

# **Joint Interim Committee on Department of Energy Oversight Co-Chair DRAFT -- Committee Report and Recommendations December 1, 2016**

## **Introduction**

The Joint Interim Committee on Department of Energy Oversight (Committee) was appointed in January 2016 to conduct a thorough review of the Oregon Department of Energy (ODOE) and to make recommendations to the 2017 session. The Committee was directed by the Senate President and the Speaker of the House to focus its work on the following elements:

- Review of the agency's charge, mission, and statutory responsibilities.
- Review of the agency's organizational structure and funding streams.
- Assessment of the current gaps and deficiencies in the agency's operational structure and personnel capacity to fulfill its mission and programs.
- Assessment of the agency's capacity to facilitate stakeholder relationships, both public and private, to fulfill its mission.

## **Agency Structure and Background**

The Department of Energy was first established in 1975 in response to the national energy crisis. Its statutory mission is to promote the efficient use of energy and advocate for the use and development of new renewable energy. In the 41 years since its creation, it has been assigned a variety of energy-related responsibilities, including some regulatory functions. A history of Oregon energy policy and organizations can be found [here](#)<sup>1</sup>. The agency is structured in the following four operating divisions and a supportive administrative/central services division:

- Nuclear Safety and Emergency Preparedness
- Energy Planning and Innovation
- Energy Development Services
- Energy Facility Siting

There are currently 84 permanent (FTE) Department employees. The 2015-2017 operating budget is \$37.4 million with revenue from program fees, federal dollars and \$13.1 million assessed on energy suppliers. The Department receives no General Fund revenue.

ODOE has been mired in controversy over the past several years, primarily due to the following issues:

1. A few large, non-performing loans in the constitutional Small Energy Loan Program;
2. A legacy of problems emanating from the now defunct Business Energy Tax Credit (BETC) program<sup>2</sup>;

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<sup>1</sup> Oregon Department of Energy Administrative Overview, Office of the Secretary of State, August 2014.

<sup>2</sup> See "Report of Findings, Business Energy Tax Credit Program Investigative Examination, September 2, 2016. Prepared by Marsh Minick P.C.

3. Controversy over the energy supplier assessment (ESA), the Department's primary source of program revenue; and
4. Perceived bias in favor of developers in the energy facility siting process.

## **Review Process**

The Committee met 10 times from January to December 2016 and heard more than 25 hours of testimony. (Agendas and meeting materials can be found on the Oregon Legislative Information System [here](#)<sup>3</sup>.) The Committee began its review by asking staff from the Legislative Fiscal Office and Legislative Revenue Office to provide an overview of the ODOE budget and a history of the energy tax credit programs. Stakeholders were invited to identify issues the Committee should address in its work. At this meeting, the Committee also began an in-depth review of agency programs which was completed at its July meeting. For the program review, the Committee Co-Chairs asked the agency director and staff to make a presentation about each agency division and to address the following questions for each program:

1. What is the objective of this program or function? Describe the major activities performed under this program. Explain why these functions are still needed.
2. Describe how the program or function is administered. Include flowcharts, timelines, or other illustrations as necessary to describe agency policies and procedures.
3. Provide a summary of key performance measures and other outcomes that convey the effectiveness and efficiency of this function or program.
4. Describe any important history regarding this program, including how the services or functions have changed from the original intent. Describe problems or lawsuits that have been encountered in this program.
5. Describe who or what this program or function affects.
6. If the program or function works with local, regional, other state agencies, or federal agencies, include a brief description of these entities and their relationship to the ODOE program or function. Please identify the roles assigned to each agency.
7. Explain if, and why, each of the key functions is most appropriately placed within ODOE, and how duplication with other related agencies is avoided.

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<sup>3</sup> All committee meeting materials can be found on the Oregon Legislative Information System (OLIS): <https://olis.leg.state.or.us/liz/201511/Committees/JCDEO/Overview>

The agency was also asked to provide the following information about each program: (1) actual expenditures for the last three biennia, (2) number of actual FTE, (3) statutory authority, and (4) legislatively-directed purpose. While much of the information requested was woven throughout the agency presentation, a standard reporting format was used for each program. Each committee meeting began with an agency presentation, questions from the committee members, and an opportunity for public comment focused on the programs and topics of that particular meeting. Each meeting ended with a Committee discussion to identify issues that needed to be addressed and any information requests for follow-up by the agency or staff. All meeting agendas included an opportunity for the Committee to receive and discuss follow-up information from the preceding meeting.

Following the completion of the agency program review in July, the Committee solicited recommendations from stakeholders via an online survey. A link to the survey was posted on the legislative website and sent in a Gov Delivery email to everyone who subscribed to receive Committee meeting agendas. ODOE also announced the survey opportunity in their monthly newsletter. The survey asked respondents to identify a program area for each recommendation, describe the recommendation and explain why they were making it. Respondents were also asked how the outcome of the recommendation could be measured or evaluated and could choose whether or not to identify themselves.

In all, the Committee received more than 50 [recommendations](#)<sup>4</sup> in survey responses and emails. A majority of the recommendations focused on energy facility siting issues, but some were received in each program area. The Committee met twice to review and discuss the agency programs and the stakeholder recommendations. At the conclusion of these Committee discussions, the Co-Chairs prepared this draft report and set of recommendations for consideration by the full Committee.

## **COMMITTEE FINDINGS AND RECOMMENDATIONS**

### **Agency Mission and Governance**

*Finding 1: There is continuing need and role for the Oregon Department of Energy with oversight by a new independent Energy Board to ensure that Oregonians have an adequate and resilient supply of safe and affordable energy balanced with other policy goals.*

*Finding 2: The Oregon Legislature needs to set clear direction on state energy policy, program goals, and desired outcomes.*

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<sup>4</sup> OLIS link: <https://olis.leg.state.or.us/liz/2015I1/Committees/JCDEO/2016-09-21-12-00/MeetingMaterials>

Energy issues play a significant role in the lives of Oregonians and their importance will continue to grow. Oregon's energy consumers benefit from having an agency that takes a statewide view of these issues and policies. **The primary purpose of the Oregon Department of Energy is to ensure that Oregonians have an adequate, resilient supply of safe and affordable energy, while addressing climate change issues including mitigating greenhouse gas emissions.**

While energy efficiency, conservation and the growth of renewable sources will continue to be important elements of the state's energy future, the Legislature's energy policy statement (ORS 469.010) needs to be updated to recognize today's energy world. Some issues, such as climate policy, require better coordination at the state level. The role of natural gas and renewable generation in the state's energy picture is changing and is just one example of the need for a strategic state energy plan and an agency equipped to both develop and implement that plan. A renewed commitment to coordination with federal and regional energy agencies is also needed. The plan and related tasks require a clear set of legislatively-established performance metrics and adequate resources to collect and analyze the relevant data to know whether the state is on track to achieving Oregon's energy and policy goals.

At the same time, there is a clear need for better and politically independent Department oversight. While the responsibility for recent incentive program failures rests with the Department's implementation, both action and inaction by the Legislature and Governors were important contributors. The role of a new Energy Board to oversee ODOE would be to increase transparency and bring accountability to the agency as well as to provide a forum for public discussion of the competing interests in energy policy. To further increase accountability, the Department director position should require confirmation by the Senate.

The Global Warming Commission (GWC) should continue in its current role, with increased staffing and support from the Department and related state agencies. Ultimately, the Energy Board and the GWC would benefit from a state agency coordinating body, composed of key related agency directors, to address climate issues and programs across state agencies. Each agency with membership on the coordinating body should be given statutory direction on their specific roles and expected contributions to ensure state energy and climate goals are met.

### **Key Recommendations:**

- Update the Legislature's statutory energy policy (ORS 469.010) to address today's energy issues and to clarify and update the Department's role and responsibilities (ORS 469.030). Key Department roles include providing impartial technical analysis and advice to both the Legislature and the Governor on energy policy and to continually evaluate the success or failure of that policy and related programs.

- Establish a seven-member state Energy Board, appointed by the Governor and confirmed by the Senate, to oversee ODOE. The Board should oversee the operations and programs of the Department, including the preparation of a strategic energy plan consistent with legislative policy. All board members should have energy expertise and no current connection to any utility or energy supplier assessment payer; individual membership requirements should be:
  - A member who is an economist;
  - A member from the Higher Education System with expertise in energy and climate;
  - A member representing residential energy users;
  - A member representing industrial energy users;
  - A member representing commercial energy users;
  - A member representing the transportation sector; and
  - An Oregon member of the Northwest Power and Conservation Council.
- Require Senate confirmation of the ODOE Director.
- Create a new position at ODOE dedicated to following the State's interest in federal energy policies and issues, including coordination with Bonneville Power Administration, the Northwest Power and Conservation Council, and independent and consumer owned utility organizations.
- Create a new position at ODOE dedicated to liquid and natural gas policies and issues.
- Require the directors of the Departments of Energy, Environmental Quality, Transportation, Water Resources, the Public Utility Commission, Business Oregon and any other agencies determined to be appropriate to evaluate and make recommendations to the Global Warming Commission and the Energy Board on how best to coordinate state energy and climate programs and activities, consistent with statutory requirements and legislative policies. The Global Warming Commission should make recommendations as appropriate to the Energy Board, Governor and Legislature. State agencies should provide the resources, information and analysis necessary for the Global Warming Commission and Energy Board to accomplish their missions.

## **Nuclear Safety and Emergency Preparedness Division**

*Finding 3: ODOE's Nuclear Safety and Emergency Preparedness programs are widely supported and without controversy.*

The primary focus of the Nuclear Safety and Emergency Preparedness Division is on protecting Oregon's interest in the decommissioning of the Hanford Nuclear Site in Washington state, specifically protecting the Columbia River from radiation releases. The Department does this by providing technical review and comment, policy recommendations, public information, emergency planning, and providing support to the Hanford Board.

The division also monitors on-going work at the Trojan nuclear plant site; regulates radioactive waste transport in Oregon; and provides emergency responder training. The agency is also responsible for the emergency Oregon Fuel Action Plan which lays out how the state will respond to a catastrophic event causing a severe fuel shortage.

Finally, ODOE is the designated state lead on the emergency preparedness activities related to liquefied natural gas (LNG) projects and fuel supplies. In this role the Department represents Oregon's interests during the federal siting process, developing emergency response programs and providing oversight throughout the life of a LNG project.

### **Key Recommendations:**

- Maintain the Division as currently structured.
- Adopt a joint resolution to Congress reiterating Oregon's strong interest in the Hanford cleanup and requesting sufficient funding to continue and speed up this work, particularly with regard to the remediation of groundwater contamination.
- Recognize and address the need for emergency planning funding for local governments and tribes.
- Direct ODOE and the Department of Geology and Mineral Industries to complete the assessment of need for seismic upgrades at critical fuel infrastructure facilities and report to the Legislature. This report should include a list of priority upgrades and consider alternatives for requiring that these upgrades be completed.

### **Energy Facility Siting Division**

*Finding 4: The energy facility siting process is strongly supported by industry but is controversial with citizens who object to the siting of energy facilities.*

The Energy Facility Siting Division supports the Energy Facility Siting Council (EFSC), a seven-member board of volunteers appointed by the Governor, confirmed by the Senate, who make decisions on siting applications for most large-scale energy generating facilities and infrastructure in Oregon. The type and size of regulated facilities is set in state law (ORS 469.300 (11)). Division activities include:

- Administering a consolidated state agency permitting process (essentially "one-stop" permitting);
- Ensuring continuing compliance with issued site certificate requirements; and
- Federal energy project coordination.

Nearly 80 percent of the division's budget is supported by application fees and annual assessments for the facility compliance program; the remaining budget is covered by the energy supplier assessment and federal funds.

The siting application process is a “standards-based” review. EFSC standards are listed in state law (ORS 469.490) and address 14 areas, including protected areas, land use, public services and scenic resources. In 1997, Oregon was the first state in the nation to adopt a carbon dioxide standard for energy facilities (ORS 469.503). Specific standards have also been adopted for wind energy facilities, surface facilities related to underground natural gas reservoirs and transmission lines. State law specifically precludes EFSC from considering “need” for a generating facility (ORS 469.310). EFSC is limited to reviewing what is proposed by an applicant; an alternatives analysis is not part of the process.

Although the siting process offers a number of opportunities for public input, there is still a high level of citizen frustration. Because it is a standards-based process without a “need” standard or alternative analysis requirement, if the standards are met, a site certificate must be issued. This is frustrating to those citizens who object to a project on principle or for reasons that are not addressed by a standard. These citizens feel that their participation in the contested case portion of the siting process is not meaningful and end up feeling shut out. Recently there have been times when large wind energy projects appear to have been separated into smaller segments to avoid siting requirements.

### **Key Recommendations:**

- The Legislature and Governor should convene a task force of diverse stakeholders to evaluate and report back to the Legislature on the following siting issues:
  - If there are opportunities for improvements in public participation in the siting process to make the process more transparent and understandable for non-industry participants;
  - If there are needed improvements to the contested case process;
  - Whether ODOE should use the Office of Administrative Hearings’ administrative law judges as hearings officers;
  - Whether the current state jurisdictional thresholds are appropriate; and
  - If existing siting standards are adequate; the work group should address whether a state and regional need standard is desirable and if cumulative impact analyses or alternatives analyses should be required.

Resources should be provided to hire a professional facilitator for this task force.

- Revise the definition of “single energy facility” to make clear when multiple smaller energy facilities are or are not a single facility.
- Change the current cost recovery formula applied to site certificate holders to pay more of siting division costs. This will result in less revenue from the energy supplier assessment going to this division.

## Planning and Innovation Division

*Finding 5: The state of Oregon needs a comprehensive, strategic energy plan.*

*Finding 6: The Governor and Legislature can benefit from expert energy analysis, advice and recommendations from an independent entity.*

The Energy Planning and Innovation Division supports a myriad of programs addressing energy policy, energy efficiency and conservation, and technology adaptation. The division budget relies primarily on the energy supplier assessment, with the remaining budget supported by federal funds and fees and awards. The division programs fall into five categories of work:

- Assisting the Governor and Legislature with energy planning and policy option development;
- Serving as an energy information collector, analyzer and resource;
- Helping state and local government lead in energy use by example;
- Promoting emerging technologies and resources; and
- Providing energy-related technical assistance.

The division is responsible for producing the biennial state energy plan required under ORS 469.060. In recent years, the plan has become a report on the state of Oregon's energy supply and consumption patterns, energy costs and a recitation of energy issues and trends. As such, it is not viewed as a useful document by stakeholders. What is needed is a state strategic energy and climate plan with clearly defined goals, tactical action items and agreed upon metrics for measuring progress toward goal achievement. The agency began to move in this direction with the development of the 2015-2019 Strategic Framework. Further development of this strategy into an actionable plan with performance metrics would serve the state.

### **Key Recommendations:**

- Direct the new Energy Board to evaluate the many Planning and Innovation Division programs to ensure their contribution toward and consistency with the updated agency mission and state energy goals. Direct the Energy Board to report to Legislature by July 1, 2018 with recommendations to change, consolidate or end programs as appropriate.
- Update ORS 469.060 to direct ODOE to prepare a proposed strategic energy plan to achieve the state's goals with specific action items or tactics and performance measures. Require review of the plan by the Energy Board with subsequent consideration by the Legislature.
- Direct the Governor to convene a team of agency directors and diverse stakeholders to develop a routine process and set of metrics to evaluate the state's progress toward achieving its energy and climate goals.

- Direct ODOE to convene a diverse stakeholder group to recommend policies and programs to meet Oregon’s energy goals, including developing a comprehensive strategy and making recommendations to the Legislature.

## **Energy Development Services**

*Finding 7: Energy incentive programs can be an important tool to advance the state’s goals in energy supply, conservation and efficiency. Any new or continuing incentive programs should be mission-driven, based on verifiable outcome metrics, and supported by a strong, effective compliance and risk-management program.*

The Energy Development Services Division administers the agency’s loan programs and residential and commercial incentives programs. The division budget is primarily funded by fees and awards; the remaining funds are energy supplier assessments and federal dollars. The incentive programs are intended to promote energy savings across all sectors as well as development of renewable energy projects to reach the state’s renewable portfolio standard.

There have been serious problems in both the tax credit and loan programs administered by ODOE over the past decade. As stated earlier, the responsibility for these problems lies with the agency, as well as the Legislature and Governors. As the BETC program audit<sup>5</sup> details, these problems included:

- insufficient staff and resources,
- multiple and shifting program objectives,
- ineffective and inconsistent application reviews,
- inadequate compliance program and statutory recourse authority over improper incentive claims,
- and a lack of metrics and related data to gauge program performance.

The audit found that ODOE:

- did not have staff or assistance to create a risk management program,
- was under political and high-aiming energy policy pressures, and
- had statutory limitations, not favoring the agency’s ability to deny tax credits.

Though the audit found no direct evidence of fraud, statistical and direct examination of records identified 79 projects where there was circumstantial evidence sufficient to warrant referral to the Oregon Department of Justice for further review.

Market trends suggest that some wind and solar generation may be approaching market rates. The Legislature should carefully consider whether new incentive programs are necessary to

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<sup>5</sup> “Report of Findings, Business Energy Tax Credit Program Investigative Examination, September 2, 2016. Prepared by Marsh Minick P.C.

achieve the state's energy goals and, if so, apply the lessons learned from past mistakes in crafting any new program.

### **Key Recommendations:**

- To the extent practicable, ODOE and the Department of Justice should enforce any existing performance agreements on outstanding BETC credits and claw back or discontinue any nonperforming credits.
- Allow the Energy Incentive Program and the Biomass Producer and Collector Tax Credit Programs (not including the Animal Manure/Rendering Offal tax credit) to sunset as currently scheduled on January 1, 2018.
- Transfer the Animal Manure/Rendering Offal tax credit program to the Oregon Department of Agriculture (ODA) until it sunsets on December 31, 2021. Establish a monetary cap on this tax credit.
- Continue the Residential Energy Tax Credit (RETC) program for two years or until a replacement program is adopted. Direct ODOE to study and report to the Legislature on or before December 31, 2017 with recommendations on the need for new incentive programs for residential energy users including the elements needed to ensure that incentives are correctly targeted over time to promote renewable energy, energy efficiency or resiliency. This study should include a comparative review of incentives offered through RETC and those offered by the Energy Trust of Oregon programs.
- During the 2017 session, legislative policy committees should consider what new incentives, if any, are necessary to achieve the state's energy and climate goals. If new incentives programs are desirable, they should have clearly stated objectives, outcome-based metrics, and provide caps on budget demands. The recommendations listed in the BETC audit should be carefully reviewed and incorporated into any proposed new incentive program.<sup>6</sup>
- Repeal the Energy Efficiency and Sustainable Technology Loan Program.
- Provide resources to ODOE to track the results of spending on incentive programs. Require all incentive programs to track and report the amount of energy produced or conserved, the capacity installed, and the cost of the incentive and the installed cost and the amount of greenhouse gas emissions reductions for all projects participating in the program.
- Return the Small Energy Loan Program (SELP) to its original mission and establish a cap on loan size.
- Transfer SELP to the Oregon Business Development Department with a continued ODOE role in project qualification.

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<sup>6</sup> "Report of Findings, Business Energy Tax Credit Program Investigative Examination, September 2, 2016. Prepared by Marsh Minick P.C.

- Direct OBDD to work with the State Treasurer's Office to review past loan defaults and strengthen loan underwriting and other program requirements where needed.
  - Remove statutory authority for Governor to override ODOE decisions on loan applications.
  - Address the SELP shortfall by:
    - Repealing the Alternative Vehicle Fuel Revolving Loan Program and transferring remaining funds (approximately \$3 million) to SELP.
    - Restarting the loan program to help generate a repayment revenue stream to help fund the shortfall if supported by OBDD/Treasurer Office review.
    - Determine and fund the revenue shortfall to avoid defaulting on bonded debt (this may not necessitate complete capitalization in the 2017-19 biennium).
  - Transfer the State Home Weatherization Program to Oregon Housing and Community Services.
  - Enact needed statutory changes to address the existing EIP tax credit transfer problems currently facing local governments. Three options have been suggested:
    - Option 1: change the date that the rate is set from the pre-certification date to the date of the final certification or the date of sale.
    - Option 2: eliminate the need for tax exempt entity that owns an energy tax credit to sell (transfer) a tax credit, and instead have the state buy back the tax credit directly.
    - Option 3: Do nothing.
- Option 2 is recommended as the least costly and fairest approach.

## **Central Services and Director's Office**

*Finding 8: The purpose of the state energy supplier assessment (ESA) is to fund statewide energy planning, advocacy and programs that benefit the energy consumers of the state of Oregon.*

*Finding 9: Accurate and reliable data is critical to energy and climate policy development, program implementation and measuring outcomes.*

The primary source of revenue for the Oregon Department of Energy programs is the energy supplier assessment (ESA). The ESA is paid by energy resource suppliers, a term which is defined in ORS 469.421 to mean an electric utility, natural gas utility or petroleum supplier. This statute also describes the method of calculating ESA payments: the ESA is not a rate, but an assessment of agency expenses that is based on payer revenue. The result can be highly variable year-to-year and difficult for payers to estimate. Further, the agency budget is prepared prior to supplier revenues being reported. The technical difficulties of the ESA, combined with an incorrect assumption that the ESA payments provide no value or benefit to energy suppliers and

energy consumers in Oregon by supporting energy planning and programs, has led to considerable controversy.

**Key Recommendations:**

- Clarify in statute that the ESA is an assessment on revenue derived from energy suppliers in Oregon and is used to pay for energy programs that benefit the state's energy consumers.
- Ensure all energy suppliers pay ESA as required.
- Direct ODOE to convene a work group to address technical concerns over the ESA, including the timing of payments and the formula and revenue base that is used to determine the assessments, and recommend changes to the Legislature.
- Raise the floor for ESA payments from \$250 to a higher minimum.
- The Legislative Joint Information Management and Technology Committee should review the priority recommendations of the completed comprehensive third-party review of the agency's data systems and make recommendation to enable the agency to be the central repository and clearinghouse for energy data.
- Provide clear statutory authority to ODOE to implement the priority recommendations of the completed comprehensive third-party review of the agency's data systems.
- Ensure all energy suppliers provide data requested by ODOE pursuant to ORS 469.080.