

# House Bill 3329

Sponsored by Representative RESCHKE

## SUMMARY

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

Requires application for energy facility site certificate or amended site certificate submitted to Energy Facility Siting Council to be approved by board of county commissioners for each county in which area affected by application is located.

## A BILL FOR AN ACT

1  
2 Relating to the Energy Facility Siting Council siting process; amending ORS 469.360, 469.370, 469.373  
3 and 469.403.

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

5 **SECTION 1.** ORS 469.370 is amended to read:

6 469.370. (1) Based on its review of the application and the comments and recommendations on  
7 the application from state agencies and local governments, the State Department of Energy shall  
8 prepare and issue a draft proposed order on the application.

9 (2) Following issuance of the draft proposed order, the Energy Facility Siting Council shall hold  
10 one or more public hearings on the application for a site certificate in the affected area and else-  
11 where, as the council considers necessary. Notice of the hearing shall be mailed at least 20 days  
12 before the hearing. The notice shall, at a minimum:

13 (a) Comply with the requirements of ORS 197.797 (2), with respect to the persons notified;

14 (b) Include a description of the facility and the facility's general location;

15 (c) Include the name of an agency representative to contact and the telephone number where  
16 additional information may be obtained;

17 (d) State that copies of the application and draft proposed order are available for inspection at  
18 no cost and will be provided at a reasonable cost; and

19 (e) State that failure to raise an issue in person or in writing prior to the close of the record  
20 of the public hearing with sufficient specificity to afford the decision maker an opportunity to re-  
21 spond to the issue precludes consideration of the issue in a contested case.

22 (3) Any issue that may be the basis for a contested case shall be raised not later than the close  
23 of the record at or following the final public hearing prior to issuance of the department's proposed  
24 order. Such issues shall be raised with sufficient specificity to afford the council, the department  
25 and the applicant an adequate opportunity to respond to each issue. A statement of this requirement  
26 shall be made at the commencement of any public hearing on the application.

27 **(4) After the conclusion of the public hearing or hearings, and before the department**  
28 **may issue a proposed order, the board of county commissioners for each county in which the**  
29 **area affected by the application is located shall vote to reject or approve the application. If**  
30 **a board votes to reject the application, the council shall issue a final order rejecting the ap-**  
31 **plication based upon the board's vote. The council may not continue with the evaluation**

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

1 **process until each board holds a vote to reject or approve the application.**

2 [(4)] (5) **If all boards vote to approve the application, and** after reviewing the application, the  
3 draft proposed order and any testimony given at the public hearing and after consulting with other  
4 agencies, the department shall issue a proposed order recommending approval or rejection of the  
5 application. The department shall issue public notice of the proposed order, that shall include notice  
6 of a contested case hearing specifying a deadline for requests to participate as a party or limited  
7 party and a date for the prehearing conference.

8 [(5)] (6) Following receipt of the proposed order from the department, the council shall conduct  
9 a contested case hearing on the application for a site certificate in accordance with the applicable  
10 provisions of ORS chapter 183 and any procedures adopted by the council. The applicant shall be  
11 a party to the contested case. The council may permit any other person to become a party to the  
12 contested case in support of or in opposition to the application only if the person appeared in person  
13 or in writing at the public hearing on the site certificate application. Issues that may be the basis  
14 for a contested case shall be limited to those raised on the record of the public hearing under sub-  
15 section (3) of this section, unless:

16 (a) The department failed to follow the requirements of subsection (2) or (3) of this section; or

17 (b) The action recommended in the proposed order, including any recommended conditions of the  
18 approval, differs materially from that described in the draft proposed order, in which case only new  
19 issues related to such differences may be raised.

20 [(6)] (7) If no person requests party status to challenge the department's proposed order, the  
21 proposed order shall be forwarded to the council and the contested case hearing shall be concluded.

22 [(7)] (8) At the conclusion of the contested case, the council shall issue a final order, either  
23 approving or rejecting the application based upon the standards adopted under ORS 469.501 and any  
24 additional statutes, rules or local ordinances determined to be applicable to the facility by the  
25 project order, as amended. The council shall make its decision by the affirmative vote of at least  
26 four members approving or rejecting any application for a site certificate. The council may amend  
27 or reject the proposed order, so long as the council provides public notice of its hearing to adopt  
28 a final order, and provides an opportunity for the applicant and any party to the contested case to  
29 comment on material changes to the proposed order, including material changes to conditions of  
30 approval resulting from the council's review. The council's order shall be considered a final order  
31 for purposes of appeal.

32 [(8)] (9) Rejection or approval of an application, together with any conditions that may be at-  
33 tached to the certificate, shall be subject to judicial review as provided in ORS 469.403.

34 [(9)] (10) The council shall either approve or reject an application for a site certificate:

35 (a) Within 24 months after filing an application for a nuclear installation, or for a thermal power  
36 plant, other than that described in paragraph (b) of this subsection, with a nameplate rating of more  
37 than 200,000 kilowatts;

38 (b) Within nine months after filing of an application for a site certificate for a combustion tur-  
39 bine power plant, a geothermal-fueled power plant or an underground storage facility for natural  
40 gas;

41 (c) Within six months after filing an application for a site certificate for an energy facility, if  
42 the application is:

43 (A) To expand an existing industrial facility to include an energy facility;

44 (B) To expand an existing energy facility to achieve a nominal electric generating capacity of  
45 between 25 and 50 megawatts; or

1 (C) To add injection or withdrawal capacity to an existing underground gas storage facility; or  
 2 (d) Within 12 months after filing an application for a site certificate for any other energy facil-  
 3 ity.

4 [(10)] (11) At the request of the applicant, the council shall allow expedited processing of an  
 5 application for a site certificate for an energy facility with an average electric generating capacity  
 6 of less than 100 megawatts. No notice of intent shall be required. Following approval of a request  
 7 for expedited review, the department shall issue a project order, which may be amended at any time.  
 8 **Following issuance of the project order, the board of county commissioners for each county**  
 9 **in which the area affected by the application is located shall vote to reject or approve the**  
 10 **application. If a board votes to reject the application, the council shall issue a final order**  
 11 **rejecting the application based upon the board’s vote.** The council shall either approve or reject  
 12 an application for a site certificate within six months after filing the site certificate application if  
 13 there are no intervenors in the contested case conducted under subsection [(5)] (6) of this section.  
 14 If there are intervenors in the contested case, the council shall either approve or reject an appli-  
 15 cation within nine months after filing the site certificate application. For purposes of this sub-  
 16 section, the generating capacity of a thermal power plant is the nameplate rating of the electrical  
 17 generator proposed to be installed in the plant.

18 [(11)] (12) Failure of the council to comply with the deadlines set forth in subsection [(9) or] (10)  
 19 or (11) of this section shall not result in the automatic issuance or denial of a site certificate.

20 [(12)] (13) The council shall specify in the site certificate a date by which construction of the  
 21 facility must begin.

22 [(13)] (14) For a facility that is subject to and has been or will be reviewed by a federal agency  
 23 under the National Environmental Policy Act, 42 U.S.C. Section 4321, et seq., the council shall  
 24 conduct its site certificate review, to the maximum extent feasible, in a manner that is consistent  
 25 with and does not duplicate the federal agency review. Such coordination shall include, but need  
 26 not be limited to:

- 27 (a) Elimination of duplicative application, study and reporting requirements;
- 28 (b) Council use of information generated and documents prepared for the federal agency review;
- 29 (c) Development with the federal agency and reliance on a joint record to address applicable  
 30 council standards;
- 31 (d) Whenever feasible, joint hearings and issuance of a site certificate decision in a time frame  
 32 consistent with the federal agency review; and
- 33 (e) To the extent consistent with applicable state standards, establishment of conditions in any  
 34 site certificate that are consistent with the conditions established by the federal agency.

35 **SECTION 2.** ORS 469.373 is amended to read:

36 469.373. (1) Notwithstanding the expedited review process established pursuant to ORS 469.370,  
 37 an applicant may apply under the provisions of this section for expedited review of an application  
 38 for a site certificate for an energy facility if the energy facility:

- 39 (a) Is a combustion turbine energy facility fueled by natural gas or is a reciprocating engine  
 40 fueled by natural gas, including an energy facility that uses petroleum distillate fuels for backup  
 41 power generation;
- 42 (b) Is a permitted or conditional use allowed under an applicable local acknowledged compre-  
 43 hensive plan, land use regulation or federal land use plan, and is located:
  - 44 (A) At or adjacent to an existing energy facility; or
  - 45 (B)(i) At, adjacent to or in close proximity to an existing industrial use; and

1 (ii) In an area currently zoned or designated for industrial use;

2 (c) **Has been approved by a vote of the board of county commissioners for each county**  
 3 **in which the area affected by the application is located;**

4 [(c)(A)] (d)(A) Requires no more than three miles of associated transmission lines or three miles  
 5 of new natural gas pipelines outside of existing rights of way for transmission lines or natural gas  
 6 pipelines; or

7 (B) Imposes, in the determination of the Energy Facility Siting Council, no significant impact in  
 8 the locating of associated transmission lines or new natural gas pipelines outside of existing rights  
 9 of way;

10 [(d)] (e) Requires no new water right or water right transfer;

11 [(e)] (f) Provides funds to a qualified organization in an amount determined by the council to  
 12 be sufficient to produce any required reduction in emissions as specified in ORS 469.503 (2)(c)(C) and  
 13 in rules adopted under ORS 469.503 for the total carbon dioxide emissions produced by the energy  
 14 facility for the life of the energy facility; and

15 [(f)(A)] (g)(A) Discharges process wastewater to a wastewater treatment facility that has an  
 16 existing National Pollutant Discharge Elimination System permit, can obtain an industrial pretreat-  
 17 ment permit, if needed, within the expedited review process time frame and has written confirmation  
 18 from the wastewater facility permit holder that the additional wastewater load will be accommo-  
 19 dated by the facility without resulting in a significant thermal increase in the facility effluent or  
 20 without requiring any changes to the wastewater facility National Pollutant Discharge Elimination  
 21 System permit;

22 (B) Plans to discharge process wastewater to a wastewater treatment facility owned by a mu-  
 23 nicipal corporation that will accommodate the wastewater from the energy facility and supplies ev-  
 24 idence from the municipal corporation that:

25 (i) The municipal corporation has included, or intends to include, the process wastewater load  
 26 from the energy facility in an application for a National Pollutant Discharge Elimination System  
 27 permit; and

28 (ii) All conditions required of the energy facility to allow the discharge of process wastewater  
 29 from the energy facility will be satisfied; or

30 (C) Obtains a National Pollutant Discharge Elimination System or water pollution control fa-  
 31 cility permit for process wastewater disposal, supplies evidence to support a finding that the dis-  
 32 charge can likely be permitted within the expedited review process time frame and that the  
 33 discharge will not require:

34 (i) A new National Pollutant Discharge Elimination System permit, except for a storm water  
 35 general permit for construction activities; or

36 (ii) A change in any effluent limit or discharge location under an existing National Pollutant  
 37 Discharge Elimination System or water pollution control facility permit.

38 (2) An applicant seeking expedited review under this section shall submit documentation to the  
 39 State Department of Energy, prior to the submission of an application for a site certificate, that  
 40 demonstrates that the energy facility meets the qualifications set forth in subsection (1) of this  
 41 section. The department shall determine, within 14 days of receipt of the documentation, on a pre-  
 42 liminary, nonbinding basis, whether the energy facility qualifies for expedited review.

43 (3) If the department determines that the energy facility preliminarily qualifies for expedited  
 44 review, the applicant may submit an application for expedited review. Within 30 days after the date  
 45 that the application for expedited review is submitted, the department shall determine whether the

1 application is complete. If the department determines that the application is complete, the applica-  
2 tion shall be deemed filed on the date that the department sends the applicant notice of its deter-  
3 mination. If the department determines that the application is not complete, the department shall  
4 notify the applicant of the deficiencies in the application and shall deem the application filed on the  
5 date that the department determines that the application is complete. The department or the  
6 council may request additional information from the applicant at any time.

7 (4) The State Department of Energy shall send a copy of a filed application to the Department  
8 of Environmental Quality, the Water Resources Department, the State Department of Fish and  
9 Wildlife, the State Department of Geology and Mineral Industries, the State Department of Agri-  
10 culture, the Department of Land Conservation and Development, the Public Utility Commission and  
11 any other state agency, city, county or political subdivision of the state that has regulatory or ad-  
12 visory responsibility with respect to the proposed energy facility. The State Department of Energy  
13 shall send with the copy of the filed application a notice specifying that:

14 (a) In the event the council issues a site certificate for the energy facility, the site certificate  
15 will bind the state and all counties, cities and political subdivisions in the state as to the approval  
16 of the site, the construction of the energy facility and the operation of the energy facility, and that  
17 after the issuance of a site certificate, all permits, licenses and certificates addressed in the site  
18 certificate must be issued as required by ORS 469.401 (3); and

19 (b) The comments and recommendations of state agencies, counties, cities and political subdi-  
20 visions concerning whether the proposed energy facility complies with any statute, rule or local  
21 ordinance that the state agency, county, city or political subdivision would normally administer in  
22 determining whether a permit, license or certificate required for the construction or operation of the  
23 energy facility should be approved will be considered only if the comments and recommendations  
24 are received by the department within a reasonable time after the date the application and notice  
25 of the application are sent by the department.

26 (5) Within 90 days after the date that the application was filed, the department shall issue a  
27 draft proposed order setting forth:

28 (a) A description of the proposed energy facility;

29 (b) A list of the permits, licenses and certificates that are addressed in the application and that  
30 are required for the construction or operation of the proposed energy facility;

31 (c) A list of the statutes, rules and local ordinances that are the standards and criteria for ap-  
32 proval of any permit, license or certificate addressed in the application and that are required for the  
33 construction or operation of the proposed energy facility; and

34 (d) Proposed findings specifying how the proposed energy facility complies with the applicable  
35 standards and criteria for approval of a site certificate.

36 (6) The council shall review the application for site certification in the manner set forth in  
37 subsections (7) to (10) of this section and shall issue a site certificate for the facility if the council  
38 determines that the facility, with any required conditions to the site certificate, will comply with:

39 (a) The requirements for expedited review as specified in this section;

40 (b) The standards adopted by the council pursuant to ORS 469.501 (1)(a), (c) to (e), (g), (h) and  
41 (L) to (o);

42 (c) The requirements of ORS 469.503 (3); and

43 (d) The requirements of ORS 469.504 (1)(b).

44 (7) Following submission of an application for a site certificate, the council shall hold a public  
45 informational meeting on the application. Following the issuance of the proposed order, the council

1 shall hold at least one public hearing on the application. The public hearing shall be held in the area  
2 affected by the energy facility. The council shall mail notice of the hearing at least 20 days prior  
3 to the hearing. The notice shall comply with the notice requirements of ORS 197.797 (2) and shall  
4 include, but need not be limited to, the following:

5 (a) A description of the energy facility and the general location of the energy facility;

6 (b) The name of a department representative to contact and the telephone number at which  
7 people may obtain additional information;

8 (c) A statement that copies of the application and proposed order are available for inspection  
9 at no cost and will be provided at reasonable cost; and

10 (d) A statement that the record for public comment on the application will close at the conclu-  
11 sion of the hearing and that failure to raise an issue in person or in writing prior to the close of  
12 the record, with sufficient specificity to afford the decision maker an opportunity to respond to the  
13 issue, will preclude consideration of the issue, by the council or by a court on judicial review of the  
14 council's decision.

15 (8) Prior to the conclusion of the hearing, the applicant may request an opportunity to present  
16 additional written evidence, arguments or testimony regarding the application. In the alternative,  
17 prior to the conclusion of the hearing, the applicant may request a contested case hearing on the  
18 application. If the applicant requests an opportunity to present written evidence, arguments or tes-  
19 timony, the council shall leave the record open for that purpose only for a period not to exceed 14  
20 days after the date of the hearing. Following the close of the record, the department shall prepare  
21 a draft final order for the council. If the applicant requests a contested case hearing, the council  
22 may grant the request if the applicant has shown good cause for a contested case hearing. If a re-  
23 quest for a contested case hearing is granted, subsections (9) to (11) of this section do not apply,  
24 and the application shall be considered under the same contested case procedures used for a non-  
25 expedited application for a site certificate.

26 (9) The council shall make its decision based on the record and the draft final order prepared  
27 by the department. The council shall, within six months of the date that the application is deemed  
28 filed:

29 (a) Grant the application;

30 (b) Grant the application with conditions;

31 (c) Deny the application; or

32 (d) Return the application to the site certification process required by ORS 469.320.

33 (10) If the application is granted, the council shall issue a site certificate pursuant to ORS  
34 469.401 and 469.402. Notwithstanding subsection (6) of this section, the council may impose condi-  
35 tions based on standards adopted under ORS 469.501 (1)(b), (f) and (i) to (k), but may not deny an  
36 application based on those standards.

37 (11) Judicial review of the approval or rejection of a site certificate by the council under this  
38 section shall be as provided in ORS 469.403.

39 **SECTION 3.** ORS 469.403 is amended to read:

40 469.403. (1) Any party to a contested case proceeding may apply for rehearing within 30 days  
41 from the date the approval or rejection is served. The date of service shall be the date on which the  
42 Energy Facility Siting Council delivered or mailed its approval or rejection in accordance with ORS  
43 183.470. The application for rehearing shall set forth specifically the ground upon which the appli-  
44 cation is based. No objection to the council's approval or rejection of an application for a site cer-  
45 tificate or a site certificate amendment shall be considered on rehearing without good cause shown

1 unless the basis for the objection is urged with reasonable specificity before the council in the site  
 2 certificate or amended site certificate process. Upon such application, the council shall have the  
 3 power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless  
 4 the council acts upon the application for rehearing within 30 days after the application is filed, the  
 5 application shall be considered denied. The filing of an application for rehearing shall not, unless  
 6 specifically ordered by the council, operate as a stay of the site certificate or amended site certifi-  
 7 cate for the facility.

8 (2) **An applicant or** any party to a contested case proceeding on a site certificate or amended  
 9 site certificate application may appeal the council's approval or rejection of the site certificate or  
 10 amended site certificate application. Issues on appeal shall be limited to **any vote by a board of**  
 11 **county commissioners to reject an application or** those raised by the parties to the contested  
 12 case proceeding before the council.

13 (3) Jurisdiction for judicial review of the council's approval or rejection of an application for a  
 14 site certificate or amended site certificate is conferred upon the Supreme Court. Proceedings for  
 15 review shall be instituted by filing a petition in the Supreme Court. The petition shall be filed within  
 16 60 days after the date of service of the council's final order or within 30 days after the date the  
 17 petition for rehearing is denied or deemed denied. Date of service shall be the date on which the  
 18 council delivered or mailed its order in accordance with ORS 183.470.

19 (4) The filing of a petition for judicial review may not stay the order, except that a party to the  
 20 contested case may apply to the Supreme Court for a stay upon a showing that there is a colorable  
 21 claim of error and that:

22 (a) The petitioner will suffer irreparable injury; or

23 (b) Construction of the energy facility will result in irreparable harm to resources protected by  
 24 applicable council standards or applicable agency or local government standards.

25 (5) If the Supreme Court grants a stay pursuant to subsection (4) of this section, the court:

26 (a) Shall require the petitioner requesting the stay to give an undertaking in the amount of  
 27 \$5,000.

28 (b) May grant a stay in whole or in part.

29 (c) May impose other reasonable conditions on the stay.

30 (6) Except as otherwise provided in ORS 469.320 and this section, the review by the Supreme  
 31 Court shall be the same as the review by the Court of Appeals described in ORS 183.482. The Su-  
 32 preme Court shall give priority on its docket to such a petition for review and shall render a deci-  
 33 sion within six months of the filing of the petition for review.

34 (7) The following periods of delay shall be excluded from the six-month period within which the  
 35 court must render a decision under subsection (6) of this section:

36 (a) Any period of delay resulting from a motion properly before the court; or

37 (b) Any reasonable period of delay resulting from a continuance granted by the court on the  
 38 court's own motion or at the request of one of the parties, if the court granted the continuance on  
 39 the basis of findings that the ends of justice served by granting the continuance outweigh the best  
 40 interests of the public and the other parties in having a decision within six months.

41 (8) No period of delay resulting from a continuance granted by the Supreme Court under sub-  
 42 section (7)(b) of this section shall be excluded from the six-month period unless the court sets forth,  
 43 in the record, either orally or in writing, its reasons for finding that the ends of justice served by  
 44 granting the continuance outweigh the best interests of the public and the other parties in having  
 45 a decision within six months. The factors the court shall consider in determining whether to grant

1 a continuance under subsection (7)(b) of this section are:

2 (a) Whether the failure to grant a continuance in the proceeding would be likely to make a  
3 continuation of the proceeding impossible or result in a miscarriage of justice; or

4 (b) Whether the case is so unusual or so complex, due to the number of parties involved or the  
5 existence of novel questions of fact or law, that it is unreasonable to expect adequate consideration  
6 of the issues within the six-month period.

7 (9) No continuance under subsection (7)(b) of this section shall be granted because of general  
8 congestion of the court calendar or lack of diligent preparation or attention to the case by any  
9 member of the court or any party.

10 **SECTION 4.** ORS 469.360 is amended to read:

11 469.360. (1) The Energy Facility Siting Council shall evaluate each notice of intent, site certif-  
12 icate application or request for expedited review.

13 (2) Pursuant to a written contract or agreement, the council may compensate a state agency or  
14 a local government affected by the application for expenses directly related to participation by the  
15 compensated agency or local government in the following evaluation activities:

16 (a) Consultation initiated by an applicant after payment of the fee under ORS 469.421 (2) for the  
17 notice of intent or request for expedited review but prior to submittal of the notice or request;

18 (b) Review of the notice of intent, the application or a request for an expedited review; and

19 (c) Participation in a council proceeding, excluding legal expenses of the agency or local gov-  
20 ernment incurred as a result of participation by the state agency or local government as a party in  
21 a contested case conducted by the council pursuant to ORS 469.370 [(5)] (6).

22 (3) Compensation for consultation expenses under subsection (2)(a) of this section shall be lim-  
23 ited to the expenses established in an estimate provided by the council and agreed to by the appli-  
24 cant. The applicant may request that the estimate be revised to allow for additional consultation  
25 activities at any time prior to submitting the notice of intent.

26 (4) Pursuant to a written agreement, the council may compensate a tribe identified by the  
27 Commission on Indian Services as affected by the application for expenses directly related to the  
28 tribe's review of a notice of intent, site certificate application or request for expedited review.

29 (5) As part of its evaluation, the council also may commission an independent study by an in-  
30 dependent contractor, state agency, local government or any other person, of any aspect of the  
31 proposed facility within its statutory authority to review. The council may commission an inde-  
32 pendent study under this subsection only after the council makes a determination that the council  
33 is unable to fully evaluate the application without assistance and identifies specific issues to be  
34 addressed and only pursuant to a written contract or agreement with the independent contractor,  
35 state agency, local government or other person. The council shall compensate the independent con-  
36 tractor, state agency, local government or other person only to the extent the costs are directly  
37 related to issues identified by the council.

38 (6) The council shall provide funding to state agencies, cities or counties required to contract  
39 with another entity to complete comments and recommendations pursuant to ORS 469.350.

40 (7) In addition to compensating state agencies, tribes and local governments pursuant to this  
41 section, the council may provide funding to the Department of Environmental Quality for the de-  
42 partment to conduct modeling and provide technical assistance to expedite preparation, submission  
43 and review of applications for permits under ORS 468A.040 required for energy facilities.