

## Agenda Item Summary

### BACKGROUND

On July 27, 2015, the Fish and Wildlife Commission adopted amendments to OAR Chapter 635, Division 140 pertaining to development impacts and mitigation in sage-grouse habitat. The Division 140 rules apply only in sage-grouse habitat and supersede the Fish and Wildlife Habitat Mitigation Policy rules in OAR chapter 635, Division 415, which govern Department approval of, or recommendations to other permitting entities on, development impacts and mitigation in all other fish and wildlife habitat. The Division 415 rules contained no indication that they had been superseded for impacts in sage-grouse habitat. To provide that clarity the Department filed temporary rule OAR 635-415-0025(7) with the Secretary of State on October 19, 2015. This proposal is to make the temporary rule permanent in order to provide continued guidance in Division 415 that in sage-grouse habitat the applicable rules are in Division 140.

In addition, the temporary rule and the proposed permanent rule include an exemption for any energy facility that has submitted a preliminary application to the Energy Facility Siting Council for a site certificate pursuant to ORS 469.300 et seq. on or before the effective date of the temporary rule (October 19, 2015) such that certain provisions of Division 140 do not apply. A preliminary application for a site certificate involves many years of preparation and planning based on applicable legal requirements. Permanently adopting the proposed rule will avoid changing the applicable legal requirements for energy facilities that are far enough along in the application process to have submitted a preliminary application for a site certificate.

### PUBLIC INVOLVEMENT

During the development of the Division 140 rules, the Department convened a Rules Advisory Committee (RAC) of diverse, interested parties, which met on four different occasions to provide input in shaping the proposed rule changes. The RAC included representatives from five counties (Harney, Lake, Crook, Union, and Baker), conservation and recreation groups (The Nature Conservancy, Oregon Natural Desert Association, Portland Audubon, and Back Country Hunters and Anglers), the energy development industry (Renewable Northwest), the Oregon Farm Bureau, and the Oregon Cattlemen's Association. In addition, representatives of the Oregon Land Conservation and Development Commission as well as Department staff, Oregon Energy Department, U.S. Fish and Wildlife Service, the Burns Paiute Tribe and the Confederated Tribes of Warm Springs provided technical input. The RAC was charged with providing input to the rule language that addressed their respective interests and striving to reach consensus on the proposed rule changes. Additionally, ODFW held two public meetings on the proposed rules in affected counties (Burns and Lakeview) and received input on the subject of the rules during regular SageCon

Partnership meetings. The RAC considered and discussed modifications needed to the Division 415 rules to clarify that Division 140 governs development impacts to and mitigation in sage-grouse habitat. The exemption was presented during the two public meetings where public input was recorded.

In addition, ORS 469.520 requires the Department to coordinate rulemaking that may concern energy facility siting with the State Department of Energy. On October 9, 2015, the Department received confirmation from the State Department of Energy that these rules conform to state policy on energy facility siting (Attachment 5).

## ISSUE 1

**INCLUDE LANGUAGE IN DIVISION 415 THAT EXPLICITLY STATES THAT FOR PROPOSED DEVELOPMENT IN SAGE-GROUSE HABITAT, MITIGATION IS ADDRESSED IN DIVISION 140.**

## ANALYSIS

The proposed amendment in Division 415 directs sage-grouse specific mitigation issues to refer to Division 140, Greater Sage-Grouse Conservation Strategy for Oregon. This amendment is meant to be helpful only. It does not create a substantive change and it eliminates the risk that developers and permitting entities will fail to recognize that Division 140 supersedes Division 415 for development impacts to and mitigation in sage-grouse habitat.

## ISSUE 2

**EXEMPT ENERGY FACILITIES WITH A PRELIMINARY APPLICATION FOR A SITE CERTIFICATE SUBMITTED BEFORE OCTOBER 19, 2015 FROM CERTAIN COMPONENTS OF THE DIVISION 140 MITIGATION HIERARCHY REQUIREMENTS SUCH THAT DIVISION 415 CONTINUES TO APPLY.**

## ANALYSIS

The proposed amendment also creates an exemption from certain components of the Division 140 mitigation hierarchy for any energy facility that has submitted a preliminary application for site certificate pursuant to ORS 496.300 et seq. on or before the effective date of the temporary rule (October 19, 2015). Specifically, OAR 635-140-0025(2) provides that the Department may approve or recommend approval of mitigation for impacts from large scale development permitted by another public entity within sage-grouse habitat only after the permitting entity has addressed a mitigation hierarchy, the intent of which is to direct development action away from the most productive habitats and into the least productive areas for sage-grouse. The mitigation hierarchy requires the permitting entity to address: (1) avoidance of impacts in Core Area Habitat, Low Density Habitat, and General Area Habitat; (2) minimization of impacts in Core Area Habitat and General Area Habitat; and (3) compensatory mitigation where avoidance and minimization efforts have been exhausted. The proposed rule exempts any energy facility that has submitted a preliminary application for a site certificate to the Energy Facility Siting Council before October 19, 2015 from the

avoidance test in all sage-grouse habitat (Core Area Habitat, Low Density Habitat and General Area Habitat) and from the minimization provision in Core Area Habitat. The proposed exemption recognizes a preliminary application for a site certificate involves many years of preparation based on certain applicable rules (e.g. Division 415). Additionally, changing the applicable rules to Division 140 after a preliminary application has been filed would result in a substantial setback in the application process, and significant additional preparation and expense. To avoid those consequences, the proposed rule exempts energy facilities that have already submitted a preliminary application for a site certificate from the more stringent components of the Division 140 hierarchy.

**OPTIONS**

1. Adopt staff proposal, which makes the temporary rule permanent.
2. Reject staff proposal and do not adopt the proposed amendment to OAR 635-415-0025(7).
3. Amend proposed rule.

**STAFF  
RECOMMENDATION**

Option 1. Adopt staff proposal to make the temporary rule permanent.

**DRAFT MOTION**

I move to amend OAR Chapter 635-415-0025 as proposed by staff.

Upon filing

**EFFECTIVE DATE**