

**HEARING OFFICER'S REPORT**  
**SEED**  
**20% ENERGY USE SAVINGS IN EXISTING STATE FACILITIES**  
**BY 2015**

Oregon Administrative Rules  
Chapter 330, Division 130, Sections 0010-0090  
July 29, 2008

**Procedural Background**

1  
2 The purpose of these rules is to implement House Bill 3612, which requires that before  
3 June 30, 2015, an authorized state agency reduce the amount of energy it uses in its state  
4 owned facilities by 20% based on usage in calendar year 2000. Stakeholder meetings were  
5 held with Agencies and with Technical Service providers on May 27, 2008.

6  
7 Notice of proposed rulemaking was published in the June 2, 2008 Secretary of State's  
8 Bulletin. Draft rules were posted on ODOE's Web site on June 4, 2008. A public hearing  
9 was held on June 18, 2008. The public comment period closed on June 24, 2008 at 5 p.m.

10  
11 Based on comments received, the Department is withdrawing the portion of the rules  
12 concerning leased buildings. We will address this issue in the program Guidelines after  
13 further discussions with DAS and General Counsel.

14  
15 One person provided testimony at the hearing, and six written comments were received.  
16 All changes recommended in this report are to the June 4, 2008, version of the proposed  
17 rules.

**Issues Addressed**

18  
19  
20 The Department identified the following issues for consideration in its notice of proposed  
21 rulemaking and initial draft rules:

- 22 • Establish criteria by which the State Department of Energy determines a person is  
23 pre-qualified to perform energy consumption analysis for a major facility that is to  
24 be constructed or renovated.
- 25 • Establish the requirement that the energy consumption analysis model be calibrated  
26 to reflect actual design and operating conditions.
- 27 • Amend rules definitions for consistency with ORS 276.900-915.
- 28 • Establish guidelines that incorporate energy efficiency requirements into lease  
29 agreements of 10 or more years.
- 30 • Establish criteria by which to pre-qualify persons for work including energy  
31 consumption analysis, energy savings performance contracts, energy audits,  
32 building commissioning, monitoring and verification services and other services

1 related to the operation and management of a facility's energy systems in order to  
2 achieve the 20% energy savings required by this bill.

- 3 • Establish annual reporting requirements and deadlines for when a state agency fails  
4 to achieve and maintain a 20 percent reduction in energy use in their authorized  
5 facilities on and after June 30, 2015.
- 6 • Determine fees by which the State Department of Energy will recover from  
7 authorized state agencies the costs associated with administering the provisions of  
8 this bill, including costs associated with adopting rules, maintaining a state energy  
9 use database and pre-qualifying persons to perform energy related work.

## 10 11 12 **Comments Received**

13 Oral comment was received at the public hearing from:

- 14 • Robin Harpster, Department of Administrative Services

15  
16 Written comments were received from:

- 17 • Troy Hanson, Balzhiser Hubbard Engineering
- 18 • Michael Rosenberg, Pacific Northwest National Laboratory (PNNL)
- 19 • Robin Harpster, Department of Administrative Services
- 20 • Stephen Kaufory, Lobbyist for Johnson Controls International (JCI)
- 21 • David Palmer, Tour Andover Controls (TAC)
- 22 • David Solomon, Oregon Parks & Recreation Department

23  
24 Copies of written testimony and an audio recording and transcript of the 20% Savings for  
25 Existing State Facilities by 2015 public hearing will be available upon request from the  
26 Department.

## 27 28 **Issues, Discussion, and Recommendations**

### 29 ***Issue 1: Baseline energy model.***

30 Comment(s): Troy Hanson of Balzhiser & Hubbard Engineering commented that the  
31 Final Energy Model created in the design development phase should not be the basis  
32 for the +/- 5% comparison between actual and predicted energy use. He suggested that  
33 a later model reflecting actual building schedules should be the basis of comparison.  
34 Michael Rosenberg of PNNL agreed with the proposal put forth by Troy Hanson.

35  
36 Discussion: The design development stage of the building design is early in the overall  
37 design process. Often times equipment and lighting systems, envelope components,  
38 and schedules change between the design development stage and the final construction  
39 of the building. The energy model developed at the design development stage often  
40 times does not accurately represent the actual building. A final SEED energy model  
41 developed later in the design process allows for a more accurate model of the actual  
42 building construction and operation.  
43

1        Recommendation: The Final SEED Energy Model shall be submitted to ODOE during  
2 the construction phase of the project, after all substitutions and change orders have  
3 been incorporated into the design.  
4

5        ***Issue 2: Address building operation in post-occupancy phase.***

6        Comment(s): Troy Hanson of Balzhiser Hubbard Engineering stated that the current  
7 SEED program addresses the effects on energy use from design and implementation in  
8 building projects, but does not adequately address the effects on energy use from  
9 building operation. Troy suggested changes to the Post Occupancy phase of the SEED  
10 program. Suggested changes include a more robust post-occupancy phase review by  
11 the Agency, ODOE, the design team, and commissioning agent of building operation  
12 and energy use. Michael Rosenberg of PNNL agreed with comments put forth by Troy  
13 Hanson.  
14

15        Discussion: The comment is valid. However, this issue is best addressed through the  
16 SEED Guidelines, not in the administrative rules.  
17

18        Recommendation: No action is necessary. Address this action through the SEED  
19 Guidelines.  
20

21        ***Issue 3: Does the pre-qualified energy analyst need to be a professional engineer?***

22        Comment(s): Troy Hanson of Balzhiser & Hubbard Engineering questioned whether  
23 the language in HB 3612 requiring that an energy consumption analysis be prepared  
24 "... under the direction of a person that is pre-qualified in accordance with this section"  
25 would allow an energy analyst who is not a professional engineer or licensed architect  
26 to perform an energy consumption analysis. He feels this would be a step backwards  
27 for the SEED program.  
28

29        Discussion: The Department of Energy does not have the authority to revise ORS  
30 276.915 language. However, the intent of the pre-qualification requirement is to  
31 maintain the current professional standards. This will be addressed in the RFQ for the  
32 Energy Analysts.  
33

34        Recommendation: No action or change is necessary.  
35

36        ***Issue 4: Submetering of loads.***

37        Comment(s): Troy Hanson of Balzhiser & Hubbard Engineering suggested that sub-  
38 metering of the plug loads, interior and exterior lighting, specialized loads, domestic  
39 water heating, and heating and cooling loads would provide important information for  
40 energy model calibration and trouble shooting problems of building operation.  
41

42        Discussion: Metering of electrical and fossil fuel consumption is currently required as a  
43 minimum for all SEED projects. Additional sub-metering of energy loads can assist the  
44 building operator in determining if the building is performing as designed. Sub-  
45 metering loads also provides valuable information for calibrating the energy model.  
46 Additional meters can be expensive and might not be practical for smaller projects.

1  
2 Recommendation: The Agency and the Department in consultation with the energy  
3 analyst shall determine when additional sub-metering is appropriate for each project.  
4

5 ***Issue 5: No consensus on leased facilities.***

6 Comment(s): Robin Harpster of DAS expressed the concern that DAS had not been  
7 included in the formation of Rule language concerning leased buildings. Robin stated  
8 that the Draft rules were not released until June 10<sup>th</sup> and recommended that more time  
9 be allowed for collaboration between DAS and stakeholders regarding the writing of  
10 rules affecting leased buildings.  
11

12 Discussion: DAS has the most leased buildings of any state agency, so it is important  
13 the rules address their needs. ODOE met with DAS personnel on May 29<sup>th</sup> to discuss  
14 lease contracts. ODOE incorporated some of their suggestions into the Rules language.  
15 The rules were posted on the ODOE website on June 4<sup>th</sup>, two weeks before the public  
16 hearing. No comments from DAS were received between the posting of the Draft Rules  
17 and the public hearing.  
18

19 Recommendation: The rules should refer to establishing Guidelines for incorporating  
20 energy efficiency requirements into lease agreements of 10 years or more as stated in  
21 HB 3612. ODOE will consult with DAS and OUS in the development of the  
22 Guidelines.  
23

24 ***Issue 6: Authority to require energy efficiency language be added to Agency lease***  
25 ***contracts.***

26  
27 Comment(s): Ms. Harpster questioned the authority of ODOE to require language be  
28 added to DAS contracts.  
29

30 Discussion: HB 3612 says the State Department of Energy shall adopt rules  
31 “establishing guidelines for incorporating energy efficiency requirements into lease  
32 agreements of 10 years or more, to be phased in as current leases expire or as new  
33 agreements are entered into.” Incorporating language into the contract would seem to  
34 be an effective, if not necessary, way to ensure that agencies obtain maximum energy  
35 efficiency in leased buildings. We need to consult further with general Counsel and  
36 DAS on the best way to do this.  
37

38 Recommendation: The Rules shall refer to establishing Guidelines for incorporating  
39 energy efficiency requirements into lease agreements of 10 years or more as stated in  
40 HB 3612.  
41

42 ***Issue 7: The rules should reference the Guidelines.***

43 Comment(s): Ms. Harpster expressed the concern that the required Guidelines were  
44 neither referenced nor included in the rules. An additional comment submitted by Ms.  
45 Harpster on June 24th requested that DAS would like to have their request for changes  
46 to the rule on record for future reference therefore requesting that the section of the

1 rules addressing procedures for leased buildings be revised to reference Guidelines as  
2 required under HB 3612.

3  
4 Discussion: HB 3612 states that rules shall establish guidelines for incorporating  
5 energy requirements into lease agreements of ten years or more. Rules do not typically  
6 include guidelines. Generally guidelines are written after Rules have been completed  
7 and contain further explanation of the requirements of the rules. ODOE will consult  
8 with DAS and OUS in the development of the Guidelines.

9  
10 Recommendation: The Rules shall refer to establishing Guidelines for incorporating  
11 energy efficiency requirements into lease agreements of 10 years or more as stated in  
12 HB 3612.

13  
14 ***Issue 8: Should penalties for non-compliant leased buildings be addressed in rule?***

15 Comment(s): Robin Harpster said that no penalty was identified if leased buildings  
16 were not in compliance with the rules.

17  
18 Discussion: Reporting requirements and penalties for non-compliant leased buildings  
19 will be determined in Guidelines.

20  
21 Recommendation: The Rules shall refer to establishing Guidelines for incorporating  
22 energy efficiency requirements into lease agreements of 10 years or more as stated in  
23 HB 3612. Penalties for non-compliance will be addressed, if necessary.

24  
25 ***Issue 9: Selection of Energy Service Company (ESCO) directly from Dept. of Energy list***  
26 ***of pre-qualified contractors.***

27 Comment: Steven Kafoury, representing Johnson Controls International (JCI), stated  
28 that the concept of HB3612 was that the Oregon Department of Energy (ODOE) would  
29 pre-qualify ESCOs, who could then be directly selected by contracting agencies for  
30 ESPC work. This is the model that the Federal Government Service Accountability  
31 (GSA) follows. Steven Kafoury suggests that a compromise should be made that  
32 requires contracting agencies to select a minimum of three ESCOs from the list for  
33 interviews.

34  
35 Discussion: We concur with Mr. Kafoury's suggestion that contracting agencies select  
36 a minimum of three ESCOs from ODOE's list of pre-qualified contractors for  
37 interviews. GSA and several states that have successful ESPC programs have similar  
38 models that follow a two step selection process, beginning with pre-qualification by the  
39 State Energy Office (SEO). They require a less formal selection process that includes  
40 ESCO response to information specific to the project, interviews with two or more  
41 ESCOs, and prior to entering into an audit contract.

42  
43 This process will reduce costs to the ESCO and the owner because the first step of the  
44 selection process (which is a one-time effort) will include the comprehensive proposal.  
45 The second step of the selection process will be much less comprehensive and will  
46 only require that the ESCO respond to the specific project in question.

1  
2 Recommendation: Add language incorporating Mr. Kafoury's suggestion that  
3 contracting agencies select at least three ESCOs from the list for an interview/informal  
4 bid.

5  
6 ***Issue 10: Consideration of non-qualified ESCOs.***

7 Comment: Steven Kafoury, representing Johnson Controls International (JCI), stated  
8 that the new rules require public notification by the contracting agency not only to  
9 ESCOs but to the all contractors.

10  
11 Discussion: We concur with the intent of Mr. Kafoury's comments. The purpose of  
12 pre-qualifying ESCOs is to streamline the selection process for contracting agencies by  
13 narrowing the universe of potential contractors. However, we thought the draft rules  
14 already did what Mr. Kafoury suggests. OAR 330-130-0090 says that "Authorized  
15 state agencies must only select persons or firms that have been pre-qualified by the  
16 Oregon Department of Energy to perform energy analysis and energy savings  
17 performance contracting services. Authorized state agencies that wish to hire a person  
18 or firm that has not been previously pre-qualified by the Oregon Department of Energy  
19 must request approval from the department for exemption from this requirement."  
20

21 Recommendation: *No action or change is necessary.*

22  
23 ***Issue 11: Financial guarantees.***

24 Comment: David Palmer of Tour Andover Controls (TAC) stated that the definition of  
25 ESCO does not mention the ability to provide financial guarantees in which the client  
26 is protected by a shortfall check in the event that energy cost savings are not realized  
27 from the project.

28  
29 Discussion: One of the primary qualification criteria will be the ESCOs ability to  
30 provide a financial guarantee for the project. The definition of ESCO includes such  
31 language in rule. The procurement process for pre-qualifying ESCOs under the  
32 provision of this bill will require proposing firms to provide information about the  
33 financial soundness, history, and bonding of the company. These sections will be  
34 spelled out in more detail in the procurement process.

35  
36 Recommendation: No action or change is necessary.

37  
38 ***Issue 12: Pricing factors in selection criteria.***

39 Comment: David Palmer from Tour Andover Controls (TAC) stated that their  
40 experience shows that the client typically benefits the most from a RFQ-only type  
41 process. "Most states use an RFQ model as their prescribed process for ESCO  
42 selection. We are curious why price factors are included in Oregon's RFP. In our  
43 experience, having a price component to the selection gives ESCOs the ability to "buy"  
44 projects through one-time low fee structure or audit cost agreements. If price is a  
45 component, it also gives the client the idea they want the cheapest vendor instead of the  
46 one with the best track record of their clients seeing true measured performance

1 increases as a result of their ESPC project. Because an ESPC agreement is built  
2 around the long-term value of the project (savings), and the client is depending on that  
3 value being delivered in the future, shouldn't the merits of the company be the sole  
4 deciding factors in the selection? In our experience, most ESCOs charge  
5 approximately the same fees for delivering a project when all is said and done. This  
6 price component of the draft rule is concerning to us and we appreciate the opportunity  
7 to voice our concerns as the rules are re-written.”

8  
9 Discussion: The scoring criteria will be heavily weighted on qualifications. However,  
10 the state feels that it is prudent to require the ESCO to provide cost and pricing  
11 information. Other states with successful ESPC models require such information and  
12 actually establish acceptable maximum audit costs, markups, and fees. ODOE has  
13 determined that including cost and pricing factors in the procurement process is  
14 consistent with Oregon procurement statute, and with other state ESPC procurement  
15 models.

16  
17 Recommendation: No action or change is necessary.

18  
19 ***Issue 13: Limiting ESPC to projects that save energy and water.***

20 Comment: Under the list of requirements for state agencies entering ESPC agreements,  
21 item d) limits the scope of ESPC work to projects that save energy and water. David  
22 Palmer of Tour Andover Controls (TAC) asked whether it is the overall project or each  
23 individual component that must save energy or water. In many cases, as part of the  
24 scope of an ESPC, roofs and other infrastructure are replaced as part of the  
25 improvements of the energy-using systems. This is typically the result of needing to  
26 demolish part of the structure to accomplish the needed energy conservation measures,  
27 or leveraging energy savings to buy down the cost of a larger improvement project.

28  
29 Discussion: Oregon procurement law (ORS 279A.010) limits the permitted scope of  
30 work under ESPC to implementation of ECMs, as well as other work on building  
31 systems or building components that are directly related to the ECMs. In terms of the  
32 comments submitted, if something needs to be altered or demolished to accommodate  
33 an energy conservation measure, it may be included as part of the work under an ESPC  
34 subject to these rules.

35  
36 Recommendation: No action or change is necessary.

37  
38 ***Issue 14: Include a definition of nonrenewable energy in the rules.***

39 Comment(s): David Solomon requested a definition of “nonrenewable energy” be  
40 added to the rules.

41  
42 Discussion: House Bill 3612 removed the term nonrenewable from ORS 276.900-915,  
43 therefore there is no reason to provide a definition in the rules.

44  
45 Recommendation: A definition of “nonrenewable energy” will not be added to ORS  
46 276.900-915. However, with rising energy costs, institution of a Renewable Portfolio

1 Standard, and other drivers, this is an appropriate time to provide a definition of  
2 renewable energy. A definition for “renewable energy” will be added.

3  
4 ***Issue 15: Should the rules should say that increased renewable energy use is allowed.***

5 Comment(s): David Solomon from Oregon State Parks and Recreation Department  
6 stated that since the goal of this bill is to reduce the use of nonrenewable energy, the  
7 rules should state that increased use of renewable energy is allowed by Agencies and  
8 not be counted against the 20% less than 2000 target.

9  
10 Discussion: House Bill 3612 calls for state agencies to reduce energy use 20 percent or  
11 more. However, it deleted the word “nonrenewable.” While we believe it is reasonable  
12 to give credit for on-site use of distributed renewable resources, we believe the clear  
13 intent of removing “nonrenewable” was to ensure that renewable energy not be used to  
14 relieve an agency of the obligation to improve the energy efficiency of buildings.  
15 Energy conservation generally is more cost-effective than renewables, and agencies  
16 should be reducing loads before trying to meet loads with more expensive renewables.

17  
18 In new buildings and major renovations (i.e., SEED) we currently give credit for  
19 renewables, so long as building load is reduced 20% beyond what would be used by a  
20 building designed to code. We will continue to do so. In existing buildings, agencies  
21 are required to reduce energy use in facilities by 20% compared to usage in calendar  
22 year 2000. This is measured by purchased energy. So long as agencies reduce  
23 purchased energy use by 20% or more, it doesn’t matter whether it was due to  
24 efficiency improvements or use of on-site renewable resources.

25  
26 Our concern is with using renewable energy generating facilities external to the state  
27 facility that could offset the entire need to reduce load through efficiency  
28 improvements. By this logic, credit should not be given for the purchase of green tags  
29 or renewable energy generated external to the state facility in question.

30  
31 Recommendation: The definition of renewable energy (#14, above) should specifically  
32 exclude the purchase of green tags and use of or renewable energy generated external  
33 to the state facility in question.

34  
35 Respectfully Submitted,

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Date