Local Law provides

Nothing in this act is intended to affect rights or interests in real property or supersede state law.” Staff concludes that this statement indicates that application for development on private land is not automatically barred except as specified in Title II, III, and IV of the same act.

This provision was cited by some commenters to support the view that private property rights should be upheld and this petition denied. Other commenters also discussed the degradation of views and loss of open spaces due to “industrial wind” facilities.

Response to ORS 183.390(3) (c) The complexity of the rule:

The petitioner states that the proposed rule is not complex and simply adds an additional area to the Council’s listing of protected area’s. However, by applying a prohibition to development on private lands the Council may be taking an action that exceeds the council’s jurisdictional reach by placing Federal restrictions onto private land. Under the Act the CMPA is designated as “approximately 425,550 acres of Federal land located in Harney County, Oregon” (16 USC 460nnn-11, emphasis added). ONDA’s proposed language, however, includes “all lands within the boundaries of the Cooperative Management and Protection Area depicted on the Steens Mountain Boundary Map.”

Response to ORS 183.390(3)(d) The extent to which the rule overlaps, duplicates or conflicts with other state rules or federal regulations and, to the extent feasible, with local government regulations:

The proposed rule, to add the CMPA, to the list of Council Protected areas, duplicates existing rules, in that Wilderness Areas and designated Wild and Scenic River segments are already included as protected areas; OAR 345-020-0040(c) and (k). Further, the Steens Mountain CMPA Resource Management Plan (RMP) specifically states in the Energy and Minerals section (page 49) “Note: For renewable energy permitting, see the Land and Realty Section. The primary form of authorization for wind and solar energy development is an ROW or other realty use authorization.” In the Land and Realty Section of the RMP, Objective 2 states “Meet public, private, and Federal agency needs for realty-related land use authorizations and land withdrawals including those authorizations necessary

wind, solar, biomass and other forms of renewable energy development.” The RMP further states that ROW and other land uses for “renewable energy development are recognized valid use of public lands and are authorized pursuant to Sections 302 and 501 of the the FLPMA” (Federal Land Policy and Management Act). The proposed rule, to add the CMPA to the list of protected areas, appears to be in conflict with the RMP, by prohibiting energy development on private and federal lands within the CMPA and outside the two mentioned protected areas.

The proposed rule would have no effect on Harney County’s Comprehensive Land Use Plan as the rule would only be applicable to Council jurisdictional projects. The County’s plan guides the decision process for development on private lands in the county. Harney County has previously permitted, through the conditional use permitting process, a renewable energy project. The addition of the CMPA to the list of protected area’s may not affect the siting of a <35 MW average electric generating capacity energy project unless Harney county’s comprehensive land use plan incorporated the list of protected area at OAR 345-020-0040.

Response to ORS 183.390(3) (e) The degree to which technology, economic conditions or other factors have changed in the subject area affected by the rule.

Staff notes that wind turbine technology has seen dramatic changes since 2000 and with the advent of Renewable Portfolio Standards across the West, considerable development pressure exist to bring renewable energy projects to the market. Prohibiting development on private and federal lands may exacerbate the pressure on other areas and limit economic opportunities within Harney County. However, the placement of wind turbines in close proximity to Wilderness Areas or Wild and Scenic Rivers may detract from already existing tourist economies.

Response to ORS 183.390(3)(f) The statutory citation or legal basis for the rule.

The Council is to adopt standards for the siting, construction, operation and retirement of facilities; ORS 469.501. The Council is provided broad authority to define standards and provide exemptions to those standards. Further, the council is not required to find that a facility meet all standards in the council determines that the overall public benefits of the facility outweigh the damage to the resources protected by the standard the facility does not meet.

The Council rule for protected areas (OAR 345-020-0040) was last updated in May of 2007 to include federal or state statutes or regulatory designations in effect as of May 11, 2007.

Staff Statement

Staff reviewed the Steens Mountain Cooperative Management and Protection Act of 2000 and the Steens Mountain Cooperative Management and Protection Record of Decision Resource Management Plan to help prepare this summary. The policy statement in the Act and RMP adopted by BLM are not entirely consistent regarding development on private lands, however that issue is beyond the Council’s jurisdictional reach. Following internal discussion and discussion with BLM staff, staff believes that the Federal process was carried out appropriately and the RMP must be accepted as presently written.

Within the Act, Staff finds two key references to support the conclusion that private realty rights, and thus, the exception to application of Federal requirements to private lands, is upheld by the Act. The Act provides:

SEC. 4. VALID EXISTING RIGHTS. *Nothing in this Act shall effect any valid existing right (emphasis added).*

And

SEC. 122. COOPERATIVE EFFORTS TO CONTROL DEVELOPMENT AND ENCOURAGE CONSERVATION.

(a) POLICY.—Development on public and private lands within the boundaries of the Cooperative Management and Protection Area which is different from the current character and uses of the lands is inconsistent with the purposes of this Act.

(b) USE OF NONDEVELOPMENT AND CONSERVATION EASEMENTS.— The Secretary may enter into a nondevelopment easement or conservation easement with willing landowners to further the purposes of this Act.

(c) CONSERVATION INCENTIVE PAYMENTS.—The Secretary may provide technical assistance, cost-share payments, incentive payments, and education to a private landowner in the Cooperative Management and Protection Area who enters into a contract with the Secretary to protect or enhance ecological resources on the private land covered by the contract if those protections or enhancements benefit public lands.

(d) RELATION TO PROPERTY RIGHTS AND STATE AND LOCAL LAW.—Nothing in this Act is intended to affect rights or interests in real property or supersede State law. (emphasis added)

The Resource Management Plan or RMP, also explicitly speaks to the development of renewable energy projects in the section on Energy and Minerals beginning on page 49 and the section on Lands and Realty beginning on page 49.

Staff Conclusion

A Staff conclusion may be provided at the conclusion of the public comment period on June 11, 2010.