

HEARING OFFICER'S REPORT
RENEWABLE PORTFOLIO STANDARD (RPS)
RENEWABLE ENERGY CERTIFICATE (REC) TRACKING

Oregon Administrative Rules
Chapter 330, Division 150, Sections 0005 to 0030
January 28, 2008

Procedural Background

The Secretary of State published a notice of this proceeding on October 1, 2007 in the Secretary of State's Bulletin.

SB 838 was signed into law on June 6, 2007. A public workshop was held on November 6, 2007. This workshop addressed the scope of this rulemaking and potential future rulemaking related to implementation of SB 838. Notice of the workshop was sent via e-mail to mailing lists maintained by the Oregon Department of Energy, as well as to additional interested parties, and was posted on the front page of the Department's Web site. An e-mail list service was established to provide continuing information about rules and implementation of the Oregon RPS to interested parties.

Draft rules (#1A) were available November 5, 2007 and reviewed at the November workshop. Draft rules were revised based on comments received during and subsequent to the workshop. The revised rules (#2) were posted on the Department's Web site on December 4, 2007. Comments from the workshop are not included in this report, unless otherwise noted. The public hearing was held on December 5, 2007. The public comment period ended on December 11, 2007.

Because of the issues raised at the workshop and again during the public comment period, the Department delayed rule adoption beyond the anticipated date of January 1, 2008. The primary issue staff considered during this delay was the appropriate earliest date for a Renewable Energy Certificate that could be used to satisfy the requirements of the Oregon RPS. Because the first compliance period for the Oregon RPS is 2011, the date determined to be the oldest eligible Certificate for Oregon will be the first banking date. The delay in rule adoption provided for more thorough review of the effect of various banking dates on the effectiveness of the Oregon RPS.

The Renewable Energy Working Group (REWG) held its first meeting on February 22, 2006. One of the activities of the REWG was to evaluate an RPS, in comparison to production based incentives, which would lead to an increase in the percentage of Oregon's electricity supply generated from renewable energy resources. The REWG served an advisory role to develop the framework of the Oregon RPS, ultimately expressed within Senate Bill 838.

Issues Addressed

Below is a summary of the rules proposed by the Department in its rulemaking notice and draft rules posted on December 4, 2007.

- Establish the Western Renewable Energy Generation Information System (WREGIS) as the tracking system for compliance with the Oregon RPS.
- Establish October 1, 2007 as the earliest creation date of Renewable Energy Certificates that may be used to satisfy requirements of the Oregon RPS.
- Establish the parameters for use of bundled and unbundled Renewable Energy Certificates to meet the requirements of the Oregon RPS.

Additional issues raised during the comment period are discussed in the following section.

Comments Received

Public comment was received either at the public hearing or in writing from the following (with date of transmittal noted).

- Oregon Public Utility Commission (OPUC), Lisa Schwartz, November 21, 2007
- Oregon Business Association (OBA), Lisa Adatto, November 26, 2007
- Associated Oregon Industries (AOI), Julie Ann Brandis, November 27, 2007
- PacifiCorp, Andrea L. Kelly, November 29, 2007
- Renewable Northwest Project (RNP), Jesse Jenkins, December 3, 2007
- PacifiCorp, Ryan Flynn, December 5, 2007
- Oregon Municipal Electric Utilities Association (OMEU), Tom O'Connor, December 5, 2007
- RNP, Jesse Jenkins, December 5, 2007
- Citizens' Utility Board (CUB), Jason Eisdorfer, December 10, 2007
- Industrial Customers of Northwest Utilities (ICNU), Allan Chan, December 11, 2007
- OMEU, Tom O'Connor, December 11, 2007
- Energy Trust of Oregon (Energy Trust), Peter West, December 11, 2007
- RNP, Jesse Jenkins, Suzanne Leta Liou and Environment Oregon, Jeremiah Baumann, December 11, 2007
- David Shaw, Oregon Rural Electric Cooperatives Association (ORECA), December 11, 2007
- PacifiCorp, Andrea L. Kelly, December 11, 2007
- OPUC, Lisa Schwartz, December 11, 2007
- Bonneville Power Administration (BPA), Peter Cogswell, December 11, 2007
- Portland General Electric (PGE), Brendan McCarthy, December 11, 2007

Issue 1: Designate the Western Renewable Energy Generation Information System to track and report Renewable Energy Certificates

Comment: Nearly all comments supported the use of WREGIS, though some support was conditional. (Note that Issue 4, below, addresses the conditional support of WREGIS.)

Discussion: SB 838 requires the Department to "consult with the Public Utility Commission before establishing a system of renewable energy certificates." This consultation resulted in

the proposed rules to designate WREGIS as the system to show compliance with the Oregon RPS. (Additional discussion is included in consideration of Issue 4.)

Recommendation: Retain the designation of WREGIS as the sole system for tracking compliance with the Oregon RPS.

Issue 2: Establish October 1, 2007 as the initial date for which Renewable Energy Certificates may be used to satisfy future requirements of the Oregon RPS

Comment: The Department's draft (#1A) rules of November 5, 2007 proposed an effective date of January 1, 2008 to accept valid, WREGIS issued Certificates for use to satisfy the Oregon RPS. This date matched the one that required OPUC to implement some portions of Senate Bill 838 (Section 27). Based on public comments during the November 6, 2007 workshop, the subsequent draft (#2) of these rules proposed October 1, 2007 as the initial date. The comments which follow are primarily in relation to the revised date of October 1, 2007.

OPUC, RNP, Environment Oregon, CUB, OMEU, and ORECA supported the October 1, 2007 date as a reasonable interpretation of the law.

The OPUC comments note that they find January 1, 2007 as a reasonable alternative date. Their comments continued as follows:

“We have concerns about the integrity of older renewable energy certificates. The earlier the first banking date, the more difficult it is to establish that the renewable energy certificates are in fact available for compliance with the renewable portfolio standards — in other words, the utility did not previously claim the certificates in power source disclosures to retail consumers, sell them in the wholesale market, or use them to meet consumer purchases for voluntary renewable energy programs.”

PGE considered several dates and expressed support for the OPUC conclusion regarding January 1, 2007. The PGE comments note that a “statutory maxim of construction is that, generally, statutes will not be considered to have retroactive effect unless the legislature’s intent to the contrary clearly appears.” PGE further notes: “The bill does not contain any unusual phrasing or specific grammatical clues such as the use of past tense verbs that would provide for a retroactive application.” This argument concluded that the signing date of June 6, 2007 has stronger legislative support than the drafted October 1, 2007 date. PGE also rendered an alternate argument for January 1, 1995 as superior to the draft date of October 1, 2007. Citing an aim to “recognize actions taken by utilities in preparation for the adoption of a renewable portfolio standard without significantly changing the pressures on utilities to prioritize the acquisition of renewable generation” PGE concluded their comments with support for January 1, 2007.

CUB suggested a June 6, 2007 date as a good compromise between the proposed date and requests for an older date. They cited:

“the value of SB 838 as moving more renewable generation into existing utility resource portfolios on a going forward basis, not simply congratulating ourselves for the meager investments we have made in renewable energy in the distant past. On the other hand, there may be relatively recent investments that were made in anticipation of a renewable portfolio standard. An earlier date that encompasses these resources but does not go too far back in time would reduce costs for the customer and still preserve the integrity of the Act.”

OMEU also supported the June 6, 2007 date, without comment on earlier dates, whereas RNP and Environment Oregon opposed an earlier date. The latter two organizations stated concerns that an earlier date will reduce the need for new renewable generation facilities which compromises the law’s effectiveness and raises question about the integrity of Certificates associated with older electricity generation.

PacifiCorp’s written comments included a proposed basis for selecting an effective date. Considering the January 1, 1995 date as the date intended by the bill, as noted below, PacifiCorp also offered that:

“any date that the Department adopts other than the January 1, 1995 date provided by statute must have a rational and nondiscriminatory basis. Accordingly, if the Department determines that its criterion for establishing such date is the date upon which utilities might reasonably have begun taking actions to comply with a state renewable energy requirement, the more appropriate, nondiscriminatory date would be April 12, 2005, the date of the Renewable Energy Action Plan for the state. This initiated the Renewable Energy Working Group, which worked to create legislation that ultimately resulted in SB 838.”

PacifiCorp, AOI, OBA, and ICNU all supported a January 1, 1995 date. Their comments generally state that the SB 838 language that defines eligible generating facilities (Section 3) is intended to encompass of eligible generation of electricity as well.

PacifiCorp provided the most detailed comments from the group actively supporting the January 1, 1995 date. PacifiCorp argued the October 1, 2007 date is “arbitrary, inconsistent with SB 838, undermines important consumer protection measures contained in the legislation, and penalizes the customers of pioneering utilities, such as PacifiCorp, that increased their use of renewable energy sources before the law required them to do so.” They further commented that the proposed date “indicates disparate treatment between customers of consumer-owned utilities and investor-owned utilities by rewarding certain parties, but not others, for early action.”

Discussion: Department staff prepared forecasts of the new resources that would likely be needed to meet the Oregon RPS for the two largest utilities in the state. These utilities, PGE and PacifiCorp, provide about two-thirds of the electricity consumed in Oregon. The Department’s forecasts included the outcome of these dates: January 1, 2005; April 12, 2005; January 1, 2007; and June 6, 2007. Staff projections considered eligible facilities currently in operation and those with announced operation by the end of 2008. Varying amounts of Certificates acquired from the 14 western states as well as relevant Canadian and Mexican members of the Western Energy Coordinating Council have been factored in. The general assumption is that no Certificates from outside entities will be used for any 2007 start date

but the legal maximum from outside entities will be used for the 1995 start date. A 2005 start date is forecast to use one-third of the legal maximum.

Department projections were checked against data supplied by PacifiCorp and PGE to the Oregon PUC. The projections conclude that a January 1, 2007 date means that the targets for both utilities are sufficiently large by 2020 that meaningful development of renewable energy must begin now to assure that adequate resources are acquired to meet the standard. That is not true for either utility using the January 1, 1995 date and is not true for PacifiCorp using the April 12, 2005 date.

The Department's Assistant Attorney General has expressed concern that older dates could be an abuse of discretion by the Department. This is because older dates result in development of substantially fewer, if any, renewable generation resources by 2025. An interpretation by the Department to use the dates earlier than January 1, 2007 would be a clear contravention of the purposes of Senate Bill 838. On the other hand, the Department of Justice has advised that January 1, 2007 is legally defensible.

The Legislature provided a clear expectation in the purposes section of Senate Bill 838 that the bill was intended to cause significant actions to occur to develop more renewable energy. The purposes section provides the following:

“Whereas the Legislative Assembly finds that it is in the interest of the state to promote research and development of *new renewable energy sources in Oregon*; and

Whereas the Legislative Assembly finds that it is necessary for Oregon's electric utilities to decrease their reliance on fossil fuels for electricity generation and *to increase their use of renewable energy resources*;

Whereas the Oregon Renewable Energy Act provides a comprehensive renewable energy policy for Oregon, enabling industry, government and all Oregonians *to accelerate the transition* to a more reliable and more affordable energy system; ...” (emphasis added).

Staff finds that the forecasts for utility compliance with the RPS are clear: a decision to allow Certificates associated with generation from January 1995 forward, as proposed by some, would clearly undermine legislative intent to develop and increase the use of renewable energy resources. The same holds, to a somewhat lesser degree, for all proposed alternative dates before 2007.

The bill allows Certificates to be used from renewable resources anywhere in the 14 western states covered by the Western Electricity Coordinating Council (WECC). There is a limit of unbundled Certificates but the Act's banking provisions provide for the potential of a significant accumulation of Certificates from outside Oregon. The use of older Certificates, which the utilities may possess or can readily acquire from generation throughout the WECC, and utility-owned or contracted sources associated with generation earlier than 2007 would satisfy most of the requirements of the Oregon RPS well beyond the initial compliance years.

An additional and significant issue with dates before 2007 is that verifying Certificates that were produced over the last ten years would be extremely difficult, if not impossible. As

noted in the Comments section, above, and again here for reference, the OPUC raised this issue:

“We have concerns about the integrity of older renewable energy certificates. The earlier the first banking date, the more difficult it is to establish that the renewable energy certificates are in fact available for compliance with the renewable energy standards – in other word, the utility did not previously claim the certificates in power source disclosures to retail consumers, sell them in the wholesale market, or use them to meet consumer purchases for voluntary renewable energy programs.”

The Legislature authorized the Department of Energy in Section 14 of Senate Bill 838 to establish a system of renewable energy certificates to determine compliance with the Oregon RPS. That Section further provides that the Department “may allow use of renewable energy certificates that are issued, monitored, accounted for or transferred through a regional system or trading program, including but not limited to the Western Renewable Energy Generation Information System (WREGIS).”

While not requiring the WREGIS system, the Legislature clearly wanted a regional system which would allow trading and banking of Certificates by Oregon’s utilities. WREGIS is the only regional system in the western United States. It was developed by the western states, including Oregon, so that our utilities would be able to use Certificates in a manner which allowed for trading among other utilities with which our utilities commonly exchange power and transmission access.

WREGIS only became operational in June of 2007. It does not have the capacity or ability to verify Certificates from power plants which have been operating for years to determine if they meet the appropriate criteria for WREGIS certification. The WREGIS governing body may not find that a request to issue Certificates for the six month period that would be allowed by our date of January 1, 2007 satisfies the organization’s rules. Nevertheless, if utilities are able to satisfy WREGIS requirements for documentation in this six month period before WREGIS became effective then Department staff finds that the Certificates from this period should be accepted to satisfy requirements of the Oregon RPS.

January 1, 2007 is also the effective date for projects covered by the package of energy bills passed by the Legislature. The two new tax credits in the biofuels package, House Bill 2210, apply to qualifying investments made in years beginning on or after January 1, 2007. Similarly, the changes to the Business Energy Tax Credit and to the Residential Energy Tax Credit apply to projects completed on or after January 1, 2007. The January 1, 2007 date was used in those bills so that projects would not be delayed by the pending legislation, but could move forward and would still benefit from the bills if those bills were passed. A similar justification exists for the first date to accept Certificates for the Oregon RPS.

Use of January 1, 2007, also means that most of the initial output of recent wind farms such as Leaning Juniper and Biglow Canyon can be credited as bankable Certificates under this effective date.

Beyond the previously discussed findings that a decision to accept Certificates prior to 2007 undermines the purpose of the Act, staff does not find a compelling basis to select April 12, 2005 in particular. The Renewable Energy Action Plan – cited as the primary support for the April 12, 2005 date – did not propose a specific renewable portfolio standard. It simply provided for the Renewable Energy Working group to consider an Oregon RPS. The plan provides the following:

“The Renewable Energy Working Group will consider to:

...

- Assess the feasibility of a state Renewable Portfolio Standard and compare it with production-based incentives as to its effectiveness to encourage renewable energy development.”

Page 11, Renewable Energy Action Plan, April 12, 2005.

In fact, no RPS was introduced in the 2005 session. The Renewable Energy Working Group considered the RPS as well as other legislative ideas throughout all of 2006. Legislation was introduced in 2007 and was changed further numerous times before Senate Bill 838 received final passage.

With due consideration of the design and construction timeline for large generation projects, all facilities in operation at the time SB 838 became law would have been authorized with a prospective Oregon RPS as a relatively minor consideration. Therefore, the concept that these early investments are penalized by selection of 2007 date reaches beyond a reasonable understanding of investment analysis. Older facilities are allowed to earn Certificates for continued production of electricity from qualified renewable resources as is consistent with the Act. Staff believes that this is the reward for early adopters intended by the Act.

In regards of the comment by PacifiCorp that an October 1, 2007 date “nullifies an entire subsection [4(4)(b)] of SB 838” staff notes the following. PacifiCorp compares subsection 4(4)(b) to subsection 3(3). These subsections of SB 838 are as follows:

“SECTION 3. Qualifying electricity; age of generating facility.

...

(3) [Electricity from a hydroelectric facility that became operational before January 1, 1995, may be used to comply with a renewable portfolio standard if the electricity is attributable to efficiency upgrades made on or after January 1, 1995. If an efficiency upgrade is made to a Bonneville Power Administration facility, only that portion of the electricity generation attributable to Oregon’s share of the electricity may be used to comply with a renewable portfolio standard.]

SECTION 4. Renewable energy sources.

...

(4) Electricity generated by a hydroelectric facility may be used to comply with a renewable portfolio standard only if:

...

(b) The electricity is attributable to efficiency upgrades made to the facility on or after January 1, 1995.”

The main difference between these subsections is the reference in (3) to BPA facilities. The eligibility date of Certificates for compliance with the Oregon RPS does not impact either of these subsections.

Staff believes the concerns that the proposed October 1, 2007 date “undermines important consumer protection measures contained in the legislation” fails to acknowledge a primary and explicit consumer protection measure: the cost limitation of Section 12.

Recommendation: Establish January 1, 2007 as the earliest date that an Oregon qualified, WREGIS-issued Certificate may be used to meet the requirements of the Oregon RPS. Require entities that participate in the Oregon RPS to comply with all information, data reporting, and verification requirements of WREGIS and the WREGIS Operating Rules, including costs required for compliance. Retain the requirement that only WREGIS-issued Certificates may be used.

Issue 3: Add provision in rules to require Agency Director’s consultation with interested parties in case of significant changes in WREGIS operating policies

Comment: PacifiCorp’s comments of November 29, 2007 include a proposed modification to a provision for the Department to implement rulemaking to address concerns about potential changes to the WREGIS Operating Rules. PacifiCorp’s proposed modification is to add language with the explicit condition that the Department Director consults with interested parties prior to implementing rulemaking.

Discussion: The rulemaking process provides for input of interested parties. The decision to begin the rulemaking process occurs in response to legislative action or when Department staff identifies a need to improve or clarify some element of existing rule. The latter is typically in response to constituent request or comment. As such, the modification requested does not appear to be needed. However, the subject matter of this rulemaking is complicated. Unforeseen developments at WREGIS may occur which require unanticipated rulemaking to address. Rulemaking by the Department, in turn, could affect Oregon entities participation in WREGIS. Accordingly, the suggestion that the Department consult with interested parties involved in WREGIS before initiating rulemaking is a good one and will be adopted.

Recommendation: Adopt language which implements public consultation with interested parties.

Issue 4: Establish an alternate tracking system for generation not eligible for tracking within WREGIS

Comment: While all expressed support for WREGIS in principle, OMEU, PGE, BPA, and the Energy Trust listed conditions that could result in the need for an alternate system to WREGIS. An alternate system would provide Certificates under a variety of circumstances that cause some generation to be ineligible for WREGIS Certification or some condition that makes WREGIS unworkable for some entities.

OMEU expressed a reservation in the use of WREGIS if efforts to allow smaller utilities to operate under a BPA membership are not successful. They expressed a related concern if system constraints prevent WREGIS from issuing retroactive Certificates for Oregon eligible generation. OMEU requested creation of an Oregon 'bridge' account to address this concern.

PGE echoed the OMEU comments with a concern that "Depending on the date established by the department for the banking of [Certificates] created by qualifying facilities, WREGIS may not yet be available for the issuance and monitoring of those RECs." PGE agreed with the suggestion of a bridging system with difference of specifically noting a bridge so "Certificates [are] adequately tracked for future inclusion in WREGIS."

The comments from BPA noted a concern for "when a change to WREGIS operations or, worse, a direct dispute or conflict with WREGIS, prevents an individual utility from using WREGIS to demonstrate compliance with the RPS." Their proposed resolution is to add language in the rules to reflect the permissive reference within SB 838 of "a regional system or trading program including but limited to WREGIS."

Comments from the Energy Trust identify a problem of meeting WREGIS requirements for most of the small systems they have funded. This problem stems from the WREGIS requirement that "all net-metered [Certificates] must have an actual meter reading [and] the meters still must be read in person or through the installation of elaborate metering and communication systems." The Energy Trust notes that the expense of this individual reading is inordinately large relative to the amount of generation and the associated Certificates from them. The Trust requests a waiver as they seek potential modification of WREGIS protocols.

Discussion: WREGIS is the only regional system available in the western United States to register and track Renewable Energy Certificates. It was developed by the western states, including Oregon, as well as two Canadian provinces and a portion of Baja California. WREGIS allows utilities to trade Certificates as they currently exchange power and access to transmission. It took years of work to develop WREGIS.

It is not practical for Oregon to develop an alternative system. An alternate system is not likely to be accepted by WREGIS or other states, and the Certificates created through an alternate system would likely not be tradable in other states.

Staff believes a robust trading system is only practical and likely through the exclusive use of WREGIS. An alternate system to track Renewable Energy Certificates ineligible for WREGIS has not been shown to provide a value commensurate with the expense of creating such a system.

Beyond the discussion contained under Issue 1, staff notes that SB 838 directs the Department to "allow use of renewable energy certificates that are issued, monitored, accounted for or transferred by or through a regional system or trading program." An alternative system to satisfy limited or particular needs in Oregon will be unlikely to operate on a regional basis.

An alternative Oregon-only system will undermine a vigorous system that allows for regional transfer of Certificates. This would produce a dramatic alteration of the Oregon RPS intended through SB 838.

In the particular case of the concern raised by the Energy Trust, staff believes the best course is to investigate options for net-metered systems with the Energy Trust, WREGIS, and other interested parties. The waiver suggested by the Energy Trust diminishes the uniformity, integrity, and robust functions needed to allow the Oregon RPS to operate in successful partnership with other organizations throughout the larger western region encompassed by WREGIS.

Recommendation: Retain the designation of WREGIS as the system for tracking compliance with the Oregon RPS.

Issue 5: Require registration with WREGIS by a date certain for compliance with the Oregon RPS.

Comment: The first draft (#1A) of the proposed rules included a provision that allowed electric utilities and service suppliers to defer setting up WREGIS accounts until they entered an applicable compliance year. In response to this, the OPUC expressed concern that this contradicted existing requirements that regulated utilities to establish WREGIS accounts to meet a variety of purposes. The OPUC noted establishing accounts would

“facilitate banking of renewable energy certificates under SB 838, while ensuring the certificates are not counted toward multiple purposes — e.g., RPS compliance, wholesale sales, voluntary programs and power mix disclosure.”

“Conflicting agency rules and orders would not be in the public interest.”

RNP also objected to this proposed rule recommending

“that all utilities subject to RPS obligations must establish WREGIS accounts by January 1, 2009 or whatever date the utility wishes to begin banking RECs for later compliance, whichever comes earlier.”

“Once utilities are eligible to bank RECs for later compliance years, tracking of RECs is necessary to ensure utilities are clear about where they are using their RECs – either for power mix disclosure in the current year, for banking for later RPS compliance, for use to supply voluntary green power programs,¹ or for wholesale transactions. Allowing utilities to wait to open WREGIS accounts until their first compliance year – which we note is not until 2025 for every utility except the largest three – would create a situation rife for confusion and potential double counting of RECs.”

As noted in Issue 4, other parties requested provisions for an alternate Certificate tracking system. This request, in part, was intended to allow participants to have adequate time to evaluate WREGIS agreements without a loss of Certificates that might be used to satisfy the Oregon RPS.

Discussion: Staff has confirmed with the WREGIS administrator that Certificates associated with electricity generation as far back as June 2007 may be issued through 2009 as part of routine account handling procedures.

Staff believes the concerns that have been raised are valid. The time period available for participants to establish an account and have Certificates issued for generation from June 2007 forward is sufficient to allay potential concerns that agreements would be rushed.

Recommendation: WREGIS accounts are required to be established by January 1, 2009. Provide for newly formed entities or those that may begin participation in the Oregon RPS at some point in the future.

Issue 6: Clarify that the Department determines if a facility can receive a WREGIS Certificate designated as eligible to satisfy the Oregon RPS.

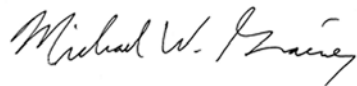
Comment: The OPUC and RNP both commented on a need to clarify that the process used by WREGIS relies on the Department to accept or reject generating facilities that seek to be listed as qualified for the Oregon RPS.

Discussion: Staff believes that this concern is answered explicitly in the WREGIS Operating Rules and the Act but believes that adoption of this suggestion will make the rules a more complete, and therefore useful, document.

Recommendation: Adopt language which clarifies the Department's authority to direct WREGIS in whether or not to designate Certificates from each interested generation facility as qualified to satisfy the Oregon RPS.

Conclusion

For the reasons discussed above, I accept the rules as revised and recommended.



Michael W. Grainey
Director
Oregon Department of Energy

January 28, 2008
Date
