

Enrolled Senate Bill 259

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CHAPTER

AN ACT

Relating to energy facility siting process cost recovery; amending ORS 469.360, 469.421, 469.430 and 469.441.

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

SECTION 1. ORS 469.360 is amended to read:

469.360. (1) The Energy Facility Siting Council shall evaluate each **notice of intent**, site certificate application **or request for expedited review**. *[As part of its evaluation, the council may commission an independent study by an independent contractor, state agency, local government or any other person, of any aspect of the proposed facility within its statutory authority to review. The council may compensate a state agency or local government for expenses related to:]*

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

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

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

[(b)] (c) [The state agency's or local government's] Participation in a council proceeding[; and], excluding legal expenses of the agency or local government incurred as a result of participation by the state agency or local government as a party in a contested case conducted by the council pursuant to ORS 469.370 (5).

[(c) The performance of specific studies necessary to complete the council's statutory evaluation of the application.]

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

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

[2] (5) *[The council may enter into a contract under subsection (1) of this section]* **As part of its evaluation, the council also may commission an independent study by an independent contractor, state agency, local government or any other person, of any aspect of the proposed facility within its statutory authority to review. The council may commission an independent study under this subsection** only after the council makes a determination that the council is unable to fully evaluate the application without assistance and identifies specific issues to be addressed and only pursuant to a written contract or agreement with the independent contractor, state agency, local government or other person. The council shall compensate the independent contractor, state agency, local government or other person only to the extent the costs are directly related to issues identified by the council.

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

[4] (7) In addition to compensating state agencies, **tribes** and local governments pursuant to *[subsection (1) of]* this section, the council may provide funding to the Department of Environmental Quality for the department to conduct modeling and provide technical assistance to expedite preparation, submission and review of applications for permits under ORS 468A.040 required for energy facilities.

SECTION 2. ORS 469.421 is amended to read:

469.421. (1) Subject to the provisions of ORS 469.441, any person submitting a notice of intent, a request for exemption under ORS 469.320, a request for an expedited review under ORS 469.370, a request for an expedited review under ORS 469.373, a request for the State Department of Energy to approve a pipeline under ORS 469.405 (3), an application for a site certificate or a request to amend a site certificate shall pay all expenses incurred by the Energy Facility Siting Council and the department related to the review and decision of the council. *[These expenses may include legal expenses, expenses incurred in processing and evaluating the application, issuing a final order or site certificate, commissioning an independent study by a contractor, state agency or local government under ORS 469.360, and changes to the rules of the council that are specifically required and related to the particular site certificate.]* **Expenses under this subsection may include:**

- (a) **Legal expenses;**
- (b) **Expenses incurred in processing and evaluating the application;**
- (c) **Expenses incurred in issuing a final order or site certificate;**
- (d) **Expenses incurred in commissioning an independent study under ORS 469.360;**
- (e) **Compensation paid to a state agency, a tribe or a local government pursuant to a written contract or agreement relating to compensation as provided for in ORS 469.360; or**
- (f) **Expenses incurred by the council in making rule changes that are specifically required and related to the particular site certificate.**

(2) Every person submitting a notice of intent to file for a site certificate, a request for exemption or a request for expedited review shall *[submit]* **pay** the fee required under the fee schedule established under ORS 469.441 to the department *[when]* **prior to submitting** the notice or request *[is submitted]* to the council. To the extent possible, the full cost of the evaluation shall be paid from the fee paid under this subsection. However, if costs of the evaluation exceed the fee, the person submitting the notice or request shall pay any excess costs shown in an itemized statement prepared by the council. In no event shall the council incur evaluation expenses in excess of 110 percent of the fee initially paid unless the council provides prior notification to the applicant and a detailed projected budget the council believes necessary to complete the project. If costs are less than the fee paid, the excess shall be refunded to the person submitting the notice or request.

(3) Before submitting a site certificate application, the applicant shall request from the department an estimate of the costs expected to be incurred in processing the application. The department shall inform the applicant of that amount and require the applicant to make periodic payments of the costs pursuant to a cost reimbursement agreement. The cost reimbursement agreement shall provide for payment of 25 percent of the estimated costs when the applicant submits the application. If costs of the evaluation exceed the estimate, the applicant shall pay any excess costs shown in an

itemized statement prepared by the council. In no event shall the council incur evaluation expenses in excess of 110 percent of the fee initially estimated unless the council provided prior notification to the applicant and a detailed projected budget the council believes is necessary to complete the project. If costs are less than the fee paid, the council shall refund the excess to the applicant.

(4) Any person who is delinquent in the payment of fees under subsections (1) to (3) of this section shall be subject to the provisions of subsection (11) of this section.

(5) Subject to the provisions of ORS 469.441, each holder of a certificate shall pay an annual fee, due every July 1 following issuance of a site certificate. For each fiscal year, upon approval of the department's budget authorization by an odd-numbered year regular session of the Legislative Assembly or as revised by the Emergency Board meeting in an interim period or by the Legislative Assembly meeting in special session or in an even-numbered year regular session, the Director of the State Department of Energy promptly shall enter an order establishing an annual fee based on the amount of revenues that the director estimates is needed to fund the cost of ensuring that the facility is being operated consistently with the terms and conditions of the site certificate, any order issued by the department under ORS 469.405 (3) and any applicable health or safety standards. In determining this cost, the director shall include both the actual direct cost to be incurred by the council and the department to ensure that the facility is being operated consistently with the terms and conditions of the site certificate, any order issued by the department under ORS 469.405 (3) and any applicable health or safety standards, and the general costs to be incurred by the council and the department to ensure that all certificated facilities are being operated consistently with the terms and conditions of the site certificates, any orders issued by the department under ORS 469.405 (3) and any applicable health or safety standards that cannot be allocated to an individual, licensed facility. Not more than 35 percent of the annual fee charged each facility shall be for the recovery of these general costs. The fees for direct costs shall reflect the size and complexity of the facility [and its certificate conditions], **the anticipated costs of ensuring compliance with site certificate conditions, the anticipated costs of conducting site inspections and compliance reviews as described in ORS 469.430, and the anticipated costs of compensating state agencies and local governments for participating in site inspection and compliance enforcement activities at the request of the council.**

(6) Each holder of a site certificate executed after July 1 of any fiscal year shall pay a fee for the remaining portion of the year. The amount of the fee shall be set at the cost of regulating the facility during the remaining portion of the year determined in the same manner as the annual fee.

(7) When the actual costs of regulation incurred by the council and the department for the year, including that portion of the general regulation costs that have been allocated to a particular facility, are less than the annual fees for that facility, the unexpended balance shall be refunded to the site certificate holder. When the actual regulation costs incurred by the council and the department for the year, including that portion of the general regulation costs that have been allocated to a particular facility, are projected to exceed the annual fee for that facility, the director may issue an order revising the annual fee.

(8)(a) In addition to any other fees required by law, each energy resource supplier shall pay to the department annually its share of an assessment to fund the programs and activities of the council and the department.

(b) Prior to filing budget forms under ORS 291.208 for purposes related to the compilation and preparation of the Governor's budget under ORS 291.216, the director shall determine the projected aggregate amount of revenue to be collected from energy resource suppliers under this subsection that will be necessary to fund the programs and activities of the council and the department for each fiscal year of the upcoming biennium. After making that determination, the director shall convene a public meeting with representatives of energy resource suppliers and other interested parties for the purpose of providing energy resource suppliers with a full accounting of:

(A) The projected revenue needed to fund each department program or activity; and

(B) The projected allocation of moneys derived from the assessment imposed under this subsection to each department program or activity.

(c) Upon approval of the budget authorization of the council and the department by an odd-numbered year regular session of the Legislative Assembly, the director shall promptly enter an order establishing the amount of revenues required to be derived from an assessment pursuant to this subsection in order to fund programs and activities that the council and the department are charged with administering and authorized to conduct under the laws of this state, including those enumerated in ORS 469.030, for the first fiscal year of the forthcoming biennium. On or before June 1 of each even-numbered year, the director shall enter an order establishing the amount of revenues required to be derived from an assessment pursuant to this subsection in order to fund the programs and activities that the council and the department are charged with administering and authorized to conduct under the laws of this state, including those enumerated in ORS 469.030, for the second fiscal year of the biennium. The order shall take into account any revisions to the biennial budget of the council and the department made by the Emergency Board meeting in an interim period or by the Legislative Assembly meeting in special session or in an even-numbered year regular session.

(d) Each order issued by the director pursuant to paragraph (c) of this subsection shall allocate the aggregate assessment set forth in the order to energy resource suppliers in accordance with paragraph (e) of this subsection.

(e) The amount assessed to an energy resource supplier shall be based on the ratio which that supplier's annual gross operating revenue derived within this state in the preceding calendar year bears to the total gross operating revenue derived within this state during that year by all energy resource suppliers. The assessment against an energy resource supplier shall not exceed 0.375 percent of the supplier's gross operating revenue derived within this state in the preceding calendar year. The director shall exempt from payment of an assessment any individual energy resource supplier whose calculated share of the annual assessment is less than \$250.

(f) The director shall send each energy resource supplier subject to assessment pursuant to this subsection a copy of each order issued by registered or certified mail or through use of an electronic medium with electronic receipt verification. The amount assessed to the energy resource supplier pursuant to the order shall be considered to the extent otherwise permitted by law a government-imposed cost and recoverable by the energy resource supplier as a cost included within the price of the service or product supplied.

(g) The amounts assessed to individual energy resource suppliers pursuant to paragraph (e) of this subsection shall be paid to the department as follows:

(A) Amounts assessed for the first fiscal year of a biennium shall be paid not later than 90 days following adjournment sine die of the odd-numbered year regular session of the Legislative Assembly; and

(B) Amounts assessed for the second fiscal year of a biennium shall be paid not later than July 1 of each even-numbered year or 90 days following adjournment sine die of the even-numbered year regular session of the Legislative Assembly, whichever is later.

(h) An energy resource supplier shall provide the director, on or before May 1 of each year, a verified statement showing its gross operating revenues derived within the state for the calendar or fiscal year that was used by the energy resource supplier for the purpose of reporting federal income taxes for the preceding calendar or fiscal year. The statement must be in the form prescribed by the director and is subject to audit by the director. The statement must include an entry showing the total operating revenue derived by petroleum suppliers from fuels sold that are subject to the requirements of Article IX, section 3a, of the Oregon Constitution, and ORS 319.020 with reference to aircraft fuel and motor vehicle fuel, and ORS 319.530. The director may grant an extension of not more than 15 days for the requirements of this subsection if:

(A) The energy supplier makes a showing of hardship caused by the deadline;

(B) The energy supplier provides reasonable assurance that the energy supplier can comply with the revised deadline; and

(C) The extension of time does not prevent the council or the department from fulfilling its statutory responsibilities.

(i) As used in this section:

(A) "Energy resource supplier" means an electric utility, natural gas utility or petroleum supplier supplying, generating, transmitting or distributing electricity, natural gas or petroleum products in Oregon.

(B) "Gross operating revenue" means gross receipts from sales or service made or provided within this state during the regular course of the energy supplier's business, but does not include either revenue derived from interutility sales within the state or revenue received by a petroleum supplier from the sale of fuels that are subject to the requirements of Article IX, section 3a, of the Oregon Constitution, or ORS 319.020 or 319.530.

(C) "Petroleum supplier" has the meaning given that term in ORS 469.020.

(j) In determining the amount of revenues that must be derived from any class of energy resource suppliers by assessment pursuant to this subsection, the director shall take into account all other known or readily ascertainable sources of revenue to the council and department, including, but not limited to, fees imposed under this section and federal funds, and may take into account any funds previously assessed pursuant to ORS 469.420 (1979 Replacement Part) or section 7, chapter 792, Oregon Laws 1981.

(k) Orders issued by the director pursuant to this section shall be subject to judicial review under ORS 183.484. The taking of judicial review shall not operate to stay the obligation of an energy resource supplier to pay amounts assessed to it on or before the statutory deadline.

(9)(a) In addition to any other fees required by law, each operator of a nuclear fueled thermal power plant or nuclear installation within this state shall pay to the department annually on July 1 an assessment in an amount determined by the director to be necessary to fund the activities of the state and the counties associated with emergency preparedness for a nuclear fueled thermal power plant or nuclear installation. The assessment shall not exceed \$461,250 per year. Moneys collected as assessments under this subsection are continuously appropriated to the department for this purpose.

(b) The department shall maintain and cause other state agencies and counties to maintain time and billing records for the expenditure of any fees collected from an operator of a nuclear fueled thermal power plant under paragraph (a) of this subsection.

(10) Reactors operated by a college, university or graduate center for research purposes and electric utilities not connected to the Northwest Power Grid are exempt from the fee requirements of subsections (5), (8) and (9) of this section.

(11)(a) All fees assessed by the director against holders of site certificates for facilities that have an installed capacity of 500 megawatts or greater may be paid in several installments, the schedule for which shall be negotiated between the director and the site certificate holder.

(b) Energy resource suppliers or applicants or holders of a site certificate who fail to pay a fee provided under subsections (1) to (9) of this section [*or the fees required under ORS 469.360*] after it is due and payable shall pay, in addition to that fee, a penalty of two percent of the fee a month for the period that the fee is past due. Any payment made according to the terms of a schedule negotiated under paragraph (a) of this subsection shall not be considered past due. The director may bring an action to collect an unpaid fee or penalty in the name of the State of Oregon in a court of competent jurisdiction. The court may award reasonable attorney fees to the director if the director prevails in an action under this subsection. The court may award reasonable attorney fees to a defendant who prevails in an action under this subsection if the court determines that the director had no objectively reasonable basis for asserting the claim or no reasonable basis for appealing an adverse decision of the trial court.

SECTION 3. ORS 469.430 is amended to read:

469.430. (1) The Energy Facility Siting Council has continuing authority over the site for which the site certificate is issued [*and may*], **including but not limited to the authority to:**

(a) Inspect, or direct the State Department of Energy to inspect, or request another state agency or local government to inspect, the site at any time in order to [*assure*] **ensure** that the facility is being operated consistently with the terms and conditions of the site certificate or any order issued by the department under ORS 469.405 (3); **and**

(b) Periodically review documents, reports and other materials, or direct the State Department of Energy or request another state agency or local government to review documents, reports or other materials, to ensure that the facility continues to comply with all terms and conditions of the site certificate or any order issued by the department under ORS 469.405 (3).

(2) The council shall avoid duplication of effort with site inspections **and compliance reviews** by other state and federal agencies and local governments that have issued permits or licenses for the facility.

(3) If the council requests that another state agency or local government conduct a site inspection or compliance review under this section, the council may compensate that state agency or local government for expenses related to the site inspection or compliance review.

SECTION 4. ORS 469.441 is amended to read:

469.441. (1) All expenses incurred by the Energy Facility Siting Council and the State Department of Energy under ORS 469.360 [(1)] and 469.421 that are charged to or allocated to the fee paid by an applicant or the holder of a site certificate shall be necessary, just and reasonable. Upon request, the department or the council shall provide a detailed justification for all charges to the applicant or site certificate holder. Not later than January 1 of each odd-numbered year, the council by order shall establish a schedule of fees which those persons submitting a notice of intent, a request for an exemption, a request for a pipeline described in ORS 469.405 (3) or a request for an expedited review must submit under ORS 469.421 [at the time of] **prior to** submitting the notice of intent, request for exemption, request for pipeline or request for expedited review. The fee schedule shall be designed to recover the council's actual costs of evaluating the notice of intent, request for exemption, request for pipeline or request for expedited review subject to any applicable expenditure limitation in the council's budget. Fees shall be based upon actual, historical costs incurred by the council and department to the extent historical costs are available. The fees established by the schedule shall reflect the size and complexity of the project for which a notice of intent, request for exemption, request for pipeline or request for expedited review is submitted, whether the notice of intent, request for exemption, request for pipeline or request for expedited review is for a new or existing facility and other appropriate variables having an effect on the expense of evaluation.

(2) If a dispute arises regarding the necessity or reasonableness of expenses charged to or allocated to the fee paid by an applicant or site certificate holder, the applicant or holder may seek judicial review for the amount of expenses charged or allocated in circuit court as provided in ORS 183.480, 183.484, 183.490 and 183.500. If the applicant or holder establishes that any of the charges or allocations are unnecessary or unreasonable, the council or the department shall refund the amount found to be unnecessary or unreasonable. The applicant or holder shall not waive the right to judicial review by paying the portion of the fee or expense in dispute.

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Lori L. Brocker, Secretary of Senate

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Peter Courtney, President of Senate

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Tina Kotek, Speaker of House

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Approved:

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Kate Brown, Governor

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Jeanne P. Atkins, Secretary of State