

A-Engrossed
House Bill 2106

Ordered by the House April 24
Including House Amendments dated April 24

Sponsored by Representative HUFFMAN; Representative DAVIS (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

[Requires Director of State Department of Energy, after consultation with other state agencies and parties, to develop map that identifies areas east of summit of Cascade Mountains that are appropriate for siting of energy facilities and any related or supporting facilities. Specifies contents of map.]

[Requires State Department of Fish and Wildlife, after consultation with State Department of Energy, to develop mitigation bank.]

Modifies provisions related to Energy Facility Siting Council's adoption of standards related to siting, construction, operation and retirement of facilities.

[Requires State Department of Energy to undertake study regarding types of facilities subject to authority of Energy Facility Siting Council and to report to Legislative Assembly.]

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to the siting of facilities; creating new provisions; amending ORS 469.501 and 469.503; and
3 declaring an emergency.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 469.501 is amended to read:

6 469.501. (1) The Energy Facility Siting Council shall adopt standards for the siting, construction,
7 operation and retirement of facilities. The standards may address but need not be limited to the
8 following subjects:

9 (a) The organizational, managerial and technical expertise of the applicant to construct and
10 operate the proposed facility.

11 (b) Seismic hazards.

12 (c) Areas designated for protection by the state or federal government, including but not limited
13 to monuments, wilderness areas, wildlife refuges, scenic waterways and similar areas.

14 (d) The financial ability and qualifications of the applicant.

15 (e) Effects of the facility, taking into account mitigation, on fish and wildlife, including threat-
16 ened and endangered fish, wildlife or plant species.

17 (f) Impacts of the facility on historic, cultural or archaeological resources listed on, or deter-
18 mined by the State Historic Preservation Officer to be eligible for listing on, the National Register
19 of Historic Places or the Oregon State Register of Historic Properties.

20 (g) Protection of public health and safety, including necessary safety devices and procedures.

21 (h) The accumulation, storage, disposal and transportation of nuclear waste.

22 (i) Impacts of the facility on recreation, scenic and aesthetic values.

23 (j) Reduction of solid waste and wastewater generation to the extent reasonably practicable.

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 (k) Ability of the communities in the affected area to provide sewers and sewage treatment,
2 water, storm water drainage, solid waste management, housing, traffic safety, police and fire pro-
3 tection, health care and schools.

4 (L) The need for proposed nongenerating facilities as defined in ORS 469.503, consistent with the
5 state energy policy set forth in ORS 469.010 and 469.310. The council may consider least-cost plans
6 when adopting a need standard or in determining whether an applicable need standard has been met.
7 The council shall not adopt a standard requiring a showing of need or cost-effectiveness for gener-
8 ating facilities as defined in ORS 469.503.

9 (m) Compliance with the statewide planning goals adopted by the Land Conservation and De-
10 velopment Commission as specified by ORS 469.503.

11 (n) Soil protection.

12 (o) For energy facilities that emit carbon dioxide, the impacts of those emissions on climate
13 change. For fossil-fueled power plants, as defined in ORS 469.503, the council shall apply a standard
14 as provided for by ORS 469.503 (2).

15 (2) The council may adopt exemptions from any need standard adopted under subsection (1)(L)
16 of this section if the exemption is consistent with the state's energy policy set forth in ORS 469.010
17 and 469.310.

18 (3)(a) The council may issue a site certificate for a facility that does not meet one or more of
19 the **applicable** standards adopted under subsection (1) of this section if the council determines that
20 the overall public benefits of the facility outweigh *[the damage to the resources]* **any adverse effects**
21 **on a resource or interest** protected by the **applicable** standards the facility does not meet.

22 **(b) The council by rule shall specify the criteria by which the council makes the deter-**
23 **mination described in paragraph (a) of this subsection.**

24 (4) Notwithstanding subsection (1) of this section, the council may not impose any standard de-
25 veloped under subsection (1)(b), (f), (j) or (k) of this section to approve or deny an application for
26 an energy facility producing power from wind, solar or geothermal energy. However, the council
27 may, to the extent it determines appropriate, apply any standards adopted under subsection (1)(b),
28 (f), (j) or (k) of this section to impose conditions on any site certificate issued for any energy facility.

29 **SECTION 2.** ORS 469.503 is amended to read:

30 469.503. In order to issue a site certificate, the Energy Facility Siting Council shall determine
31 that the preponderance of the evidence on the record supports the following conclusions:

32 (1) The facility complies with the **applicable** standards adopted by the council pursuant to ORS
33 469.501 or the overall public benefits of the facility outweigh *[the damage to the resources]* **any ad-**
34 **verse effects on a resource or interest** protected by the **applicable** standards the facility does
35 not meet.

36 (2) If the energy facility is a fossil-fueled power plant, the energy facility complies with any
37 applicable carbon dioxide emissions standard adopted by the council or enacted by statute. Base
38 load gas plants shall comply with the standard set forth in subsection (2)(a) of this section. Other
39 fossil-fueled power plants shall comply with any applicable standard adopted by the council by rule
40 pursuant to subsection (2)(b) of this section. Subsections (2)(c) and (d) of this section prescribe the
41 means by which an applicant may comply with the applicable standard.

42 (a) The net carbon dioxide emissions rate of the proposed base load gas plant shall not exceed
43 0.70 pounds of carbon dioxide emissions per kilowatt hour of net electric power output, with carbon
44 dioxide emissions and net electric power output measured on a new and clean basis.
45 Notwithstanding the foregoing, the council may by rule modify the carbon dioxide emissions stand-

1 ard for base load gas plants if the council finds that the most efficient stand-alone combined cycle,
2 combustion turbine, natural gas-fired energy facility that is commercially demonstrated and operat-
3 ing in the United States has a net heat rate of less than 7,200 Btu per kilowatt hour higher heating
4 value adjusted to ISO conditions. In modifying the carbon dioxide emission standard, the council
5 shall determine the rate of carbon dioxide emissions per kilowatt hour of net electric output of such
6 energy facility, adjusted to ISO conditions, and reset the carbon dioxide emissions standard at 17
7 percent below this rate.

8 (b) The council shall adopt carbon dioxide emissions standards for other types of fossil-fueled
9 power plants. Such carbon dioxide emissions standards shall be promulgated by rule. In adopting
10 or amending such carbon dioxide emissions standards, the council shall consider and balance at
11 least the following principles, the findings on which shall be contained in the rulemaking record:

12 (A) Promote facility fuel efficiency;

13 (B) Promote efficiency in the resource mix;

14 (C) Reduce net carbon dioxide emissions;

15 (D) Promote cogeneration that reduces net carbon dioxide emissions;

16 (E) Promote innovative technologies and creative approaches to mitigating, reducing or avoiding
17 carbon dioxide emissions;

18 (F) Minimize transaction costs;

19 (G) Include an alternative process that separates decisions on the form and implementation of
20 offsets from the final decision on granting a site certificate;

21 (H) Allow either the applicant or third parties to implement offsets;

22 (I) Be attainable and economically achievable for various types of power plants;

23 (J) Promote public participation in the selection and review of offsets;

24 (K) Promote prompt implementation of offset projects;

25 (L) Provide for monitoring and evaluation of the performance of offsets; and

26 (M) Promote reliability of the regional electric system.

27 (c) The council shall determine whether the applicable carbon dioxide emissions standard is met
28 by first determining the gross carbon dioxide emissions that are reasonably likely to result from the
29 operation of the proposed energy facility. Such determination shall be based on the proposed design
30 of the energy facility. The council shall adopt site certificate conditions to ensure that the predicted
31 carbon dioxide emissions are not exceeded on a new and clean basis. For any remaining emissions
32 reduction necessary to meet the applicable standard, the applicant may elect to use any of subpar-
33 agraphs (A) to (D) of this paragraph, or any combination thereof. The council shall determine the
34 amount of carbon dioxide or other greenhouse gas emissions reduction that is reasonably likely to
35 result from the applicant's offsets and whether the resulting net carbon dioxide emissions meet the
36 applicable carbon dioxide emissions standard. For purposes of determining the net carbon dioxide
37 emissions, the council shall by rule establish the global warming potential of each greenhouse gas
38 based on a generally accepted scientific method, and convert any greenhouse gas emissions to a
39 carbon dioxide equivalent. Unless otherwise provided by the council by rule, the global warming
40 potential of methane is 23 times that of carbon dioxide, and the global warming potential of nitrous
41 oxide is 296 times that of carbon dioxide. If the council or a court on judicial review concludes that
42 the applicant has not demonstrated compliance with the applicable carbon dioxide emissions stand-
43 ard under subparagraphs (A), (B) or (D) of this paragraph, or any combination thereof, and the ap-
44 plicant has agreed to meet the requirements of subparagraph (C) of this paragraph for any
45 deficiency, the council or a court shall find compliance based on such agreement.

1 (A) The facility will sequentially produce electrical and thermal energy from the same fuel
2 source, and the thermal energy will be used to displace another source of carbon dioxide emissions
3 that would have otherwise continued to occur, in which case the council shall adopt site certificate
4 conditions ensuring that the carbon dioxide emissions reduction will be achieved.

5 (B) The applicant or a third party will implement particular offsets, in which case the council
6 may adopt site certificate conditions ensuring that the proposed offsets are implemented but shall
7 not require that predicted levels of avoidance, displacement or sequestration of greenhouse gas
8 emissions be achieved. The council shall determine the quantity of greenhouse gas emissions re-
9 duction that is reasonably likely to result from each of the proposed offsets based on the criteria in
10 sub-subparagraphs (i) to (iii) of this subparagraph. In making this determination, the council shall
11 not allow credit for offsets that have already been allocated or awarded credit for greenhouse gas
12 emissions reduction in another regulatory setting. In addition, the fact that an applicant or other
13 parties involved with an offset may derive benefits from the offset other than the reduction of
14 greenhouse gas emissions is not, by itself, a basis for withholding credit for an offset.

15 (i) The degree of certainty that the predicted quantity of greenhouse gas emissions reduction
16 will be achieved by the offset;

17 (ii) The ability of the council to determine the actual quantity of greenhouse gas emissions re-
18 duction resulting from the offset, taking into consideration any proposed measurement, monitoring
19 and evaluation of mitigation measure performance; and

20 (iii) The extent to which the reduction of greenhouse gas emissions would occur in the absence
21 of the offsets.

22 (C) The applicant or a third party agrees to provide funds in an amount deemed sufficient to
23 produce the reduction in greenhouse gas emissions necessary to meet the applicable carbon dioxide
24 emissions standard, in which case the funds shall be used as specified in paragraph (d) of this sub-
25 section. Unless modified by the council as provided below, the payment of 57 cents shall be deemed
26 to result in a reduction of one ton of carbon dioxide emissions. The council shall determine the
27 offset funds using the monetary offset rate and the level of emissions reduction required to meet the
28 applicable standard. If a site certificate is approved based on this subparagraph, the council may
29 not adjust the amount of such offset funds based on the actual performance of offsets. After three
30 years from June 26, 1997, the council may by rule increase or decrease the monetary offset rate of
31 57 cents per ton of carbon dioxide emissions. Any change to the monetary offset rate shall be based
32 on empirical evidence of the cost of offsets and the council's finding that the standard will be eco-
33 nomically achievable with the modified rate for natural gas-fired power plants. Following the initial
34 three-year period, the council may increase or decrease the monetary offset rate no more than 50
35 percent in any two-year period.

36 (D) Any other means that the council adopts by rule for demonstrating compliance with any
37 applicable carbon dioxide emissions standard.

38 (d) If the applicant elects to meet the applicable carbon dioxide emissions standard in whole or
39 in part under paragraph (c)(C) of this subsection, the applicant shall identify the qualified organ-
40 ization. The applicant may identify an organization that has applied for, but has not received, an
41 exemption from federal income taxation, but the council may not find that the organization is a
42 qualified organization unless the organization is exempt from federal taxation under section 501(c)(3)
43 of the Internal Revenue Code as amended and in effect on December 31, 1996. The site certificate
44 holder shall provide a bond or comparable security in a form reasonably acceptable to the council
45 to ensure the payment of the offset funds and the amount required under subparagraph (A)(ii) of this

1 paragraph. Such security shall be provided by the date specified in the site certificate, which shall
2 be no later than the commencement of construction of the facility. The site certificate shall require
3 that the offset funds be disbursed as specified in subparagraph (A) of this paragraph, unless the
4 council finds that no qualified organization exists, in which case the site certificate shall require
5 that the offset funds be disbursed as specified in subparagraph (B) of this paragraph.

6 (A) The site certificate holder shall disburse the offset funds and any other funds required by
7 sub-subparagraph (ii) of this subparagraph to the qualified organization as follows:

8 (i) When the site certificate holder receives written notice from the qualified organization cer-
9 tifying that the qualified organization is contractually obligated to pay any funds to implement off-
10 sets using the offset funds, the site certificate holder shall make the requested amount available to
11 the qualified organization unless the total of the amount requested and any amounts previously re-
12 quested exceeds the offset funds, in which case only the remaining amount of the offset funds shall
13 be made available. The qualified organization shall use at least 80 percent of the offset funds for
14 contracts to implement offsets. The qualified organization shall assess offsets for their potential to
15 qualify in, generate credits in or reduce obligations in other regulatory settings. The qualified or-
16 ganization may use up to 20 percent of the offset funds for monitoring, evaluation, administration
17 and enforcement of contracts to implement offsets.

18 (ii) At the request of the qualified organization and in addition to the offset funds, the site cer-
19 tificate holder shall pay the qualified organization an amount equal to 10 percent of the first
20 \$500,000 of the offset funds and 4.286 percent of any offset funds in excess of \$500,000. This amount
21 shall not be less than \$50,000 unless a lesser amount is specified in the site certificate. This amount
22 compensates the qualified organization for its costs of selecting offsets and contracting for the im-
23 plementation of offsets.

24 (iii) Notwithstanding any provision to the contrary, a site certificate holder subject to this sub-
25 paragraph shall have no obligation with regard to offsets, the offset funds or the funds required by
26 sub-subparagraph (ii) of this subparagraph other than to make available to the qualified organization
27 the total amount required under paragraph (c) of this subsection and sub-subparagraph (ii) of this
28 subparagraph, nor shall any nonperformance, negligence or misconduct on the part of the qualified
29 organization be a basis for revocation of the site certificate or any other enforcement action by the
30 council with respect to the site certificate holder.

31 (B) If the council finds there is no qualified organization, the site certificate holder shall select
32 one or more offsets to be implemented pursuant to criteria established by the council. The site cer-
33 tificate holder shall give written notice of its selections to the council and to any person requesting
34 notice. On petition by the State Department of Energy, or by any person adversely affected or
35 aggrieved by the site certificate holder's selection of offsets, or on the council's own motion, the
36 council may review such selection. The petition must be received by the council within 30 days of
37 the date the notice of selection is placed in the United States mail, with first-class postage prepaid.
38 The council shall approve the site certificate holder's selection unless it finds that the selection is
39 not consistent with criteria established by the council. The site certificate holder shall contract to
40 implement the selected offsets within 18 months after commencing construction of the facility unless
41 good cause is shown requiring additional time. The contracts shall obligate the expenditure of at
42 least 85 percent of the offset funds for the implementation of offsets. No more than 15 percent of the
43 offset funds may be spent on monitoring, evaluation and enforcement of the contract to implement
44 the selected offsets. The council's criteria for selection of offsets shall be based on the criteria set
45 forth in paragraphs (b)(C) and (c)(B) of this subsection and may also consider the costs of particular

1 types of offsets in relation to the expected benefits of such offsets. The council's criteria shall not
2 require the site certificate holder to select particular offsets, and shall allow the site certificate
3 holder a reasonable range of choices in selecting offsets. In addition, notwithstanding any other
4 provision of this section, the site certificate holder's financial liability for implementation, monitor-
5 ing, evaluation and enforcement of offsets pursuant to this subsection shall be limited to the amount
6 of any offset funds not already contractually obligated. Nonperformance, negligence or misconduct
7 by the entity or entities implementing, monitoring or evaluating the selected offset shall not be a
8 basis for revocation of the site certificate or any other enforcement action by the council with re-
9 spect to the site certificate holder.

10 (C) Every qualified organization that has received funds under this paragraph shall, at five-year
11 intervals beginning on the date of receipt of such funds, provide the council with the information
12 the council requests about the qualified organization's performance. The council shall evaluate the
13 information requested and, based on such information, shall make any recommendations to the
14 Legislative Assembly that the council deems appropriate.

15 (e) As used in this subsection:

16 (A) "Adjusted to ISO conditions" means carbon dioxide emissions and net electric power output
17 as determined at 59 degrees Fahrenheit, 14.7 pounds per square inch atmospheric pressure and 60
18 percent humidity.

19 (B) "Base load gas plant" means a generating facility that is fueled by natural gas, except for
20 periods during which an alternative fuel may be used and when such alternative fuel use shall not
21 exceed 10 percent of expected fuel use in Btu, higher heating value, on an average annual basis, and
22 where the applicant requests and the council adopts no condition in the site certificate for the
23 generating facility that would limit hours of operation other than restrictions on the use of alter-
24 native fuel. The council shall assume a 100 percent capacity factor for such plants and a 30-year
25 life for the plants for purposes of determining gross carbon dioxide emissions.

26 (C) "Carbon dioxide equivalent" means the global warming potential of a greenhouse gas re-
27 flected in units of carbon dioxide.

28 (D) "Fossil-fueled power plant" means a generating facility that produces electric power from
29 natural gas, petroleum, coal or any form of solid, liquid or gaseous fuel derived from such material.

30 (E) "Generating facility" means those energy facilities that are defined in ORS 469.300 (11)(a)(A),
31 (B) and (D).

32 (F) "Global warming potential" means the determination of the atmospheric warming resulting
33 from the release of a unit mass of a particular greenhouse gas in relation to the warming resulting
34 from the release of the equivalent mass of carbon dioxide.

35 (G) "Greenhouse gas" means carbon dioxide, methane and nitrous oxide.

36 (H) "Gross carbon dioxide emissions" means the predicted carbon dioxide emissions of the pro-
37 posed energy facility measured on a new and clean basis.

38 (I) "Net carbon dioxide emissions" means gross carbon dioxide emissions of the proposed energy
39 facility, less carbon dioxide or other greenhouse gas emissions avoided, displaced or sequestered by
40 any combination of cogeneration or offsets.

41 (J) "New and clean basis" means the average carbon dioxide emissions rate per hour and net
42 electric power output of the energy facility, without degradation, as determined by a 100-hour test
43 at full power completed during the first 12 months of commercial operation of the energy facility,
44 with the results adjusted for the average annual site condition for temperature, barometric pressure
45 and relative humidity and use of alternative fuels, and using a rate of 117 pounds of carbon dioxide

1 per million Btu of natural gas fuel and a rate of 161 pounds of carbon dioxide per million Btu of
2 distillate fuel, if such fuel use is proposed by the applicant. The council may by rule adjust the rate
3 of pounds of carbon dioxide per million Btu for natural gas or distillate fuel. The council may by
4 rule set carbon dioxide emissions rates for other fuels.

5 (K) "Nongenerating facility" means those energy facilities that are defined in ORS 469.300
6 (11)(a)(C) and (E) to (I).

7 (L) "Offset" means an action that will be implemented by the applicant, a third party or through
8 the qualified organization to avoid, sequester or displace emissions.

9 (M) "Offset funds" means the amount of funds determined by the council to satisfy the applicable
10 carbon dioxide emissions standard pursuant to paragraph (c)(C) of this subsection.

11 (N) "Qualified organization" means an entity that:

12 (i) Is exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code as
13 amended and in effect on December 31, 1996;

14 (ii) Either is incorporated in the State of Oregon or is a foreign corporation authorized to do
15 business in the State of Oregon;

16 (iii) Has in effect articles of incorporation that require that offset funds received pursuant to
17 this section are used for offsets that require that decisions on the use of the offset funds are made
18 by a decision-making body composed of seven voting members of which three are appointed by the
19 council, three are Oregon residents appointed by the Bullitt Foundation or an alternative environ-
20 mental nonprofit organization named by the body, and one is appointed by the applicants for site
21 certificates that are subject to paragraph (d) of this subsection and the holders of such site certif-
22 icates, and that require nonvoting membership on the body for holders of site certificates that have
23 provided funds not yet disbursed under paragraph (d)(A) of this subsection;

24 (iv) Has made available on an annual basis, beginning after the first year of operation, a signed
25 opinion of an independent certified public accountant stating that the qualified organization's use
26 of funds pursuant to this statute conforms with generally accepted accounting procedures except
27 that the qualified organization shall have one year to conform with generally accepted accounting
28 principles in the event of a nonconforming audit;

29 (v) Has to the extent applicable, except for good cause, entered into contracts obligating at least
30 60 percent of the offset funds to implement offsets within two years after the commencement of
31 construction of the facility; and

32 (vi) Has to the extent applicable, except for good cause, complied with paragraph (d)(A)(i) of this
33 subsection.

34 (3) Except as provided in ORS 469.504 for land use compliance and except for those statutes and
35 rules for which the decision on compliance has been delegated by the federal government to a state
36 agency other than the council, the facility complies with all other Oregon statutes and administra-
37 tive rules identified in the project order, as amended, as applicable to the issuance of a site certif-
38 icate for the proposed facility. If compliance with applicable Oregon statutes and administrative
39 rules, other than those involving federally delegated programs, would result in conflicting conditions
40 in the site certificate, the council may resolve the conflict consistent with the public interest. A
41 resolution may not result in the waiver of any applicable state statute.

42 (4) The facility complies with the statewide planning goals adopted by the Land Conservation
43 and Development Commission.

44 **SECTION 3. The amendments to ORS 469.501 and 469.503 by sections 1 and 2 of this 2013**
45 **Act apply to all applications for site certificates made to the Energy Facility Siting Council**

1 under ORS 469.350 on or after the effective date of this 2013 Act.

2 SECTION 4. This 2013 Act being necessary for the immediate preservation of the public
3 peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect
4 on its passage.

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