

SAGE GROUSE RULE REVISION REMOVES REQUIREMENT TO IDENTIFY FEDERALLY PROTECTED THREATENED AND ENDANGERED SPECIES

The Oregon Department of Energy (ODOE) filed a rule change which is supposed to incorporate the new Sage Grouse protections. They included additional changes which will significantly weaken protections for both sage grouse and other federally protected wildlife.

THERE ARE CONFLICTS BETWEEN THIS RULE AND EXISTING RULES RELATED TO THREATENED AND ENDANGERED ANIMALS PROTECTED BY FEDERAL FISH AND WILDLIFE RULES AND STATUTES.

The proposed rule: OAR 345-021-0010(1)(q) removes the requirement that energy developers identify federally protected threatened and endangered species at the site of a proposed development. There have always been problems in this area as the Department of Energy has been unwilling to implement recommendations from the US Fish and Wildlife Service stating they only are required to address state protected species. Site certificates are being issued authorizing a specific number of deaths of threatened and endangered species per Kw of capacity in wind farm developments. They have, however, at least required the developer to identify the federally protected species. This rule change codifies a practice that probably is illegal as federal wildlife laws cannot be ignored by states.

Removing this information from applications for site certificates will have a direct impact and is in conflict with the following other rules and statutes:

ORS 183.332 regarding conformity of state rules with equivalent federal laws and rules. It states: "it is also the policy of the state that agencies attempt to adopt rules that correspond with equivalent federal laws and rules unless:

- (1) There is specific statutory direction to the agency that authorizes the adoption of the rule.
- (2) A federal waiver has been granted that authorizes the adoption of the rule
- (3) Local or special conditions exist in this state that warrant a different rule.
- (4) The state rule has the effect of clarifying the federal rules, standards, procedures or requirements
- (5) The state rule achieves the goals of the federal and state law with the least impact on public and private resources or
- (6) There is no corresponding federal regulation."

None of these reasons exist to support removing this requirement, and in fact, it appears that this federal law requires the Oregon Department of Energy to add rule language that corresponds to the federal laws and rules.

The Department of Energy documented one reason why the information they are proposing be removed from applications should continue to be required. In their Project Order for Boardman to Hemingway Project dated Jan. 26, 2009, page 4, the order states, "However, OAR 345-021-0010 (1)(q) requires applicants to consider plant and animal species listed as endangered or threatened under both state and federal law. This requirement applies because the Council, in making its decisions, must be mindful of possible adverse impacts to federally listed species. Note also that OAR 345-022-0070 applies to all lands affected by a proposed facility including state, federal and private land." This argument continues to apply.

ORS 469.501 which identifies rules that shall be adopted states "Effects of the facility, taking into account mitigation, on fish and wildlife, including threatened and endangered fish, wildlife or plant species." There is no indication in the statute that the legislature was authorizing the Department of

Energy or Energy Facility Siting Council to exclude federally protected species in this requirement. To do so would need to be addressed through a change to statute and it is probably illegal to ignore federal wildlife laws.

The Columbia Plateau Eco Region Wind and Wildlife Energy Taskforce report references the need to address both state and federally protected wildlife. It states on page 25 “Impacts to state or federally-listed species require consultation with the ODFW and USFWS if there is potential for take of listed species.” It also states “Any impacts to state or federally-listed species require immediate consultation with the ODFW and USFWS.”

--OAR 345-024-0015(4) which is the Cumulative Effects Standard for Wind Energy Facility states that the department must assure that the energy developer is “...designing the facility to reduce the risk of injury to raptors or other vulnerable wildlife in areas near turbines or electrical equipment.” By definition, federal threatened and endangered species would be “vulnerable”. A facility can not be designed to reduce the risk to these species when there is no effort to identify where or if the species exist at the site of the development.

--OAR 345-022-0060 requires that the design, construction and operation of the facility, taking into account mitigation are consistent with the fish and wildlife habitat mitigation goals and standards of OAR 635-415-0025. (The new rules contained in OAR 345-021-0010(l)(p)(B) will change this rule to require that the development be “generally consistent” or in other words, subject to the council’s interpretation.) The word “generally” needs to be removed from the rule revision.

--OAR 635-415-0020(3) which is an Oregon Department of Fish and Wildlife (ODFW) rule states: “The Department shall recommend mitigation consistent with the goals and standards of OAR 635-415-0025 for development actions which impact fish and wildlife habitat for other than Department actions when: (a) Federal or state environmental laws or land use regulations authorize or require mitigation for impacts to fish and wildlife”. In other words, the ODFW rules place responsibility on them to recommend mitigation for federally protected species. If the applications do not contain information on federally protected species, ODFW will not be able to make these recommendations which are required by their rules.

--OAR 345-022-0000(3)(g) is another area of concern in the newly filed rules because it allows the Energy Facility Siting Council (EFSC) to apply their “balancing authority” to “indirect impacts” of transmission lines. The EFSC is responsible for approving Site Certificates based upon recommendations made by the Oregon Department of Energy. This rule change will allow impacts which are not allowed in their rules if the EFSC members decide to allow them. The EFSC considers only the footprint of structures to be “direct” impacts. Everything else including habitat damage from construction activities are considered “indirect” impacts. The impact of this rule is that transmission lines can be placed adjacent to core or low density sage grouse habitat regardless of impacts as long as the power poles are not placed directly in the habitat. The EFSC will have the authority to make an independent, subjective determination regarding whether or not to allow this. The Governor, by Executive Order No. 15-18 has ordered agencies to incorporate the Sage Grouse protections and that their rules must comply with OAR 635-0140-000 thru 635-140-0025. This rule will allow the Oregon Department of Energy and the Energy Facility Siting Council to make subjective decisions to ignore the protections in the issuance of site certificates which include transmission lines.

This rule change in combination with current practices of the Department of Energy and Energy Facility Siting Council which allow a certain number of deaths of federally protected species conflict with federal laws providing for the protection of threatened and endangered species.

This rule change needs to be reviewed by legislative council due to the conflicts it creates with other administrative rules and statutes. As currently proposed, it is setting up the department for legal action due to abuse of power on the part of the administrator, and more specifically, the potential for a private citizen suit in federal court due to a failure to honor federal threatened and endangered species laws. It clearly meets the standard of being concrete and particularized, there is documentation of the fact that the damages are actual and imminent, that they result from the actions of the Department of Energy and their administration and are not just likely, but predictable and documented through established “thresholds of concern” and wildlife monitoring reports submitted to the department.

I strongly encourage a careful review of this proposed change due to the fact that it will increase even further the deaths of federally protected threatened and endangered species beyond the illegal take which is already being authorized by the department through their site certificates.

You are encouraged to comment on this rule change either by developing your own submission, or taking parts or all of this document. You can either comment directly in person or by phone, or send comments in. The hearing will be held at 4:30 p.m. on Thursday, February 23 at Cousins’ Country Inn, Banquet Room/ 2114 W 6th St. NE/ The Dalles, OR 97058
Call in Number 877-873-8071 Passcode 799345

Written comments can be submitted to:
EFS Rulemaking Coordinator
Oregon Department of Energy
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Salem Oregon 97301
Email: Jason.Sierman@oregon.gov

Reference: <http://www.oregon.gov/energy/Siting/Pages/council-rulemaking.aspx>

[Thank you very much.](#)