



To: House Committee on Energy and Environment

From: Todd R. Cornett, Assistant Director for Siting
Oregon Department of Energy

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Subject: SB 259-A – Energy Facility Siting Council Process Cost Recovery

INTRODUCTION

The Oregon Department of Energy is introducing and supports Senate Bill 259-A. The bill amends ORS 469.360 and ORS 469.421 to add authority for the Energy Facility Siting Council (EFSC) to compensate state agencies and local governments for expenses directly related to work prior to the submittal of the Notice of Intent at the request of the applicant; state agencies and local governments to ensure compliance with site certificate conditions only when their expertise is required by Oregon Department of Energy Staff (ODOE); and tribal governments to review and comment on Notice of Intent and site certificate application materials.

BACKGROUND

EFSC is a seven member board appointed by the Governor and confirmed by the Senate. EFSC has the responsibility to review applications for site certificates for all state-jurisdictional energy facilities. ODOE administers the EFSC facility siting process, which consolidates state agency and local government regulations into a single review process. Local governments, state agencies, federal agencies, tribes and other entities identified in statute or rule that have regulatory or advisory responsibility, with respect to a proposed energy facility participate throughout the process as Reviewing Agencies.

In 2013, the Legislature passed HB 2105 requiring ODOE to study several substantive and procedural issues related to energy facility siting. The Department was required to present a report to the Legislature by Nov. 1, 2013. The report required recommendations for potential legislation. SB 259-A was one of the recommendations that came out of the report.

The Energy Facility Siting process requires full cost recovery for work conducted by ODOE, their contractors and certain Reviewing Agencies. Reviewing Agencies can only be reimbursed if they have entered into an agreement with ODOE that outlines the scope of work that is reimbursable and the timeliness requirements for submitting invoices. During the Notice of Intent phase the applicant submits funds based on a fee schedule established by the EFSC and updated every two



years, which is intended to cover the total cost of that phase. During the application submittal phase the applicant submits funds based on a cost estimate established by ODOE and subject to a Cost Reimbursement Agreement which describes how payments are made. Once a site certificate is issued, each energy facility is assessed an annual fee based on the estimated cost of compliance activities for the coming year for that particular facility.

The Notice of Intent is the applicant's conceptual plan and the beginning of the energy facility site certificate process. This is the first opportunity for most agencies, local governments and the public to see the proposal. The information from the Notice of Intent is used to establish which standards, policies and goals are applicable to the proposal. Applicants often consult with state agencies and local governments prior to submitting the Notice of Intent to identify issues and avoid potential impacts. Current statutory language allows for state agencies and local governments to request reimbursement for review of the submitted Notice of Intent but does not expressly allow for reimbursement for consultation reviews requested by the applicant prior to its submittal.

The energy facility siting process functions as a consolidated review that incorporates standards, policies and goals from state agencies and local governments. Many of the pre-construction, construction and operational conditions of approval are a direct result of the standards, policies and goals of other state agencies and local governments. After an energy facility is approved and a site certificate is issued, ODOE staff often must rely on the expertise of state agencies and local governments, in the form of document review or site visits, to ensure compliance with conditions of approval that come from those state agencies and local governments. A typical example would be to request Oregon Department of Fish and Wildlife biologists to review wildlife surveys that were required as part of the habitat mitigation plan. Current statutory language does not expressly allow for state agencies or local governments to be reimbursed for this work in helping ODOE ensure compliance with conditions of approval.

EFSC administrative rules currently include, as a Reviewing Agency any of the nine federally recognized Oregon tribes identified by the Legislative Commission on Indian Services as affected by the proposed facility. ODOE sends each identified tribe the same Notice of Intent and site certificate application materials as state agencies and local governments that are identified as a Reviewing Agency. Identified tribes review the materials and provide comments based on their knowledge and expertise in a variety of subject areas, including but not limited to federally and state protected cultural, historic, archaeological, and treaty reserved rights and resources. Currently, state agencies and local governments are statutorily allowed to be reimbursed for expenses related to their review and comment, but tribes are not.

DISCUSSION

Senate Bill 259-A will allow state agencies and local governments reimbursement for consultation and review conducted prior to the applicant submitting the Notice of Intent only



when it is requested by the applicant. Applicants would be under no obligation to request this consultation or review. The main benefit of having state agencies or local governments evaluate aspects of the proposed facility prior to submittal of the Notice of Intent is to the applicants by allowing them to identify issues as early as possible in the process. This can help them avoid costly studies and mitigation as well as potential opposition that can greatly increase the review process timelines.

To provide cost certainty for applicants electing to have pre-Notice of Intent consultation and review, ODOE would establish an estimate which includes all costs of pre-Notice of Intent consultation. The applicant would have to agree to these costs before any work was conducted and the costs could not be exceeded without revising the cost estimate, which would also have to be agreed to by the applicant.

The opportunity to consult with state agencies and local governments prior to submittal of the Notice of Intent is intended to be for limited use only. It is not intended to create a de-facto expedited review process where an applicant can work with every state agency and local government outside of the formal public process.

Senate Bill 259-A will also allow state agencies and local governments reimbursement for assisting ODOE in evaluating conditions of approval for compliance. ODOE relies on the expertise of numerous state agencies and local governments to ensure each energy facility is in compliance with all conditions of approval. Many state agencies and local governments have resource limitations that impact their ability perform work beyond their core services. This bill would create a financial incentive to assist ODOE when their expertise is needed to review documents or conduct site visits to verify that a facility is in compliance with site certificate conditions.

SB 259-A identifies the important role tribes play in the energy facility siting process. The bill expressly allows EFSC to reimburse a tribe identified by the Legislative Commission on Indian Services as affected by the applicant for their review and comments on Notice of Intent and site certificate application. Only tribes that enter into a reimbursement agreement with ODOE would be eligible for reimbursement.

SB 259-A removes the ability of a state agency or local government to request reimbursement for legal expenses if they participate as a part in a contested case. State agencies and local governments review project information and provide comments at numerous times during the review process. The intent of these review and comment opportunities is to ensure any issues or concerns they have are addressed prior to the contested case. If a state agency or local government were to participate as a party in a contested case, it would most likely be in opposition to the action recommended in the proposed order.



SUMMARY

The Oregon Department of Energy supports Senate Bill 259-A which will allow EFSC to reimburse state agencies and local governments when energy facility applicants request their assistance in evaluating issues before they submit their Notice of Intent to ODOE. The bill will also help ensure energy facilities are constructed and operated in compliance with all conditions of approval by allowing reimbursement to state agencies and local governments whose expertise is needed to verify compliance. Finally, the bill will also recognize the important role of tribes in the EFSC process by allowing them to be reimbursed for their work in reviewing and commenting on Notice of Intent and site certificate application materials.