



# Oregon

Theodore R. Kulongoski, Governor



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May 6, 2010

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## Energy Facility Siting Council Denial of Petition for Rulemaking

Gentlemen:

On February 1, 2010, the Oregon Natural Desert Association (“ONDA”) submitted a petition for rulemaking to the Energy Facility Siting Council (“EFSC” or “Council”) that proposed an amendment to the definition section of the Council’s administrative rules. ONDA proposed that the council adopt two new provisions to

“[clarify] the statutory ambiguity regarding EFSC jurisdiction over segmented energy generation projects to limit the impacts and accumulating effects from multiple sites which are, for all practical purposes, and in terms of their effects, a single facility.”

ONDA Petition for Rulemaking, p. 4. The proposed rules would amend the definition section of OAR 345 to add a definition of “single energy facility” and would add a provision requiring applicants for county approval of small energy generating plants to seek a Council determination that the facility was not a “small energy facility” as defined in the Council’s rules.

The Council received public comments at the March 12, 2010 Council meeting. At that meeting the council directed staff to solicit and collect written comments by April 2, 2010, for presentation to the Council. The Council also determined to allow additional public comments at the April 30th, 2010 council meeting. The notice of the petition was sent to interested persons on March 22, 2010.

Review of a petition for rulemaking is governed by ORS 183.390. Because the petition requested amendment of an existing rule, the considerations listed in ORS 183.380(3) apply to the review of the petition:

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.

In addition to the six factors listed above, the notice of the petition invited interested persons to comment "on whether options exist for achieving the rule's substantive goals in a way that reduces the negative economic impact on businesses," as required by ORS 813.390(2).

The Council's staff reviewed the comments and prepared a summary of the comments, which was presented to the Council at its April 30, 2010 meeting. A copy the staff reports is attached to this memo and incorporated into this order by this reference.

In addition to the written comments, several members of the public addressed the Council at the April 30 meeting, including the Deputy Director of the Department of Energy, members of several county planning commissions and county planners, a representative of ONDA and members of the general public. In addition, the Council received legal advice that the rule, as proposed, would likely be held by a court to be outside the Council's authority, although if the Council decided to address the issue and undertake rulemaking, that the final legal analysis would depend on the rule that the Council actually decided to adopt. Verbal comments did not provide substantially new information.

The Council has deliberated on the issues presented by this petition for rulemaking, including the six factors of ORS 183.390(3), and has determined to adopt the staff recommendations in their entirety. The Council recognizes that there is a substantial policy issue raised by the increase in the number of small wind energy facilities proposed in Oregon, but has determined that the rule proposed by ONDA in this petition will not adequately address all of the issues.

Therefore, the Council hereby DENIES the petition for rulemaking submitted by ONDA on February 10, 2010.

Sincerely,



Robert Shiprack  
Chair  
Oregon Energy Facility Siting Council

April 18, 2010

Memo to EFSC Members

RE: Staff Summary of Petition Received to refine definition of Single Energy Facility

**Council members,**

**This memo is to provide an overview of the Oregon Natural Desert Association, the Portland Audubon Society and Defenders of Wildlife petition to modify council rules to clarify the description of a “single energy facility”. A copy of the petition is attached for your reference. Staff has reviewed the petition and comments received prior to the April 2, 2010 deadline. The petitioning process proposed by the requestor is outlined in ORS 183.390. The provisions are set out below, followed by a summary of the comments received on each section. 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 May 6<sup>th</sup>, 2010 to deny the petition in writing or initiate rulemaking.**

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 March Council meeting, and the council further directed staff to solicit and collect written comments by April 2 for presentation to the council. The Council also determined to allow additional public comments at the April 30<sup>th</sup>, 2010 council meeting.**

**Numerous comments were received expressing concern over developers avoiding the State's siting process, but did not formally address the six questions found in ORS 183.390(3). Most of the comments focused on the projects' impacts or the counties' review process. Several commenters noted the cost and time required to navigate the State's process would have a negative economic impact on businesses and remove local decision making. Some comments recognized that economic impacts to business could be addressed during the rulemaking process, with the goal of minimizing, and that the petition is a starting point not an end point.**

**It was noted that counties in Oregon have statutory authority to review and conditionally approve land use, ORS 215.283(2) including commercial utility facilities, but that authority is limited by ORS 469.300 for wind generation projects greater than 105 MW.**

Staff Memo to Council  
Oregon Natural Desert Association – Petition for Rulemaking  
Add definition of single energy facility to OAR 345 Division 1

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 rule proposed in the petition is seeking to clarify the definition of the term single energy facility within the definitions at OAR 345-001-0010. The definition of an energy facility at OAR 345-001-0010(17) refers to the definition provided at ORS 469.300(11) (a)(A through J) and (b). ORS 469.300(11) (a)(J) uses the phrase “single energy facility” without further clarification. ORS 469.300(11)(a)(J) states “An electric power generating plant with an average generating capacity of 35 MW or more if the power is produced from geothermal, solar or wind energy at a single energy facility or within a single energy generation area.”**

**Since the phrase “single energy facility” is not defined, staff anticipates that the Council could provide direction on the terminology and the council could, via rulemaking clarify the definition at OAR 345-001-0010.**

Response to ORS 193.390(3) (b) The nature of complaints or comments received concerning the rule from the public:

**A compendium of comments has been provided to you for your review. Arguments are presented to support the petition and to deny the petition. As stated the phrase “single energy facility” is not presently defined in statute or rule. As noted, Staff has informally worked with developers and county staff to clarify what is a single energy facility based primarily on business risk tolerance, construction time frame, interconnection and infrastructure proposals, and power purchase agreements. Developers have been advised by both the EFSC staff and county planning staff that pursuant to ORS 469.320(8) they can “opt” into the EFSC process for renewable resource generating facilities of less than 35 megawatts of average generating capacity.**

**EFSC staff has also worked with concerned stakeholders to develop guidelines to be used by developers and counties in determining impacts. This effort culminated in the Columbia Basin Bird and Bat Guidelines, which has been followed by the Association of Oregon’s counties effort to develop guidelines for Oregon counties.**

Many comments expressed concern about developers intentionally avoiding the EFSC process, some related to degradation of Steens Mountain, and avoidance of ODFW review.

Response to ORS 193.390(3) (c) The complexity of the rule:

The definition proposed in the petition adopts the criteria used by the Oregon Department of Energy's temporary Business Energy Tax Credit (BETC) program rules to determine eligibility for the tax credit. The BETC Statute was substantially revised by 2010 special session of the Legislature. Under the revisions, the Business Energy tax credit for EFSC jurisdictional wind generating projects will sunset in 2012, indicating the maturation of the industry. The proposed definition is intended to clarify when multiple proposed facilities should be treated as a single facility for siting purposes, by requiring an affirmative response to three of ten questions (or criteria). The petition's triggering questions specifically exclude ownership, construction phases, or applications for county permits, prior to application to the state or local jurisdiction. Additionally, under the proposed rules, a developer who proposes an energy facility not obviously within the Council's jurisdiction would be required to obtain concurrence from EFSC that the facility is not subject to combination with other facilities into a "single energy facility" subject to Council jurisdiction

The proposed rule is complex and would interpose a state decision process as a requirement prior to a developer applying for a County's conditional approval of land use.

It was noted by one commenter that the demarcation between the County comprehensive land use process and the State siting process is clearly defined as 105 MW.

Response to ORS 193.390(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 decisional process would be new in rulemaking and therefore does not directly overlap other local, state, or federal rules. However, rules exist at the local and state level to permit energy facilities. At the local level, an energy facility can be permitted through the conditional land use process outlined at ORS 215, et seq. If large enough, the proposed facility must be permitted through the states' jurisdictional authority outlined at ORS 469.300, et seq.

Commenters argue that implementation of the proposed rule would be complex; has the practical effect of requiring state oversight of all projects; duplicates the existing county conditional use processes and conflicts with EFSC's own rules on Energy Generation Areas.

Response to ORS 193.390(3) (e) The degree to which technology, economic conditions or other factors have changed in the subject area affected by the rule.

Wind turbine technology has seen dramatic changes over the past decade. Oregon's first commercial wind farm was constructed with 750 kW turbines in 2000 and by 2010 most projects are proposing to use turbines that approach 3 MW in nameplate generating capacity, continuing the trend toward fewer larger turbines in each project.

Economic conditions have become more challenging due to overall economic trends in the United States and decision by Oregon's 2010 legislature to scale back the Business Energy Tax Credit program for large renewable wind energy projects. It was noted that many states are implementing Renewable Portfolio Standards and this will support additional development to meet that demand.

Other factors noted by comments focused primarily on unintended consequences, environmental impacts, and loss of heritage due to the proliferation of wind turbines. We interpret this to be the densification of projects into areas with the best wind resources receiving the most development and that projects could be constructed on adjacent lands but not meet the same general requirements.

Response to ORS 193.390(3)(f) The statutory citation or legal basis for the rule.

EFSC's jurisdiction is defined at ORS 469.300 and County jurisdiction at ORS 197.175 with further clarification at ORS 215.

#### Staff Statement

Staff is concerned on two specific points. First, the rule as proposed might be considered an expansion of council jurisdiction beyond that intended by the legislature. Secondly, the rulemaking establishes a process that asks EFSC to authorize the initiation of the county conditional use permitting, which might be considered an expansion of council jurisdiction beyond that intended by the legislature.

Staff Conclusion – If the Council concurs that management of cumulative impacts is not occurring and that better management of cumulative impacts is required, staff recommends that the council review the definition of energy generation areas, as defined at ORS 469.300(12), and find that multiple energy generation areas should be established, through rule, as part of natural resource development in the state. Staff recommends that the Council not undertake rulemaking to define “single energy facility” at this time.

## CERTIFICATE OF SERVICE

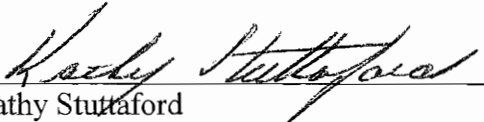
I hereby certify that on May 6, 2010, I filed the attached ONDA DENIAL within on the parties hereto by electronic mail and by first class mail a true, exact and full copy thereof as follows:

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Kathy Stuttaford  
Rulemaking Coordinator