

Report to the 77th Legislature on Study Results and Recommendations from HB 2105



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ENERGY



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Report on HB 2105

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PURPOSE

The 2013 Legislature enacted HB 2105, directing the Oregon Department of Energy to review its energy facility siting procedures and make recommendations to the legislature on the following seven issues:

- a) Means to encourage consistency between the standards for the siting of facilities of the federal government and local governments with those specified in ORS 469.300 to 469.563.
- b) A mechanism to enhance the participation of local governments during the facility siting process when the standards for the siting of facilities of local governments are consistent with those specified in ORS 469.300 to 469.563.
- c) Means to encourage public participation in the design and siting of facilities.
- d) The definition of “energy facility” specified in ORS 469.300 and recommendations to clarify the definition for purposes of determining which public body, as defined in ORS 174.109, has authority relating to the siting of facilities.
- e) Means to ensure constructive and effective participation by local governments, state agencies and federally recognized Indian tribes in the siting of facilities.
- f) Means to ensure the efficient and cost-effective recovery of fees expended in the review of Site Certificates Applications.
- g) Any other matters deemed relevant by the department.

HB 2105 requires the department to “submit a report with the results of the study, and include recommendations for legislation to the interim committees of the Legislative Assembly related to environment and natural resources on or before November 1, 2013.” This report fulfills that directive.

The Energy Facility Siting Council has jurisdiction over:

- Large electric power plants (wind, solar, natural gas, biomass).
- Transmission lines of 230 kilovolts or more that are more than 10 miles in length and that are to be constructed in more than one city or county in the state.
- Surface facilities associated with underground natural gas storage facilities with capacity greater than 50 million cubic feet per day.
- Liquid fuel pipelines that are 6 inches or larger in diameter and 5 miles or more in length.
- Liquefied natural gas storage facilities with capacity of 70,000 gallons or more.
- Intrastate natural gas pipelines that are 16 inches or more in diameter and 5 miles or more in length.
- Plants that convert biomass to gas, liquid or solid fuel products if any one of such products is capable of being burned to produce the equivalent of 6 billion Btu of heat per day.

EXECUTIVE SUMMARY

This report reviews Oregon energy facility siting procedures and makes preliminary recommendations to the legislature on the seven issues raised in HB 2105. Additionally, this report summarizes the administrative process improvements the department already is working on or has identified, and describes current rulemaking activities. In drafting this report department staff solicited input from 30 individual stakeholders representing various groups who participate in the Oregon energy facility siting process.

This report is not intended to lay out a long-term vision for energy facility siting in the state. Once the department completes the efforts outlined in this report, the department will work with stakeholders on long-term planning to position itself to be as responsive as possible to changes in energy markets and the demands for new energy generation and transmission facilities.

HB 2105 Study Results Overview

a) Encouraging Consistency with Other Governments

Federal Government: The state and the federal energy facility siting processes are fundamentally different. The state process is standards-based, where proposed facilities are evaluated against an established set of standards, such as land use, scenic resources and wildlife habitat. The federal process is impacts based, where the federal agency evaluates how to avoid or mitigate a proposal's environmental impacts, which can include requiring an entirely new location for the proposed facility. The state's energy facility siting statutes recognize the importance of state-federal collaboration. Several opportunities for improvement, which are further described in this report, are underway to ensure these different processes can be collaborative and operate in a manner that minimizes duplication of effort.

Local Government: Consistency between state and local standards is, to a large degree, built into the existing statutory structure. New energy facilities with a large physical footprint, or a long linear distance, are most likely to be sited in farm use zones where local land use regulations are largely determined by statute or in forest zones where local land use regulations are largely determined by the Department of Land Conservation and Development administrative rules. Even greater consistency between state and local standards can be achieved through better defining the jurisdictional thresholds of the different types of energy facilities as described in section d below.

b) Enhancing Local Government Participation

By law, local government Special Advisory Groups (SAGs) are required to participate in the site certificate review process, and the participation parameters are outlined in the existing statutory structure. In addition, all local jurisdictions (as well as state agencies) can be reimbursed for all expenses incurred during their review of some components of the Energy Facility Siting Council (EFSC) review process.

Within the existing statutory requirements, the department has initiated efforts to improve local jurisdictions' understanding of the state energy facility siting process and to ensure SAGs are aware of their opportunities and obligations for local participation in the process. Additionally, the department meets regularly with local governments through the Association of Oregon Counties, League of Oregon Cities and other forums to discuss these opportunities.

c) Encouraging Public Participation

As part of its process improvement initiative, the department has focused on increasing public understanding, enhancing transparency, and improving the effectiveness of the public's participation in the EFSC process. These continuing efforts have already resulted in better and timelier access to project information, easier-to-read project notices and more opportunities to follow and participate in EFSC meetings.

d) Energy Facility Definition

The Governor's 10-Year Energy Action Plan calls for evaluating the jurisdictional thresholds for renewable energy facilities that are located in the statutory "Energy Facility" definition and for creating a definition for a "Single Energy Facility." An inclusive stakeholder involvement process, with representatives from the legislature, other state agencies, federal agencies, counties, cities, utilities, tribal governments, independent power producers, natural resource interest groups and the public will be established for each facility type threshold (i.e. wind and geothermal) and the creation of the "Single Energy Facility" definition. The results of these collaborative efforts will result in legislative recommendations.

e) Ensuring Government Participation

Oregon law includes mechanisms for local, state, federal and tribal governments to participate in the state energy facility siting process. The department has been working to ensure that all levels of government are fully informed of each Site Certificate Application and encouraged to participate in the siting process. Process improvement efforts to date have facilitated improved communication and, consequently, the coordination and effectiveness of agency participation at all levels. However, statute limits the project components for which state and local government may request reimbursement for participation, and the statutory authorization for tribal reimbursement is not clear. In addition, while the law clearly anticipates that the state energy facility siting process is intended to be a consolidated process, ambiguity remains regarding the extent of EFSC's jurisdictional authority over some state and local permits.

f) Ensuring Cost Recovery

The current statutory structure clearly establishes the expectation that the department will recover all costs incurred in the review of Site Certificate Applications, and establishes requirements for the collection of estimated fees based on the application phase. Depending on the project phase, either the entire estimate or an estimate deposit is required before staff begins work. Delays in invoices from other state and local agencies, as well as internal billing lags, create the potential that expenses will exceed the entire estimate or deposit before either the department or the applicant are aware that expenses have exceeded payment. The

department is then put at risk to pay for additional expenses without funds available to cover those expenses. Applicants are placed in a difficult position if they learn that they will need to submit an additional deposit once their initial deposit is already completely used, putting them at risk for defaulting on their fee obligations to the department.

The department is working to resolve this issue through encouraging more timely receipt of invoices from reviewing agencies, more efficient billing, and changes to procedures for estimating expenses and collecting fees or deposits. This reduces, but does not eliminate, the possibility for default. The department is also reviewing other financial mechanisms and procedures to ensure payment of all expenses in processing Site Certificate Applications.

g) Other Matters

Department staff has identified additional opportunities to increase the efficiency, effectiveness, transparency, accountability and predictability of the site certificate process. Fundamental to improving and enhancing understanding and participation in the EFSC process is staff's continuing effort to ensure EFSC's substantive standards are properly applied. Recent application and amendment requests have highlighted issues regarding how and when Council standards apply to amendment requests, and how the Council applies its land use standard. Legislative clarification of these statutory requirements could help streamline and clarify the EFSC review process.

INTRODUCTION AND BACKGROUND

The Oregon Legislature established the Energy Facility Siting Council (EFSC) to ensure that large energy facilities are located, built, operated and retired in ways that protect the environment and public health and safety. The Council must approve and issue a Site Certificate before any energy facility under state jurisdiction can be developed. The facility must meet all the Council's applicable siting standards such as land use, scenic resources and wildlife habitat. The Site Certificate binds state agencies and local jurisdictions to the Council's action and requires them to issue permits, licenses, and certificates for construction and operation of the facility. The Council monitors the construction, operation and retirement of all approved facilities.

EFSC has seven members, appointed by the Governor and confirmed by the Oregon Senate. Members may not be employed by a company that has an energy facility or proposed energy facility under the Council's jurisdiction, nor can they have ever worked for a company that owns or has owned a large energy facility.

Oregon Department of Energy Siting Division employees serve as staff to the Council. Department staff members evaluate and analyze all issues involved with Site Certificate Applications, including the proposed design, construction, operation and retirement of energy facilities for consistency with the Council's siting standards. Department staff directs and coordinates the work of an interdisciplinary team of agency staff, other state agencies, attorneys, and contractors in reviewing Site Certificate Applications and amendment requests for accuracy, completeness, and consistency with agency and state policies and EFSC standards. Based on their analyses, staff makes recommendations to the Council, but the Council is responsible for all rulemaking and site certificate decisions.

Department staff is also responsible for negotiating a project performance schedule with the applicant and participating agencies, and for managing the preparation of Project Orders, completeness determinations, Draft Proposed Orders and Proposed Orders in accordance with the requirements of ORS 469.300 et seq. Finally, siting staff analyze and propose rules and policy for projects that require development of technical and administrative analysis. They independently analyze emerging issues and propose laws and administrative rules related to the energy facility siting process.

HB 2105 STUDY RESULTS

In late 2012, in response to the Governor’s Regulatory Streamlining and Simplification Project, the department engaged an outside consultant to analyze and streamline the process for site certificate applicants, making it more timely, consistent, inclusive, transparent and predictable. This included in-depth interviews with numerous stakeholders and an intensive staff evaluation of the entire state energy facility siting process. The department has made significant administrative efforts to identify and pursue process efficiencies that will enhance relationships with the various groups who participate in the EFSC process. To the extent these efficiencies relate to the legislature’s directive in HB 2105, they are also addressed in this report.

a) Encouraging Consistency With Other Governments

Means to encourage consistency between the standards for the siting of facilities of the federal government and local governments with those specified in ORS 469.300 to 469.563.

Issues

The definition of “Energy Facility” in ORS 469.300(11) determines which proposed facilities must be reviewed by EFSC. Those below the thresholds listed in the definition are subject to review by local governments. Proposed facilities at or above the thresholds in this definition and located on federal land must be reviewed by both EFSC and the federal government.

Consistency With Federal Siting Standards: The Oregon EFSC review process is fundamentally different from the National Environmental Policy Act (NEPA) review process. Oregon’s process is “standards” based, where EFSC reviews only what the applicant proposes in its application, and the Site Certificate must be issued if the proposed facility meets all applicable standards. In contrast, the NEPA process is “impacts” based and requires the lead federal agency to evaluate the environmental impacts of a proposal and find ways to avoid or mitigate those impacts, which can include requiring entirely new locations for the proposed facility.

Despite this fundamental difference, the Oregon Legislature anticipated the need for process coordination with federal government partners conducting a simultaneous review of proposed development to reduce the burden on the applicant and to ensure the Oregon energy facility siting process is as efficient and expeditious as possible. ORS 469.370(13) requires:

“For a facility that is subject to and has been or will be reviewed by a federal agency under the National Environmental Policy Act, 42 U.S.C. Section 4321, et seq., the council shall conduct its site certificate review, to the maximum extent feasible, in a manner that is consistent with and does not duplicate the federal agency review.”

(a) Elimination of duplicative application, study and reporting requirements;

(b) Council use of information generated and documents prepared for the federal agency review;

- (c) Development with the federal agency and reliance on a joint record to address applicable council standards;*
- (d) Whenever feasible, joint hearings and issuance of a site certificate decision in a time frame consistent with the federal agency review; and*
- (e) To the extent consistent with applicable state standards, establishment of conditions in any site certificate that are consistent with the conditions established by the federal agency.*

Consistency Between EFSC and Local Government Standards: EFSC has authority over large energy facilities, whereas local governments retain jurisdiction over smaller facilities. Many energy facilities are located in farm and forest zones. Because of the statutory or rule mandates in these zones, there already is a great deal of consistency between the EFSC and local standards regarding how and where facilities may be located. Outside of these farm and forest zone statute and rule mandates, some local jurisdictions duplicate EFSC standards, and others provide additional locally specific standards, some of which may conflict with EFSC standards.

For its jurisdictional facilities, EFSC has a statutory obligation to appoint as a Special Advisory Group (SAG) the governing body of each local government in whose jurisdiction a facility is proposed to be located. The department requests each SAG to provide to department staff all land use criteria that the local government would apply if it were reviewing the proposed facility. Those criteria are incorporated into the EFSC review process.

Current Efforts and Opportunities

Consistency With Federal Siting Standards: The department has had recent experience reviewing two high-voltage transmission line projects undergoing a simultaneous federal NEPA review. Based on this experience and given the fundamental difference between the state and federal review processes, the greatest opportunity to create regulatory efficiencies is through better integrating these very different processes. Department staff is participating in the following efforts to achieve this integration.

- **Western Governors Association Transmission Siting Taskforce:** The members of this taskforce include state, federal, industry and natural resource interest group representatives. The taskforce goals include 1) identifying and promoting best practices; 2) creating an online clearinghouse of sample/template documents; 3) working with the US Department of Energy's National Renewable Energy Laboratory to create an open and editable website to include each state's energy facility siting process; and 4) developing a pre-application toolkit. Department staff will incorporate all applicable administrative elements and include all useful tools to potential applicants in the pre-application packet that is being created.
- **White House Council for Environmental Quality Interagency Rapid Response Team for Transmission (RRTT):** The RRTT consists of the federal Department of Agriculture, the Department of Commerce, the Department of Defense, the Department of Energy, the

Department of Interior, the Environmental Protection Agency, the Federal Energy Regulatory Commission, the Advisory Council on Historic Preservation, and the White House Council on Environmental Quality. Its purpose is to improve the overall quality and timeliness of electrical transmission infrastructure permitting.

In April 2013 department staff participated in an RRTT stakeholder workshop focused on ways to create an integrated pre-application process to identify and address issues before the formal permit application process begins; and to streamline the coordination of permitting processes across federal, state, and tribal governments. This workshop included representatives of all of the above listed federal agencies as well as representatives of states, tribes, and non-governmental organizations. The outcome was a Presidential Memorandum signed in June 2013 directing federal agencies to create and utilize a consistent, integrated pre-application process for all federal projects.

- Pacific Northwest Regional Infrastructure Team (PNWRIT): Another product of the RRTT is a Declaration of Cooperation signed in 2013 by Interior Secretary Jewell, Oregon Governor Kitzhaber, Washington Governor Inslee and Idaho Governor Otter. The purpose of this Declaration is to expedite the federal review and permitting of energy generation, power transmission and other infrastructure development in the three states. Department staff participates in monthly meetings designed to identify and remove barriers to the siting of these facilities as they arise. One identified priority project is the Boardman to Hemingway transmission line, which is currently being reviewed through both the federal NEPA process and the Oregon EFSC process.
- Cascade Crossing Transmission Line Case Study: Staff is participating in a case study of the Cascade Crossing transmission line application process to capture valuable tools, experiences and lessons learned. Before Portland General Electric withdrew its Site Certificate Application, this process was widely viewed as being collaborative, well coordinated and a good model for other multi-jurisdictional linear facility applications. Federal, state and applicant representatives as well as others who worked on the application will provide their findings and recommendations on how the state and federal review processes can be better integrated.

As department staff has worked on the two high voltage transmission lines, it has become evident that some of the current processes and standards are not conducive to reviewing and siting long linear facilities. This has required a lot of flexibility to ensure the project review continues to progress. An opportunity therefore exists to evaluate these regulatory obstacles and make appropriate changes.

Federal energy generation projects (with the exception of hydropower) or infrastructure projects that have triggered analysis under the National Environmental Policy Act are actively monitored. Department staff takes the lead in overseeing Oregon's interests in the siting of these federal projects and coordinates all state agency participation.

Consistency With Local Government Siting Standards: EFSC standards are already consistent with some local government standards because of the statutory or rule mandates in farm and forest zones. To better coordinate efforts and create more consistency between state and local governments, department staff track and participate in proposed rulemaking and legislative efforts that could impact standards at both the state and local levels. Recent examples include:

- Department of Land Conservation and Development Rulemaking: Changes to rules in the Exclusive Farm Use zone related to the siting of wind (Dec. 2008) and solar (Oct. 2011 and April 2012) facilities.
- 2013 Legislative Session: House Bill 2203 requires the owner of a transmission line sited either at the local or state level to provide updated emergency contact information to the applicable Public Utility Commission. HB 2704 creates a two-tiered approval process with corresponding standards for all transmission lines.

As described in Section d below, one area in which greater consistency can be achieved is through better defining the jurisdictional thresholds of different types of energy facilities. Department staff worked with numerous stakeholders to update jurisdictional thresholds for solar facilities, which the 2013 Legislature approved in HB 2820. Department staff will continue to work with stakeholders to evaluate jurisdictional thresholds for other types of facilities.

Department staff will continue to track rulemaking and legislative efforts that have direct or indirect impacts on the standards and process of EFSC.

b) Enhancing Local Government Participation

A mechanism to enhance the participation of local governments during the facility siting process when the standards for the siting of facilities of local governments are consistent with those specified in ORS 469.300 to 469.563.

Issues

ORS 469.480 requires EFSC to appoint the governing body of each local government as a Special Advisory Group (SAG) for any proposed energy facility located within the local government's geographic boundaries. For proposed facilities that choose to obtain land use approval through EFSC, ORS 469.504 requires those SAGs to participate in the site certificate review process by providing a listing of all applicable substantive criteria from the local government's comprehensive plan. The Special Advisory Group also

supplies land use regulations that are required by statewide planning goals along with its recommendations, comments and interpretations of those criteria in the form of a resolution adopted by the local governing body, if it so chooses. SAGs are not statutorily required to provide non-land use criteria, though in practice SAGs generally provide all local criteria, including those not directly land-use related. ORS 469.504 also provides EFSC direction to

establish the applicable local land use criteria when either the SAG does not respond or when a proposed facility extends through multiple jurisdictions. Department staff and EFSC also rely on SAGs to provide comments on whether an application establishes compliance with the local criteria and recommended conditions to ensure compliance.

ORS 469.504 does not, however, require applicants to obtain land use approval from EFSC. The applicants may seek local land use approval, which then becomes the basis for EFSC's determination that the proposed facility complies with the statewide planning goals. If the local land use decision is made after the applicant has submitted its Notice of Intent to file an application, the land use decision is subject to judicial review under the EFSC process, though the statute does not clearly establish how that judicial review coordinates with the judicial review of the Council's Final Order.

Current Efforts and Opportunities

Department staff and EFSC rely on the SAGs to provide input not only for the proposed facility itself, but also for all related or supporting facilities that the applicant requests through its application. However, the definition of "related or supporting facilities" in ORS 469.300(24) creates some uncertainty as to what facilities are appropriately included as related or supporting. The statute currently defines "related or supporting facilities" as structures "proposed by the applicant" for the proposed facility and structures to be constructed or substantially modified as part of the facility development. The ambiguities in this definition have created confusion and delays in evaluation of Site Certificate Applications, as local governments, applicants and department staff work to determine what infrastructure is considered "structures" that are "related" and that will be "constructed or substantially modified" as part of the development. In addition, although the statute requires review of only those related or supporting facilities "proposed by the applicant," the statute does not establish whether the application must include related or supporting facilities that are necessary for facility operation. A related issue is whether an applicant should be required to include, as part of a proposed facility, a means to connect the energy generated to the grid.

Similarly, the statutory structure creates some uncertainty as to which local permits and other approvals are appropriately under EFSC jurisdiction. As discussed further in section e below, although ORS 469.401(4) lists some "matters" that are not included in a Site Certificate, including building code compliance and other issues unrelated to siting the facility, the scope of those issues is not clearly established.

To integrate the EFSC process into the existing land use process under ORS 197.180, which requires local governments to issue land use compatibility statements when a state agency makes certain permitting decisions, ORS 469.378 modifies the local governments' obligation by allowing the Council or the local government to rely on conditions in the Site Certificate. However, ORS 469.378 creates confusion for both state agencies and local governments as they attempt to ensure compliance with both the EFSC and land use processes.

Despite these ambiguities, the department has initiated several administrative efforts to enhance local government participation. One such effort has been to conduct individual and group trainings for local government planners and decision makers to increase their awareness of their opportunities and obligations to participate in the state energy facility siting process. Another is to provide written notification to the SAG of the appointment process by EFSC with an explanation of their role and an offer by department staff to conduct training to provide for more effective participation. Additionally, the department meets regularly with local governments through the Association of Oregon Counties, League of Oregon Cities and other forums to explain these obligations and opportunities.

c) Encouraging Public Participation

Means to encourage public participation in the design and siting of facilities.

Issues

The state energy facility siting process includes multiple opportunities for public participation. The following list generally describes the stages during which public participation is encouraged.

Notice of Intent: This Notice is the applicant's first step in the state energy facility siting process and provides general information about the proposed energy facility and its potential impacts. The department issues a public notice of the Notice of Intent to surrounding property owners and EFSC's general mailing list. The notice encourages comments to help the applicant and department staff gain a broader understanding of any concerns related to the design and siting of the facility. Department staff encourages applicants to engage in additional public outreach through informal information meetings.

Complete Application: This document addresses the Council's application requirements and includes a detailed description of the proposed facility and the anticipated impacts on the site and surrounding area. The department issues a public notice of the Complete Application to surrounding property owners, EFSC's general mailing list, and individuals who have requested notification. The notice indicates where the Complete Application is available (digitally and physically) and provides notice of a public information meeting (or meetings) on the Complete Application. At these meetings, held at locations in close proximity to the proposed facility, department staff provides details regarding the EFSC review process and the public's opportunity to participate in that process. The applicant provides details regarding the Site Certificate Application.

Draft Proposed Order: This document includes the department staff's evaluation of the application and its recommended findings, conclusions and recommended Site Certificate conditions for all Council siting standards for construction, operation and retirement of the facility. The department issues a public notice of the Draft Proposed Order and public hearing to surrounding property owners, EFSC's general mailing list, and individuals who have

requested notification. The notice also indicates where the Draft Proposed Order is available (digitally and physically) and offers details on providing public comments.

Draft Proposed Order Hearing: This is the public hearing for the proposed facility, which is conducted in the vicinity of the site of the proposed facility. The public may submit written comments after the notice of the Draft Proposed Order and before the end of the comment deadline or provide oral testimony at the hearing.

Contested Case Proceeding: This is a mandatory part of all Site Certificate Applications. The Council appoints an independent hearing officer to conduct the proceeding. Aside from the applicant and the department, persons eligible to participate in the contested case proceeding must request party status from the hearing officer. Notice of the contested case is sent only to those who participated in person or in writing prior to the close of the Draft Proposed Order hearing record. If there are no parties to the contested case it is a perfunctory exercise that concludes within a couple of weeks.

Current Efforts and Opportunities

Although it includes multiple opportunities for public participation, the state energy facility siting process is lengthy and complex. By drawing on the department's communication and outreach expertise, the department is working to both encourage public participation and to help the public better understand the process to increase the effectiveness of their participation. As part of process improvement efforts, department staff has updated procedures and communications (including both website and hardcopy). For example, historically staff conducted public information meetings when a Notice of Intent was submitted. However, because of the conceptual and uncertain nature of a potential project at that stage, this meeting tended to create more confusion than clarity regarding the potential project and the review process. While still encouraging the applicant to conduct its own public outreach efforts, the department no longer intends to conduct formal information meetings at this early, uncertain and conceptual stage in the state energy facility siting process.

Conversely, in the past staff typically did not conduct an information meeting after the Complete Application is submitted. Consequently, the department is now conducting public information meetings at this state in the state energy facility siting process. A meeting at this point in the process has greater value to the public because detailed information about the proposed facility is available. This meeting provides the applicant an opportunity to explain its proposal, and department staff can provide details regarding the EFSC process and prepare the public to more meaningfully participate in the Draft Proposed Order hearing.

Staff is also working to encourage public participation through the Draft Proposed Order hearing process. State law allows for the Draft Proposed Order hearing to be conducted either by EFSC or a hearing officer appointed by EFSC. In the past, a hearing officer conducted the hearing. While the hearing officer provided an official report to the Council on issues raised during the hearing, and thus Council members were fully informed of all issues raised, the

public did not have an opportunity to directly present their issues and concerns to EFSC. Department staff is pursuing means to engage the Council more directly and Draft Proposed Order hearings are currently being conducted jointly before the Council and a hearing officer.

Stakeholders have requested an evaluation of the notification requirements in administrative rule with the intent of increasing the number of people notified. The current requirement is notification to all property owners within the site boundary and specified distances from the site boundary based on the underlying zoning. Oregon's state land use system requires similar notification distances based on the underlying zoning. However, that notification distance starts from the property boundary on which the project is located. In most instances this results in greater notification areas and more property owners being made aware of the project. Department staff agrees that notification requirements in administrative rule should be evaluated to determine if they are adequate or if they should be amended.

Additional staff efforts to encourage effective public participation include:

Website: Department staff is converting all project pages to a format that includes a full outline of the EFSC process, including a summary description of each phase and updated documents, notice and relevant dates. This allows the public to see the full process laid out and to access all documentation as the siting review progresses. The department is also working to obtain and create boundary files for all proposed and approved facilities. These files will be used to create a web-based map that will depict the locations of these facilities with links to the project pages, allowing a more comprehensive evaluation of proposed energy facilities.

EFSC Meetings: Meetings are scheduled around the state based on proximity to facility-related items on each agenda. To make the meetings more accessible, every meeting includes a very clear call-in feature and, subject to internet capabilities, a webinar to track presentations and a streaming video feed of EFSC members and each presenter. The department has received positive feedback from applicants and the public on these improvements.

GovDelivery: This email subscription service allows individuals to sign up for emails of any combination of EFSC meeting notices, general EFSC announcements, rulemaking notices and any or all project specific notices. Subscribers themselves manage what they receive, significantly reducing the cost and resources associated with paper notices.

Property Owner Mailing Lists: The mailing list for every notice EFSC or department staff issues to property owners within a specified distance from the project must be based on the most recent property tax assessment roll. To ensure the notices meet all procedural requirements, department staff now requires the following documentation:

- (1) The list in its original format as it was taken from the County Assessor records;
- (2) The date the list was pulled from the County Assessor records. It should be no older than 60 days prior to the date of mailing;
- (3) Map(s) that show the project boundary and all properties that are required by rule to receive notification with information that corresponds to the submitted list; and

(4) Verification of mailing.

d) Energy Facility Definition

The definition of “energy facility” specified in ORS 469.300 and recommendations to clarify the definition for purposes of determining which public body, as defined in ORS 174.109, has authority relating to the siting of facilities.

Issues

ORS 469.300(11) includes the definition of an “Energy Facility”. This definition establishes the size or capacity threshold for when an energy facility is subject to EFSC jurisdiction and, by inference, when an energy facility is subject to local government jurisdiction.

The Governor’s 10-Year Energy Action Plan contains the following action item:

“The state will amend the Energy Siting Council statute to adjust the jurisdictional threshold for renewable generation facilities.”

The Legislative Assembly began implementing this plan during the 2013 legislative session when it enacted HB 2820, which revises jurisdictional thresholds for solar energy facilities. The legislature’s adoption of this bill culminated a three-year effort to resolve a threshold conflict for solar energy facilities. It creates a nameplate capacity (megawatt) threshold for concentrating solar (thermal) energy facilities and tiered acreage thresholds for photovoltaic facilities based on the agricultural productivity of the proposed location.

The Governor’s 10-Year Energy Action Plan also calls for an amendment to more clearly define a “Single Energy Facility.” That term is used in ORS 469.300(11)(j) and ORS 469.320 (site certificate requirements) but it is not defined either in statute or rule.

Current Efforts and Opportunities

In coordination with stakeholder and interest groups, the department will monitor and evaluate the thresholds established through HB 2820 for solar facilities to determine if they need to be further adjusted in the future.

With regard to thresholds for other types of energy facilities, several options have been identified for amendments including one or more of the following:

- Retaining traditional single jurisdictional thresholds based on maximum generating capacity, acreage or facility-specific measurements but adjusting them based on stakeholder input.
- Creating tiered thresholds based on site-specific circumstances such as zoning designation, agricultural productivity and natural resource values.

- Creating tiered thresholds based on the consistency of local government standards with EFSC’s standards, as contemplated in the Governor’s 10-Year Energy Action Plan:

“In order to achieve more consistent standards and reduce forum shopping, the State will create a tiered threshold structure to encourage local governments to adopt standards for renewable facilities consistent with state standards.”

Similar to the coordinated process that culminated in HB 2820 (2013), department staff proposes to systematically evaluate each type of energy facility through a stakeholder group process with representatives from the legislature, other state agencies, federal agencies, counties, cities, utilities, independent power producers, natural resource interest groups and the public. The objective is to propose to the legislature a consensus for jurisdictional thresholds for each type of energy facility. Consistent with the Governor’s 10-Year Energy Action Plan, renewable energy facilities will be the top priority.

e) Ensuring Government Participation

Means to ensure constructive and effective participation by local governments, state agencies, and federally recognized Indian tribes in the siting of facilities.

Issues

The state energy facility siting process is based on ORS 469.310, which establishes the policy that all energy facilities will be evaluated through a coordinated, consolidated process. To facilitate that consolidated review, ORS 469.350 requires participation in the EFSC process by any “state

agency that has regulatory or advisory responsibility with respect to the facility and any city or county affected by the application.” All state reviewing agencies and local governments are statutorily required to respond to requests from department staff, to evaluate potential impacts of the proposed facility to areas under their jurisdiction, and to provide comments and potential mitigation strategies.

In general, local and reviewing agency permit requirements are incorporated into the EFSC review, and after the Site Certificate is issued, the agencies and local governments must issue the permits, subject only to conditions in the Site Certificate, and without any further proceedings. Subject to statutory limitations in ORS 469.421, state agencies and local governments are eligible for reimbursement of resources they expend during their participation in the EFSC process.

The department requests reviewing agency and local government participation at the following review stages:

Notice of Intent: Department staff requests that affected local and state agencies provide a listing of all applicable substantive criteria (standards), as well as specific agency comments and concerns. All agency criteria, standards and comments are incorporated into the Project Order, which establishes Site Certificate Application requirements.

Preliminary Application: Department staff requests verification that all applicable substantive criteria are included and comments on whether the applicant has provided adequate information to address each criterion.

Complete Application: Department staff requests that agencies comment on whether the Complete Application addresses all agency-related substantive criteria, and provide conditions they would include if they were making the decision on the application.

Draft Proposed Order: Department staff requests that agencies comment on department staff's evaluation, findings and conclusions regarding the agency's specific substantive criteria.

Jurisdictions within close proximity to the proposed facility site boundary also receive the same requests for review and evaluation and are eligible for reimbursement. This allows these jurisdictions to evaluate the potential impacts to public services such as water, sewer, transportation and emergency services.

OAR 345-020-0011(1)(P) requires that the Notice of Intent include evidence of consultation with the Legislative Commission on Indian Services. The consultation requires applicants to identify each affected tribe for consultation with regard to the proposed facility's possible effects on Indian historic and cultural resources. These identified tribes receive all notices and documentation and are requested to provide comments at each stage of the process as outlined in the state energy facility siting rules. These rules are intended to implement ORS 182.164 which requires state agencies to promote communication and positive government-to-government relations between the state and tribes, and to cooperate with tribes in the development and implementation of programs that affect them.

Current Efforts and Opportunities

Although department staff ensures compliance with all procedural requirements for notification and participation, the department's process improvement review indicates a continuing lack of understanding of the EFSC process and other agencies' roles. Department staff has identified several actions to increase constructive and effective participation of these groups.

Reviewing Agency Training: Department staff has conducted reviewing agency trainings in Salem and Pendleton to explain the EFSC process and reviewing agencies' roles.

Interdisciplinary Team Meetings: Consistent with the Governor's 10-Year Energy Action Plan, department staff is now convening an interdisciplinary team of individuals from state agencies and local governments to evaluate the information in the Notice of Intent. The objective of this early, collaborative meeting is to foster mutual, cross-agency problem-solving. Identifying issues and developing a common understanding of a project and its potential impacts and benefits early in the process is essential to efficiently resolving those issues. Staff is finding that

this discussion and the subsequent comments help department staff generate a more complete list of standards in the Project Order.

Use of GIS: Most state agencies and local governments use GIS to conduct much of their day-to-day land use planning business. To expedite their analysis and help them provide more timely comments, department staff is providing spatial boundaries of projects that can be overlaid with state agency and local government spatial data sets.

Early Contact With Reviewing Agencies: Historically, reviewing agencies only become aware of a proposed energy facility after the Notice of Intent had been submitted. Department staff is increasingly reaching out to reviewing agencies to make them aware of projects prior to receiving the Notice of Intent. This allows department staff to identify specific contacts at each agency, to coordinate timely communication, and to utilize subject matter expertise from other state agencies and local governments before the Notice of Intent is submitted. In appropriate situations, the applicant is encouraged to work with a reviewing agency to identify significant issues prior to submitting the Notice of Intent.

Although department staff have made significant improvements to facilitate participation in the state energy facility siting process by other state agencies and local governments, substantive concerns and confusion continue regarding the scope of EFSC's review, and in particular which other agency permits and approvals should or must be included in the state's Site Certificate. Clarification of the role of the Project Order and of the scope of other agency permits intended to be included in it, could aid in facilitating more effective participation.

The department enters into agreements for reimbursement with most state agencies and establishes intergovernmental agreements for reimbursement with local governments associated with each project. However, statutory language specifically refers only to state agencies and local governments for their work in reviewing the Notice of Intent, Application, Draft and Proposed Orders and the Site Certificate. That authority does not allow agencies to seek reimbursement for valuable preliminary work done in anticipation of the Notice of Intent when requested by an applicant. Nor does it allow reimbursement for work done to ensure compliance with conditions of the Site Certificate during the facility's construction and operation. Also, there is no express statutory authority to allow federally recognized tribal governments to seek reimbursement for the work they do in evaluating proposed facilities for the presence of cultural or archeological resources.

f) Ensuring Cost Recovery

Means to ensure the efficient and cost-effective recovery of fees expended in the review of applications for site certificates.

Issues

ORS 469.421 requires that the department recover all costs expended in the review of Site Certificate Applications and establishes requirements for the collection of estimated fees during the application phase. The department has adopted a

fiscal management policy and corresponding procedures to ensure compliance with this statute. Specifically, there are protocols for cash flow management, cost reimbursement agreements, accounts receivable monitoring, general contracts management, and accounts management and reconciliation.

Currently, depending on the project phase, either the entire estimate or a deposit is required before department staff begins work. ORS 469.421 generally requires that the department collect the estimated costs for review of a Notice of Intent at the time the applicant submits the Notice of Intent. Before submitting a Preliminary Application, the applicant must request a cost reimbursement estimate from staff for the cost of processing the application. From that, staff prepares a cost reimbursement agreement (CRA), which requires the applicant to submit 25 percent of the estimated cost at the time the application is submitted. Historically, staff has used that first 25 percent to cover initial expenses, and then billed the applicant in 25 percent increments until the applicant has paid 100 percent of the estimate. If actual costs exceed the estimate, the department amends the CRA and bills the applicant for the additional expenses.

There are some limitations with the current statewide accounting infrastructure and protocols that impact efficient and effective cost recovery. Delays in receiving invoices from other state and local agencies and lags in accounting system expenditure data ranging from 60-90 days, create the potential that several months of expenses might be incurred before the department is aware that there are insufficient funds being held at the department to cover actual expenditures. This inherent system lag increases the Energy Department's financial exposure. It may also place applicants in a difficult position to learn only after the initial cost estimate has been exceeded that the cost reimbursement agreement must be amended.

Current Efforts and Opportunities

While constraints of the current statewide accounting systems present some challenges, the department is working to create internal processes and protocols to mitigate the risk associated with the billing lag. In addition, staff is working with state and local reviewing agencies to ensure timely receipt of reimbursement requests. This presents a challenge to other state agencies as they also work in the same statewide accounting system, which means lags in aggregate can extend to 120 days or longer.

ORS 469.421(3) requires an applicant to submit 25 percent of the estimated costs of the review at the time an applicant submits a Preliminary Application. However, it does not prescribe how the department must bill or collect the remaining estimate. Nor does it prescribe how the initial estimate must be applied. Staff is currently testing the following changes to existing protocols, which is consistent with the existing statutes:

- The applicant submits the statutorily mandated 25 percent of the cost estimate indicated in the signed CRA. This amount is held as a deposit in order to avoid risk to the agency in the event of default by the applicant. The applicant is billed monthly for all charges incurred against the project's Application Review phase. When the charges

incurred reach 50 percent, and then later 75 percent of the cost estimate, department staff will determine if a new cost estimate is needed in order to complete the Application Review Phase. If it is determined that a new cost estimate is necessary the CRA will be amended. Upon execution of the amended CRA, the applicant is required to pay all or a portion of the new estimate. In the latter case, once the department has expended three-fourths, or 75 percent of the first installment of the new estimate, the department will invoice the applicant for the final amount.

For the 2013-15 biennium the legislature approved a limited duration Fiscal Analyst 2 for the Oregon Department of Energy’s Siting Division. This will allow the department to implement systems that provide applicants with more timely and detailed information on the cost of reviewing their applications, and minimize the financial risk to the agency. This position will also allow the department to explore other opportunities to ensure efficient and cost-effective fee recovery, such as a program level system that provides project and time management support, minimizing the risk inherent in the statewide accounting system.

g) Other Matters

Any other matters deemed relevant by the department.

Issues

The following are ongoing opportunities to increase the efficiency, effectiveness, transparency, accountability and predictability of the site certificate process.

Current Efforts and Opportunities

Intergovernmental Communication: The first working day of every month department staff sends out a 90-day forecast of all projects and other major activities. This document goes to reviewing agencies and anyone else who is interested, and provides ongoing communication regarding the status of each EFSC-jurisdictional project.

Draft Exhibit Review: For complex or controversial projects, applicants have the option to submit “draft exhibits” of specific sections of the Preliminary Application before submitting the document. This allows department staff, reviewing agencies and third party contractors to identify and resolve significant issues early in the process. While ultimately this early review can save time and resources in the overall evaluation, this additional review requires more time and resources early-on and is only done at the applicant’s request.

Several project applicants have elected to do this and there have been mixed results. The major lesson learned is that draft exhibit review should only be utilized with specifically targeted exhibits that include complex or controversial information.

Document Management: All documents are being reorganized and digitally scanned to eliminate duplication and allow for more efficient access to documents.

Compliance: The Site Certificate for each approved energy facility includes a large number of conditions. Both the site certificate holder and department staff are obligated to track all conditions and ensure they are met. To facilitate tracking and compliance, the siting compliance officer generates searchable compliance matrices for each Site Certificate.

Internal Project Team: Consistent with the Governor’s 10-Year Energy Action Plan, department staff convenes an internal project team several times during the site certificate process to establish a shared understanding of roles and responsibilities and identify issues.

Project Schedules: Certain timeframes within the site certificate process are the responsibility of department staff and others are the responsibility of the applicant. Department staff now creates a project schedule at the beginning of the site certificate process. Staff continually evaluates and updates schedules to ensure a shared understanding of the projected timelines between staff and the applicant.

Early Work on Draft Proposed Order (DPO): The DPO includes staff’s written, factual analyses and recommendations, evaluating the Complete Application for compliance with each of the Council’s standards. In the recent past, the DPO was started after an application was deemed complete. To more efficiently identify issues at the Preliminary Application stage, initial work is being done on the DPO when the Preliminary Application is submitted.

Rulemaking: EFSC authorized a rulemaking process in June 2013 to fully evaluate the procedural and substantive provisions of the Council’s amendment process. This rulemaking effort has included two public workshops and a broadly representative advisory committee appointed by EFSC.

Department staff is generating a list of potential rulemaking changes as needs are identified. This list will be brought to EFSC periodically for its prioritization and determination of rulemaking activities.

One of the current rulemaking priorities is a directive by the legislature during the 2013 session in HB 2106, consistent with the Governor's 10-Year Energy Action Plan. This requires EFSC to further specify by rule the criteria it will use to determine whether to issue a Site Certificate for a facility that does not meet one or more of the applicable criteria. This is also referred to as the “balancing authority.”

Completeness of Application: Site Certificate Applications have waited during the completeness review stage while staff have worked to ensure Site Certificate Applications not only meet the application requirements (in OAR 345, Division 21) but also that the applicant has fully complied with each of the Council’s review standards (in OAR 345, Division 22). This was intended to ensure the application was approvable before it was determined to be complete. Department staff is working to limit determination of application completeness to the Division 21 requirements. This will expedite the time it will take to determine that an application is “complete” and make the process more transparent. It will also appropriately put the burden

on applicants to include sufficient evidence in their application to meet all applicable standards in OAR 22, 23, 24 and as indicated in the Project Order.

Performance Metrics: To better understand how well the site certificate process is working for all groups involved with the process and make any necessary adjustments, the right performance metrics must be established and consistently evaluated. Staff is establishing performance metrics to evaluate the state energy facility siting process based on time, cost, resources, scope, quality and actions.

Application Packet: In order to assist applicants' understanding of the site certificate process requirements, department staff is creating a comprehensive application packet that will clearly and concisely explain important parts of the process and prepare applicants to be successful. This will be available on the website and provided at the first meeting between department staff and the applicant.

Clarification of Other Statutory Requirements: Fundamental to improving and enhancing understanding and participation in the EFSC process is staff's continuing effort to ensure EFSC's substantive standards are properly applied. Recent application and amendment requests have highlighted issues regarding how and when Council standards apply.

- A recent Supreme Court case related to the Helix Wind Power Facility Amendment #2, Blue Mountain Alliance v. Energy Facility Siting Council, raised a potential conflict between the requirements of ORS 469.504(1)(b)(A) and ORS 469.401(2) with regard to the applicability of land use regulations adopted after an amendment application was filed.
- Other amended applications raised an issue regarding when ORS 469.401(2) requires an amendment to consider all Council standards (a "general reopener") and when an amendment is subject to only those standards at issue in the request. An earlier Supreme Court decision, COB v. Energy Facility Siting Council, evaluated how the Council must apply the provisions of ORS 469.504(1)(b) when a proposed facility cannot satisfy one ordinance requirement. Related to that is the issue of how the provisions of ORS 469.504(5) correspond to the requirements of ORS 469.504(1)(b). That decision has subsequently created issues for some site certificate applicants in determining how to address the EFSC land use standard. Legislative clarification of these statutory requirements could help streamline and clarify the EFSC review process.

RECOMMENDATIONS FOR LEGISLATION

HB 2105 directed the Oregon Department of Energy, as part of its EFSC review and study to include recommendations for legislation. This report identifies several areas that may benefit from changes to current law. The following recommendations are preliminary in nature. Any legislative concepts will be fully vetted by the department and developed in conjunction with the Governor and his staff, and department stakeholders before they are formally forwarded as legislative concepts. The relevant sections of this report are cross-referenced below.

d) [Definitional Clarity – Page 19 – Energy Facility Jurisdictional Thresholds](#)

ORS 469.300(11) includes the definition of an “Energy Facility.” This definition establishes the size or capacity threshold for when an energy facility is subject to EFSC jurisdiction and by inference, when an energy facility is subject to local government jurisdiction. The Governor’s energy policy priorities contained in the 10-Year Energy Action Plan encourage the state to amend the EFSC statute to adjust the jurisdictional thresholds for renewable generation facilities. Department staff, through a stakeholder group process, proposes to evaluate the jurisdictional thresholds for individual energy sources. The goals of the process will be to prioritize the different types of energy sources for evaluation and reach consensus for jurisdictional threshold adjustments.

Following a consensus based work group process, a concept should be considered to revise the definition of “Energy Facility” in ORS 469.300(11) by adjusting the jurisdictional thresholds.

The term “single energy facility” is used in the definition of “energy facility” in ORS 469.300(11) (site certificate requirements) but it is not defined either in statute or rule. A definition of “single energy facility” is necessary to ensure that mitigation efforts are consistently applied to single large-scale facilities and to limit piecemeal permitting of multiple small facilities that should be considered single large-scale facilities.

Following a consensus-based work group process a concept should be considered to create a definition of “Single Energy Facility” in ORS 469.300 to limit permitting of multiple small facilities that should be considered large-scale facilities.

e) [Local and Tribal Government Reimbursement for Participation in the State Energy Facility Siting Process – Page 22 – Government Participation](#)

The EFSC process for siting energy facilities is based on ORS 469.310, which establishes the policy that all energy facilities will be evaluated through a coordinated, consolidated process. To facilitate that consolidated review, ORS 469.350 requires participation in the EFSC process by any “state agency that has regulatory or advisory responsibility with respect to the facility and any city or county affected by the application.” All state

reviewing agencies and local governments are statutorily required to respond to reviews from Council staff.

The department has mechanisms in place for reimbursement with most state agencies and local governments associated with each project. However, that authority does not allow agencies to seek reimbursement for valuable planning work prior to the Notice of Intent when requested by an applicant, nor does it allow reimbursement for work done to ensure compliance during the projects construction and operation. In addition, there is no express authority to allow Oregon’s nine federally recognized tribal governments to seek reimbursement for the work they do in evaluating proposed facilities for the presence of cultural or archeological resources.

A concept should be considered to allow for reimbursement agreements with state agencies and local governments to cover expenses incurred prior to submittal by the applicant of the Notice of Intent and after approval and to explicitly allow for reimbursement of expenses by tribal governments participating in the state siting review process similar to state agencies and local governments.

(f) [Efficient Cost-Effective Recovery of Fees – Page 23 – Ensuring Cost Recovery](#)

ORS 469.421 requires the department to recover all costs expended in the review of Site Certificate Applications, and establishes requirements for the collection of estimated fees during the Application Phase. The department has adopted a fiscal management policy and corresponding procedures to ensure compliance with this statute. There continue to be limitations with the current statutory structure and protocols related to efficient and cost-effective recovery. These limitations create the potential for expenses to exceed funds deposited by applicants, running the risk that applicants will default on their cost reimbursement agreement obligations.

A concept should be considered to revise ORS 469.421 to establish financial mechanisms to ensure payment of all expenses expended in processing Site Certificate Applications.

(g) [Statutory Clarification – Page 26 – Other Matters](#)

Fundamental to improving and enhancing understanding and participation in the EFSC process is the department’s ability to ensure standards are properly applied. A recent potential conflict was discovered between ORS 469.504(1)(b)(A) and ORS 469.401(2) with regard to applicability of land use regulations adopted after an Amendment Application was filed.

A concept should be considered to clarify the timing for abiding by state law and local ordinances and to clarify the trigger for applying “later adopted” regulations.

An EFSC Site Certificate or the amended Site Certificate contains conditions for the protection of the public health and safety. The Site Certificate or the amended Site Certificate requires parties to abide by local ordinances and state law and the rules of the Council in effect on the date the Site Certificate or amended Site Certificate is executed. Questions have been raised over when ORS 469.401(2) requires an amendment to the Site Certificate to consider all Council standards versus when an amendment is subject only to those standards at issue in the request.

A concept should be considered to clarify when an amendment must be evaluated against all Council standards and when it is subject only to certain Council standards.

