

No. 36393-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

COLUMBIA RIVERKEEPER, et al.,

Appellants,

v.

COWLITZ COUNTY, et al.,

Respondents.

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BRIEF OF RESPONDENT ENERGY NORTHWEST

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I. INTRODUCTION

As part of its responsibility to evaluate and address the region's need for future energy supplies, Energy Northwest¹ filed an application with the Washington State Energy Facility Site Evaluation Council ("EFSEC") to site a new thermal power plant, the Pacific Mountain Energy Center ("Pacific Mountain"). EFSEC is a special quasi-judicial state agency that provides an exclusive "one-stop shopping" process for all state and local permits for energy facilities like Pacific Mountain.

The Legislature created EFSEC to provide a "unique statutory framework [that] involves an expedited administrative process leading to EFSEC siting recommendations to the Governor for approval, rejection, or return for further EFSEC proceedings." *Lathrop v. EFSEC*, 130 Wn. App. 147, 148, 121 P.3d 774 (2005) ("*Lathrop*"). EFSEC's process is designed to ensure "that the location and operation of such facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life" and to "avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay." RCW 80.50.010 and .010(5)

¹ Energy Northwest is one of the Respondents in this appeal.

Through this case, appellants Columbia Riverkeeper and Peter Huhtala (“Riverkeeper”) improperly sought interlocutory review by the Cowlitz County Superior Court of a letter issued by Cowlitz County (the “County”) to EFSEC as a part of the EFSEC permitting process for Pacific Mountain. Riverkeeper sought review of the letter through a petition under the Land Use Petition Act, chapter 36.70C RCW (“LUPA”). The letter, however, is not a land use decision – it is merely a rebuttable evidentiary submission to EFSEC on one of the many issues EFSEC must decide. Moreover, under chapter 80.50 RCW, which has broad and express preemption provisions, the time to seek judicial review of any aspect of EFSEC’s site certification for Pacific Mountain is when that decision becomes final and is approved by the Governor. Then, judicial review of the final decision is allowed in Thurston County Superior Court.

The trial court correctly dismissed Riverkeeper’s LUPA petition, ruling that its authority under LUPA “is superseded and pre-empted by RCW 80.50.110.” CP 104. Energy Northwest respectfully requests that this Court affirm the trial court.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

Energy Northwest assigns no errors.

B. Issues Pertaining to Riverkeeper’s Assignments of Error

1. Did the trial court correctly rule that the EFSEC process, including its provisions for judicial review, provides the sole method for review of whether Pacific Mountain complies with county land use standards, and dismiss Riverkeeper’s claims on this ground?

2. Alternatively, may the trial court also be affirmed because the County’s advisory letter was not a reviewable decision under LUPA, or because Riverkeeper failed to join EFSEC, a necessary party?

III. COUNTERSTATEMENT OF THE CASE

Energy Northwest is a joint operating agency comprised of public power entities formed under chapter 43.52 RCW.² It has the authority to provide for its members’ energy needs through development and operation of all types of electric generating facilities. RCW 43.52.300; RCW 43.52.380. Unlike a shareholder-owned company, the best interests of Energy Northwest are determined by the best interests of the ratepayers it affects. RCW 43.52.385. After careful evaluation of energy needs and alternatives for meeting those needs, Energy Northwest determined that development of Pacific Mountain was in the best interests of ratepayers and accordingly filed an application for site certification with EFSEC in

² A portion of Chapter 43.52 RCW is set out in Appendix A.

September 2006. CP 25. The site certification application remains pending with EFSEC, which has recently initiated the adjudicative aspect of its administrative proceedings. In the Matter of Application No 2006-1, Order Commencing Adjudicative Proceeding (Aug. 13, 2007).³

Energy Northwest's siting of Pacific Mountain is governed by the energy facility site certification process set out in chapter 80.50 RCW (or, the "Act").⁴ That process is the *exclusive* method of obtaining approval for the location and construction of energy facilities like Pacific Mountain. *See* RCW 80.50.060(1); RCW 80.50.110(2); *see also* Attorney General Opinion 1977, No. 1.⁵ The operative effect of RCW 80.50.110(2), which states, "The state hereby preempts the regulation and certification of the location, construction, and operational conditions of the energy facilities

³ This order is set out in Appendix B. Energy Northwest references several of EFSEC's orders in this brief. As official decisions of a state administrative agency, Energy Northwest believes that these citations appropriately reflect legal authority. If this Court disagrees with this assessment, Energy Northwest requests that this Court take judicial notice of these orders for the purposes of illustrating matters related to EFSEC's process generally, the procedural status of Energy Northwest's application with EFSEC and Riverkeeper's participation in EFSEC's proceedings for Pacific Mountain. Energy Northwest is not relying on the orders to demonstrate Pacific Mountain's consistency with the County's land use regulations or any other substantive facts. These factual issues are not relevant to this appeal.

⁴ Chapter 80.50 RCW is set out in Appendix C.

⁵ This Attorney General Opinion is set out in Appendix D.

[regulated by the Act],” is that EFSEC conducts a single and exclusive process for applying all state and local regulatory requirements to proposed energy facilities. The EFSEC process allows a single, dedicated agency to balance the full scope of public interests, of which land use consistency is only one, involved in siting an energy facility like Pacific Mountain. RCW 80.50.010 (interests to be balanced in siting energy facilities). The Act also expressly preempts state laws, rules and regulations that conflict with it. *See* RCW 80.50.110(1).

The Act requires EFSEC to hold a public hearing so that EFSEC itself may “determine whether or not the proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances.” RCW 80.50.090(2). EFSEC conducts these land use hearings pursuant to chapter 463-26 WAC.⁶ These rules call for a county to provide a statement regarding its view of whether a proposed EFSEC-jurisdictional facility is consistent with a county’s land use requirements; the rules further provide that the county’s determination is simply evidentiary input to EFSEC, the entity empowered to make a final decision as to land use consistency:

This rule contemplates that applicants will enter as exhibits, at the land use hearing, certificates from local

⁶ Chapter 463-26 WAC is set out in Appendix E.

authorities attesting to the fact that the proposal is consistent and in compliance with land use plans and zoning ordinances. In cases where this is done, such certificates will be regarded as *prima facie* proof of consistency and compliance with such land use plans and zoning ordinances absent contrary demonstration by anyone present at the hearing.

WAC 463-26-090.

Consistent with chapter 80.50 RCW and its regulations, EFSEC conducted extensive public hearings regarding its environmental review process for Pacific Mountain. CP 42-43; CP 35. EFSEC conducted two public hearings on land use issues – one on November 6, 2006 and one on March 13, 2007. *Id.* As part of this process, the County submitted letters to EFSEC dated October 24, 2006 and February 13, 2007. CP 62; CP 37-38. Riverkeeper presented testimony at both public hearings, and also submitted its own letter dated November 20, 2006. In the Matter of Application No. 2006-1, Council Order No. 828, Order on Consistency with Local and Regional Land Use Plans or Zoning Ordinances, pp. 2-3 (Apr. 26, 2007) [hereinafter “EFSEC Order No. 828”].⁷

On April 10, EFSEC conducted a workshop on land use determinations and heard further from Riverkeeper. EFSEC Order No. 828. Later that day, EFSEC approved a motion determining that Pacific

⁷ EFSEC Order No. 828 is set out in Appendix F.

Mountain is consistent with land use plans and zoning, but expressly reserved issues relating to the County's critical areas ordinance for EFSEC's SEPA and adjudicative processes. EFSEC Order No. 828; *see also* RCW 80.50.090(2).

In the meantime, on March 6, 2007, before EFSEC had issued its order, Riverkeeper filed a LUPA petition in the Cowlitz County Superior Court. CP 1-16. Its petition sought review of the February 13, 2007 letter from the County to EFSEC (the "County Letter"). CP 37-38. Riverkeeper's core allegation in its land use petition was that the County erred in concluding that Pacific Mountain is consistent with the County's land use, shoreline management, floodplain and critical areas requirements. CP 1-16. Riverkeeper's petition did not identify EFSEC as a party. *Id.* Energy Northwest notified Riverkeeper that EFSEC was needed for the just adjudication of the matter pursuant to RCW 36.70C.050. CP 40. Riverkeeper did not join EFSEC.

Energy Northwest and the other respondents, the County and the Port of Kalama, filed motions to dismiss Riverkeeper's land use petition based on preemption and other grounds. CP 17-23; 24-33. Following oral argument, the trial court granted the Respondents' motions. CP 104. Riverkeeper filed a notice of appeal on May 31, 2007. CP 105-08.

IV. ARGUMENT

The trial court properly dismissed Riverkeeper's petition for three alternative reasons. First, chapter 80.50 RCW expressly preempts any LUPA claim in this case. This was the ground on which the trial court ruled, and if this Court upholds the preemption decision, it need go no further. Alternatively, however, this Court may affirm on two other grounds. Second, even absent preemption, the decision at issue is exempt from LUPA by LUPA's own terms. Third, Riverkeeper failed to join a necessary party. This Court reviews the grant of a motion to dismiss *de novo*. *Cutler v. Phillips Petroleum, Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994).

A. The Trial Court Properly Ruled that Chapter 80.50 RCW Provides the Exclusive Means to Review All Aspects of Energy Facility Siting Decisions.

This is a clear case of express preemption. As discussed above, the *Lathrop* decision holds that chapter 80.50 RCW provides the exclusive review process for energy facility site certification decisions. Yet, in its opening brief, Riverkeeper fails to cite, much less distinguish, this controlling authority. As a result, Riverkeeper's arguments regarding the preemptive effect of chapter 80.50 RCW are incomplete and misleading.⁸

⁸ Energy Northwest cited *Lathrop* to the trial court in its motion to dismiss Riverkeeper's LUPA petition. See CP 27-29. As a result, Riverkeeper

Under *Lathrop* and chapter 80.50 RCW, the trial court correctly determined that it lacked jurisdiction to consider Riverkeeper's LUPA petition.

1. The "statutory authority to review energy facility siting decisions under RCW 80.50.140(1) rests solely with the Thurston County Superior Court after final decision by the Governor."

Because the County Letter was issued pursuant to chapter 80.50 RCW, the trial court correctly determined that its authority to review Riverkeeper's land use petition was "superseded and pre-empted by RCW 80.50.110." CP 104.

"While superior courts have broad general original jurisdiction, here, the statutory authority to review energy facility siting decisions under RCW 89.50.140(1) rests solely with the Thurston County Superior Court after final decision by the Governor." *Lathrop* 130 Wn. App. at 153 (affirming dismissal, for lack of subject matter jurisdiction, by Kittitas County Superior Court of petition seeking review of EFSEC land use ruling).

In *Lathrop*, EFSEC declined to rule on a facility opponent's motion to dismiss an applicant's land use preemption request. 130 Wn.

cannot claim it was unaware of this decision.

App. at 150. There, the trial court determined that it did not have subject matter jurisdiction to hear the opponent's challenge to EFSEC's interlocutory action. *Id.* The Court of Appeals upheld the trial court's decision, holding that RCW 80.50.140 vests exclusive authority to review EFSEC's actions, including interlocutory decisions and final recommendations, in the Thurston County Superior Court in a single proceeding after the EFSEC process is complete. *Id.* at 152-53. Aside from *Lathrop*, Energy Northwest is not aware of any reported decision addressing a superior court's authority to review EFSEC decisions outside of the review process set out in RCW 80.50.140.

Lathrop also demonstrates that review under LUPA would directly conflict with chapter 80.50 RCW, which the Legislature has forbidden. *See* RCW 80.50.110(1). Allowing separate and protracted LUPA review of land use consistency certificates issued in accordance with the provisions of chapter 463-26 WAC would impair EFSEC's ability to comply with its directive under RCW 80.50.100(1).

One of the primary purposes for the Act's site certification process is to "ensure that decisions are made timely and without unnecessary delay." RCW 80.50.010(5). "The expedited process is partly designed to avoid time-consuming, piecemeal litigation over the council's

interlocutory decisions and processes....” *Lathrop*, 130 Wn. App. at 152.

The expedited process calls for EFSEC to make a site certification recommendation for an energy facility to the Governor within twelve months of receiving an application to site that energy facility.

RCW 80.50.100(1). The Governor then has 60 days to make the final determination. RCW 80.50.100(2). Collateral review of County determinations will disrupt this process and render it all but impossible for the Governor to timely receive or act upon applications.

Here, Energy Northwest submitted the site certification application for Pacific Mountain on September 12, 2006. CP 25. Under RCW 80.50.100(1), EFSEC’s statutory review period would normally have expired on September 12, 2007.⁹ Interlocutory review through the LUPA process creates the very real risk of delayed and potentially inconsistent results.

Because LUPA applies generally to land use decisions, while chapter 80.50 RCW applies specifically to the siting of energy facilities, the terms of the energy facility-specific statute must also prevail over the more-general terms of LUPA. “A more specific statute supersedes a

⁹ Other, unrelated matters have delayed EFSEC’s review of Pacific Mountain’s site certification application beyond the September 12, 2007 deadline.

general statute only if the two statutes pertain to the same subject matter and conflict to the extent they cannot be harmonized.” *State v. Conte*, 159 Wn.2d 797, 803, 154 P.3d 194 (2007) (quoting *In re Estate of Kerr*, 134 Wn.2d 328, 343, 949 P.2d 810 (1998)); see also *Wark v. Wash. Nat'l Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976) (“[If] concurrent general and special acts are in *pari materia* and cannot be harmonized, the latter will prevail, unless it appears that the legislature intended to make the general act controlling”). This is true even when the general statute was enacted after the specific statute:

It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment. If it was passed before the general statute, the special statute will be construed as remaining an exception to its terms, unless it is repealed by express words or by necessary implication.

Wark, 87 Wn.2d at 867.

In sum, this Court should follow *Lathrop* and the express legislative intent stated in chapter 80.50 RCW, and affirm on grounds of preemption.

2. *Riverkeeper has failed to exhaust its administrative remedies at EFSEC, the agency that has primary jurisdiction over this matter.*

The preemptive effect of chapter 80.50 RCW as applied to this case is further buttressed by the doctrine of “primary jurisdiction.” Put another way, Riverkeeper’s failure to pursue administrative remedies also deprives it of standing under LUPA. RCW 36.70C.060(2)(d).

EFSEC is the agency that has primary jurisdiction over this matter. “‘Primary jurisdiction’ is a doctrine which requires that issues within an agency’s special expertise be decided by the appropriate agency.” *Tenore v. AT&T Wireless Services*, 136 Wn.2d 322, 345, 962 P.2d 104 (1998) (citations omitted).

Under this doctrine claims must be referred to an agency if (1) the administrative agency has the authority to resolve the issues that would be referred to it by the court; (2) the agency has special competence over all or some part of the controversy which renders the agency better able than the court to resolve the issues, and (3) the claim before the court involves issues that fall within the scope of a pervasive regulatory scheme creating a danger that judicial action would conflict with the regulatory scheme.

Id.

If an agency such as EFSEC has primary jurisdiction, then a court must determine whether a claimant must exhaust his or her administrative remedies at that agency. *See Dioxin/Organochlorine Center v.*

Department of Ecology, 119 Wn.2d 761, 776, 837 P.2d 1007 (1992).

Under both LUPA and the Administrative Procedure Act, chapter 34.05 RCW, those who challenge a decision must exhaust their administrative remedies. *See* RCW 36.70C.060(2)(d);¹⁰ RCW 34.05.534.¹¹

Here, the County Letter was issued pursuant to RCW 80.50.090 and its implementing rule, WAC 463-26-090. Under the rule, the County Letter is only “*prima facie*” evidence of land use consistency. WAC 463-26-090. EFSEC, not the County, is required to make the final determination of land use consistency, based both on the County’s input and on information EFSEC collects at the land use hearings. *Id.*; RCW 80.50.090(2). Moreover, under the Act, EFSEC can recommend, and the Governor can approve, a site for an energy facility that is *inconsistent* with the County’s land use regulations. *See* RCW 80.50.110(2) (preempting “the regulation and certification of the location, construction, and operational conditions of certification of energy facilities . . .”); chapter 463-28 WAC (establishing procedures for EFSEC to follow as it determines whether to recommend that the Governor preempt local land use laws).¹² As a result, EFSEC has the exclusive authority to resolve in

¹⁰ Chapter 36.70C RCW is set out in Appendix G.

¹¹ RCW 34.05.534 is set out in Appendix H.

¹² Chapter 463-28 WAC is set out in Appendix I.

the first instance the issues that Riverkeeper asked the Cowlitz County Superior Court to address, with judicial review allowed following a final decision.

The present case demonstrates the sound application of the primary jurisdiction doctrine. EFSEC provides a broad range of expertise on land use and other permitting issues. Its members include a chair appointed by the Governor and confirmed by the Senate; and representatives from the Department of Ecology, the Department of Fish & Wildlife, the Department of Community, Trade and Economic Development, the Department of Natural Resources and the Utilities and Transportation Commission; and a representative from the affected county.

RCW 80.50.030. It has issued decisions on land use matters for many energy facilities, such as Kittitas Valley Wind Project (EFSEC Order No. 826); the Wild Horse Wind Project (EFSEC Order No. 814); the Chehalis Generation Facility (EFSEC Order No. 698); the Satsop Combustion Turbine Project (EFSEC Order No. 766); and the BP Cherry Point Cogeneration project (EFSEC Order No. 803).¹³ Thus, the agency has extensive competence and experience on siting issues, including land use, and is entitled to deference.

¹³ The conclusions of law, in which EFSEC sets out its determination of land use consistency, for these EFSEC orders are set out in Appendix J.

Moreover, the Act provides a complete and exclusive regulatory scheme for regulating the location and construction of energy facilities. RCW 80.50.110(2). EFSEC's process provides an efficient and unitary siting process for energy facilities and is "designed to avoid time-consuming, piecemeal litigation" over energy facility siting. *Lathrop*, 130 Wn. App. at 152. The LUPA appeal process will interfere with the timely and efficient regulatory process envisioned by the Act by further delaying the EFSEC review process beyond the statutory review period set out in RCW 80.50.100(1). The comprehensive nature of EFSEC's process and the risk that premature judicial intervention would undermine the purposes of the Act likewise require application of the doctrine of primary jurisdiction. Riverkeeper should continue to participate in EFSEC's administrative proceedings and may seek judicial review of any *final* agency decision in Thurston County as contemplated by EFSEC's organic statute.

3. *Riverkeeper's brief avoids the true issue before this Court.*

Riverkeeper devotes a considerable portion of its brief to its own opinion on the adequacy of the County Letter. But this issue is a red herring. This appeal is about preemption under chapter 80.50 RCW, not the substance of the County Letter. Under the Act, neither the County nor

the trial court has authority to make land use decisions for facilities that are EFSEC-jurisdictional. The Act provides the sole process under which “regulation and certification of the *location*, construction, and operational conditions” are determined. RCW 80.50.110(2) (emphasis added).

Riverkeeper contends that it must, nonetheless, appeal the County Letter under LUPA. Appellant’s Brief at 10-11. Yet, Riverkeeper will have the opportunity to appeal all aspects of EFSEC’s site certification decision, including its land use consistency determination, under the review procedures of RCW 80.50.140. Once again, Riverkeeper’s failure to cite *Lathrop* is telling. There too, the appellant was concerned about the Act’s preemptive effects with respect to land use. *See* 130 Wn. App. at 150 (the plaintiff’s petition for review concerned EFSEC’s authority to preempt zoning laws under the Growth Management Act). The Court of Appeals confirmed that the issue was still subject to review under the procedures of RCW 80.50.140. *Id.* at 152.

Moreover, as discussed above, the County Letter was only *prima facie* evidence of consistency. Riverkeeper had an opportunity (and took that opportunity) to present evidence to the contrary. CP 35. EFSEC then makes the final determination of land use consistency and all other aspects of the “location, construction, and operational conditions” of the facility.

RCW 80.50.110(2). Finally, the Governor reviews that determination and makes the ultimate decision. The Act's review process provides Riverkeeper with a full and effective method to participate in Pacific Mountain's approval process and then to obtain judicial review if it is unhappy with the outcome of that process.

This case is, therefore, very different from cases, such as *Samuel's Furniture, Inc. v. State of Washington, Department of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002), in which other statutorily-authorized permit decisions with state agency involvement were subject to the LUPA review process. In *Samuel's Furniture*, a key part of the Supreme Court's analysis was that the "administration of the permit system [under the Shoreline Management Act] 'shall be performed exclusively by the local government.'" *Id.* at 448 (quoting RCW 90.58.140(3)); *see also id.* at 455. Here, in contrast, the authority to manage the site certification process is granted exclusively to EFSEC. RCW 80.50.110. In addition, because the County Letter only provided rebuttable evidence to EFSEC regarding land use consistency, it was by no means final under the analysis set out in *Samuel's Furniture*. 147 Wn.2d at 452 (comparing final decisions to interlocutory decisions). The decision in *Samuel's Furniture* was final because it left "nothing open to further dispute and which sets at rest cause

of action between parties.” *Id.* (quoting Black’s Law Dictionary 567 (5th ed. 1979)). Here, instead, the County Letter is interlocutory, because it “is not a final decision of the whole controversy.” *Id.* (quoting Black’s at 731). Under the statutory process laid out by chapter 80.50 RCW, EFSEC will make the final decision regarding Pacific Mountain’s site certification application, including for all permits required under state and local law. RCW 80.50.110(2).

The trial court found that its review authority under RCW 36.70C.040 “is superseded and preempted by RCW 80.50.110.”¹⁴ CP 104. Riverkeeper’s bald assertion that “LUPA, which provides for judicial review of land use decisions, does not conflict with EFSEC’s authority” is not persuasive. Appellant’s Opening Brief at 13. Review under LUPA, by directly interfering with the timely and efficient regulatory process envisioned by the Act, conflicts with the Act for the reasons discussed above. As a result, Riverkeeper’s assertion that the trial court preempted the County’s land use regulations is simply wrong. Its lengthy discussion on pages 13 to 21 of its opening brief about the preemption process set out in EFSEC’s regulations is immaterial to this Court’s analysis because

¹⁴ Through a typographical error, the trial court’s order cites to RCW 30.70C.020 (not RCW 36.70C.020).

EFSEC did not use that process, which could have been triggered only by a determination of *inconsistency*.

Riverkeeper is also incorrect in its assertion that the trial court's decision stands for the proposition that "all local land use regulations and local concerns" are "meaningless." Appellant's Opening Brief at 21. The trial court's decision, instead, carries out the Legislature's intent to furnish an exclusive set of procedures to determine where an energy facility should be located.¹⁵ Riverkeeper and others are afforded a full opportunity to present evidence and argument about local land use regulations before EFSEC and, if necessary, before the Thurston County Superior Court following a final decision.

Riverkeeper's discussion of the County's critical areas ordinance is a further attempt to distract the Court from the narrow issue before it. In addition, the County Letter does not make any decision regarding Pacific Mountain's compliance with its critical areas ordinance; instead it simply

¹⁵ These procedures provide a much more thorough review process and much broader stakeholder and public participation than is otherwise the case. At EFSEC, but not in other venues, an adjudicatory proceeding, in addition to at least two public hearings, is conducted on whether, where and under what conditions a facility may be built and operated. RCW 80.50.090. The adjudicative hearing must address a wide range of specified issues, including "[c]onsistency of the proposal with zoning and land use regulations." WAC 463-30-300. WAC 463-30-300 is set out in Appendix K.

states that “Cowlitz County would accept the [U.S. Army Corps of Engineer’s] decision and mitigation conditions for filing of the wetland” and “*If* storage of materials conforms to CCC 16.05.060, the Uniform Fire Code and WAC 173-360, [Pacific Mountain] would be consistent with the aquifer recharge area requirements of the CAO as the ordinance is currently written.” CP 38 (emphasis added).

These statements, which are conditioned on the occurrence of future events, are not the type of final decision subject to LUPA. *See Samuel’s Furniture*, 147 Wn.2d at 452 (final decisions leave “nothing open to further dispute” and conclude “the action by resolving the plaintiff’s entitlement to the requested relief;” citations omitted). Here, for example, if the Army Corps of Engineers issues a permit, that permit, and thus compliance with the County’s critical areas ordinance, would be subject to further dispute. On the other hand, if the Army Corps of Engineers does not issue its permit, then Riverkeeper’s requested relief, invalidation of the County Letter, would no longer be necessary.

Moreover, EFSEC’s decision to delay consideration of critical areas issues does not change the fact that RCW 80.50.110(2) preempts the regulation of energy facility locations and any related critical area issues related to that location. *See Lathrop*, 130 Wn. App. at 153 (EFSEC’s

decision to delay ruling on a land use issue does not deprive a project opponent of review of that agency decision under RCW 80.50.140). Indeed, it confirms that Riverkeeper will still have its “day in court” – both at EFSEC and in any appeal of EFSEC’s recommendation under the review procedures set out in RCW 80.50.140.

Thus, none of Riverkeeper’s arguments support reversal of the trial court, and this Court should affirm solely on grounds of preemption.

B. The Trial Court Ruling is Justified on the Alternative Grounds that County Letter Was Not Reviewable under LUPA and because Riverkeeper Failed to Join EFSEC.

In addition to preemption, this Court should also affirm the trial court on two alternative grounds.

1. LUPA does not apply to decisions that are subject to review by a quasi-judicial body.

Under LUPA’s plain language, review of the County Letter falls outside the statute. EFSEC is a quasi-judicial body, required by statute to conduct an adjudicative hearing prior to making any recommendation on land use to the Governor. RCW 80.50.090(3). LUPA does not apply to “[l]and use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law” RCW 36.70C.030(1)(a)(ii). Therefore, LUPA review was not available for the County Letter. Excluding from LUPA review matters that are subject to quasi-judicial

review elsewhere represents sound policy. It avoids the mischief of piecemeal review, inconsistent results, scheduling chaos, and the waste of judicial resources.

2. *Riverkeeper failed to join EFSEC, a necessary party, in its LUPA petition.*

Riverkeeper's petition also should have been dismissed for failure to join an indispensable party – EFSEC. EFSEC has multiple important interests in the outcome of Riverkeeper's land use petition action. The action has implications for EFSEC's own decision on Pacific Mountain land use consistency, for EFSEC's ability to meet its statutory schedule for Pacific Mountain and, more broadly, for interpretation of EFSEC's statutory authority and obligations. Energy Northwest informed Riverkeeper that EFSEC was a party needed for just adjudication on March 20, 2007. CP 40. Accordingly, Riverkeeper should have named EFSEC as a party to the action, particularly after being notified of the deficiency. Riverkeeper did not do so.

Under LUPA, once a petitioner is notified that there are other parties "needed for just adjudication of the petition," the petitioner must "promptly name and serve any such person whom the petitioner agrees may be needed for just adjudication." RCW 36.70C.050. Superior Court Rule ("CR") 19 likewise requires the joinder of a party "if (1) in his

absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may ... leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.” CR 19(a)(1).

EFSEC was a party who should have been joined if feasible within the meaning of CR 19, and there was no reason why joining EFSEC would not have been feasible. Complete relief among the parties to the action can not be accorded absent EFSEC. For example, because EFSEC was not made a party to this case, it may assert it is not bound by the proceedings.

EFSEC’s absence puts Energy Northwest at substantial risk of incurring inconsistent obligations by reason of EFSEC’s interests at play in this case. Under the Act, EFSEC – not the County – makes the final determination of land use consistency. If the trial court had not dismissed Riverkeeper’s petition, EFSEC’s determination could have been inconsistent with the trial court’s decision, putting Energy Northwest in the untenable position of having to comply with conflicting decisions. EFSEC would also have the authority to override any decision by the trial

court regarding consistency because EFSEC may recommend and the Governor may approve preemption of local land use regulations. As a result, the trial court should also have dismissed Riverkeeper's land use petition because Riverkeeper failed to join EFSEC as a party.

C. Energy Northwest is Entitled to Reasonable Attorney's Fees and Expenses associated with this Appeal.

RAP 18.1(a) authorizes this Court to award attorney fees and expenses where "applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court...."

RCW 4.84.370 authorizes this Court to award expenses and reasonable attorneys' fees, including those associated with prosecuting this appeal:

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on

appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

Notwithstanding Energy Northwest's position that Riverkeeper's LUPA petition is preempted by chapter 80.50 RCW, Riverkeeper brought this appeal under the provisions of LUPA. As a result, the attorneys' fees and expenses provisions applicable to LUPA apply to this appeal. This situation is analogous to the circumstances where a party claims there is no binding contract when sued for breach of contract. If there is an attorneys' fees clause in that contract, the defending party can recover their fees despite their substantive position that no contract existed (for example, for lack of consideration or fraud). *See e.g., Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004) (citing cases and stating, "Attorneys fees and costs are awarded to the prevailing party even when the contract containing the attorneys fee provision is invalidated").

Here, Energy Northwest requested that the County assess Pacific Mountain's consistency with the County's land use regulations. CP 54, 56-57. In response to this request, the County issued two letters, including the county letter, to Energy Northwest noting that Pacific Mountain was consistent with its land use regulations. CP 37-38, 54, 62. As a result,

Energy Northwest was the prevailing party before the County. In addition, because the trial court dismissed Riverkeeper's LUPA petition, CP 104, Energy Northwest was the prevailing party in the prior judicial proceedings in this matter. Accordingly, Energy Northwest is entitled to attorneys' fees and costs under RAP 18.1 and RCW 4.84.370.

V. CONCLUSION

Energy Northwest respectfully requests that this Court affirm the trial court's dismissal of Riverkeeper's LUPA petition. Riverkeeper's attempt to apply the provisions of LUPA to an interlocutory determination in an ongoing, quasi-judicial state agency process is deficient for all the reasons stated above. Energy Northwest also respectfully requests that this Court award it the reasonable attorneys' fees and costs associated with this appeal.

DATED this 17th day of September, 2007.

Respectfully submitted,

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APPENDIX A

Chapter 43.52 RCW Operating agencies

Chapter Listing

RCW Sections

- [43.52.250](#) Definitions.
- [43.52.260](#) Scope of authority.
- [43.52.272](#) Power commission abolished.
- [43.52.290](#) Members of the board of directors of an operating agency -- Compensation -- May hold other public position -- Incompatibility of offices doctrine voided.
- [43.52.300](#) Powers and duties of an operating agency.
- [43.52.3411](#) Revenue bonds or warrants.
- [43.52.343](#) Revenue bonds or warrants -- Sale by negotiation or advertisement and bid.
- [43.52.350](#) Operating agencies to provide fishways, facilities and hatcheries -- Contracts.
- [43.52.360](#) Operating agency -- Formation -- Additional projects -- Appeals -- Membership, withdrawal -- Dissolution.
- [43.52.370](#) Operating agency board of directors -- Members, appointment, vote, term, etc. -- Rules -- Proceedings -- Limitation on powers and duties.
- [43.52.374](#) Operating agency executive board -- Members -- Terms -- Removal -- Rules -- Proceedings -- Managing director -- Civil immunities -- Defense and indemnification.
- [43.52.375](#) Treasurer -- Auditor -- Powers and duties -- Official bonds -- Funds.
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- 43.52.595 Contracts for electric power and energy.
- 43.52.612 Contract bid form.
- 43.52.910 Construction -- 1965 c 8.

43.52.250 **Definitions.**

As used in this chapter and unless the context indicates otherwise, words and phrases shall mean:

"District" means a public utility district as created under the laws of the state of Washington authorized to engage in the business of generating and/or distributing electricity.

"City" means any city or town in the state of Washington authorized to engage in the business of generating and/or distributing electricity.

"Canada" means Canada or any province thereof.

"Operating agency" or "joint operating agency" means a municipal corporation created pursuant to RCW 43.52.360, as now or hereafter amended.

"Board of directors" means the board established under RCW 43.52.370.

"Executive board" means the board established under RCW 43.52.374.

"Board" means the board of directors of the joint operating agency unless the operating agency is constructing, operating, terminating, or decommissioning a nuclear power plant under a site certification agreement under chapter 80.50 RCW, in which case "board" means the executive board.

"Public utility" means any person, firm or corporation, political subdivision or governmental subdivision including cities, towns and public utility districts engaged in or authorized to engage in the business of generating, transmitting or distributing electric energy.

"Revenue bonds or warrants" means bonds, notes, bond anticipation notes, warrants, certificates of indebtedness, commercial paper, refunding or renewal obligations, payable from a special fund or revenues of the utility properties operated by the joint operating agency.

"Electrical resources" means both electric energy and conservation.

"Electrical energy" means electric energy produced by any means including water power, steam power, nuclear power, and conservation.

"Conservation" means any reduction in electric power consumption as a result of increases in efficiency of energy use, production, or distribution.

[1987 c 376 § 8; 1982 1st ex.s. c 43 § 1; 1981 1st ex.s. c 1 § 1; 1977 ex.s. c 184 § 1; 1965 c 8 § 43.52.250. Prior: 1953 c 281 § 1.]

Notes:

Severability -- Savings -- 1982 1st ex.s. c 43: See notes following RCW 43.52.374.

Severability -- 1981 1st ex.s. c 1: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not

affected." [1981 1st ex.s. c 1 § 5.]

43.52.260
Scope of authority.

The authority granted in this chapter shall apply equally to the generating of electricity by water power, by steam power, by nuclear power, conservation, or by any other means whatsoever.

[1987 c 376 § 9; 1977 ex.s. c 184 § 2; 1965 c 8 § 43.52.260. Prior: 1955 c 258 § 18; 1953 c 281 § 20.]

43.52.272
Power commission abolished.

The Washington state power commission is hereby abolished.

[1965 c 8 § 43.52.272. Prior: 1957 c 295 § 8.]

43.52.290
Members of the board of directors of an operating agency — Compensation — May hold other public position — Incompatibility of offices doctrine voided.

Members of the board of directors of an operating agency shall be paid the sum of fifty dollars per day as compensation for each day or major part thereof devoted to the business of the operating agency, together with their traveling and other necessary expenses. Such member may, regardless of any charter or other provision to the contrary, be an officer or employee holding another public position and, if he be such other public officer or employee, he shall be paid by the operating agency such amount as will, together with the compensation for such other public position equal the sum of fifty dollars per day. The common law doctrine of incompatibility of offices is hereby voided as it applies to persons sitting on the board of directors or the executive board of an operating agency and holding an elective or appointive position on a public utility district commission or municipal legislative authority or being an employee of a public utility district or municipality.

[1983 1st ex.s. c 3 § 1; 1982 1st ex.s. c 43 § 5; 1977 ex.s. c 184 § 3; 1965 c 8 § 43.52.290. Prior: 1953 c 281 § 4.]

Notes:
Severability -- Savings -- 1982 1st ex.s. c 43: See notes following RCW 43.52.374.

43.52.300
Powers and duties of an operating agency.

An operating agency formed under RCW 43.52.360 shall have authority:

- (1) To generate, produce, transmit, deliver, exchange, purchase or sell electric energy and to enter into contracts for any or all such purposes.
- (2) To construct, condemn, purchase, lease, acquire, add to, extend, maintain, improve, operate, develop and

regulate plants, works and facilities for the generation and/or transmission of electric energy, either within or without the state of Washington, and to take, condemn, purchase, lease and acquire any real or personal, public or private property, franchise and property rights, including but not limited to state, county and school lands and properties, for any of the purposes herein set forth and for any facilities or works necessary or convenient for use in the construction, maintenance or operation of any such works, plants and facilities; provided that an operating agency shall not be authorized to acquire by condemnation any plants, works and facilities owned and operated by any city or district, or by a privately owned public utility. An operating agency shall be authorized to contract for and to acquire by lease or purchase from the United States or any of its agencies, any plants, works or facilities for the generation and transmission of electricity and any real or personal property necessary or convenient for use in connection therewith.

(3) To negotiate and enter into contracts with the United States or any of its agencies, with any state or its agencies, with Canada or its agencies or with any district or city of this state, for the lease, purchase, construction, extension, betterment, acquisition, operation and maintenance of all or any part of any electric generating and transmission plants and reservoirs, works and facilities or rights necessary thereto, either within or without the state of Washington, and for the marketing of the energy produced therefrom. Such negotiations or contracts shall be carried on and concluded with due regard to the position and laws of the United States in respect to international agreements.

(4) To negotiate and enter into contracts for the purchase, sale, exchange, transmission or use of electric energy or falling water with any person, firm or corporation, including political subdivisions and agencies of any state of Canada, or of the United States, at fair and nondiscriminating rates.

(5) To apply to the appropriate agencies of the state of Washington, the United States or any thereof, and to Canada and/or to any other proper agency for such permits, licenses or approvals as may be necessary, and to construct, maintain and operate works, plants and facilities in accordance with such licenses or permits, and to obtain, hold and use such licenses and permits in the same manner as any other person or operating unit.

(6) To establish rates for electric energy sold or transmitted by the operating agency. When any revenue bonds or warrants are outstanding the operating agency shall have the power and shall be required to establish and maintain and collect rates or charges for electric energy, falling water and other services sold, furnished or supplied by the operating agency which shall be fair and nondiscriminatory and adequate to provide revenues sufficient for the payment of the principal and interest on such bonds or warrants and all payments which the operating agency is obligated to set aside in any special fund or funds created for such purposes, and for the proper operation and maintenance of the public utility owned by the operating agency and all necessary repairs, replacements and renewals thereof.

(7) To act as agent for the purchase and sale at wholesale of electricity for any city or district whenever requested so to do by such city or district.

(8) To contract for and to construct, operate and maintain fishways, fish protective devices and facilities and hatcheries as necessary to preserve or compensate for projects operated by the operating agency.

(9) To construct, operate and maintain channels, locks, canals and other navigational, reclamation, flood control and fisheries facilities as may be necessary or incidental to the construction of any electric generating project, and to enter into agreements and contracts with any person, firm or corporation, including political subdivisions of any state, of Canada or the United States for such construction, operation and maintenance, and for the distribution and payment of the costs thereof.

(10) To employ legal, engineering and other professional services and fix the compensation of a managing director and such other employees as the operating agency may deem necessary to carry on its business, and to delegate to such manager or other employees such authority as the operating agency shall determine. Such manager and employees shall be appointed for an indefinite time and be removable at the will of the operating agency.

(11) To study, analyze and make reports concerning the development, utilization and integration of electric generating facilities and requirements within the state and without the state in that region which affects the electric resources of the state.

(12) To acquire any land bearing coal, uranium, geothermal, or other energy resources, within or without the state, or any rights therein, for the purpose of assuring a long-term, adequate supply of coal, uranium, geothermal, or other energy resources to supply its needs, both actual and prospective, for the generation of power and may make such contracts with respect to the extraction, sale, or disposal of such energy resources that it deems proper.

[1977 ex.s. c 184 § 4; 1975 1st ex.s. c 37 § 1; 1965 c 8 § 43.52.300. Prior: 1955 c 258 § 1; 1953 c 281 § 5.]

43.52.3411**Revenue bonds or warrants.**

For the purposes provided for in this chapter, an operating agency shall have power to issue revenue bonds or warrants payable from the revenues of the utility properties operated by it. Whenever the board of a joint operating agency shall deem it advisable to issue bonds or warrants to engage in conservation activities or to construct or acquire any public utility or any works, plants or facilities or any additions or betterments thereto or extensions thereof it shall provide therefor by resolution, which shall specify and adopt the system or plan proposed and declare the estimated cost thereof as near as may be. Such cost may include funds for working capital, for payment of expenses incurred in the conservation activities or the acquisition or construction of the utility and for the repayment of advances made to the operating agency by any public utility district or city. Except as otherwise provided in RCW 43.52.343, all the provisions of law as now or hereafter in effect relating to revenue bonds or warrants of public utility districts shall apply to revenue bonds or warrants issued by the joint operating agency including, without limitation, provisions relating to: The creation of special funds and the pledging of revenues thereto; the time and place of payment of such bonds or warrants and the interest rate or rates thereon; the covenants that may be contained therein and the effect thereof; the execution, issuance, sale, funding, or refunding, redemption and registration of such bonds or warrants; and the status thereof as negotiable instruments, as legal securities for deposits of public moneys and as legal investments for trustees and other fiduciaries and for savings and loan associations, banks and insurance companies doing business in this state. However, for revenue bonds or warrants issued by an operating agency, the provisions under RCW 54.24.030 relating to additional or alternate methods for payment may be made a part of the contract with the owners of any revenue bonds or warrants of an operating agency. The board may authorize the managing director or the treasurer of the operating agency to sell revenue bonds or warrants maturing one year or less from the date of issuance, and to fix the interest rate or rates on such revenue bonds or warrants with such restrictions as the board shall prescribe. Such bonds and warrants may be in any form, including bearer bonds or bearer warrants, or registered bonds or registered warrants as provided in RCW 39.46.030. Such bonds and warrants may also be issued and sold in accordance with chapter 39.46 RCW.

[1987 c 376 § 10; 1983 c 167 § 116; 1981 1st ex.s. c 1 § 2; 1965 c 8 § [43.52.3411](#). Prior: 1957 c 295 § 6.]

Notes:

Liberal construction -- Severability -- 1983 c 167: See RCW 39.46.010 and note following.

Severability -- 1981 1st ex.s. c 1: See note following RCW [43.52.250](#).

43.52.343**Revenue bonds or warrants — Sale by negotiation or advertisement and bid.**

All bonds issued by an operating agency shall be sold and delivered in such manner, at such rate or rates of interest and for such price or prices and at such time or times as the board shall deem in the best interests of the operating agency, whether by negotiation or to the highest and best bidder after such advertising for bids as the board of the operating agency may deem proper: PROVIDED, That the board may reject any and all bids so submitted and thereafter sell such bonds so advertised under such terms and conditions as it may deem most advantageous to its own interests.

[1981 1st ex.s. c 1 § 3; 1965 c 8 § [43.52.343](#). Prior: 1957 c 295 § 7; 1955 c 258 § 10.]

Notes:

Severability -- 1981 1st ex.s. c 1: See note following RCW [43.52.250](#).

43.52.350**Operating agencies to provide fishways, facilities and hatcheries — Contracts.**

An operating agency shall, at the time of the construction of any dam or obstruction, construct and shall thereafter maintain and operate such fishways, fish protective facilities and hatcheries as the director of fish and wildlife finds

necessary to permit anadromous fish to pass any dam or other obstruction operated by the operating agency or to replace fisheries damaged or destroyed by such dam or obstruction and an operating agency is further authorized to enter into contracts with the department of fish and wildlife to provide for the construction and/or operation of such fishways, facilities and hatcheries.

[1994 c 264 § 24; 1988 c 36 § 18; 1977 ex.s. c 184 § 5; 1965 c 8 § 43.52.350. Prior: 1953 c 281 § 11.]

43.52.360

Operating agency — Formation — Additional projects — Appeals — Membership, withdrawal — Dissolution.

Any two or more cities or public utility districts or combinations thereof may form an operating agency (herein sometimes called a joint operating agency) for the purpose of acquiring, constructing, operating and owning plants, systems and other facilities and extensions thereof, for the generation and/or transmission of electric energy and power. Each such agency shall be a municipal corporation of the state of Washington with the right to sue and be sued in its own name.

Application for the formation of an operating agency shall be made to the director of the department of ecology (herein sometimes referred to as the director) after the adoption of a resolution by the legislative body of each city or public utility district to be initial members thereof authorizing said city or district to participate. Such application shall set forth (1) the name and address of each participant, together with a certified copy of the resolution authorizing its participation; (2) a general description of the project and the principal project works, including dams, reservoirs, power houses and transmission lines; (3) the general location of the project and, if a hydroelectric project, the name of the stream on which such proposed project is to be located; (4) if the project is for the generation of electricity, the proposed use or market for the power to be developed; (5) a general statement of the electric loads and resources of each of the participants; (6) a statement of the proposed method of financing the preliminary engineering and other studies and the participation therein by each of the participants.

Within ten days after such application is filed with the director of the department of ecology notice thereof shall be published by the director once a week for four consecutive weeks in a newspaper of general circulation in the county or counties in which such project is to be located, setting forth the names of the participants and the general nature, extent and location of the project. Any public utility wishing to do so may object to such application by filing an objection, setting forth the reasons therefor, with the director of the department of ecology not later than ten days after the date of last publication of such notice.

Within ninety days after the date of last publication the director shall either make findings thereon or have instituted a hearing thereon. In the event the director has neither made findings nor instituted a hearing within ninety days of the date of last publication, or if such hearing is instituted within such time but no findings are made within one hundred and twenty days of the date of such last publication, the application shall be deemed to have been approved and the operating agency established. If it shall appear (a) that the statements set forth in said application are substantially correct; (b) that the contemplated project is such as is adaptable to the needs, both actual and prospective, of the participants and such other public utilities as indicate a good faith intention by contract or by letter of intent to participate in the use of such project; (c) that no objection to the formation of such operating agency has been filed by any other public utility which prior to and at the time of the filing of the application for such operating agency had on file a permit or license from an agency of the state or an agency of the United States, whichever has primary jurisdiction, for the construction of such project; (d) that adequate provision will be made for financing the preliminary engineering, legal and other costs necessary thereto; the director shall make findings to that effect and enter an order creating such operating agency, establishing the name thereof and the specific project for the construction and operation for which such operating agency is formed. Such order shall not be construed to constitute a bar to any other public utility proceeding according to law to procure any required governmental permits, licenses or authority, but such order shall establish the competency of the operating agency to proceed according to law to procure such permits, licenses or authority.

No operating agency shall undertake projects or conservation activities in addition to those for which it was formed without the approval of the legislative bodies of a majority of the members thereof. Prior to undertaking any new project for acquisition of an energy resource, a joint operating agency shall prepare a plan which details a least-cost approach for investment in energy resources. The plan shall include an analysis of the costs of developing conservation compared with costs of developing other energy resources and a strategy for implementation of the plan. The plan shall be presented to the energy and utilities committees of the senate and house of representatives for their review and comment. In the event that an operating agency desires to undertake such a hydroelectric project at a site or sites upon which any publicly or privately owned public utility has a license or permit or has a prior application for a license or permit pending with any commission or agency, state or federal, having jurisdiction thereof, application to construct such additional project shall be made to the director of the department of ecology in the same manner, subject to the same

requirements and with the same notice as required for an initial agency and project and shall not be constructed until an order authorizing the same shall have been made by the director in the manner provided for such original application.

Any party who has joined in filing the application for, or objections against, the creation of such operating agency and/or the construction of an additional project, and who feels aggrieved by any order or finding of the director shall have the right to appeal to the superior court in the manner set forth in RCW 43.52.430.

After the formation of an operating agency, any other city or district may become a member thereof upon application to such agency after the adoption of a resolution of its legislative body authorizing said city or district to participate, and with the consent of the operating agency by the affirmative vote of the majority of its members. Any member may withdraw from an operating agency, and thereupon such member shall forfeit any and all rights or interest which it may have in such operating agency or in any of the assets thereof: PROVIDED, That all contractual obligations incurred while a member shall remain in full force and effect. An operating agency may be dissolved by the unanimous agreement of the members, and the members, after making provisions for the payment of all debts and obligations, shall thereupon hold the assets thereof as tenants in common.

[1998 c 245 § 68; 1987 c 376 § 11; 1977 ex.s. c 184 § 6; 1965 c 8 §43.52.360 . Prior: 1957 c 295 § 1; 1955 c 258 § 3; 1953 c 281 § 12.]

Notes:

Generation of electric energy by steam: RCW 43.21A.610 through 43.21A.642.

43.52.370

Operating agency board of directors — Members, appointment, vote, term, etc. — Rules — Proceedings — Limitation on powers and duties.

(1) Except as provided in subsection (2) of this section, the management and control of an operating agency shall be vested in a board of directors, herein sometimes referred to as the board. The legislative body of each member of an operating agency shall appoint a representative who may, at the discretion of the member and regardless of any charter or other provision to the contrary, be an officer or employee of the member, to serve on the board of the operating agency. Each representative shall have one vote and shall have, in addition thereto, one vote for each block of electric energy equal to ten percent of the total energy generated by the agency during the preceding year purchased by the member represented by such representative. Each member may appoint an alternative representative to serve in the absence or disability of its representative. Each representative shall serve at the pleasure of the member. The board of an operating agency shall elect from its members a president, vice president and secretary, who shall serve at the pleasure of the board. The president and secretary shall perform the same duties with respect to the operating agency as are provided by law for the president and secretary, respectively, of public utility districts, and such other duties as may be provided by motion, rule or resolution of the board. The board of an operating agency shall adopt rules for the conduct of its meetings and the carrying out of its business, and adopt an official seal. All proceedings of an operating agency shall be by motion or resolution and shall be recorded in the minute book which shall be a public record. A majority of the board members shall constitute a quorum for the transaction of business. A majority of the votes which the members present are entitled to cast shall be necessary and sufficient to pass any motion or resolution: PROVIDED, That such board members are entitled to cast a majority of the votes of all members of the board. The members of the board of an operating agency may be compensated by such agency as is provided in RCW 43.52.290: PROVIDED, That the compensation to any member shall not exceed five thousand dollars in any year except for board members who are elected to serve on an executive board established under RCW 43.52.374.

(2) If an operating agency is constructing, operating, terminating, or decommissioning a nuclear power plant under a site certification agreement under chapter 80.50 RCW, the powers and duties of the board of directors shall include and are limited to the following:

(a) Final authority on any decision of the operating agency to purchase, acquire, construct, terminate, or decommission any power plants, works, and facilities except that once the board of directors has made a final decision regarding a nuclear power plant, the executive board established under RCW 43.52.374 shall have the authority to make all subsequent decisions regarding the plant and any of its components;

(b) Election of members to, removal from, and establishment of salaries for the elected members of the executive board under RCW 43.52.374(1)(a); and

(c) Selection and appointment of three outside directors as provided in RCW 43.52.374(1)(b).

All other powers and duties of the operating agency, including without limitation authority for all actions subsequent to

final decisions by the board of directors, including but not limited to the authority to sell any power plant, works, and facilities are vested in the executive board established under RCW 43.52.374.

[1983 1st ex.s. c 3 § 2; 1982 1st ex.s. c 43 § 2; 1981 1st ex.s. c 3 § 1; 1977 ex.s. c 184 § 7; 1965 c 8 § 43.52.370. Prior: 1957 c 295 § 2; 1953 c 281 § 13.]

Notes:

Severability -- Savings -- 1982 1st ex.s. c 43: See notes following RCW 43.52.374.

43.52.374

Operating agency executive board — Members — Terms — Removal — Rules — Proceedings — Managing director — Civil immunities — Defense and indemnification.

(1) With the exception of the powers and duties of the board of directors described in RCW 43.52.370(2), the management and control of an operating agency constructing, operating, terminating, or decommissioning a nuclear power plant under a site certification agreement under chapter 80.50 RCW is vested in an executive board established under this subsection and consisting of eleven members.

(a) Five members of the executive board shall be elected to four-year terms by the board of directors from among the members of the board of directors. The board of directors may provide by rule for the composition of the five members of the executive board elected from among the members of the board of directors so as to reflect the member public utility districts' and cities' participation in the joint operating agency's projects. Members elected to the executive board from the board of directors are ineligible for continued membership on the executive board if they cease to be members of the board of directors. The board of directors may also provide by rule for the removal of a member of the executive board, except for the outside directors. Members of the board of directors may be elected to serve successive terms on the executive board. Members elected to the executive board from the board of directors shall receive a salary from the operating agency at a rate set by the board of directors.

(b) Six members of the executive board shall be outside directors. Three shall be selected and appointed by the board of directors, and three shall be selected and appointed by the governor and confirmed by the senate. All outside directors shall:

(i) Serve four-year terms on the executive board. However, of the initial members of the executive board, the board of directors and the governor shall each appoint one outside director to serve a two-year term, one outside director to serve a three-year term, and one outside director to serve a four-year term. Thereafter, all outside directors shall be appointed for four-year terms. All outside directors are eligible for reappointment;

(ii) Receive travel expenses on the same basis as the five members elected from the board of directors. The outside directors shall also receive a salary from the operating agency as fixed by the governor;

(iii) Not be an officer or employee of, or in any way affiliated with, the Bonneville power administration or any electric utility conducting business in the states of Washington, Oregon, Idaho, or Montana;

(iv) Not be involved in the financial affairs of the operating agency as an underwriter or financial adviser of the operating agency or any of its members or any of the participants in any of the operating agency's plants; and

(v) Be representative of policy makers in business, finance, or science, or have expertise in the construction or management of such facilities as the operating agency is constructing or operating, or have expertise in the termination, disposition, or liquidation of corporate assets.

(c) The governor may remove outside directors from the executive board for incompetency, misconduct, or malfeasance in office in the same manner as state appointive officers under chapter 43.06 RCW. For purposes of this subsection, misconduct shall include, but not be limited to, nonfeasance and misfeasance.

(2) Nothing in this chapter shall be construed to mean that an operating agency is in any manner an agency of the state. Nothing in this chapter alters or destroys the status of an operating agency as a separate municipal corporation or makes the state liable in any way or to any extent for any preexisting or future debt of the operating agency or any present or future claim against the agency.

(3) The eleven members of the executive board shall be selected with the objective of establishing an executive board which has the resources to effectively carry out its responsibilities. All members of the executive board shall conduct their

business in a manner which in their judgment is in the interest of all ratepayers affected by the joint operating agency and its projects.

(4) The executive board shall elect from its members a chairman, vice chairman, and secretary, who shall serve at the pleasure of the executive board. The executive board shall adopt rules for the conduct of its meetings and the carrying out of its business. All proceedings shall be by motion or resolution and shall be recorded in the minute book, which shall be a public record. A majority of the executive board shall constitute a quorum for the transaction of business.

(5) With respect to any operating agency existing on April 20, 1982, to which the provisions of this section are applicable:

(a) The board of directors shall elect five members to the executive board no later than sixty days after April 20, 1982; and

(b) The board of directors and the governor shall select and appoint the initial outside directors and the executive board shall hold its organizational meeting no later than sixty days after April 20, 1982, and the powers and duties prescribed in this chapter shall devolve upon the executive board at that time.

(6) The executive board shall select and employ a managing director of the operating agency and may delegate to the managing director such authority for the management and control of the operating agency as the executive board deems appropriate. The managing director's employment is terminable at the will of the executive board.

(7) Members of the executive board shall be immune from civil liability for mistakes and errors of judgment in the good faith performance of acts within the scope of their official duties involving the exercise of judgment and discretion. This grant of immunity shall not be construed as modifying the liability of the operating agency.

The operating agency shall undertake the defense of and indemnify each executive board member made a party to any civil proceeding including any threatened, pending, or completed action, suit, or proceeding, whether civil, administrative, or investigative, by reason of the fact he or she is or was a member of the executive board, against judgments, penalties, fines, settlements, and reasonable expenses, actually incurred by him or her in connection with such proceeding if he or she had conducted himself or herself in good faith and reasonably believed his or her conduct to be in the best interest of the operating agency.

In addition members of the executive board who are utility employees shall not be fired, forced to resign, or demoted from their utility jobs for decisions they make while carrying out their duties as members of the executive board involving the exercise of judgment and discretion.

[1983 1st ex.s. c 3 § 3; 1982 1st ex.s. c 43 § 3; 1981 1st ex.s. c 3 § 2.]

Notes:

Severability -- 1982 1st ex.s. c 43: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1982 1st ex.s. c 43 § 11.]

Savings -- 1982 1st ex.s. c 43: "(1) All personnel and employees of a board of directors or executive board or committee displaced by section 3 of this act shall become personnel and employees of the executive board created in section 3 of this act without any loss of rights, subject to any appropriate action thereafter.

(2) All pending business before a board of directors or executive board or committee which is replaced by the executive board created in section 3 of this act shall be continued and acted upon by the new executive board.

(3) This act shall not be construed to alter:

(a) Any existing rights acquired under laws relating to operating agencies;

(b) The status of any actions, activities, or civil or criminal proceedings of any existing operating agencies;

(c) The status of any collective bargaining agreements, indebtedness, contracts, or other obligations;

(d) Any valid resolutions, covenants, or agreements between an operating agency and members, participants in any electric generating facility, privately owned public utilities, or agencies of the federal government; or

(e) Any rules, resolutions, or orders adopted by a board of directors or executive board or committee until canceled or superseded." [1982 1st ex.s. c 43 § 4.]

43.52.375**Treasurer — Auditor — Powers and duties — Official bonds — Funds.**

The board of each joint operating agency shall by resolution appoint a treasurer. The treasurer shall be the chief financial officer of the operating agency, who shall report at least annually to the board a detailed statement of the financial condition of the operating agency and of its financial operations for the preceding fiscal year. The treasurer shall advise the board on all matters affecting the financial condition of the operating agency. Before entering upon his duties the treasurer shall give bond to the operating agency, with a surety company authorized to write such bonds in this state as surety, in an amount which the board finds by resolution will protect the operating agency against loss, conditioned that all funds which he receives as such treasurer will be faithfully kept and accounted for and for the faithful discharge of his duties. The amount of such bond may be decreased or increased from time to time as the board may by resolution direct.

The board shall also appoint an auditor and may require him to give a bond with a surety company authorized to do business in the state of Washington in such amount as it shall by resolution prescribe, conditioned for the faithful discharge of his duties. The auditor shall report directly to the board and be responsible to it for discharging his duties.

The premiums on the bonds of the auditor and the treasurer shall be paid by the operating agency. The board may provide for coverage of said officers and other persons on the same bond.

All funds of the joint operating agency shall be paid to the treasurer and shall be disbursed by him only on warrants issued by the auditor upon orders or vouchers approved by the board: PROVIDED, That the board by resolution may authorize the managing director or any other bonded officer or employee as legally permissible to approve or disapprove vouchers presented to defray salaries of employees and other expenses of the operating agency arising in the usual and ordinary course of its business, including expenses incurred by the board of directors, its executive committee, or the executive board in the performance of their duties. All moneys of the operating agency shall be deposited forthwith by the treasurer in such depositories, and with such securities as are designated by rules of the board. The treasurer shall establish a general fund and such special funds as shall be created by the board, into which he shall place all money of the joint operating agency as the board by resolution or motion may direct.

[1982 1st ex.s. c 43 § 7; 1981 1st ex.s. c 3 § 3; 1965 c 8 § [43.52.375](#). Prior: 1957 c 295 § 4.]

Notes:

Severability -- Savings -- 1982 1st ex.s. c 43: See notes following [RCW 43.52.374](#).

43.52.378**Executive board — Appointment of administrative auditor — Retention of firm for performance audits — Duties of auditor and firm — Reports.**

The executive board of any operating agency constructing, operating, terminating, or decommissioning a nuclear power plant under a site certification agreement issued pursuant to chapter 80.50 RCW shall appoint an administrative auditor. The administrative auditor shall be deemed an officer under chapter 42.23 RCW. The appointment of the administrative auditor shall be in addition to the appointment of the auditor for the issuance of warrants and other purposes as provided in [RCW 43.52.375](#). The executive board shall retain a qualified firm or firms to conduct performance audits which is in fact independent and does not have any interest, direct or indirect, in any contract with the operating agency other than its employment hereunder. No member or employee of any such firm shall be connected with the operating agency as an officer, employee, or contractor. The administrative auditor and the firm or firms shall be independently and directly responsible to the executive board of the operating agency. The executive board shall require a firm to conduct continuing audits of the methods, procedures and organization used by the operating agency to control costs, schedules, productivity, contract amendments, project design and any other topics deemed desirable by the executive board. The executive board may also require a firm to analyze particular technical aspects of the operating agency's projects and contract amendments. The firm or firms shall provide advice to the executive board in its management and control of the operating agency. At least once each year, the firm or firms shall prepare and furnish a report of its actions and recommendations to the executive board for the purpose of enabling it to attain the highest degree of efficiency in the management and control of any thermal power project under construction or in operation. The administrative auditor shall assist the firm or firms in the performance of its duties. The administrative auditor and the firm or firms shall consult

regularly with the executive board and furnish any information or data to the executive board which the administrative auditor, firm, or executive board deems helpful in accomplishing the purpose above stated. The administrative auditor shall perform such other duties as the executive board shall prescribe to accomplish the purposes of this section.

Upon the concurrent request of the chairmen of the senate or house energy and utilities committees, the operating agency shall report to the committees on a quarterly basis.

[1987 c 505 § 84; 1986 c 158 § 13; 1982 1st ex.s. c 43 § 8; 1981 1st ex.s. c 3 § 4; 1979 ex.s. c 220 § 1.]

Notes:

Severability -- Savings -- 1982 1st ex.s. c 43: See notes following RCW [43.52.374](#).

43.52.380

Member's preference to buy energy — Apportionment — Surplus.

Members shall have a preference right to the purchase of all electric energy generated by an operating agency. As between members, the amount of electric energy to which each shall be entitled shall be computed annually and shall be based on the same percentage as the purchases of such member bore to the total generation of the operating agency for the preceding year. Surplus electric energy, that is energy not contracted for by the members, may be sold to any public utility authorized by law to distribute and sell electric energy.

[1965 c 8 § [43.52.380](#). Prior: 1953 c 281 § 14.]

43.52.383

Compliance with open public meetings act.

(1) The legislature intends that the business and deliberations of joint operating agencies conducted by their boards of directors, executive boards, committees and subcommittees be conducted openly and with opportunity for public input.

(2) The board of directors, executive board, and all committees or subcommittees thereof shall comply with the provisions of chapter 42.30 RCW, in order to assure adequate public input and awareness of decisions.

[1983 1st ex.s. c 3 § 4.]

43.52.385

Best interest of ratepayers to determine interest of agency.

For the purposes of this chapter, including but not limited to RCW [43.52.343](#), the best interests of all ratepayers affected by the joint operating agency and its projects shall determine the interest of the operating agency and its board.

[1982 1st ex.s. c 43 § 9.]

Notes:

Severability -- Savings -- 1982 1st ex.s. c 43: See notes following RCW [43.52.374](#).

43.52.391**Powers and duties of operating agency.**

Except as otherwise provided in this section, a joint operating agency shall have all powers now or hereafter granted public utility districts under the laws of this state. It shall not acquire nor operate any electric distribution properties nor condemn any properties owned by a public utility which are operated for the generation and transmission of electric power and energy or are being developed for such purposes with due diligence under a valid license or permit, nor purchase or acquire any operating hydroelectric generating plant owned by any city or district on June 11, 1953, or which may be acquired by any city or district by condemnation on or after January 1, 1957, nor levy taxes, issue general obligation bonds, or create subdistricts. It may enter into any contracts, leases or other undertakings deemed necessary or proper and acquire by purchase or condemnation any real or personal property used or useful for its corporate purposes. Actions in eminent domain may be instituted in the superior court of any county in which any of the property sought to be condemned is located and the court in any such action shall have jurisdiction to condemn property wherever located within the state; otherwise such actions shall be governed by the same procedure as now or hereafter provided by law for public utility districts. An operating agency may sell steam or water not required by it for the generation of power and may construct or acquire any facilities it deems necessary for that purpose.

An operating agency may make contracts for any term relating to the purchase, sale, interchange or wheeling of power with the government of the United States or any agency thereof and with any municipal corporation or public utility, within or without the state, and may purchase or deliver power anywhere pursuant to any such contract. An operating agency may acquire any coal-bearing lands for the purpose of assuring a long-term, adequate supply of coal to supply its needs, both actual and prospective, for the generation of power and may make such contracts with respect to the extraction, sale or disposal of coal that it deems proper.

Any member of an operating agency may advance or contribute funds to an agency as may be agreed upon by the agency and the member, and the agency shall repay such advances or contributions from proceeds of revenue bonds, from operating revenues or from any other funds of the agency, together with interest not to exceed the maximum specified in RCW 43.52.395(1). The legislative body of any member may authorize and make such advances or contributions to an operating agency to assist in a plan for termination of a project or projects, whether or not such member is a participant in such project or projects. Any member who makes such advances or contributions for terminating a project or projects in which it is not a participant shall not assume any liability for any debts or obligations related to the terminated project or projects on account of such advance or contribution.

[1982 c 1 § 1; 1977 ex.s. c 184 § 8; 1965 c 8 § 43.52.391. Prior: 1957 c 295 § 5.]

Notes:

Severability -- 1982 c 1: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1982 c 1 § 3.]

Liability to other taxing districts for increased financial burdens: Chapter 54.36 RCW.

43.52.395**Maximum interest rate operating agency may pay member.**

(1) The maximum rate at which an operating agency shall add interest in repaying a member under RCW 43.52.391 may not exceed the higher of fifteen percent per annum or four percentage points above the equivalent coupon issue yield (as published by the Board of Governors of the Federal Reserve System) of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the preceding calendar month.

(2) The maximum rate specified in subsection (1) of this section is applicable to all advances and contributions made by each member to the agency prior to January 21, 1982, and to all renewals of such advances and contributions.

[1989 c 14 § 4; 1982 c 1 § 2.]

Notes:

Severability -- 1982 c 1: See note following RCW 43.52.391.

APPENDIX B

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of
Application No. 2006-01

ENERGY NORTHWEST

PACIFIC MOUNTAIN ENERGY
CENTER POWER PROJECT

ORDER COMMENCING
ADJUDICATIVE PROCEEDING;

NOTICE OF OPPORTUNITY AND
CLOSING DATE TO FILE PETITIONS
FOR INTERVENTION- **September 13,
2007**

NOTICE OF PREHEARING
CONFERENCE AND ORAL ARGUMENT
ON INTERVENTION –
**September 20, 2007, 2:00 P.M. at Kalama
Community Building Kalama,
Washington**

NOTICE OF PUBLIC HEARING TO
RECEIVE LIMITED COMMENTS ON
THE GREENHOUSE GAS REDUCTION
PLAN UNDER ESSB 6001 - **September
20, 2007, 6:30 P.M. at Kalama Community
Building, Kalama Washington**

The Application

Pacific Mountain Energy Center Power Project, Application No. 2006-01 – On September 12, 2006, Energy Northwest, a municipal corporation and joint operating agency of the State of Washington, submitted an Application for Site Certification to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) to construct and operate the Pacific Mountain Energy Center Power Project (Project), a 680-megawatt Integrated Gasification Combined Cycle (IGCC) generation facility. Related Project facilities include: a natural gas pipeline of approximately 5 miles; a railroad spur; access roads; underground and overhead electrical lines, substations and interconnection facilities to allow transmission through existing Bonneville Power Administration transmission lines; and associated supporting infrastructure and facilities. The Project is proposed to be located within Cowlitz County, on a 95-acre site in the Port of Kalama’s north industrial area.

EFSEC has taken lead agency status under WAC 197-11-938 of the State Environmental

Policy Act (SEPA) rules for the environmental review of this IGCC facility. EFSEC will be preparing a final environmental impact statement (EIS) for this project. A public informational and SEPA scoping meeting was held in Kalama, Washington, on November 6, 2006. A Land Use Consistency hearing was held in Kalama, Washington, on November 6, 2006 and on March 13, 2007 in Olympia, Washington. EFSEC also issued a draft EIS and conducted a public meeting in Kalama, Washington on June 6, 2007, to receive comments on the draft EIS. EFSEC will also conduct an examination of the project through a formal adjudicative proceeding.

Notice of Adjudicative Proceeding

The Council is reviewing Application No. 2006-01 under the procedures set forth in Chapter 80.50 of the Revised Code of Washington (RCW) and Title 463 of the Washington Administrative Code (WAC) for reviewing applications for new major energy facilities. The statute requires the Council to hold an adjudicative proceeding under Chapter 34.05 RCW, the Administrative Procedure Act. EFSEC in this order commences the adjudicative hearing related to Application No. 2006-01 in accordance with the procedural requirements found in Chapter 463-30 WAC and Chapter 34.05 RCW.

Notice of Closing Date for Submitting Petitions for Intervention – September 13, 2007 5:00 P.M.

The statutory parties to an adjudicative proceeding are the Applicant, Energy Northwest, and the Counsel for the Environment (as defined in RCW 80.50.020(12)), Assistant Attorney General, Michael Tribble. According to WAC 463-30-050, any state agency that is a member of EFSEC, or has opted to appoint a Council member for this proposal, may participate as a party. Any other person may petition to intervene as a party in this adjudicative proceeding under RCW 34.05.443, RCW 80.50.090, and WAC 463-30-091. The Council will consider the requests for intervention and determine whether or not to grant intervention.

An "intervenor," as defined in RCW 80.50.020(3), may be an individual, partnership, joint venture, private or public corporation, association, firm, public service company, political subdivision, municipal corporation, government agency, public utility district, or any other entity, public or private, however organized. Any such "person" who wishes to participate in this proceeding may petition for intervention. The nature of intervenor status and a discussion of factors that the Council has used in deciding whether to grant petitions for intervention are described in this notice.

Each person admitted to an adjudicative proceeding as an intervenor is a party to the proceedings only for the purposes and subject to any limitations and conditions specified in the EFSEC order, granting intervention.

In this case, the deadline for submitting requests for intervention is September 13, 2007.

The Council will consider requests for late intervention according to the requirements of WAC 463-30-091 and 463-30-092 and other considerations identified in this Notice. See the

discussion below for further information. Also see Other Opportunities for Public Participation below.

How to Intervene

To be considered timely, Petitions for Intervention in the matter of Application No. 2006-01 **must be received in the EFSEC office by close of business (5 p.m.) on September 13, 2007**. Petitions for Intervention will not be considered after that date except for good cause as discussed below. A copy of each petition must be served on Energy Northwest, and on Counsel for the Environment at the same time they are filed with the Council. The names and mailing addresses of the Council, all known parties, and their representatives appear in Attachment A.

Petitions for Intervention must be filed with:

Washington State Energy Facility Site Evaluation Council

Attn: Allen J. Fiksdal, EFSEC Manager

P.O. Box 43172

925 Plum Street SE

**** Note Effective August 20, 2007 Street Address:**

905 Plum Street SE Building 3, 3rd floor.

Olympia, WA 98504-3172

Petitions must be filed in hard copy with one original and one copy. A courtesy electronic copy should be provided on disk¹ at the time of filing, or e-mailed to efsec@cted.wa.gov. **E-mail alone does not constitute filing with EFSEC.**

Persons wishing to intervene should consider relevant provisions of Chapter 463-30 WAC. In particular, WAC 463-30-091 establishes the following requirements for Petitions for Intervention:

All petitions to intervene shall be verified under oath by the petitioner, shall adequately identify the petitioner, and shall establish with particularity an interest in the subject matter and that the ability to protect such interest may be otherwise impaired or impeded.

In considering whether to file a petition to become an intervenor, potential parties should

¹ Electronic versions must be IBM-PC compatible and may be supplied on: CD-ROM, IOMEGA (or other brand) 100 MB ZIP disk. For questions or assistance with these requirements please contact Stephen Posner of EFSEC at (360) 956-2063, or stephenp@cted.wa.gov.

recognize that persons who are granted intervenor status assume responsibilities they must meet in order for the adjudicative process to be an effective means for all participants to resolve the significant issues that are raised. Intervenors are expected to appear at the proceeding, either on their own behalf or by an attorney.

Intervenors must study other parties' cases so they can participate knowledgeably. They must decide whether to cross-examine other parties' witnesses, and determine the nature and scope of the cross-examination. Intervenors also have the responsibility either to attend the entire proceeding, including prehearing conferences, or to monitor it to learn when their interests will be at issue - otherwise they may be bound by matters that are resolved in their absence. Intervenors have the responsibility to become familiar with the Council's procedural rules and guidelines to enable them to participate knowledgeably and to advance their interests effectively. Because of potential delay to the proceeding that could interfere with rights of the parties involved, and because simply appearing to give advice to one party could give the appearance of impropriety or could adversely affect the rights of others, the Council cannot instruct participants on procedural matters. Becoming an intervenor in a Council adjudicative proceeding may require a significant commitment of time and financial resources.

To receive examples of petitions for intervention that have been filed in previous EFSEC cases, contact Stephen Posner of EFSEC at (360) 956-2063 or the EFSEC office at (360) 956-2121.

Each petitioner for intervention, the Counsel for the Environment, and each governmental agency appearing as a party must identify the particular issue(s) or concern(s) that the petitioner or agency intends to address as an intervening party. The identification of issues must be specific enough for the Council and other parties to identify the specific problem that could cause harm to the petitioner or agency and the nature of that harm. The designation of issue(s) may be a factor in determining whether to grant intervention and will be used to organize and to manage the hearing. Parties may add additional issues later in the proceeding using the same basis the Council may use to grant late-filed petitions for intervention.

The closing date for intervention and for statements of intervention by authorized governmental agencies, who intend to participate as intervenors is **September 13, 2007, 5:00 P.M.**

Late Intervention for Good Cause Shown

Parties who have been granted intervenor status may petition the Council to permit them to add new issues based on new information or issues that have been identified. At this time, other persons may also petition the Council to intervene for the first time if they can establish that new information identified, not previously known or reasonably discoverable, demonstrates that an interest of theirs could be impaired or impeded by the proposed project. Persons may seek late intervention or expansion of the issues they may address as parties at other times, but must also demonstrate that their petition to do so is based upon new information, not previously known to them or reasonably discoverable by them, and that their

petition is made within a reasonable period after discovering that information.

Notice of Prehearing Conference – September 20, 2007

The Washington State Energy Facility Site Evaluation Council will convene an initial prehearing conference on **September 20, 2007 at 2:00 P.M., Kalama Community Building, 126 North Second Street, Kalama, Washington 98625**. The purpose of this prehearing conference will be to hear the Applicant's objections to petitions for intervention, petitioner's responses to the Applicant's objections to petitions for intervention, to rule on timely filed petitions for intervention, and to discuss and rule on matters as provided for in WAC 463-30-270:

- (a) Simplification of the scope and issues

At this first prehearing conference there will be a discussion and agreement on the issues and schedule for briefs on whether the applicant's sequestration plan meets the minimum legal requirements of Section 5 of Engrossed Substitute Senate Bill 6001 (ESSB 6001), Chapter 307, Laws of 2007, an act relating to mitigating the impacts of climate change;

- (b) Opportunities for settlement agreements between parties;
- (c) The necessity or desirability of amendments to the pleadings;
- (d) The possibility of obtaining admissions of fact, and admissions of the genuineness of documents which will avoid unnecessary proof;
- (e) Limitations on the number and consolidation of the examination of witnesses;
- (f) Procedural matters including but not limited to: draft hearing guidelines; discovery and scheduling issues; determination of dates for the evidentiary hearing; whether evidence shall be prefiled; whether the hearing shall be segmented, the location of hearing sessions, and the timing and location of hearing sessions devoted to receiving evidence from the public;
- (g) Distribution of written testimony and exhibits to the Council and to parties prior to the hearing; and
- (h) Such other matters as may aid in the disposition or settlement of the proceeding including scheduling the hearing and determination of the sequence of the subject matter.

All participants are asked to be prepared to discuss the matters identified above including intervention request to the extent that they are reasonably able to do so. A detailed notice of the first prehearing conference may be sent at a later date to all parties, all petitioners for intervention, and all persons who ask to receive such notices. A form for requesting assistance is attached to this notice as Attachment B; please fill it out and return it if any party or witness

needs an interpreter or other assistance.

Oral Responses To Petitions For Intervention

The Council will hear the Applicants oral responses, if any, to intervention requests at the first prehearing conference, scheduled for **September 20, 2007**. Petitioners' responses to the Applicant's objections to intervention requests shall also be presented orally at the first prehearing conference scheduled for **September 20, 2007**, for any review of the basis of their intervention. If there are objections, petitioners must be prepared to respond to any objections filed. Appearance by telephone does not constitute an acceptable appearance, and will not be considered by the Council for the **September 20, 2007** prehearing conference.

Other Opportunities for Public Participation

Besides formal intervention, public participation in the EFSEC process is accommodated in several additional ways. First, under RCW 80.50.080, the Counsel for the Environment represents "the public and its interest in protecting the quality of the environment". Second, RCW 80.50.090(3) affords an opportunity for members of the public to present testimony in the hearing without having to intervene formally. Third, the public has the opportunity to submit written comments at any time. When adjudicative (evidentiary) hearings begin (perhaps later this year), the Council plans to schedule specially-designated sessions to receive testimony from members of the public, at one or more times and places to be set by later notice of hearing. The Council will maintain a copy of current records of the hearing at its offices in Olympia for the use of persons who may wish to review them. Mr. Michael Tribble has been designated as Counsel for the Environment by the Attorney General under RCW 80.50.080 to represent the public and its interest in protecting the quality of the environment. Persons wishing to contact Counsel for the Environment should contact him directly at the address, e-mail or telephone number listed on Attachment A.

Notice of Public Hearing on the PMEC Greenhouse Gas Reduction Plan – September 20, 2007

Under recently enacted legislation, Engrossed Substitute Senate Bill 6001 (ESSB 6001), the PMEC project is required to submit a "carbon sequestration plan" that details how the PMEC project will meet the provisions of the new law. Energy Northwest has submitted to EFSEC a Greenhouse Gas Reduction Plan.

EFSEC will provide an opportunity for public comments (written and oral) on the PMEC Greenhouse Gas Reduction Plan after its Prehearing Conference on September 20, 2007. The PMEC Greenhouse Gas Reduction Plan is available on the EFSEC web site at www.efsec.wa.gov or by contacting the EFSEC office. **The public hearing will be held on September 20, 2007 at 6:30 P.M. Kalama Community Building, 126 North Second Street, Kalama, Washington 98625.**

Contact Information

To obtain additional information about the intervention process, please contact the EFSEC office at (360) 956-2121.

More specific information about the project is available from EFSEC's office, on EFSEC's web site at www.efsec.wa.gov, or from reviewing the application at public libraries at the following locations:

- Washington State Library, Joel M. Pritchard Branch: 6880 Capitol Blvd South, Olympia, WA, 98504-5513, (360) 704-5200;
- City of Kalama Public Library: 320 North First St, Kalama, WA 98625, (360) 673-4568;
- City of Kelso Public Library: 314 Academy St., Kelso, WA 98626, (360) 423-8110;
- City of Longview Public Library: 1600 Louisiana Ave., Longview, WA 98632, (360) 442-5300.

WASHINGTON ENERGY FACILITY SITE EVALUATION COUNCIL

Dated in Olympia, Washington this 13th day of August, 2007.

Allen J. Fiksdal, EFSEC Manager

Attachment A

Addresses of the Council and representatives of known parties

Pacific Mountain Energy Center Power Project Application No. 2006-01

Note: Parties petitioning to intervene must serve petitions to all of the addresses below.

Energy Northwest, Applicant:	
<p>Ted Beatty Energy Northwest P.O. Box 968 Richland, WA 99352</p> <p>E-mail: tbeatty@energy-northwest.com</p> <p>Phone: (509) 371-5531</p> <p>Fax: (509) 377-8124</p>	<p>Elizabeth Thomas K & L Gates 925 4th Ave., Suite 2900 Seattle, WA 98104</p> <p>E-mail: lizthomas@klgates.com</p> <p>Phone: (206) 623-7580</p> <p>Fax: (206) 370-6190</p>
EFSEC:	Counsel for the Environment:
<p>Mr. Allen J. Fiksdal EFSEC Manager Energy Facility Site Evaluation Council 905 Plum Street SE, Building 3 PO Box 43172 Olympia, WA 98504-3172</p> <p>E-mail: allenf@cted.wa.gov</p> <p>Phone: (360) 956-2152</p> <p>Fax: (360) 956-2158</p>	<p>Michael Tribble Assistant Attorney General Counsel for the Environment Office of the Attorney General 1125 Washington St. S.E. P.O. Box 40100 Olympia, WA 98504-0100</p> <p>E-mail: Michaelt1@atg.wa.gov</p> <p>Phone: (360) 753-2711</p> <p>Fax: (360) 664-0229</p>

Attachment B

Request for Interpreter or Other Assistance

NOTICE

PLEASE TAKE NOTICE that:

- Smoking is prohibited in hearing facilities:
- The hearing facilities are accessible to interested persons with disabilities:
- A qualified interpreter will be appointed at no cost to the party or witness, if a party or witness is hearing impaired or limited English-speaking and needs an interpreter.

*Information needed to provide an appropriate interpreter or other assistance should be given below and the form returned to **Allen Fiksdal, EFSEC Manager, Energy Facility Site Evaluation Council, P.O. Box 43172, 905 Plum Street, Olympia, WA 98504-3172.***

Please print all requested information.

Hearing date/location: _____

Applicant: Energy Northwest _____

Name of Party: _____

Primary language: _____

Hearing impaired? (Yes) ___ (No) ___

Do you need a certified sign language interpreter? Visual _____ Tactile _____

Other type of assistance needed: _____

English-speaking person who can be reached if there are questions:

Name: _____

Address: _____ City: _____

Telephone: () _____

APPENDIX C

Chapter 80.50 RCW Energy facilities — site locations

Chapter Listing

RCW Sections

- [80.50.010](#) Legislative finding -- Policy -- Intent.
- [80.50.020](#) Definitions.
- [80.50.030](#) Energy facility site evaluation council -- Created -- Membership -- Support.
- [80.50.040](#) Energy facility site evaluation council -- Powers enumerated.
- [80.50.045](#) Recommendations to secretary, federal energy regulatory commission -- Siting electrical transmission corridors -- Council designated as state authority for siting transmission facilities.
- [80.50.060](#) Energy facilities to which chapter applies -- Applications for certification -- Forms -- Information.
- [80.50.071](#) Council to receive applications -- Fees or charges for application processing or certification monitoring.
- [80.50.075](#) Expedited processing of applications.
- [80.50.080](#) Counsel for the environment.
- [80.50.085](#) Council staff to assist applicants, make recommendations.
- [80.50.090](#) Public hearings.
- [80.50.100](#) Recommendations to governor -- Approval or rejection of certification -- Reconsideration.
- [80.50.105](#) Transmission facilities for petroleum products -- Recommendations to governor.
- [80.50.110](#) Chapter governs and supersedes other law or regulations -- Preemption of regulation and certification by state.
- [80.50.120](#) Effect of certification.
- [80.50.130](#) Revocation or suspension of certification -- Grounds.
- [80.50.140](#) Review.
- [80.50.150](#) Enforcement of compliance -- Penalties.
- [80.50.160](#) Availability of information.
- [80.50.175](#) Study of potential sites -- Fee -- Disposition of payments.
- [80.50.180](#) Proposals and actions by other state agencies and local political subdivisions pertaining to energy facilities exempt from "detailed statement" required by RCW 43.21C.030.
- [80.50.190](#) Disposition of receipts from applicants.
- [80.50.300](#) Unfinished nuclear power projects -- Transfer of all or a portion of a site to a political subdivision or subdivisions of the state -- Water rights.
- [80.50.310](#) Council actions -- Exemption from chapter 43.21C RCW.
- [80.50.320](#) Governor to evaluate council efficiency, make recommendations.
- [80.50.900](#) Severability -- 1970 ex.s. c 45.
- [80.50.901](#) Severability -- 1974 ex.s. c 110.
- [80.50.902](#) Severability -- 1977 ex.s. c 371.
- [80.50.903](#) Severability -- 1996 c 4.
- [80.50.904](#) Effective date -- 1996 c 4.

Notes:

Reviser's note: Powers and duties of the department of social and health services and the secretary of social and health services transferred to the department of health and the secretary of health. See RCW 43.70.060.

Energy supply emergencies: Chapter 43.21G RCW.

Regulation of dangerous wastes associated with energy facilities: RCW 70.105.110.

State energy office: Chapter 43.21F RCW.

Water pollution control, energy facilities, permits, etc., duties of energy facility site evaluation council: RCW 90.48.262.

80.50.010

Legislative finding — Policy — Intent.

The legislature finds that the present and predicted growth in energy demands in the state of Washington requires the development of a procedure for the selection and utilization of sites for energy facilities and the identification of a state position with respect to each proposed site. The legislature recognizes that the selection of sites will have a significant impact upon the welfare of the population, the location and growth of industry and the use of the natural resources of the state.

It is the policy of the state of Washington to recognize the pressing need for increased energy facilities, and to ensure through available and reasonable methods, that the location and operation of such facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.

It is the intent to seek courses of action that will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public. Such action will be based on these premises:

(1) To assure Washington state citizens that, where applicable, operational safeguards are at least as stringent as the criteria established by the federal government and are technically sufficient for their welfare and protection.

(2) To preserve and protect the quality of the environment; to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment.

(3) To provide abundant energy at reasonable cost.

(4) To avoid costs of complete site restoration and demolition of improvements and infrastructure at unfinished nuclear energy sites, and to use unfinished nuclear energy facilities for public uses, including economic development, under the regulatory and management control of local governments and port districts.

(5) To avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay.

[2001 c 214 § 1; 1996 c 4 § 1; 1975-'76 2nd ex.s. c 108 § 29; 1970 ex.s. c 45 § 1.]

Notes:

Severability -- 2001 c 214: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2001 c 214 § 33.]

Effective date -- 2001 c 214: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 8, 2001]." [2001 c 214 § 34.]

Findings -- 2001 c 214: See note following RCW 39.35.010.

Severability -- Effective date -- 1975-'76 2nd ex.s. c 108: See notes following RCW 43.21F.010.

Nuclear power facilities, joint operation: Chapter 54.44 RCW.

State energy office: Chapter 43.21F RCW.

80.50.020
Definitions.

***** CHANGE IN 2007 *** (SEE 1037-S.SL) *****

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Applicant" means any person who makes application for a site certification pursuant to the provisions of this chapter.

(2) "Application" means any request for approval of a particular site or sites filed in accordance with the procedures established pursuant to this chapter, unless the context otherwise requires.

(3) "Person" means an individual, partnership, joint venture, private or public corporation, association, firm, public service company, political subdivision, municipal corporation, government agency, public utility district, or any other entity, public or private, however organized.

(4) "Site" means any proposed or approved location of an energy facility.

(5) "Certification" means a binding agreement between an applicant and the state which shall embody compliance to the siting guidelines, in effect as of the date of certification, which have been adopted pursuant to RCW 80.50.040 as now or hereafter amended as conditions to be met prior to or concurrent with the construction or operation of any energy facility.

(6) "Associated facilities" means storage, transmission, handling, or other related and supporting facilities connecting an energy plant with the existing energy supply, processing, or distribution system, including, but not limited to, communications, controls, mobilizing or maintenance equipment, instrumentation, and other types of ancillary transmission equipment, off-line storage or venting required for efficient operation or safety of the transmission system and overhead, and surface or subsurface lines of physical access for the inspection, maintenance, and safe operations of the transmission facility and new transmission lines constructed to operate at nominal voltages in excess of 115,000 volts to connect a thermal power plant or alternative energy facilities to the northwest power grid. However, common carrier railroads or motor vehicles shall not be included.

(7) "Transmission facility" means any of the following together with their associated facilities:

(a) Crude or refined petroleum or liquid petroleum product transmission pipeline of the following dimensions: A pipeline larger than six inches minimum inside diameter between valves for the transmission of these products with a total length of at least fifteen miles;

(b) Natural gas, synthetic fuel gas, or liquefied petroleum gas transmission pipeline of the following dimensions: A pipeline larger than fourteen inches minimum inside diameter between valves, for the transmission of these products, with a total length of at least fifteen miles for the purpose of delivering gas to a distribution facility, except an interstate natural gas pipeline regulated by the United States federal power commission;

(c) Electrical transmission facilities in excess of 115,000 volts in national interest electric transmission corridors as designated by the United States secretary of the department of energy or the federal energy regulatory commission pursuant to section 1221 of the national energy policy act, and such rules and regulations as the secretary or the federal energy regulatory commission adopts to implement the act.

(8) "Independent consultants" means those persons who have no financial interest in the applicant's proposals and who are retained by the council to evaluate the applicant's proposals, supporting studies, or to conduct additional studies.

(9) "Thermal power plant" means, for the purpose of certification, any electrical generating facility using any fuel, including nuclear materials, for distribution of electricity by electric utilities.

(10) "Energy facility" means an energy plant or transmission facilities: PROVIDED, That the following are excluded from the provisions of this chapter:

(a) Facilities for the extraction, conversion, transmission or storage of water, other than water specifically consumed or discharged by energy production or conversion for energy purposes; and

(b) Facilities operated by and for the armed services for military purposes or by other federal authority for the national defense.

(11) "Council" means the energy facility site evaluation council created by RCW 80.50.030.

(12) "Counsel for the environment" means an assistant attorney general or a special assistant attorney general who shall represent the public in accordance with RCW 80.50.080.

(13) "Construction" means on-site improvements, excluding exploratory work, which cost in excess of two hundred fifty thousand dollars.

(14) "Energy plant" means the following facilities together with their associated facilities:

(a) Any stationary thermal power plant with generating capacity of three hundred fifty thousand kilowatts or more, measured using maximum continuous electric generating capacity, less minimum auxiliary load, at average ambient temperature and pressure, and floating thermal power plants of one hundred thousand kilowatts or more, including associated facilities. For the purposes of this subsection, "floating thermal power plants" means a thermal power plant that is suspended on the surface of water by means of a barge, vessel, or other floating platform;

(b) Facilities which will have the capacity to receive liquefied natural gas in the equivalent of more than one hundred million standard cubic feet of natural gas per day, which has been transported over marine waters;

(c) Facilities which will have the capacity to receive more than an average of fifty thousand barrels per day of crude or refined petroleum or liquefied petroleum gas which has been or will be transported over marine waters, except that the provisions of this chapter shall not apply to storage facilities unless occasioned by such new facility construction;

(d) Any underground reservoir for receipt and storage of natural gas as defined in RCW 80.40.010 capable of delivering an average of more than one hundred million standard cubic feet of natural gas per day; and

(e) Facilities capable of processing more than twenty-five thousand barrels per day of petroleum into refined products.

(15) "Land use plan" means a comprehensive plan or land use element thereof adopted by a unit of local government pursuant to chapter 35.63, 35A.63, 36.70, or 36.70A RCW.

(16) "Zoning ordinance" means an ordinance of a unit of local government regulating the use of land and adopted pursuant to chapter 35.63, 35A.63, 36.70, or 36.70A RCW or Article XI of the state Constitution.

(17) "Alternative energy resource" means: (a) Wind; (b) solar energy; (c) geothermal energy; (d) landfill gas; (e) wave or tidal action; or (f) biomass energy based on solid organic fuels from wood, forest, or field residues, or dedicated energy crops that do not include wood pieces that have been treated with chemical preservatives such as creosote, pentachlorophenol, or copper-chrome-arsenic.

(18) "Secretary" means the secretary of the United States department of energy.

[2006 c 205 § 1; 2006 c 196 § 1; 2001 c 214 § 3; 1995 c 69 § 1; 1977 ex.s. c 371 § 2; 1975-'76 2nd ex.s. c 108 § 30; 1970 ex.s. c 45 § 2.]

Notes:

Reviser's note: This section was amended by 2006 c 196 § 1 and by 2006 c 205 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Findings -- 2006 c 196: "(1) Section 1221 of the national energy policy act also authorizes a state siting authority, in those instances where applicants seek a federal construction permit otherwise authorized pursuant to section 1221 of the act, to assert jurisdiction on the basis of existing state regulatory authority.

(2) Section 1221 of the national energy policy act further authorizes a state siting authority to approve the siting of facilities or consider the interstate benefits to be achieved by proposed construction or modification as provided for in section 1221(b)(1)(A)(i)-(ii) of the act or other provisions of the act, or rules and regulations implementing the act, and to convey the views and recommendations regarding the need for and impact of a transmission facility where the federal energy regulatory commission is determined to have jurisdiction.

(3) Because the types of transmission facilities subject to section 1221 of the national energy policy act are not defined, and because the legislature recognizes that the siting of electric transmission lines at or below 115,000 volts

has historically been regulated by local governments in the state, the legislature finds that the 115,000 volt threshold established in this act is appropriate to satisfy the requirements of section 1221." [2006 c 196 § 2.]

Severability -- Effective date -- 2001 c 214: See notes following RCW 80.50.010.

Findings -- 2001 c 214: See note following RCW 39.35.010.

Severability -- Effective date -- 1975-'76 2nd ex.s. c 108: See notes following RCW 43.21F.010.

80.50.030

Energy facility site evaluation council — Created — Membership — Support.

(1) There is created and established the energy facility site evaluation council.

(2)(a) The chair of the council shall be appointed by the governor with the advice and consent of the senate, shall have a vote on matters before the council, shall serve for a term coextensive with the term of the governor, and is removable for cause. The chair may designate a member of the council to serve as acting chair in the event of the chair's absence. The salary of the chair shall be determined under RCW 43.03.040. The chair is a "state employee" for the purposes of chapter 42.52 RCW. As applicable, when attending meetings of the council, members may receive reimbursement for travel expenses in accordance with RCW 43.03.050 and 43.03.060, and are eligible for compensation under RCW 43.03.250.

(b) The chair or a designee shall execute all official documents, contracts, and other materials on behalf of the council. The Washington state department of community, trade, and economic development shall provide all administrative and staff support for the council. The director of the department of community, trade, and economic development has supervisory authority over the staff of the council and shall employ such personnel as are necessary to implement this chapter. Not more than three such employees may be exempt from chapter 41.06 RCW.

(3)(a) The council shall consist of the directors, administrators, or their designees, of the following departments, agencies, commissions, and committees or their statutory successors:

- (i) Department of ecology;
- (ii) Department of fish and wildlife;
- (iii) Department of community, trade, and economic development;
- (iv) Utilities and transportation commission; and
- (v) Department of natural resources.

(b) The directors, administrators, or their designees, of the following departments, agencies, and commissions, or their statutory successors, may participate as councilmembers at their own discretion provided they elect to participate no later than sixty days after an application is filed:

- (i) Department of agriculture;
- (ii) Department of health;
- (iii) Military department; and
- (iv) Department of transportation.

(c) Council membership is discretionary for agencies that choose to participate under (b) of this subsection only for applications that are filed with the council on or after May 8, 2001. For applications filed before May 8, 2001, council membership is mandatory for those agencies listed in (b) of this subsection.

(4) The appropriate county legislative authority of every county wherein an application for a proposed site is filed shall appoint a member or designee as a voting member to the council. The member or designee so appointed shall sit with the council only at such times as the council considers the proposed site for the county which he or she represents, and

such member or designee shall serve until there has been a final acceptance or rejection of the proposed site.

(5) The city legislative authority of every city within whose corporate limits an energy plant is proposed to be located shall appoint a member or designee as a voting member to the council. The member or designee so appointed shall sit with the council only at such times as the council considers the proposed site for the city which he or she represents, and such member or designee shall serve until there has been a final acceptance or rejection of the proposed site.

(6) For any port district wherein an application for a proposed port facility is filed subject to this chapter, the port district shall appoint a member or designee as a nonvoting member to the council. The member or designee so appointed shall sit with the council only at such times as the council considers the proposed site for the port district which he or she represents, and such member or designee shall serve until there has been a final acceptance or rejection of the proposed site. The provisions of this subsection shall not apply if the port district is the applicant, either singly or in partnership or association with any other person.

[2001 c 214 § 4; 1996 c 186 § 108. Prior: 1994 c 264 § 75; 1994 c 154 § 315; 1990 c 12 § 3; 1988 c 36 § 60; 1986 c 266 § 51; prior: 1985 c 466 § 71; 1985 c 67 § 1; 1985 c 7 § 151; prior: 1984 c 125 § 18; 1984 c 7 § 372; 1977 ex.s. c 371 § 3; 1975-'76 2nd ex.s. c 108 § 31; 1974 ex.s. c 171 § 46; 1970 ex.s. c 45 § 3.]

Notes:

Severability -- Effective date -- 2001 c 214: See notes following RCW [80.50.010](#).

Findings -- 2001 c 214: See note following RCW [39.35.010](#).

Findings -- Intent -- Part headings not law -- Effective date -- 1996 c 186: See notes following RCW [43.330.904](#).

Parts and captions not law -- Effective date -- Severability -- 1994 c 154: See RCW [42.52.902](#), [42.52.904](#), and [42.52.905](#).

Effective date -- 1990 c 12: "This act shall take effect July 1, 1990." [1990 c 12 § 12.]

Severability -- 1986 c 266: See note following RCW [38.52.005](#).

Effective date -- Severability -- 1985 c 466: See notes following RCW [43.31.125](#).

Severability -- Headings -- Effective date -- 1984 c 125: See RCW [43.63A.901](#) through [43.63A.903](#).

Severability -- 1984 c 7: See note following RCW [47.01.141](#).

Severability -- Effective date -- 1975-'76 2nd ex.s. c 108: See notes following RCW [43.21F.010](#).

80.50.040

Energy facility site evaluation council — Powers enumerated.

The council shall have the following powers:

- (1) To adopt, promulgate, amend, or rescind suitable rules and regulations, pursuant to chapter 34.05 RCW, to carry out the provisions of this chapter, and the policies and practices of the council in connection therewith;
- (2) To develop and apply environmental and ecological guidelines in relation to the type, design, location, construction, and operational conditions of certification of energy facilities subject to this chapter;
- (3) To establish rules of practice for the conduct of public hearings pursuant to the provisions of the Administrative Procedure Act, as found in chapter 34.05 RCW;
- (4) To prescribe the form, content, and necessary supporting documentation for site certification;

(5) To receive applications for energy facility locations and to investigate the sufficiency thereof;

(6) To make and contract, when applicable, for independent studies of sites proposed by the applicant;

(7) To conduct hearings on the proposed location of the energy facilities;

(8) To prepare written reports to the governor which shall include: (a) A statement indicating whether the application is in compliance with the council's guidelines, (b) criteria specific to the site and transmission line routing, (c) a council recommendation as to the disposition of the application, and (d) a draft certification agreement when the council recommends approval of the application;

(9) To prescribe the means for monitoring of the effects arising from the construction and the operation of energy facilities to assure continued compliance with terms of certification and/or permits issued by the council pursuant to chapter 90.48 RCW or subsection (12) of this section: PROVIDED, That any on-site inspection required by the council shall be performed by other state agencies pursuant to interagency agreement: PROVIDED FURTHER, That the council may retain authority for determining compliance relative to monitoring;

(10) To integrate its site evaluation activity with activities of federal agencies having jurisdiction in such matters to avoid unnecessary duplication;

(11) To present state concerns and interests to other states, regional organizations, and the federal government on the location, construction, and operation of any energy facility which may affect the environment, health, or safety of the citizens of the state of Washington;

(12) To issue permits in compliance with applicable provisions of the federally approved state implementation plan adopted in accordance with the Federal Clean Air Act, as now existing or hereafter amended, for the new construction, reconstruction, or enlargement or operation of energy facilities: PROVIDED, That such permits shall become effective only if the governor approves an application for certification and executes a certification agreement pursuant to this chapter: AND PROVIDED FURTHER, That all such permits be conditioned upon compliance with all provisions of the federally approved state implementation plan which apply to energy facilities covered within the provisions of this chapter; and

(13) To serve as an interagency coordinating body for energy-related issues.

[2001 c 214 § 6; 1990 c 12 § 4; 1985 c 67 § 2; 1979 ex.s. c 254 § 1; 1977 ex.s. c 371 § 4; 1975-'76 2nd ex.s. c 108 § 32; 1970 ex.s. c 45 § 4.]

Notes:

Severability -- Effective date -- 2001 c 214: See notes following RCW [80.50.010](#).

Findings -- 2001 c 214: See note following RCW [39.35.010](#).

Effective date -- 1990 c 12: See note following RCW [80.50.030](#).

Severability -- Effective date -- 1975-'76 2nd ex.s. c 108: See notes following RCW [43.21F.010](#).

80.50.045

Recommendations to secretary, federal energy regulatory commission — Siting electrical transmission corridors — Council designated as state authority for siting transmission facilities.

(1) The council shall consult with other state agencies, utilities, local municipal governments, public interest groups, tribes, and other interested persons to convey their views to the secretary and the federal energy regulatory commission regarding appropriate limits on federal regulatory authority in the siting of electrical transmission corridors in the state of Washington.

(2) The council is designated as the state authority for purposes of siting transmission facilities under the national energy policy act of 2005 and for purposes of other such rules or regulations adopted by the secretary. The council's authority regarding transmission facilities is limited to those transmission facilities that are the subject of section 1221 of the national energy policy act and this chapter.

(3) For the construction and modification of transmission facilities that are the subject of section 1221 of the national energy policy act, the council may: (a) Approve the siting of the facilities; and (b) consider the interstate benefits expected to be achieved by the proposed construction or modification of the facilities in the state.

(4) When developing recommendations as to the disposition of an application for the construction or modification of transmission facilities under this chapter, the fuel source of the electricity carried by the transmission facilities shall not be considered.

[2006 c 196 § 3.]

Notes:

Findings -- 2006 c 196: See note following RCW [80.50.020](#).

80.50.060

Energy facilities to which chapter applies — Applications for certification — Forms — Information.

***** CHANGE IN 2007 *** (SEE 1037-S.SL) *****

(1) The provisions of this chapter shall apply to the construction of energy facilities which includes the new construction of energy facilities and the reconstruction or enlargement of existing energy facilities where the net increase in physical capacity or dimensions resulting from such reconstruction or enlargement meets or exceeds those capacities or dimensions set forth in RCW [80.50.020](#) (7) and (14). No construction of such energy facilities may be undertaken, except as otherwise provided in this chapter, after July 15, 1977, without first obtaining certification in the manner provided in this chapter.

(2) The provisions of this chapter apply to the construction, reconstruction, or enlargement of a new or existing energy facility that exclusively uses alternative energy resources and chooses to receive certification under this chapter, regardless of the generating capacity of the project.

(3) The provisions of this chapter apply to the construction of new electrical transmission facilities or the modification of existing electrical transmission facilities in a national interest electric transmission corridor designated by the secretary.

(4) The provisions of this chapter shall not apply to normal maintenance and repairs which do not increase the capacity or dimensions beyond those set forth in RCW [80.50.020](#) (7) and (14).

(5) Applications for certification of energy facilities made prior to July 15, 1977 shall continue to be governed by the applicable provisions of law in effect on the day immediately preceding July 15, 1977 with the exceptions of RCW [80.50.190](#) and [80.50.071](#) which shall apply to such prior applications and to site certifications prospectively from July 15, 1977.

(6) Applications for certification shall be upon forms prescribed by the council and shall be supported by such information and technical studies as the council may require.

[2006 c 196 § 4; 2001 c 214 § 2; 1977 ex.s. c 371 § 5; 1975-'76 2nd ex.s. c 108 § 34; 1970 ex.s. c 45 § 6.]

Notes:

Findings -- 2006 c 196: See note following RCW [80.50.020](#).

Severability -- Effective date -- 2001 c 214: See notes following RCW [80.50.010](#).

Findings -- 2001 c 214: See note following RCW [39.35.010](#).

Severability -- Effective date -- 1975-'76 2nd ex.s. c 108: See notes following RCW [43.21F.010](#).

80.50.071**Council to receive applications — Fees or charges for application processing or certification monitoring.**

(1) The council shall receive all applications for energy facility site certification. The following fees or charges for application processing or certification monitoring shall be paid by the applicant or certificate holder:

(a) A fee of twenty-five thousand dollars for each proposed site, to be applied toward the cost of the independent consultant study authorized in this subsection, shall accompany the application and shall be a condition precedent to any further consideration or action on the application by the council. The council shall commission its own independent consultant study to measure the consequences of the proposed energy facility on the environment for each site application. The council shall direct the consultant to study any matter which it deems essential to an adequate appraisal of the site. The full cost of the study shall be paid by the applicant: PROVIDED, That said costs exceeding a total of the twenty-five thousand dollars paid pursuant to subsection (1)(a) of this section shall be payable subject to the applicant giving prior approval to such excess amount.

(b) Each applicant shall, in addition to the costs of the independent consultant provided by subsection (1)(a) of this section, pay such reasonable costs as are actually and necessarily incurred by the council and its members as designated in RCW 80.50.030 in processing the application. Such costs shall include, but are not limited to, council member's wages, employee benefits, costs of a hearing examiner, a court reporter, additional staff salaries, wages and employee benefits, goods and services, travel expenses within the state and miscellaneous expenses, as arise directly from processing such application.

Each applicant shall, at the time of application submission, deposit twenty thousand dollars, or such lesser amount as may be specified by council rule, to cover costs provided for by subsection (1)(b) of this section. Reasonable and necessary costs of the council directly attributable to application processing shall be charged against such deposit.

The council shall submit to each applicant a statement of such expenditures actually made during the preceding calendar quarter which shall be in sufficient detail to explain such expenditures. The applicant shall pay the state treasurer the amount of such statement to restore the total amount on deposit to the originally established level: PROVIDED, That such applicant may, at the request of the council, increase the amount of funds on deposit to cover anticipated expenses during peak periods of application processing. Any funds remaining unexpended at the conclusion of application processing shall be refunded to the applicant, or at the applicant's option, credited against required deposits of certificate holders.

(c) Each certificate holder shall pay such reasonable costs as are actually and necessarily incurred by the council for inspection and determination of compliance by the certificate holder with the terms of the certification relative to monitoring the effects of construction and operation of the facility.

Each certificate holder, within thirty days of execution of the site certification agreement, shall deposit twenty thousand dollars, or such other amount as may be specified by council rule, to cover costs provided for by subsection (1)(c) of this section. Reasonable and necessary costs of the council directly attributable to inspection and determination of compliance by the certificate holder with the terms of the certification relative to monitoring the effects of construction and operation of the facility shall be charged against such deposit.

The council shall submit to each certificate holder a statement of such expenditures actually made during the preceding calendar quarter which shall be in sufficient detail to explain such expenditures. The certificate holder shall pay the state treasurer the amount of such statement to restore the total amount on deposit to the originally established level: PROVIDED, That if the actual, reasonable, and necessary expenditures for inspection and determination of compliance in the preceding calendar quarter have exceeded the amount of funds on deposit, such excess costs shall be paid by the certificate holder.

(2) If an applicant or certificate holder fails to provide the initial deposit, or if subsequently required payments are not received within thirty days following receipt of the statement from the council, the council may (a) in the case of the applicant, suspend processing of the application until payment is received; or (b) in the case of a certificate holder, suspend the certification.

(3) All payments required of the applicant or certificate holder under this section are to be made to the state treasurer who shall make payments as instructed by the council from the funds submitted. All such funds shall be subject to state auditing procedures. Any unexpended portions thereof shall be returned to the applicant or certificate holder.

[2006 c 196 § 5; 1977 ex.s. c 371 § 16.]

Notes:

Findings -- 2006 c 196: See note following RCW 80.50.020.

80.50.075**Expedited processing of applications.**

(1) Any person filing an application for certification of an energy facility or an alternative energy resource facility pursuant to this chapter may apply to the council for an expedited processing of such an application. The application for expedited processing shall be submitted to the council in such form and manner and accompanied by such information as may be prescribed by council rule. The council may grant an applicant expedited processing of an application for certification upon finding that the environmental impact of the proposed energy facility is not significant or will be mitigated to a nonsignificant level under RCW 43.21C.031 and the project is found under RCW 80.50.090(2) to be consistent and in compliance with city, county, or regional land use plans or zoning ordinances.

(2) Upon granting an applicant expedited processing of an application for certification, the council shall not be required to:

(a) Commission an independent study to further measure the consequences of the proposed energy facility or alternative energy resource facility on the environment, notwithstanding the other provisions of RCW 80.50.071; nor

(b) Hold an adjudicative proceeding under chapter 34.05 RCW, the administrative procedure act, on the application.

(3) The council shall adopt rules governing the expedited processing of an application for certification pursuant to this section.

[2006 c 205 § 2; 1989 c 175 § 172; 1977 ex.s. c 371 § 17.]

Notes:

Effective date -- 1989 c 175: See note following RCW 34.05.010.

80.50.080**Counsel for the environment.**

After the council has received a site application, the attorney general shall appoint an assistant attorney general as a counsel for the environment. The counsel for the environment shall represent the public and its interest in protecting the quality of the environment. Costs incurred by the counsel for the environment in the performance of these duties shall be charged to the office of the attorney general, and shall not be a charge against the appropriation to the energy facility site evaluation council. He shall be accorded all the rights, privileges and responsibilities of an attorney representing a party in a formal action. This section shall not be construed to prevent any person from being heard or represented by counsel in accordance with the other provisions of this chapter.

[1977 ex.s. c 371 § 6; 1970 ex.s. c 45 § 8.]

80.50.085**Council staff to assist applicants, make recommendations.**

(1) After the council has received a site application, council staff shall assist applicants in identifying issues presented by the application.

(2) Council staff shall review all information submitted and recommend resolutions to issues in dispute that would allow site approval.

(3) Council staff may make recommendations to the council on conditions that would allow site approval.

[2001 c 214 § 5.]

Notes:

Severability -- Effective date -- 2001 c 214: See notes following RCW [80.50.010](#).

Findings -- 2001 c 214: See note following RCW 39.35.010.

80.50.090

Public hearings.

(1) The council shall conduct an informational public hearing in the county of the proposed site as soon as practicable but not later than sixty days after receipt of an application for site certification. However, the place of such public hearing shall be as close as practical to the proposed site.

(2) Subsequent to the informational public hearing, the council shall conduct a public hearing to determine whether or not the proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances. If it is determined that the proposed site does conform with existing land use plans or zoning ordinances in effect as of the date of the application, the city, county, or regional planning authority shall not thereafter change such land use plans or zoning ordinances so as to affect the proposed site.

(3) Prior to the issuance of a council recommendation to the governor under RCW [80.50.100](#) a public hearing, conducted as an adjudicative proceeding under chapter 34.05 RCW, the administrative procedure act, shall be held. At such public hearing any person shall be entitled to be heard in support of or in opposition to the application for certification.

(4) Additional public hearings shall be held as deemed appropriate by the council in the exercise of its functions under this chapter.

[2006 c 205 § 3; 2006 c 196 § 6; 2001 c 214 § 7; 1989 c 175 § 173; 1970 ex.s. c 45 § 9.]

Notes:

Reviser's note: This section was amended by 2006 c 196 § 6 and by 2006 c 205 § 3, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Findings -- 2006 c 196: See note following RCW [80.50.020](#).

Severability -- Effective date -- 2001 c 214: See notes following RCW [80.50.010](#).

Findings -- 2001 c 214: See note following RCW 39.35.010.

Effective date -- 1989 c 175: See note following RCW 34.05.010.

80.50.100

Recommendations to governor — Approval or rejection of certification — Reconsideration.

(1) The council shall report to the governor its recommendations as to the approval or rejection of an application for certification within twelve months of receipt by the council of such an application, or such later time as is mutually agreed by the council and the applicant. If the council recommends approval of an application for certification, it shall also submit a draft certification agreement with the report. The council shall include conditions in the draft certification agreement to implement the provisions of this chapter, including, but not limited to, conditions to protect state or local governmental or community interests affected by the construction or operation of the energy facility, and conditions designed to recognize the purpose of laws or ordinances, or rules or regulations promulgated thereunder, that are preempted or superseded pursuant to RCW [80.50.110](#) as now or hereafter amended.

- (2) Within sixty days of receipt of the council's report the governor shall take one of the following actions:
- (a) Approve the application and execute the draft certification agreement; or
 - (b) Reject the application; or
 - (c) Direct the council to reconsider certain aspects of the draft certification agreement.

The council shall reconsider such aspects of the draft certification agreement by reviewing the existing record of the application or, as necessary, by reopening the adjudicative proceeding for the purposes of receiving additional evidence. Such reconsideration shall be conducted expeditiously. The council shall resubmit the draft certification to the governor incorporating any amendments deemed necessary upon reconsideration. Within sixty days of receipt of such draft certification agreement, the governor shall either approve the application and execute the certification agreement or reject the application. The certification agreement shall be binding upon execution by the governor and the applicant.

(3) The rejection of an application for certification by the governor shall be final as to that application but shall not preclude submission of a subsequent application for the same site on the basis of changed conditions or new information.

[1989 c 175 § 174; 1977 ex.s. c 371 § 8; 1975-'76 2nd ex.s. c 108 § 36; 1970 ex.s. c 45 § 10.]

Notes:

Effective date -- 1989 c 175: See note following RCW 34.05.010.

Severability -- Effective date -- 1975-'76 2nd ex.s. c 108: See notes following RCW 43.21F.010.

80.50.105

Transmission facilities for petroleum products — Recommendations to governor.

In making its recommendations to the governor under this chapter regarding an application that includes transmission facilities for petroleum products, the council shall give appropriate weight to city or county facility siting standards adopted for the protection of sole source aquifers.

[1991 c 200 § 1112.]

Notes:

Effective dates -- Severability -- 1991 c 200: See RCW 90.56.901 and 90.56.904.

80.50.110

Chapter governs and supersedes other law or regulations — Preemption of regulation and certification by state.

(1) If any provision of this chapter is in conflict with any other provision, limitation, or restriction which is now in effect under any other law of this state, or any rule or regulation promulgated thereunder, this chapter shall govern and control and such other law or rule or regulation promulgated thereunder shall be deemed superseded for the purposes of this chapter.

(2) The state hereby preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060 as now or hereafter amended.

[1975-'76 2nd ex.s. c 108 § 37; 1970 ex.s. c 45 § 11.]

Notes:

Severability -- Effective date -- 1975-'76 2nd ex.s. c 108: See notes following RCW 43.21F.010.

80.50.120**Effect of certification.**

(1) Subject to the conditions set forth therein any certification shall bind the state and each of its departments, agencies, divisions, bureaus, commissions, boards, and political subdivisions, whether a member of the council or not, as to the approval of the site and the construction and operation of the proposed energy facility.

(2) The certification shall authorize the person named therein to construct and operate the proposed energy facility subject only to the conditions set forth in such certification.

(3) The issuance of a certification shall be in lieu of any permit, certificate or similar document required by any department, agency, division, bureau, commission, board, or political subdivision of this state, whether a member of the council or not.

[1977 ex.s. c 371 § 10; 1975-'76 2nd ex.s. c 108 § 38; 1970 ex.s. c 45 § 12.]

Notes:

Severability -- Effective date -- 1975-'76 2nd ex.s. c 108: See notes following RCW 43.21F.010.

80.50.130**Revocation or suspension of certification — Grounds.**

Any certification may be revoked or suspended:

(1) For any material false statement in the application or in the supplemental or additional statements of fact or studies required of the applicant when a true answer would have warranted the council's refusal to recommend certification in the first instance; or

(2) For failure to comply with the terms or conditions of the original certification; or

(3) For violation of the provisions of this chapter, regulations issued thereunder or order of the council.

[1970 ex.s. c 45 § 13.]

80.50.140**Review.**

(1) A final decision pursuant to RCW 80.50.100 on an application for certification shall be subject to judicial review pursuant to provisions of chapter 34.05 RCW and this section. Petitions for review of such a decision shall be filed in the Thurston county superior court. All petitions for review of a decision under RCW 80.50.100 shall be consolidated into a single proceeding before the Thurston county superior court. The Thurston county superior court shall certify the petition for review to the supreme court upon the following conditions:

(a) Review can be made on the administrative record;

(b) Fundamental and urgent interests affecting the public interest and development of energy facilities are involved which require a prompt determination;

(c) Review by the supreme court would likely be sought regardless of the determination of the Thurston county superior court; and

(d) The record is complete for review.

The Thurston county superior court shall assign a petition for review of a decision under RCW 80.50.100 for hearing at the earliest possible date and shall expedite such petition in every way possible. If the court finds that review cannot be limited to the administrative record as set forth in subparagraph (a) of this subsection because there are alleged irregularities in the procedure before the council not found in the record, but finds that the standards set forth in subparagraphs (b), (c), and (d) of this subsection are met, the court shall proceed to take testimony and determine such factual issues raised by the alleged irregularities and certify the petition and its determination of such factual issues to the supreme court. Upon certification, the supreme court shall assign the petition for hearing at the earliest possible date, and it shall expedite its review and decision in every way possible.

(2) Objections raised by any party in interest concerning procedural error by the council shall be filed with the council within sixty days of the commission of such error, or within thirty days of the first public hearing or meeting of the council at which the general subject matter to which the error is related is discussed, whichever comes later, or such objection shall be deemed waived for purposes of judicial review as provided in this section.

(3) The rules and regulations adopted by the council shall be subject to judicial review pursuant to the provisions of chapter 34.05 RCW.

[1988 c 202 § 62; 1981 c 64 § 3; 1977 ex.s. c 371 § 11; 1970 ex.s. c 45 § 14.]

Notes:

Severability -- 1988 c 202: See note following RCW 2.24.050.

80.50.150

Enforcement of compliance — Penalties.

(1) The courts are authorized to grant such restraining orders, and such temporary and permanent injunctive relief as is necessary to secure compliance with this chapter and/or with a site certification agreement issued pursuant to this chapter or a National Pollutant Discharge Elimination System (hereafter in this section, NPDES) permit issued by the council pursuant to chapter 90.48 RCW or any permit issued pursuant to RCW 80.50.040(14). The court may assess civil penalties in an amount not less than one thousand dollars per day nor more than twenty-five thousand dollars per day for each day of construction or operation in material violation of this chapter, or in material violation of any site certification agreement issued pursuant to this chapter, or in violation of any NPDES permit issued by the council pursuant to chapter 90.48 RCW, or in violation of any permit issued pursuant to RCW 80.50.040(14). The court may charge the expenses of an enforcement action relating to a site certification agreement under this section, including, but not limited to, expenses incurred for legal services and expert testimony, against any person found to be in material violation of the provisions of such certification: PROVIDED, That the expenses of a person found not to be in material violation of the provisions of such certification, including, but not limited to, expenses incurred for legal services and expert testimony, may be charged against the person or persons bringing an enforcement action or other action under this section.

(2) Wilful violation of any provision of this chapter shall be a gross misdemeanor.

(3) Wilful or criminally negligent, as defined in RCW 9A.08.010[(1)](d), violation of any provision of an NPDES permit issued by the council pursuant to chapter 90.48 RCW or any permit issued by the council pursuant to RCW 80.50.040 (14) or any emission standards promulgated by the council in order to implement the Federal Clean Air Act and the state implementation plan with respect to energy facilities under the jurisdiction provisions of this chapter shall be deemed a crime, and upon conviction thereof shall be punished by a fine of up to twenty-five thousand dollars per day and costs of prosecution. Any violation of this subsection shall be a gross misdemeanor.

(4) Any person knowingly making any false statement, representation, or certification in any document in any NPDES form, notice, or report required by an NPDES permit or in any form, notice, or report required for or by any permit issued pursuant to *RCW 80.50.090(14) shall be deemed guilty of a crime, and upon conviction thereof shall be punished by a fine of up to ten thousand dollars and costs of prosecution.

(5) Every person who violates the provisions of certificates and permits issued or administered by the council shall incur, in addition to any other penalty as provided by law, a penalty in an amount of up to five thousand dollars a day for every such violation. Each and every such violation shall be a separate and distinct offense, and in case of a continuing violation, every day's continuance shall be and be deemed to be a separate and distinct violation. Every act of commission or omission which procures, aids, or abets in the violation shall be considered a violation under the provisions of this section and subject to the penalty provided in this section. The penalty provided in this section shall be

imposed by a notice in writing, either by certified mail with return receipt requested or by personal service, to the person incurring the same from the council describing such violation with reasonable particularity. The council may, upon written application therefor received within fifteen days after notice imposing any penalty is received by the person incurring the penalty, and when deemed in the best interest to carry out the purposes of this chapter, remit or mitigate any penalty provided in this section upon such terms as the council shall deem proper, and shall have authority to ascertain the facts upon all such applications in such manner and under such regulations as it may deem proper. Any person incurring any penalty under this section may appeal the same to the council. Such appeals shall be filed within thirty days of receipt of notice imposing any penalty unless an application for remission or mitigation is made to the council. When an application for remission or mitigation is made, such appeals shall be filed within thirty days of receipt of notice from the council setting forth the disposition of the application. Any penalty imposed under this section shall become due and payable thirty days after receipt of a notice imposing the same unless application for remission or mitigation is made or an appeal is filed. When an application for remission or mitigation is made, any penalty incurred hereunder shall become due and payable thirty days after receipt of notice setting forth the disposition of the application unless an appeal is filed from such disposition. Whenever an appeal of any penalty incurred hereunder is filed, the penalty shall become due and payable only upon completion of all review proceedings and the issuance of a final order confirming the penalty in whole or in part. If the amount of any penalty is not paid to the council within thirty days after it becomes due and payable, the attorney general, upon the request of the council, shall bring an action in the name of the state of Washington in the superior court of Thurston county or of any county in which such violator may do business, to recover such penalty. In all such actions the procedure and rules of evidence shall be the same as an ordinary civil action except as otherwise provided in this chapter. All penalties recovered under this section shall be paid into the state treasury and credited to the general fund.

(6) Civil proceedings to enforce this chapter may be brought by the attorney general or the prosecuting attorney of any county affected by the violation on his own motion or at the request of the council. Criminal proceedings to enforce this chapter may be brought by the prosecuting attorney of any county affected by the violation on his own motion or at the request of the council.

(7) The remedies and penalties in this section, both civil and criminal, shall be cumulative and shall be in addition to any other penalties and remedies available at law, or in equity, to any person.

[1979 ex.s. c 254 § 2; 1979 c 41 § 1; 1977 ex.s. c 371 § 12; 1970 ex.s. c 45 § 15.]

Notes:

Reviser's note: (1) This section was amended by 1979 c 41 § 1 and by 1979 ex.s. c 254 § 2, each without reference to the other. Both amendments are incorporated in the publication of this section pursuant to RCW 1.12.025 (2). For rule of construction, see RCW 1.12.025(1).

*(2) The reference to RCW 80.50.090(14) appears to be in error; that section has only four subsections and concerns public hearings, not issuance of permits. RCW 80.50.040(12) relates to issuance of permits.

80.50.160
Availability of information.

The council shall make available for public inspection and copying during regular office hours at the expense of any person requesting copies, any information filed or submitted pursuant to this chapter.

[1970 ex.s. c 45 § 16.]

80.50.175
Study of potential sites — Fee — Disposition of payments.

(1) In addition to all other powers conferred on the council under this chapter, the council shall have the powers set forth in this section.

(2) The council, upon request of any potential applicant, is authorized, as provided in this section, to conduct a

preliminary study of any potential site prior to receipt of an application for site certification. A fee of ten thousand dollars for each potential site, to be applied toward the cost of any study agreed upon pursuant to subsection (3) of this section, shall accompany the request and shall be a condition precedent to any action on the request by the council.

(3) After receiving a request to study a potential site, the council shall commission its own independent consultant to study matters relative to the potential site. The study shall include, but need not be limited to, the preparation and analysis of environmental impact information for the proposed potential site and any other matter the council and the potential applicant deem essential to an adequate appraisal of the potential site. In conducting the study, the council is authorized to cooperate and work jointly with the county or counties in which the potential site is located, any federal, state, or local governmental agency that might be requested to comment upon the potential site, and any municipal or public corporation having an interest in the matter. The full cost of the study shall be paid by the potential applicant: PROVIDED, That such costs exceeding a total of ten thousand dollars shall be payable subject to the potential applicant giving prior approval to such excess amount.

(4) Any study prepared by the council pursuant to subsection (3) of this section may be used in place of the "detailed statement" required by RCW 43.21C.030(2)(c) by any branch of government except the council created pursuant to chapter 80.50 RCW.

(5) All payments required of the potential applicant under this section are to be made to the state treasurer, who in turn shall pay the consultant as instructed by the council. All such funds shall be subject to state auditing procedures. Any unexpended portions thereof shall be returned to the potential applicant.

(6) Nothing in this section shall change the requirements for an application for site certification or the requirement of payment of a fee as provided in RCW 80.50.071, or change the time for disposition of an application for certification as provided in RCW 80.50.100.

(7) Nothing in this section shall be construed as preventing a city or county from requiring any information it deems appropriate to make a decision approving a particular location.

[1983 c 3 § 205; 1977 ex.s. c 371 § 13; 1975-'76 2nd ex.s. c 108 § 40; 1974 ex.s. c 110 § 2.]

Notes:

Severability -- Effective date -- 1975-'76 2nd ex.s. c 108: See notes following RCW 43.21F.010.

80.50.180

Proposals and actions by other state agencies and local political subdivisions pertaining to energy facilities exempt from "detailed statement" required by RCW 43.21C.030.

Except for actions of the council under chapter 80.50 RCW, all proposals for legislation and other actions of any branch of government of this state, including state agencies, municipal and public corporations, and counties, to the extent the legislation or other action involved approves, authorizes, permits, or establishes procedures solely for approving, authorizing or permitting, the location, financing or construction of any energy facility subject to certification under chapter 80.50 RCW, shall be exempt from the "detailed statement" required by RCW 43.21C.030. Nothing in this section shall be construed as exempting any action of the council from any provision of chapter 43.21C RCW.

[1977 ex.s. c 371 § 14.]

80.50.190

Disposition of receipts from applicants.

The state general fund shall be credited with all receipts from applicants paid to the state pursuant to chapter 80.50 RCW. Such funds shall be used only by the council for the purposes set forth in chapter 80.50 RCW. All expenditures shall be authorized by law.

[1977 ex.s. c 371 § 15.]

80.50.300**Unfinished nuclear power projects — Transfer of all or a portion of a site to a political subdivision or subdivisions of the state — Water rights.**

(1) This section applies only to unfinished nuclear power projects. If a certificate holder stops construction of a nuclear energy facility before completion, terminates the project or otherwise resolves not to complete construction, never introduces or stores fuel for the energy facility on the site, and never operates the energy facility as designed to produce energy, the certificate holder may contract, establish interlocal agreements, or use other formal means to effect the transfer of site restoration responsibilities, which may include economic development activities, to any political subdivision or subdivisions of the state composed of elected officials. The contracts, interlocal agreements, or other formal means of cooperation may include, but are not limited to provisions effecting the transfer or conveyance of interests in the site and energy facilities from the certificate holder to other political subdivisions of the state, including costs of maintenance and security, capital improvements, and demolition and salvage of the unused energy facilities and infrastructure.

(2) If a certificate holder transfers all or a portion of the site to a political subdivision or subdivisions of the state composed of elected officials and located in the same county as the site, the council shall amend the site certification agreement to release those portions of the site that it finds are no longer intended for the development of an energy facility.

Immediately upon release of all or a portion of the site pursuant to this section, all responsibilities for maintaining the public welfare for portions of the site transferred, including but not limited to health and safety, are transferred to the political subdivision or subdivisions of the state. For sites located on federal land, all responsibilities for maintaining the public welfare for all of the site, including but not limited to health and safety, must be transferred to the political subdivision or subdivisions of the state irrespective of whether all or a portion of the site is released.

(3) The legislature finds that for all or a portion of sites that have been transferred to a political subdivision or subdivisions of the state prior to September 1, 1999, ensuring water for site restoration including economic development, completed pursuant to this section can best be accomplished by a transfer of existing surface water rights, and that such a transfer is best accomplished administratively through procedures set forth in existing statutes and rules. However, if a transfer of water rights is not possible, the department of ecology shall, within six months of the transfer of the site or portion thereof pursuant to subsection (1) of this section, create a trust water right under chapter 90.42 RCW containing between ten and twenty cubic feet per second for the benefit of the appropriate political subdivision or subdivisions of the state. The trust water right shall be used in fulfilling site restoration responsibilities, including economic development. The trust water right shall be from existing valid water rights within the basin where the site is located.

(4) For purposes of this section, "political subdivision or subdivisions of the state" means a city, town, county, public utility district, port district, or joint operating agency.

[2000 c 243 § 1; 1996 c 4 § 2.]

80.50.310**Council actions — Exemption from chapter 43.21C RCW.**

Council actions pursuant to the transfer of the site or portions of the site under RCW 80.50.300 are exempt from the provisions of chapter 43.21C RCW.

[1996 c 4 § 3.]

80.50.320

Governor to evaluate council efficiency, make recommendations.

The governor shall undertake an evaluation of the operations of the council to assess means to enhance its efficiency. The assessment must include whether the efficiency of the siting process would be improved by conducting the process under the state environmental policy act in a particular sequence relative to the adjudicative proceeding. The results of this assessment may include recommendations for administrative changes, statutory changes, or expanded staffing levels.

[2001 c 214 § 8.]

Notes:

Severability -- Effective date -- 2001 c 214: See notes following RCW 80.50.010.

Findings -- 2001 c 214: See note following RCW 39.35.010.

80.50.900

Severability — 1970 ex.s. c 45.

If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances, is not affected.

[1970 ex.s. c 45 § 17.]

80.50.901

Severability — 1974 ex.s. c 110.

If any provision of this 1974 act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances, is not affected.

[1974 ex.s. c 110 § 3.]

80.50.902

Severability — 1977 ex.s. c 371.

If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

[1977 ex.s. c 371 § 20.]

80.50.903

Severability — 1996 c 4.

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

[1996 c 4 § 5.]

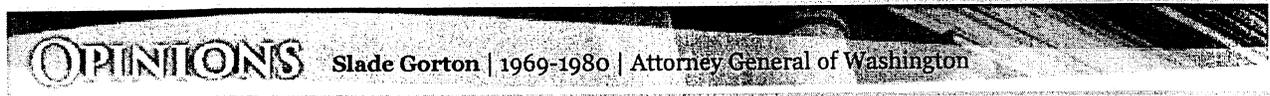
80.50.904

Effective date — 1996 c 4.

This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [March 6, 1996].

[1996 c 4 § 6.]

APPENDIX D



OFFICES AND OFFICERS -- STATE -- ENERGY FACILITY SITE EVALUATION COUNCIL -- GOVERNOR --
CERTIFICATION OF ENERGY FACILITY SITES -- PREEMPTION OF LOCAL ZONING CODES

The certification by the governor of designated energy facilities under chapter 80.50 RCW will have the effect of permitting the construction and operation of the facilities thus certified at whatever location is specified therein even where the otherwise applicable provisions of a county, city or regional zoning code are to the contrary in view of the preemptive language of RCW 80.50.100, as amended by § 37, chapter 108, Laws of 1975-76, 2nd Ex. Sess.

January 5, 1977

Honorable Keith Sherman
Chairman, Energy Facility
Site Evaluation Council
820 East Fifth Avenue
Olympia, Washington 98504

Cite as: AGO 1977 No. 1

Dear Sir:

By letter previously acknowledged you have requested our opinion on a question which we paraphrase as follows:

Will a certification, approved by the governor under chapter 80.50 RCW, have the effect of permitting the construction and operation of designated thermal power plant other energy facilities at whatever location is specified therein even where the otherwise applicable provisions of a county, city or regional zoning code are to the contrary?

We answer the foregoing question in the affirmative for the reasons set forth in our analysis.

ANALYSIS

Chapter 80.50 RCW codifies the provisions of chapter 45, Laws of 1970, Ex. Sess., commonly known as the Thermal Power Plant Siting Act, together with certain later amendments and additions thereto. Principal among the later amendments are [[Orig. Op. Page 2]] those contained in chapter 108, Laws of 1975-76, 2nd Ex. Sess., by which the basic thrust of the earlier law was extended to encompass the siting not only of thermal power plants but of other energy facilities as well.^{1/} Accordingly, as thus amended the law currently provides for the

certification of any such facilities in this state by the governor after receiving the recommendation of what is now denominated the Energy Facility Site Evaluation Council (EFSEC). "Certification" is defined by RCW 80.50.020 (5) to mean:

". . . a binding agreement between an applicant and the state which shall embody compliance to the siting guidelines, in effect as of the date of certification, which have been adopted pursuant to RCW 80.50.050 as now or hereafter amended as conditions to be met prior to or concurrent with the construction or operation of any energy facility:"

Insofar as other~~state~~ agencies are concerned the effect of certification is spelled out in RCW 80.50.120 as follows:

"(1) Subject to the conditions set forth [[Orig. Op. Page 3]] therein any certification signed by the governor shall bind the state and each of its departments, agencies, divisions, bureaus, commissions or boards of this state whether a member of the council or not as to the approval of the site and the construction and operation of the proposed energy facility.

"(2) The certification shall authorize the person named therein to construct and operate the proposed energy facility subject only to the conditions set forth in such certification.

"(3) The issuance of a certification shall be in lieu of any permit, certificate or similar document required by any department, agency, division, bureau, commission or board of this state whether a member of the council or not."

See, AGO 1975 No. 10 [[to Joseph F. Lightfoot, Executive Secretary, Thermal Power Plant Site Evaluation Council, on May 15, 1975]], copy enclosed. With regard to local units of government, however, a somewhat different approach was taken under the original, 1970, version of the law with respect to local controls. While § 11 thereof (later codified as RCW 80.50.110) provided, in subsection (2), that,

"(2) The state hereby preempts the regulation and certification of thermal power plant sites and thermal power plants as defined in section 2 of this act."

In addition, an earlier section (11) of the 1970 act (now RCW 80.50.090) read in pertinent part, as follows:

"(1) The council shall conduct a public hearing in the county of the proposed site within sixty days of receipt of an application for site certification: Provided, That [[Orig. Op. Page 4]] the place of such public hearing shall be as close as practical to the proposed site.

"(2) The council must determine at the initial public hearing whether or not the proposed site is consistent and in compliance with county or regional land use plans or zoning ordinances. If it is determined that the proposed site does conform with existing land use plans or zoning ordinances in effect as of the date of the application, the county or regional planning authority shall not thereafter change such land use plans or zoning ordinances so as to affect the proposed site."

Thus, notwithstanding the original preemptive language of § 11, *supra*, this latter provision evidenced an apparent legislative intent to preclude the siting council from recommending - for certification by the governor - a thermal power plant site which was not consistent with the provisions of the local zoning code or land use plan covering the site in question. Accord, the following colloquy reported at page 281 of the 1970 Senate Journal between Senators Gissberg and McCormack, the latter being one of the original sponsors of the thermal power plant siting act:

"Senator Gissberg: 'Will Senator McCormack yield? Senator McCormack, my inquiry has to do with following up the question of the site being in compliance with the county or regional land use plan or zoning ordinances. Let us assume that the proposed site is not consistent with the county land use plan. Under those circumstances then, is the council divested of authority to recommend that site as the site of the thermal power plant?'"

"Senator McCormack: 'Definitely yes.'"

"Senator Gissberg: 'It nowhere says that in the bill but that is the intention. Is that correct?'"

"Senator McCormack: 'Yes, that is certainly the intention. I think it is implied in the first sentence, Senator Gissberg.'"

[[Orig. Op. Page 5]]

Also to be noted is an immediately ensuing colloquy between Senators Mardesich and McCormack which is reported in the same Journal as follows:

"Senator Mardesich: 'Will Senator McCormack yield? On the same line a question occurred to me. Well and good if the council decides that this did conform but what if some private citizen questions whether the land is property zoned? There is actual zoning to accommodate this. In what situation are you then? You cannot preclude that individual certainly from'"

"Senator McCormack: 'There is nothing in this act that precludes any individual or even any political subdivision of the state from going to court to restrain the council from action. Any individual can take legal action against the council at any time.'"

This same theme, moreover, was continued in effect by the 1974 legislature which enacted what is now RCW 80.50.175. That statute, originating as § 2, chapter 110, Laws of 1974, Ex. Sess., empowered the siting council to conduct studies of potential thermal power plant sites prior to receipt of a specific application for site certification. Subsection (7) of the statute, however, disclaimed any intent by the legislature to preclude a county or city from also ". . . requiring any information it deems appropriate to make a decision approving a particular location." (Emphasis supplied.) Thus, the 1974 legislature still manifested an understanding that insofar as the relationship between site certification and local land use regulations were concerned, the county or city in which a thermal power plant was to be situated would have a legally enforceable voice (through its land use or zoning ordinances) with respect to the actual location of any such facility.^{2/}

[[Orig. Op. Page 6]]

During its most recent 1976 session, however, the legislature (also as a part of chapter 108,supra) adopted an amendment to RCW 80.50.110(2), the preemption statute quoted earlier, which, basically, has given rise to your present opinion request. By § 37 of chapter 108,supra, the legislature amended that statute to read as follows - set forth in bill form for ease of comprehension:

"(2) The state hereby preempts the regulation and certification of ~~((thermal power plant sites and thermal power plants as defined in RCW 80.50.020))~~the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060 as now or hereafter amended."

The problem is that, at the same time, the legislature retained both § 9, chapter 45, Laws of 1970, Ex. Sess., (RCW 80.50.090) and subsection (7) of § 2, chapter 110, Laws of 1974, Ex. Sess., (RCW 80.50.175(7)); i.e., it neither repealed nor amended either of those prior statutes. Thus, on the one hand, what exists at the present time is an [[Orig. Op. Page 7]] amended preemption statute which, when read in isolation, appears clearly to evidence an intent by the legislature to have the state preempt, among other things, the regulation and certification of the location of energy facilities - meaning, apparently, a preemption of the location of such facilities from any further local governmental land use controls. Yet within the same law another section (RCW 80.50.090) continues to require a determination by the council, after a hearing, on the question of whether a proposed energy facility will, or will not, be ". . . consistent and in compliance with county or regional land use plans or zoning ordinances" - and then to say that:

". . . If it is determined that the proposed site does conform with existing land use plans or zoning ordinances in effect as of the date of the application, the county or regional planning authority shall not thereafter change such land use plans or zoning ordinances so as to affect the proposed site."

And, likewise, there also still exists, as a part of the law, RCW 80.50.175(7),supra, which, in referring to studies of potential sites by the state council, disclaims any intention of,

". . . preventing a city or county from requiring any information it seems appropriate to make a decision approving a particular location."

In short, what we now have is a law passed by a legislature (the 1976 session) which appears to have had a state preemption of local control over the actual location of energy facilities in mind (as evidenced by § 37, chapter 108,supra) but which, nevertheless, failed to remove from the prior law certain provisions which are obviously more consistent with the concept of local control (or veto, if you will) than with state preemption as to the actual location of thermal or other energy facilities.

How, then, is the question which you have directed to us by your present opinion request properly to be answered? In the final analysis, of course, only the courts of our state can definitively respond to that question in the course of actual litigation. And, so long as the provisions of RCW 80.50.090(2), supra, and RCW 80.50.175(7), supra, remain a part of the law it is possible that, based thereon, a negative answer (i.e., no state preemption as to the location of energy facilities) may thus be given. Nevertheless, while acknowledging that possibility our own considered opinion on the question is to the contrary.

[[Orig. Op. Page 8]]

In terms of what the 1976 legislature did or did not do it can hardly be doubted that the single most significant and meaningful indication of legislative intent with regard to the preemption question is that which is to be found in the amended version of RCW 80.50.110(2), the original preemption statute. Repeated both for emphasis and for ease of immediate reference, that statute now reads as follows:

"(2) The state hereby preempts the regulation and certification of ~~((thermal power plant sites and thermal power plants as defined in RCW 80.50.020))~~ the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060 as now or hereafter amended."

Clearly the legislature which enacted this amendatory provision must be deemed to have intended to change the law. As observed in Home Indem. Co. v. McClellan Motors, 77 Wn.2d 1, 459 P.2d 389 (1969), at p. 3:

". . . It is a well recognized rule of statutory construction that, where a law is amended and a material change is made in the wording, it is presumed that the legislature intended a change in the law. E.g., Alexander v. Highfill, 18 Wn.2d 733, 140 P.2d 277 (1943). . . ."

Likewise, it is to be presumed that the legislature in passing the amendment did not deliberately engage in an unnecessary or meaningless act. As stated in Kelleher v. Ephrata School Dist., 56 Wn.2d 866, 873, 355 P.2d 989 (1960):

". . . The courts will presume that the legislature does not indulge in vain and useless acts and that some significant purpose or object is implicit in every legislative enactment. Guinness v. State (1952), 40 Wn. (2d) 677, 246 P. (2d) 433."

It is true, of course, that this particular amendment also reflects the legislature's extension of the overall provisions of the siting act to cover energy plant facilities as well as thermal power plants. Thus, to that extent, the amendment would have some meaning even without its further thrust - a state preemption of the location (inter alia) of all such facilities. But, likewise, it is equally [[Orig. Op. Page 9]] evident, nonetheless, that this latter expansion of the scope of the original preemption statute (RCW 80.50.110(2), supra) would be rendered meaningless if the legislature's at least arguably inadvertent retention of RCW 80.50.090(2) and RCW 80.50.175 (7) were allowed to prevail over its obviously intentional action in thus amending that statute - contrary to both of the above described principles of statutory construction. While both this office and the courts, in construing acts of the legislature, would certainly prefer a more perfect job that typically is done, we cannot insist on such perfection as a minimal criterion of accomplishment.

Therefore, our direct answer to your question, as above paraphrased, is in the affirmative. A certification, approved by the governor under chapter 80.50 RCW, as amended, will have the effect of permitting the construction and operation of designated energy facilities at whatever location is specified therein even where the otherwise applicable provisions of a county, city or regional zoning code are to the contrary.

By having so answered your question, however, we do not mean to say that the siting council is no longer required, in the course of its proceedings, to make a determination of whether or not a proposed site is ". . .

consistent and in compliance with county or regional land use plans or zoning ordinances . . ." Accord, RCW 80.50.090,supra. So long as that statute remains in effect such a determination will still be required and, along with other relevant factors, it will still be a factor to be weighed and considered both by the council in making its recommendation and by the governor in making his decision. But because of the 1976 amendment to the preemption statute, RCW 80.50.110, a finding of inconsistency will no longer by itself bar the council from recommending the site in question to the governor for ultimate certification - or, by the same token, bar the governor from issuing the certification as recommended.

[[Orig. Op. Page 10]]

We trust that the foregoing will be of some assistance to you.

Very truly yours,

SLADE GORTON
Attorney General

PHILIP H. AUSTIN
Deputy Attorney General

THOMAS F. CARR
Assistant Attorney General

***** FOOTNOTES *****

1/As defined in RCW 80.50.010(17) the term "energy plant" means:

". . . the following facilities together with their associated facilities:

"(a) Any stationary thermal power plant with generating capacity of two hundred fifty thousand kilowatts or more and floating thermal power plants of fifty thousand kilowatts or more, including associated facilities;

"(b) Facilities which will result in receipt of liquified natural gas in the equivalent of more than one hundred million standard cubic feet of natural gas per day, which has been transported over marine waters;

"(c) Facilities which will result in the receipt of more than an average of fifty thousand barrels per day of crude or refined petroleum which has been or will be transported over marine waters, except that the provisions of this chapter shall not apply to storage facilities unless occasioned by such new facility construction;

"(d) Any underground reservoir for receipt and storage of natural gas as defined in RCW 80.40.010 capable of delivering an average of more than one hundred million standard cubic feet of natural gas per day; and

"(e) Facilities which will result in the processing of more than twenty-five thousand barrels per day of petroleum into refined products."

2/Again, this reading of the intent of the legislature is also supported by dialogue reported in the Senate Journal - this time on p. 593 of the 1974 Journal where the following colloquy between Senators Washington and Bailey appears:

"Senator Bailey: 'The question I have has to do with the amendment. Do the amendments in any way change the present powers of the local county commissioners to approve or disapprove the sites?'

"Senator Washington: 'No, these amendments do not. However, you may want that same question on the bill.'

"Senator Bailey: 'I may want that back in the record on final passage.'

". . .

"The President [then] declared the question before the Senate to be the roll call on final passage . . .

"Senator Bailey: 'Mr. President, a question of Senator Washington. Again, does this bill in any way change the present power of the local board of county commissioners to approve or disapprove a site?'

"Senator Washington: 'No, it does not. They have to approve the site before the siting council can take any action.'

". . ."

APPENDIX E

Chapter 463-26 WAC Public informational meeting and land use hearing

Last Update: 10/11/04

WAC Sections

- 463-26-010 Purpose.
- 463-26-020 Notification of local authorities.
- 463-26-025 Public informational meeting.
- 463-26-035 Introduction of counsel for the environment.
- 463-26-050 Purpose for land use hearing.
- 463-26-060 Public announcement -- Testimony.
- 463-26-090 Procedure where certificates affirming compliance with land use plans and zoning ordinances are presented.
- 463-26-100 Procedure where no certificates relating to land use plans and zoning ordinances are presented.
- 463-26-110 Determination regarding land use plans and zoning ordinances.

DISPOSITIONS OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

- 463-26-030 News releases. [Order 109, § 463-26-030, filed 11/16/76.] Repealed by 92-09-013, filed 4/2/92, effective 5/3/92. Statutory Authority: RCW 80.50.040(1).
- 463-26-040 Adversary nature of hearings. [Order 109, § 463-26-040, filed 11/16/76.] Repealed by 04-21-013, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040 (1) and (12).
- 463-26-070 Introduction of counsel for the environment. [Order 109, § 463-26-070, filed 11/16/76.] Repealed by 04-21-013, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040 (1) and (12).
- 463-26-080 Explanation of entire certification process. [Statutory Authority: RCW 80.50.040(1). 87-01-065 (Order 86-1), § 463-26-080, filed 12/17/86; Order 109, § 463-26-080, filed 11/16/76.] Repealed by 04-21-013, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040 (1) and (12).
- 463-26-120 Initial determination subject to review. [Statutory Authority: RCW 80.50.040. 91-03-090, § 463-26-120, filed 1/18/91, effective 2/18/91; Order 109, § 463-26-120, filed 11/16/76.] Repealed by 04-21-013, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040 (1) and (12).
- 463-26-130 Public information meeting. [Statutory Authority: RCW 80.50.040. 91-03-090, § 463-26-130, filed 1/18/91, effective 2/18/91; Order 109, § 463-26-130, filed 11/16/76.] Repealed by 04-21-013, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040 (1) and (12).

463-26-010 Purpose.

This chapter sets forth the procedures to be followed in the conduct of the public informational meeting pursuant to RCW 80.50.090(1) and as described in WAC 463-26-025, and the public land use hearing held pursuant to RCW 80.50.090(2).

[Statutory Authority: RCW 80.50.040 (1) and (12). 04-21-013, § 463-26-010, filed 10/11/04, effective 11/11/04; Order 109, § 463-26-010, filed 11/16/76.]

463-26-020 Notification of local authorities.

Before conducting either the public informational meeting under RCW 80.50.090(1) or the public land use hearing under RCW 80.50.090(2), the council will notify the legislative authority in each county, city and port district within whose boundaries the site of the proposed energy facility is located.

[Statutory Authority: RCW 80.50.040 (1) and (12), 04-21-013, § 463-26-020, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040(1), 78-09-081 (Order 78-8), § 463-26-020, filed 8/28/78; Order 109, § 463-26-020, filed 11/16/76.]

463-26-025

Public informational meeting.

The council shall conduct at least one public informational meeting concerning each application. At this meeting, the council will present the general procedure to be followed in processing the application including a tentative sequence of council actions, the rights and methods of participation by local government in the process, and the means and opportunities for the general public to participate.

(1) The applicant shall make a presentation of the proposed project utilizing appropriate exhibits. The presentation shall include: A general description of the project and the proposed site; reasons why the proposed site or location was selected; and a summary of anticipated environmental, social, and economic impacts.

(2) The general public shall be afforded an opportunity to present written or oral comments relating to the proposed project. The comments may become part of the adjudicative proceeding record.

(3) The informational meeting shall be held in the general proximity of the proposed project as soon as practicable within sixty days after receipt of an application for site certification.

[Statutory Authority: RCW 80.50.040 (1) and (12), 04-21-013, § 463-26-025, filed 10/11/04, effective 11/11/04.]

463-26-035

Introduction of counsel for the environment.

The council shall invite the counsel for the environment to be present at the public informational meeting. Counsel for the environment shall be introduced and afforded an opportunity to explain his or her statutory duties under chapter 80.50 RCW.

[Statutory Authority: RCW 80.50.040 (1) and (12), 04-21-013, § 463-26-035, filed 10/11/04, effective 11/11/04.]

463-26-050

Purpose for land use hearing.

At the commencement of the public land use hearing, the council shall explain that the purpose of the hearing under RCW 80.50.090(2) is to determine whether at the time of application the proposed facility was consistent and in compliance with land use plans and zoning ordinances. Pursuant to RCW 80.50.020(15) "land use plan" means a comprehensive plan or land use element thereof adopted by a unit of local government under chapters 35.63, 35A.63, or 36.70 RCW. Pursuant to RCW 80.50.020(16) "zoning ordinance" means an ordinance of local government regulating the use of land and adopted pursuant to chapters 35.63, 35A.63, or 36.70 RCW or Article XI of the state constitution.

[Statutory Authority: RCW 80.50.040 (1) and (12), 04-21-013, § 463-26-050, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040(1), 78-09-081 (Order 78-8), § 463-26-050, filed 8/28/78; Order 109, § 463-26-050, filed 11/16/76.]

463-26-060**Public announcement — Testimony.**

At the outset of the public land use hearing, the council shall publicly announce that opportunity for testimony by anyone shall be allowed relative to the consistency and compliance with land use plans and zoning ordinances.

[Statutory Authority: RCW 80.50.040 (1) and (12). 04-21-013, § 463-26-060, filed 10/11/04, effective 11/11/04; Order 109, § 463-26-060, filed 11/16/76.]

463-26-090**Procedure where certificates affirming compliance with land use plans and zoning ordinances are presented.**

This rule contemplates that applicants will enter as exhibits, at the land use hearing, certificates from local authorities attesting to the fact that the proposal is consistent and in compliance with land use plans and zoning ordinances. In cases where this is done, such certificates will be regarded as *prima facie* proof of consistency and compliance with such land use plans and zoning ordinances absent contrary demonstration by anyone present at the hearing.

[Statutory Authority: RCW 80.50.040 (1) and (12). 04-21-013, § 463-26-090, filed 10/11/04, effective 11/11/04; Order 109, § 463-26-090, filed 11/16/76.]

463-26-100**Procedure where no certificates relating to land use plans and zoning ordinances are presented.**

In cases where no certificates relating to land use plans and zoning ordinances are presented to the council, then the applicant and local authorities shall address compliance or noncompliance with land use plans or zoning ordinances.

[Statutory Authority: RCW 80.50.040 (1) and (12). 04-21-013, § 463-26-100, filed 10/11/04, effective 11/11/04; Order 109, § 463-26-100, filed 11/16/76.]

463-26-110**Determination regarding land use plans and zoning ordinances.**

The council shall make a determination as to whether the proposed site is consistent and in compliance with land use plans and zoning ordinances pursuant to RCW 80.50.090(2).

[Statutory Authority: RCW 80.50.040 (1) and (12). 04-21-013, § 463-26-110, filed 10/11/04, effective 11/11/04; Order 109, § 463-26-110, filed 11/16/76.]

APPENDIX F

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2006-01:

ENERGY NORTHWEST

**PACIFIC MOUNTAIN ENERGY
CENTER**

COUNCIL ORDER NO. 828

**ORDER ON CONSISTENCY WITH
LOCAL AND REGIONAL LAND USE
PLANS OR ZONING ORDINANCES**

Nature of the Proceeding: This matter involves an application by Energy Northwest (“Applicant”), for certification to construct and operate the Pacific Mountain Energy Facility (“PMEC or Project”). PMECC is an Integrated Gasification Combined Cycle (IGCC) power generation facility that will use fuel flexible gasification technology and processes to produce approximately 650 megawatts of electrical power.

Background and Procedural Matters: On September 12, 2006 Energy Northwest, submitted application No. 2006-01 to Energy Facility Site Evaluation Council (“EFSEC or Council”) to construct and operate the PMECC. The proposed Project is located in the Port of Kalama, near Kalama, Washington. On October 20, 2006, the Council issued a *Notice of Public Informational Meeting, Land-Use Hearing, and Scoping Meeting Under the State Environmental Policy Act*. On November 6, 2006, at 6:30 p.m., pursuant to RCW 80.50.090 and Chapter 463-26 WAC, the Council convened a land-use hearing at the Kalama Community Center, in Kalama, Washington. The purpose of the meeting was to determine if the proposed PMECC site is consistent with local and regional land use plans or zoning ordinances. The hearing was reconvened on March 13, 2007 at 2:00 p.m. at the EFSEC offices in Olympia, Washington.

Hearing Procedure:

November 6, 2006 Land Use Hearing.

The following EFSEC members were present: Chair Jim Luce, Judy Wilson (Department of Natural Resources), Hedia Adelman (Department of Ecology), Jeff Tayer (Department of Fish & Wildlife), Richard Fryhling (Department of Community, Trade, and Economic Development), Tim Sweeney (Utilities and Transportation Commission), Justin Erickson (City of Kalama), and Vern

Representing the Applicant: **Elisabeth Thomas**, Attorney at Law

Counsel for the Environment: **Michael Tribble**, Assistant Attorney General

The following additional persons presented testimony to the Council orally at the March 13, 2007 reconvened hearing: Brett Vandenheovel, attorney for the Columbia River Keepers; Roger Cole and Lehman Holder, Sierra Club; and Ron Marshall representing Cowlitz County.

The applicant argued the letters from the City of Kalama (Exhibit 10) and more specifically, the letter from Cowlitz County (Exhibit 11) responding to the Council's November 16, 2007 questions confirmed consistency with local land use and zoning ordinances.

River Keepers submitted a letter dated November 20, 2006 (Exhibit 8) outlining its opposition to the Council's finding of consistency and argued that the City and County letters do not demonstrate consistency, and that prior to any consistency determination the Council must complete its analysis of compliance with critical areas ordinances, Shorelines Management Master Program, and other issues not addressed in either the City or County compliance letters. Also, submitting letters against a finding of consistency were Liam Holder (Exhibit 12) and Roger Cole (Exhibit 13).

The Council held a public workshop the morning of April 10, 2007 at its office in Olympia and reviewed precedents and past practices regarding land use determinations and heard again from counsel for PMEC and River Keepers. At its monthly meeting beginning at 1:30 pm of April 10, 2007 the council approved a motion that specifically finds the project site to be "...consistent and in compliance with..." existing land use plans and zoning ordinances. The Council determination of consistency does not include a review or determination of whether the project is in compliance with the Cowlitz County's critical area ordinance.

The Council recognizes that Cowlitz County is not a Growth Management Act (GMA) County and as such is not required to follow the processes and procedures that GMA Counties might otherwise need to follow. The Council also expressly recognizes that issues such as water rights, critical areas, aquifer recharge, wetlands, recreation, fish and wildlife conservation and others will be addressed in both the Council's State Environmental Policy Act (SEPA) review and the Council's adjudicative hearing. Because these processes have not been completed, and because they are outside the scope of the Council's land use decision, the information and argument presented by River Keeper and others is not sufficient to overcome the prima facie declarations of consistency by the City and County.

Governing Statute and Regulations:

RCW 80.50.090 provides that the Council shall conduct a public hearing to determine whether or not the proposed site is consistent and in compliance with local and regional land use plans or zoning ordinances.

Chapter 463-26 WAC generally provides that the hearing shall be adversarial in nature and shall be held to determine whether the proposed facility is consistent and in compliance with local and regional land use plans or zoning ordinances.

Chapter 463-28 WAC provides for a process for resolving land use inconsistencies; applications for state preemption of land use plans and zoning ordinances; and Council determination of whether the state should preempt local and regional land use plans or zoning ordinances when an application is not consistent with such plans or ordinances in effect on the date of application.

Council Action:

Based on the testimony provided, the submittals by the City of Kalama and Cowlitz County, and all other evidence produced at the hearing, or timely submitted to EFSEC offices, the Council, having fully considered all such matters, adopts the following Findings of Fact, Conclusions of Law, Determination, and Order:

A. Findings of Fact:

1. EFSEC is required by RCW 80.50.090(2), WAC 463-143-030 and WAC 463-26-110 to consider whether the project complies with local land use plans and zoning ordinances, but EFSEC has preemptive authority to determine those matters . See WAC 463-28-020.
2. The proposed PMEC location is within Cowlitz County.
3. The proposed natural gas line connecting the PMEC to the Deer Island Natural Gas Station lies in part within the City of Kalama.
4. The applicant provided certificates affirming compliance with land use plans and zoning ordinances for the City of Kalama (Exhibit 1 and 10) and Cowlitz County (Exhibit 2 and 11).
5. The Council conducted a land use hearings on the matter of consistency pursuant to RCW 80.50.090(2).

6. The City of Kalama and Cowlitz County responded to questions concerning the consistency certificates presented to the Council.
7. At the hearings the public had an opportunity to comment on this matter.

B. Conclusions of Law:

1. The applicant presented certificates affirming compliance with land use plans and zoning ordinances from local authorities. WAC 463-26-110.
2. The Council, having considered the testimony at the hearings and Exhibits submitted, was not persuaded by a contrary demonstration that the PMEC and connecting natural gas pipeline were inconsistent with local land use plans and zoning ordinances.
3. The project is consistent with local land use plans and zoning ordinances. WAC 463-26-110.
4. EFSEC has the ultimate authority to determine questions as to critical area wetland mitigation, noise, wildlife, seismicity and site restoration and to determine mitigation as necessary for any problems connected this project.

C. Determination and Order:

Based upon these Findings of Fact and Conclusions of Law, the Council determines that the Applicant's proposed site is consistent and in compliance with the regional land use plans or zoning ordinances of the City of Kalama and Cowlitz County.

Therefore, it is hereby **ORDERED** that the Pacific Mountain Energy Center in accordance with WAC 463-26-110 is consistent and in compliance with local land use plans and zoning ordinances.

DATED at Olympia, Washington, and effective on this 26th day of April, 2007.

WASHINGTON STATE
ENERGY FACILITY SITE EVALUATION COUNCIL

James O. Luce, Chair

Attachment 1: List of Land Use Exhibits

Name	Land Use Exhibit Number	Date
City of Kalama	1	October 24, 2006
Cowlitz County	2	October 24, 2006
Marie Wise	3	November 6, 2006
Allan and Marie Wise	4	November 6, 2006
Columbia Riverkeeper	5	November 6, 2006
Cheryl Purvis	6	November 7, 2006
Brett VandenHeuvel	7	November 20, 2006
Columbia Riverkeeper	8	November 20, 2006
Daniel Serres	9	November 20, 2006
City of Kalama	10	November 29, 2006
Cowlitz County	11	February 13, 2007
Lehman Holder	12	March 13, 2007
Roger Cole	13	March 13, 2007
Columbia Riverkeeper	14	March 13, 2007

APPENDIX G

Chapter 36.70C RCW Judicial review of land use decisions

Chapter Listing

RCW Sections

- 36.70C.005 Short title.
 - 36.70C.010 Purpose.
 - 36.70C.020 Definitions.
 - 36.70C.030 Chapter exclusive means of judicial review of land use decisions -- Exceptions.
 - 36.70C.040 Commencement of review -- Land use petition -- Procedure.
 - 36.70C.050 Joinder of parties.
 - 36.70C.060 Standing.
 - 36.70C.070 Land use petition -- Required elements.
 - 36.70C.080 Initial hearing.
 - 36.70C.090 Expedited review.
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 - 36.70C.140 Decision of the court.
 - 36.70C.900 Finding -- Severability -- Part headings and table of contents not law -- 1995 c 347.
-

36.70C.005 Short title.

This chapter may be known and cited as the land use petition act.

[1995 c 347 § 701.]

36.70C.010 Purpose.

The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.

[1995 c 347 § 702.]

36.70C.020 Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

(2) "Local jurisdiction" means a county, city, or incorporated town.

(3) "Person" means an individual, partnership, corporation, association, public or private organization, or governmental entity or agency.

[1995 c 347 § 703.]

36.70C.030

Chapter exclusive means of judicial review of land use decisions — Exceptions.

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(a) Judicial review of:

(i) Land use decisions made by bodies that are not part of a local jurisdiction;

(ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board, the environmental and land use hearings board, or the growth management hearings board;

(b) Judicial review of applications for a writ of mandamus or prohibition; or

(c) Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.

(2) The superior court civil rules govern procedural matters under this chapter to the extent that the rules are consistent with this chapter.

[2003 c 393 § 17; 1995 c 347 § 704.]

Notes:

Implementation -- Effective date -- 2003 c 393: See RCW 43.21L.900 and 43.21L.901.

36.70C.040

Commencement of review — Land use petition — Procedure.

(1) Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court.

(2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

(a) The local jurisdiction, which for purposes of the petition shall be the jurisdiction's corporate entity and not an individual decision maker or department;

(b) Each of the following persons if the person is not the petitioner:

(i) Each person identified by name and address in the local jurisdiction's written decision as an applicant for the permit or approval at issue; and

(ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue;

(c) If no person is identified in a written decision as provided in (b) of this subsection, each person identified by name and address as a taxpayer for the property at issue in the records of the county assessor, based upon the description of the property in the application; and

(d) Each person named in the written decision who filed an appeal to a local jurisdiction quasi-judicial decision maker regarding the land use decision at issue, unless the person has abandoned the appeal or the person's claims were dismissed before the quasi-judicial decision was rendered. Persons who later intervened or joined in the appeal are not required to be made parties under this subsection.

(3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.

(4) For the purposes of this section, the date on which a land use decision is issued is:

(a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;

(b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or

(c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

(5) Service on the local jurisdiction must be by delivery of a copy of the petition to the persons identified by or pursuant to RCW 4.28.080 to receive service of process. Service on other parties must be in accordance with the superior court civil rules or by first class mail to:

(a) The address stated in the written decision of the local jurisdiction for each person made a party under subsection (2)(b) of this section;

(b) The address stated in the records of the county assessor for each person made a party under subsection (2)(c) of this section; and

(c) The address stated in the appeal to the quasi-judicial decision maker for each person made a party under subsection (2)(d) of this section.

(6) Service by mail is effective on the date of mailing and proof of service shall be by affidavit or declaration under penalty of perjury.

[1995 c 347 § 705.]

36.70C.050

Joinder of parties.

If the applicant for the land use approval is not the owner of the real property at issue, and if the owner is not accurately

identified in the records referred to in RCW 36.70C.040(2) (b) and (c), the applicant shall be responsible for promptly securing the joinder of the owners. In addition, within fourteen days after service each party initially named by the petitioner shall disclose to the other parties the name and address of any person whom such party knows may be needed for just adjudication of the petition, and the petitioner shall promptly name and serve any such person whom the petitioner agrees may be needed for just adjudication. If such a person is named and served before the initial hearing, leave of court for the joinder is not required, and the petitioner shall provide the newly joined party with copies of the pleadings filed before the party's joinder. Failure by the petitioner to name or serve, within the time required by RCW 36.70C.040(3), persons who are needed for just adjudication but who are not identified in the records referred to in RCW 36.70C.040(2)(b), or in RCW 36.70C.040(2)(c) if applicable, shall not deprive the court of jurisdiction to hear the land use petition.

[1995 c 347 § 706.]

36.70C.060 Standing.

Standing to bring a land use petition under this chapter is limited to the following persons:

- (1) The applicant and the owner of property to which the land use decision is directed;
- (2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:
 - (a) The land use decision has prejudiced or is likely to prejudice that person;
 - (b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;
 - (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and
 - (d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

[1995 c 347 § 707.]

36.70C.070 Land use petition — Required elements.

A land use petition must set forth:

- (1) The name and mailing address of the petitioner;
- (2) The name and mailing address of the petitioner's attorney, if any;
- (3) The name and mailing address of the local jurisdiction whose land use decision is at issue;
- (4) Identification of the decision-making body or officer, together with a duplicate copy of the decision, or, if not a written decision, a summary or brief description of it;
- (5) Identification of each person to be made a party under RCW 36.70C.040(2) (b) through (d);
- (6) Facts demonstrating that the petitioner has standing to seek judicial review under RCW 36.70C.060;

- (7) A separate and concise statement of each error alleged to have been committed;
- (8) A concise statement of facts upon which the petitioner relies to sustain the statement of error; and
- (9) A request for relief, specifying the type and extent of relief requested.

[1995 c 347 § 708.]

36.70C.080
Initial hearing.

(1) Within seven days after the petition is served on the parties identified in RCW 36.70C.040(2), the petitioner shall note, according to the local rules of superior court, an initial hearing on jurisdictional and preliminary matters. This initial hearing shall be set no sooner than thirty-five days and no later than fifty days after the petition is served on the parties identified in RCW 36.70C.040(2).

(2) The parties shall note all motions on jurisdictional and procedural issues for resolution at the initial hearing, except that a motion to allow discovery may be brought sooner. Where confirmation of motions is required, each party shall be responsible for confirming its own motions.

(3) The defenses of lack of standing, untimely filing or service of the petition, and failure to join persons needed for just adjudication are waived if not raised by timely motion noted to be heard at the initial hearing, unless the court allows discovery on such issues.

(4) The petitioner shall move the court for an order at the initial hearing that sets the date on which the record must be submitted, sets a briefing schedule, sets a discovery schedule if discovery is to be allowed, and sets a date for the hearing or trial on the merits.

(5) The parties may waive the initial hearing by scheduling with the court a date for the hearing or trial on the merits and filing a stipulated order that resolves the jurisdictional and procedural issues raised by the petition, including the issues identified in subsections (3) and (4) of this section.

(6) A party need not file an answer to the petition.

[1995 c 347 § 709.]

36.70C.090
Expedited review.

The court shall provide expedited review of petitions filed under this chapter. The matter must be set for hearing within sixty days of the date set for submitting the local jurisdiction's record, absent a showing of good cause for a different date or a stipulation of the parties.

[1995 c 347 § 710.]

36.70C.100
Stay of action pending review.

(1) A petitioner or other party may request the court to stay or suspend an action by the local jurisdiction or another party to implement the decision under review. The request must set forth a statement of grounds for the stay and the factual basis for the request.

(2) A court may grant a stay only if the court finds that:

- (a) The party requesting the stay is likely to prevail on the merits;
- (b) Without the stay the party requesting it will suffer irreparable harm;
- (c) The grant of a stay will not substantially harm other parties to the proceedings; and
- (d) The request for the stay is timely in light of the circumstances of the case.

(3) The court may grant the request for a stay upon such terms and conditions, including the filing of security, as are necessary to prevent harm to other parties by the stay.

[1995 c 347 § 711.]

36.70C.110

Record for judicial review — Costs.

(1) Within forty-five days after entry of an order to submit the record, or within such a further time as the court allows or as the parties agree, the local jurisdiction shall submit to the court a certified copy of the record for judicial review of the land use decision, except that the petitioner shall prepare at the petitioner's expense and submit a verbatim transcript of any hearings held on the matter.

(2) If the parties agree, or upon order of the court, the record shall be shortened or summarized to avoid reproduction and transcription of portions of the record that are duplicative or not relevant to the issues to be reviewed by the court.

(3) The petitioner shall pay the local jurisdiction the cost of preparing the record before the local jurisdiction submits the record to the court. Failure by the petitioner to timely pay the local jurisdiction relieves the local jurisdiction of responsibility to submit the record and is grounds for dismissal of the petition.

(4) If the relief sought by the petitioner is granted in whole or in part the court shall equitably assess the cost of preparing the record among the parties. In assessing costs the court shall take into account the extent to which each party prevailed and the reasonableness of the parties' conduct in agreeing or not agreeing to shorten or summarize the record under subsection (2) of this section.

[1995 c 347 § 712.]

36.70C.120

Scope of review — Discovery.

(1) When the land use decision being reviewed was made by a quasi-judicial body or officer who made factual determinations in support of the decision and the parties to the quasi-judicial proceeding had an opportunity consistent with due process to make a record on the factual issues, judicial review of factual issues and the conclusions drawn from the factual issues shall be confined to the record created by the quasi-judicial body or officer, except as provided in subsections (2) through (4) of this section.

(2) For decisions described in subsection (1) of this section, the record may be supplemented by additional evidence only if the additional evidence relates to:

- (a) Grounds for disqualification of a member of the body or of the officer that made the land use decision, when such

grounds were unknown by the petitioner at the time the record was created;

(b) Matters that were improperly excluded from the record after being offered by a party to the quasi-judicial proceeding; or

(c) Matters that were outside the jurisdiction of the body or officer that made the land use decision.

(3) For land use decisions other than those described in subsection (1) of this section, the record for judicial review may be supplemented by evidence of material facts that were not made part of the local jurisdiction's record.

(4) The court may require or permit corrections of ministerial errors or inadvertent omissions in the preparation of the record.

(5) The parties may not conduct pretrial discovery except with the prior permission of the court, which may be sought by motion at any time after service of the petition. The court shall not grant permission unless the party requesting it makes a prima facie showing of need. The court shall strictly limit discovery to what is necessary for equitable and timely review of the issues that are raised under subsections (2) and (3) of this section. If the court allows the record to be supplemented, the court shall require the parties to disclose before the hearing or trial on the merits the specific evidence they intend to offer. If any party, or anyone acting on behalf of any party, requests records under chapter 42.56 RCW relating to the matters at issue, a copy of the request shall simultaneously be given to all other parties and the court shall take such request into account in fashioning an equitable discovery order under this section.

[2005 c 274 § 273; 1995 c 347 § 713.]

Notes:

Part headings not law -- Effective date -- 2005 c 274: See RCW 42.56.901 and 42.56.902.

36.70C.130

Standards for granting relief.

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

(2) In order to grant relief under this chapter, it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct. A grant of relief by itself may not be deemed to establish liability for monetary damages or compensation.

[1995 c 347 § 714.]

36.70C.140
Decision of the court.

The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. If the decision is remanded for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction.

[1995 c 347 § 715.]

36.70C.900
Finding — Severability — Part headings and table of contents not law — 1995 c 347.

See notes following RCW 36.70A.470.

APPENDIX H

RCW 34.05.534
Exhaustion of administrative remedies.

A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged, or available within any other agency authorized to exercise administrative review, except:

(1) A petitioner for judicial review of a rule need not have participated in the rule-making proceeding upon which that rule is based, have petitioned for its amendment or repeal, have petitioned the joint administrative rules review committee for its review, or have appealed a petition for amendment or repeal to the governor;

(2) A petitioner for judicial review need not exhaust administrative remedies to the extent that this chapter or any other statute states that exhaustion is not required; or

(3) The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies upon a showing that:

(a) The remedies would be patently inadequate;

(b) The exhaustion of remedies would be futile; or

(c) The grave irreparable harm that would result from having to exhaust administrative remedies would clearly outweigh the public policy requiring exhaustion of administrative remedies.

[1997 c 409 § 302; 1995 c 403 § 803; 1988 c 288 § 507.]

Notes:

Part headings -- Severability -- 1997 c 409: See notes following RCW 43.22.051.

Findings -- Short title -- Intent -- 1995 c 403: See note following RCW 34.05.328.

Part headings not law -- Severability -- 1995 c 403: See RCW 43.05.903 and 43.05.904.

APPENDIX I

Chapter 463-28 WAC State preemption

Last Update: 10/11/04

WAC Sections

463-28-010 Purpose.

463-28-020 Authority of council -- Preemption by state.

463-28-030 Determination of noncompliance -- Procedures.

463-28-040 Inability to resolve noncompliance.

463-28-050 Failure to request preemption.

463-28-060 Request for preemption -- Adjudicative proceeding.

463-28-070 Certification -- Conditions -- State/local interests.

463-28-080 Preemption -- Failure to justify.

DISPOSITIONS OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

463-28-090 Governing rules. [Statutory Authority: RCW 80.50.040(1). 78-07-036 (Order 78-3), § 463-28-090, filed 6/23/78.] Repealed by 04-21-013, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040 (1) and (12).

463-28-010 Purpose.

This chapter sets forth procedures to be followed by the council in determining whether to recommend to the governor that the state preempt local land use plans or zoning ordinances for a site or portions of a site for an energy facility.

[Statutory Authority: RCW 80.50.040 (1) and (12). 04-21-013, § 463-28-010, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040(1). 78-07-036 (Order 78-3), § 463-28-010, filed 6/23/78.]

463-28-020 Authority of council — Preemption by state.

The authority of the council is contained in RCW 80.50.040(1) and 80.50.110(2) which provides that the state preempts the regulation and certification of the location, construction, and operational conditions of certification of energy facilities.

[Statutory Authority: RCW 80.50.040(1). 78-07-036 (Order 78-3), § 463-28-020, filed 6/23/78.]

463-28-030 Determination of noncompliance — Procedures.

If the council determines during the hearing required by RCW 80.50.090 that the site of a proposed energy facility or any portion of a site is not consistent and in compliance with land use plans or zoning ordinances in effect at the date of the application, the following procedures shall be observed:

(1) As a condition necessary to continue processing the application, it shall be the responsibility of the applicant to make the necessary application for change in, or permission under, such land use plans or zoning ordinances, and make all reasonable efforts to resolve the noncompliance.

(2) All council proceedings on the application for certification may be stayed at the request of the applicant during the period when the plea for resolution of noncompliance is being processed by local authorities.

(3) The applicant shall submit regular reports to the council regarding the status of negotiations with local authorities on noncompliance issues.

[Statutory Authority: RCW 80.50.040 (1) and (12), 04-21-013, § 463-28-030, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040(1), 78-07-036 (Order 78-3), § 463-28-030, filed 6/23/78.]

463-28-040

Inability to resolve noncompliance.

Should the applicant report that efforts to resolve noncompliance issues with local authorities have not been successful, then, if applicant elects to continue processing the application, the applicant shall file a written request for state preemption as authorized in WAC 463-28-020 within ninety days after completion of the public hearing required by RCW 80.50.090, or later if mutually agreed by the applicant and the council. The request shall address the following:

- (1) That the applicant has demonstrated a good faith effort to resolve the noncompliance issues.
- (2) That the applicant and the local authorities are unable to reach an agreement which will resolve the issues.
- (3) That alternate locations which are within the same county and city have been reviewed and have been found unacceptable.
- (4) Interests of the state as delineated in RCW 80.50.010.

[Statutory Authority: RCW 80.50.040(1), 78-07-036 (Order 78-3), § 463-28-040, filed 6/23/78.]

463-28-050

Failure to request preemption.

Where noncompliance is at issue, failure of the applicant to file the written request as required in WAC 463-28-040 within the time permitted shall be sufficient grounds for the council to recommend to the governor denial of certification.

[Statutory Authority: RCW 80.50.040(1), 78-07-036 (Order 78-3), § 463-28-050, filed 6/23/78.]

463-28-060

Request for preemption — Adjudicative proceeding.

Should an applicant elect to continue processing the application and file a request with the council for state preemption, the council will schedule an adjudicative proceeding hearing on the application as specified under chapter 463-30 WAC. The council shall determine during the adjudicative proceeding whether to recommend to the governor that the state should preempt the local land use plans or zoning ordinances for a site or portions of a site for the energy facility proposed by the applicant. The factors to be evidenced under this issue are those set forth in WAC 463-28-040. The determination of preemption shall be by council order, and shall be included in its recommendation to the governor

pursuant to RCW 80.50.100.

[Statutory Authority: RCW 80.50.040. 91-03-090, § 463-28-060, filed 1/18/91, effective 2/18/91. Statutory Authority: RCW 80.50.040(1). 83-08-031 (Order 83-2), § 463-28-060, filed 3/31/83; 78-07-036 (Order 78-3), § 463-28-060, filed 6/23/78.]

463-28-070

Certification — Conditions — State/local interests.

If the council approves the request for preemption it shall include conditions in the draft certification agreement which give due consideration to state or local governmental or community interests affected by the construction or operation of the energy facility and the purposes of laws or ordinances, or rules or regulations promulgated thereunder that are preempted or superseded pursuant to RCW 80.50.110(2).

[Statutory Authority: RCW 80.50.040(1). 78-07-036 (Order 78-3), § 463-28-070, filed 6/23/78.]

463-28-080

Preemption — Failure to justify.

During the adjudicative proceeding, if the council determines that the applicant has failed to justify the request for state preemption, the council shall do so by issuance of an order accompanied by findings of fact and conclusions of law. Concurrent with the issuance of its order, the council shall report to the governor its recommendation for rejection of certification of the energy facility proposed by the applicant.

[Statutory Authority: RCW 80.50.040. 91-03-090, § 463-28-080, filed 1/18/91, effective 2/18/91. Statutory Authority: RCW 80.50.040(1). 78-07-036 (Order 78-3), § 463-28-080, filed 6/23/78.]

APPENDIX J

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of:

APPLICATION NO. 2003-01

SAGEBRUSH POWER PARTNERS, LLC

KITTITAS VALLEY WIND POWER
PROJECT

COUNCIL ORDER No. 826

**Findings of Fact, Conclusions of Law,
and Order Recommending Approval
of Site Certification on Condition**

Executive Summary: The Energy Facility Site Evaluation Council (EFSEC or Council) is the state agency charged with making a recommendation to the Governor as to whether a new major energy facility should be sited in the state of Washington. Chapter 80.50 Revised Code of Washington (RCW). The Council is aware of the region's need for energy and electrical generation capacity. The Council is equally mindful of its duty to protect the environment and the public interest.

This matter involves an Application for certification of a proposed rural site in Kittitas County, approximately 12 miles northwest of the city of Ellensburg, Washington, for the construction and operation of the Kittitas Valley Wind Power Project (Project or KVVPP), a wind-powered energy production facility consisting of a series of "strings" of turbines as well as associated electric transmission lines and other supporting infrastructure. Approximately 6,000 acres of land are associated with the Project. Up to 371 acres would be temporarily disturbed by construction activities; 118 acres would be permanently developed for placement of the turbine towers, access roads, substations, underground and overhead transmission lines, and an operations and maintenance facility. Sagebrush Power Partners, LLC, (Sagebrush or Applicant) seeks a Site Certification Agreement (SCA) to construct and operate up to 65 wind turbines that would generate between 100 and 180 megawatts (MW) of wind power, dependent on the type of turbines selected by the Applicant.

The Council has reviewed Sagebrush's Application for Site Certification (Application), No. 2003-01; conducted public and adjudicative hearings; and by this Order recommends to the Governor of the state of Washington preemption of local land use plans and zoning regulations as well as approval of the Application.

The Applicant requested that EFSEC preempt Kittitas County's local land use plans and zoning regulations. After review of the Kittitas County Comprehensive Plan and supporting zoning code, the Council finds that the Project is consistent with all of the local government's plans and regulations except (1) the 35-foot height restriction in the Forest & Range (FR20) zone and (2) the Wind Farm Overlay Ordinance, Kittitas County Code Chapter 17.61A, which prohibits all wind farms until the Board of County Commissioners takes action to approve and

permit a project. Therefore, determining that the County's siting ordinance duplicates EFSEC's site evaluation process and usurps this Council's statutory authority, the Council recommends preemption of Kittitas County's Wind Farm Overlay Ordinance as well as the height restriction.

The Applicant entered into an on-the-record stipulation with Counsel for the Environment during the adjudicative hearing agreeing to independent environmental monitoring of the Project's construction. In addition, the Applicant agreed during the adjudicative hearing to eliminate any demonstrated "shadow flicker" impacts in the area within ½ mile of the Project. Furthermore, pursuant to the requirements of the above-noted stipulation, agreement, and the evidence presented during the hearing, the Applicant will provide mitigation measures such that the planned Project is expected to produce minimal adverse impacts on the environment, the ecology of the land and its wildlife, and the ecology of the state's waters and their aquatic life.

Upon careful consideration of the state's need for energy at a reasonable cost and the need to minimize environmental impacts, the Council determined that this facility is consistent with local land use plans and zoning regulations (as explained in Appendix A) and, with the proposed mitigation measures and with the agreed upon requirements of the previously referenced stipulation and agreement, will provide the region with significant energy benefits while not resulting in unmitigated, significant adverse environmental impacts. Thus, *the proposed Project with its mitigation measures as set forth in this document, in the Final Environmental Impact Statement, and as required in the settlement agreements meets the requirements of applicable law and comports with the policy and intent of Chapter 80.50 RCW.*

The Council recommends PREEMPTION of Kittitas County's local Wind Farm Overlay Ordinance as well as the local height restriction and further recommends that the Governor APPROVE the siting of this Project, as described in this Order and the accompanying draft Site Certification Agreement.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the testimony received, and evidence admitted during the adjudicative and land use hearings, the environmental documents and environmental determinations made by the Council, the settlement agreements verbally presented to and approved by the Council, and the record in this matter, the Council makes the following Conclusions of Law:

1. The Washington State Energy Facility Site Evaluation Council has jurisdiction over the persons and the subject matter of Application No. 2003-01, pursuant to Chapter 80.50 RCW and Chapter 34.05 RCW.

2. The Council conducted its review of the Sagebrush Application 2003-01 as adjudicative proceedings and land use hearings, pursuant to Chapter 34.05 RCW as required by RCW 80.50.090(3) and Chapter 463-30 WAC (as in effect at the time of application).

3. EFSEC is the lead agency for environmental review of Sagebrush's Application pursuant to the requirements of Chapter 43.21C RCW. Because the SEPA responsible official determined that the proposed action could have one or more significant adverse environmental impacts, an Environmental Impact Statement (EIS) was required. The Council complied with Chapter 43.21C RCW, Chapter 197-11 WAC, and Chapter 463-47 WAC, by issuing a Determination of Significance and Scoping Notice, conducting a scoping hearing, issuing a Draft EIS and a Draft Supplemental EIS for public comment, conducting a public hearing and accepting written comments on the Draft EIS and Draft Supplemental EIS, issuing an Addendum to the Draft EIS, and adopting a Final EIS.

4. The Council is required to determine whether a proposed Project site is consistent with county or regional land use plans or zoning ordinances. RCW 80.50.090; WAC 463-14-030. The Council concludes that the proposed use of the site is consistent and in compliance with all Kittitas County land use plans and zoning laws except for the local height restriction (35 feet) in the Forest & Range (FR20) zone and Kittitas County's Wind Farm Overlay Ordinance (see Appendix). However, the Council concludes that it is appropriate to preempt the local zoning code's height restriction in order to allow for the height of the individual wind turbine towers, on condition of the minimum setback requirements described herein and in the SCA. In addition, the Council further concludes that this Wind Farm Overlay Ordinance improperly usurps and unnecessarily duplicates EFSEC's statutory role in the siting of energy facilities and, in accordance with RCW 80.50.110, must therefore be preempted by state law.

Consistency
Determinat

5. The legislature has recognized that the selection of sites for new energy facilities can have a significant impact upon the welfare of the population, the location and growth of industry, and the use of the natural resources of the state. It is the policy of the state of Washington to recognize the pressing need for increased energy facilities and to ensure through available and reasonable methods that the location and operation of such facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life. RCW 80.50.010.

6. The Council concludes that the certification of the Kittitas Valley Wind Power Project, as described in Application 2003-01 and as reduced in scope as described in the

supporting SEPA documents, will further the legislative intent to provide abundant energy at reasonable cost. At the same time, the mitigation measures and the conditions of the proposed Site Certification Agreement ensure that through available and reasonable methods, the construction and operation of the Project will produce minimal adverse effects to the human environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.

ORDER AND RECOMMENDATION

Based on the Findings of Fact, Conclusions of Law, the Draft EIS, the Draft Supplemental EIS, Addendum to the Draft EIS, and Final EIS, and the full record in this matter, the Council issues the following Order:

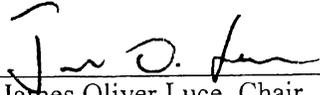
1. The Council recommends that the Governor of the state of Washington PREEMPT the Kittitas County zoning code's 35-foot height limitation in the Forest & Range zone as well as the Wind Farm Overlay Ordinance adopted by the Kittitas County Board of County Commissioners in December 2002.

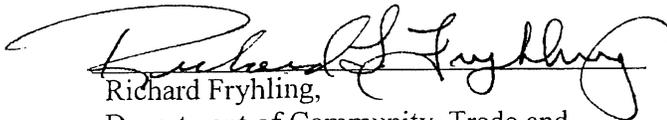
2. The Council recommends that the Governor of the state of Washington APPROVE certification for the construction and operation of the Kittitas Valley Wind Power Project located in Kittitas County, Washington.

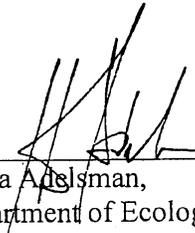
3. The Council orders that its recommendations as embodied in the Findings of Fact, Conclusions of Law and this Order, together with the Site Certification Agreement appended hereto, be reported and forwarded to the Governor of the state of Washington for consideration and action.

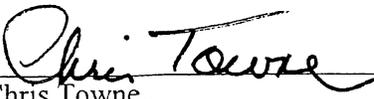
SIGNATURES

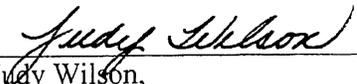
DATED and effective at Olympia, Washington, this 27th day of March, 2007.

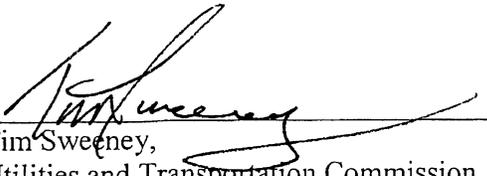

James Oliver Luce, Chair


Richard Fryhling,
Department of Community, Trade and
Economic Development


Hedia Adelman,
Department of Ecology


Chris Towne,
Department of Fish and Wildlife


Judy Wilson,
Department of Natural Resources


Tim Sweeney,
Utilities and Transportation Commission


Patti Johnson,
Kittitas County *Dissenting in part
and in result.*

NOTICE TO PARTIES: Administrative relief may be available through a petition for reconsideration, filed within twelve days of the service of this order, filed with the Council Manager pursuant to WAC 463-30-120.

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of:

APPLICATION NO. 2004-01

WIND RIDGE POWER PARTNERS, LLC

WILD HORSE WIND POWER PROJECT

COUNCIL ORDER No. 814

**Findings of Fact, Conclusions of Law,
and Order Recommending Approval
of Site Certification on Condition**

Executive Summary: The Energy Facility Site Evaluation Council (EFSEC or Council) is the state agency charged with making a recommendation to the Governor as to whether a new major energy facility should be sited in the state of Washington. Chapter 80.50 Revised Code of Washington (RCW). The Council is aware of the region's need for energy and electrical generation capacity. The Council is also mindful of its duty to protect the environment and the public interest.

This matter involves an Application for certification of a proposed rural site in Kittitas County, approximately 11 miles east of the City of Kittitas and 13 miles northeast of Ellensburg, Washington, for the construction and operation of the Wild Horse Wind Power Project (Project or WHWPP), a wind-powered energy production facility consisting of a series of turbines as well as associated electric transmission lines and other supporting infrastructure. Approximately 8,600 acres of undeveloped land are associated with the Project. Up to 401 acres would be temporarily disturbed by construction activities; 165 acres would be permanently developed for placement of the turbine towers, access roads, substations, underground and overhead transmission lines, and an operations and maintenance facility. Wind Ridge Power Partners, LLC, (Wind Ridge or Applicant) seeks a Site Certification Agreement (SCA) to construct and operate between 104 and 158 wind turbines that would generate between 158 and 312 megawatts (MW) of wind power. The Project would also construct and employ one or both of two feeder lines, totaling approximately 13 miles in length, to allow interconnection with the BPA and/or PSE transmission systems.

The Council has reviewed Wind Ridge's Application for Site Certification (Application), No. 2004-01; conducted public and adjudicative hearings; and by this Order recommends approval of the Application to the Governor of the state of Washington. The Applicant has entered into stipulations and settlement agreements with two parties to the proceeding. The Council reviewed and approved each settlement agreement. Furthermore, pursuant to the requirements of the settlements and the evidence presented during the hearing, the Applicant will provide offset and mitigation measures such that the planned Project is expected to produce minimal adverse impacts on the environment, the ecology of the land and its wildlife, and the ecology of the state waters and their aquatic life.

Upon careful consideration of the state's need for energy at a reasonable cost and the need to minimize environmental impacts, the Council determined that this facility, with the proposed mitigation measures and with the agreed upon requirements of the various settlements, will provide the region with significant energy benefits while not resulting in unmitigated, significant adverse environmental impacts. Thus, *the proposed Project with its mitigation measures as set forth in this document, in the Final Environmental Impact Statement, and as required in the settlement agreements meets the requirements of applicable law and comports with the policy and intent of Chapter 80.50 RCW.*

The Council recommends that the Governor APPROVE the siting of this Project, as described in this Order and the accompanying draft Site Certification Agreement.

the Project such that substantial completion is achieved no later than five (5) years from the date that all state and federal permits necessary to construct the Project are obtained, but in no event later than six (6) years from the effective date of the Kittitas County Development Agreement.

104. Construction of the entire Project shall be completed within approximately twelve (12) months of beginning construction.

Conformance with Law

105. The Applicant proposes to construct the Project in accordance with applicable national and international building codes, in compliance with international design and construction standards, and including the implementation of a comprehensive employee safety plan. The Council finds that operational safeguards will be at least as stringent as the criteria established by the federal government and will be technically sufficient for welfare and protection of the public. RCW 80.50.010 (1).

106. The Applicant has agreed to appropriate environmental mitigation requirements. The mitigation package preserves and protects the quality of the environment. As a renewable energy resource, the Project will enhance the public's opportunity to enjoy the aesthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment. RCW 80.50.010 (2).

107. As a renewable energy source wind power generation facility, the Project will contribute to the diversification and reliability of the state's electrical generation capacity, and will therefore support legislative intent to provide abundant energy at a reasonable cost. RCW 80.50.010 (3)

108. The Council finds that this course of action will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the testimony received, and evidence admitted during the adjudicative and land use hearings, the environmental documents and environmental determinations made by the Council, the settlement agreements presented to and approved by the Council, and the record in this matter, the Council makes the following Conclusions of Law:

1. The Washington State Energy Facility Site Evaluation Council has jurisdiction over the persons and the subject matter of Application No. 2004-01, pursuant to Chapter 80.50 RCW and Chapter 34.05 RCW.

2. The Council conducted its review of the Wind Ridge Application 2004-01 as adjudicative proceedings and land use hearings, pursuant to Chapter 34.05 RCW as required by RCW 80.50.090(3) and Chapter 463-30 WAC (as in effect at the time of application).

3. EFSEC is the lead agency for environmental review of Wind Ridge's Application pursuant to the requirements of Chapter 43.21C RCW. Because the SEPA responsible official determined that the proposed action could have one or more significant adverse environmental

impacts, an Environmental Impact Statement (EIS) was required. The Council complied with Chapter 43.21C RCW, Chapter 197-11 WAC, and Chapter 463-47 WAC, by issuing a Determination of Significance and Scoping Notice, conducting a scoping hearing, issuing a Draft EIS for public comment, conducting a public hearing and accepting written comments on the Draft EIS, and adopting a Final EIS.

4. The Council is required to determine whether a proposed Project site is consistent with county or regional land use plans or zoning ordinances. RCW 80.50.090; WAC 463-14-030. The Council concludes that the proposed use of the site is consistent and in compliance with all applicable Kittitas County land use plans and zoning laws.

Consistency
Determination

5. The Council encourages Applicants to enter into stipulations and settlement agreements whenever possible. WAC 463-30-230. In this matter, the Applicant agreed with Kittitas County that the minimum setback for this Project's wind turbine towers would be 541 feet. Respecting the terms of that Stipulation and Settlement Agreement, the Council has included this provision in the Site Certification Agreement. However, the Council makes no independent conclusion as to the appropriateness of this minimum setback distance.

6. The legislature has recognized that the selection of sites for new large energy facilities will have a significant impact upon the welfare of the population, the location and growth of industry, and the use of the natural resources of the state. It is the policy of the state of Washington to recognize the pressing need for increased energy facilities and to ensure through available and reasonable methods that the location and operation of such facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life. RCW 80.50.010.

7. The Council concludes that the certification of the Wild Horse Wind Power Project, as described in Application 2004-01, and with the inclusion of the requirements of the settlement agreements, will further the legislative intent to provide abundant energy at reasonable cost. At the same time, the mitigation measures and the conditions of the proposed Site Certification Agreement ensure that through available and reasonable methods, the construction and operation of the Project will produce minimal adverse effects to the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.

ORDER AND RECOMMENDATION

Based on the Findings of Fact, Conclusions of Law, the Draft EIS and Final EIS, and the full record in this matter, the Council issues the following Order:

1. The Council recommends that the Governor of the state of Washington APPROVE certification for the construction and operation of the Wild Horse Wind Power Project located in Kittitas County, Washington.

2. The Council orders that its recommendations as embodied in the Findings of Fact, Conclusions of Law and this Order, together with the Site Certification Agreement appended hereto, be reported and forwarded to the Governor of the state of Washington for consideration and action.

SIGNATURES

DATED and effective at Olympia, Washington, this 25th day of May, 2005.

James Oliver Luce, Chair

Richard Fryhling,
Department of Community, Trade and
Economic Development

Hedia Adelman,
Department of Ecology

Chris Towne,
Department of Fish and Wildlife

Tony Ifie, P.E.,
Department of Natural Resources

Tim Sweeney,
Utilities and Transportation Commission

Patti Johnson,
Kittitas County

NOTICE TO PARTIES: Administrative relief may be available through a petition for reconsideration, filed within twelve days of the service of this order, filed with the Council Manager pursuant to WAC 463-30-120.

**BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL**

In re Application No. 94-2

Chehalis Power Generating,
Limited Partnership
Chehalis Generation Facility

COUNCIL ORDER NO. 698

ORDER GRANTING SITE
SITE CERTIFICATION, ON
CONDITION

Nature of the Proceeding: This matter involves an application to the Washington State Energy Facility Site Evaluation Council for certification of a proposed site near Chehalis, Lewis County, Washington for construction and operation of a natural gas-fueled combustion turbine Facility to generate electrical energy. The Applicant, Chehalis Power Generating, Limited Partnership (Applicant or Chehalis Power) has requested the Energy Facility Site Evaluation Council (EFSEC or the Council¹) to issue a Site Certification Agreement for the Chehalis Generation Facility (CGF or Facility²) that would permit the construction and operation of two separate and identical combined cycle combustion turbine power generation units with a nominal maximum output of 230 megawatts each, for a total of 460 megawatts (MW). Both of the units are proposed as part of the Bonneville Power Administration's (BPA) Resource Contingency Program (RCP), which was developed to ensure that resources would be available to meet the highest potential regional load growth.

Procedural Setting: EFSEC's certification process for the CGF involved the review of Chehalis Power's application, hearings to determine if the proposal complies with local land use regulations, the adoption of an Environmental Impact Statement (EIS), the issuance of required permits, and both formal adjudicative and public comment hearings.

An adjudicative evidentiary hearing began on September 18, 1995, pursuant to notice duly given testimony was taken and exhibits entered. The hearing concluded on September 21, 1995. Counsel for the Environment (CFE), who is appointed by the Attorney General to represent the public and its interest in protecting the quality of the environment, participated in the hearing and filed a post-hearing brief opposing certification of the project. In addition the Critical Issues Council, (CIC), a group of concerned citizens who live near the proposed site and who were granted intervention by the Council, participated in the hearing and filed a post-hearing brief opposing certification. Evidence from the Applicant, CFE, and CIC was received in Olympia, Washington and Chehalis, Washington. Testimony from members of the public was taken at Chehalis, Washington. All intervenors, with the exception of the CIC, either settled with the Applicant prior to the hearing or chose not to participate in the hearing. The issues that remained unresolved at the close of the adjudicative hearing were argued in

¹ This order will also refer to EFSEC as "the Council". Other "councils" are relevant to the order, including the Critical Issues Council, an intervenor, and the Northwest Power Planning Council. Those entities will be referred to by their full names or by initials, and not as "the Council".

² A glossary of terms and acronyms appears at the end of this Order.

briefs submitted by the Applicant, Counsel for the Environment, and the Critical Issues Council. The Department of Ecology, which entered into a settlement agreement with the Applicant, also submitted a post-hearing brief.

Chapter 80.50 RCW directs the Council to prepare a written "report" to the governor recommending whether to approve or deny site certification. This Order, along with the Council's proposed Site Certification Agreement, including attachments, forms the Council's "report" and recommendation to the Governor.

Appearances: Applicant, Chehalis Generation Facility by Elizabeth Thomas, Thomas Eli Backer, and J. Alan Clark, Attorneys, Preston Gates & Ellis, Seattle; Counsel for the Environment, Thomas J. Young, Assistant Attorney General, Olympia; Washington Department of Ecology, by Ronald L. Lavigne and Mary Sue Wilson, Assistant Attorneys General, Olympia; Washington State Energy Office, by Thomas Prud'Homme, Assistant Attorney General, Olympia; Washington Department of Fish and Wildlife, by William C. Frymire, Assistant Attorney General, Olympia; Critical Issues Council by Allen T. Miller, Attorney, Connolly, Holm, Tacon & Meserve, Olympia, and John T. Mudge, President.

The Council: Council representatives who participated in this proceeding are the following: Chairman Fred Adair, citizen; Department of Agriculture, Walter Swenson; Department of Community, Trade and Economic Development, David McCraney; Department of Ecology, Ron Skinnarland; Washington State Energy Office, Doug Kilpatrick; Department of Fish and Wildlife, Jo Roller; Department of Health, Ellen Haars; Department of Natural Resources, Nancy Joseph; Department of Transportation, Gary Ray; Utilities and Transportation Commission, C. Robert Wallis; Lewis County, John Nacht; and the City of Chehalis, Mark Scheibmeir.

MEMORANDUM

The Council sets out its findings and conclusions upon contested issues and the Council's reasons and bases therefor in the memorandum portion of this document

I. INTRODUCTION

A. The Process

The Council is obliged to follow relevant Washington law in determining whether to recommend a proposed project to the Governor. The Council determined pursuant to RCW 80.50.090(2) that the Chehalis Generation Facility is consistent with local land use plans and regulations. The Council has conducted its review of the application as an adjudicative proceeding pursuant to Chapter 34.05 RCW as required by RCW 80.50.090(3).

The Council is also obligated to comply with Chapter 43.21C RCW, the State Environmental Policy Act, or SEPA. It has complied with that process by participating in the federal scoping process, commenting on the federal draft Environmental Impact Statement (EIS),

Part 13: Certificate Duration

138. The Applicant is not expected to begin construction of either unit immediately upon execution of the Site Certification Agreement. The appropriate duration of the Site Certification Agreement entered pursuant to this Order is a maximum of ten years, *i.e.*, construction of any generation unit authorized in the Site Certification Agreement must begin within ten years of the effective date of the Site Certification Agreement. The interests of the public and the environment will be protected from unforeseen changes in conditions if, six months before beginning construction, the site certificate holder (a) during the first five years following execution of the Site Certification Agreement identifies to the Council any substantial relevant change or verifies the lack of substantial change in relevant environmental conditions, regulatory environment, or economically available technology, and (b) during the second five years certifies that the representations of the application, environmental conditions, pertinent technology, and regulatory conditions remain current, or identifies any changes and proposes appropriate resulting changes in the Site Certification Agreement to deal with changes. Construction may begin only upon prior Council authorization, upon the Council's finding that no changes to the Site Certification Agreement are necessary or appropriate or upon the effect of any appropriate changes.

Part 14: Site Restoration

139. The application does not contain an initial Site Restoration Plan. The certificate holder may cure the failure by presenting its initial Site Restoration Plan six months prior to the planned commencement of construction.

Part 15: Summary

140. Approval of all the settlement agreements and settlement agreements between Chehalis Power and WSEO, Ecology, WDFW and the CIC will promote the public interest.

141. Balancing the interests sought to be protected and promoted by chapter 80.50 RCW in light of all the evidence and environmental review documents, the Council finds that issuing Chehalis Power a site certificate for the Chehalis Generation Facility, as set forth in the attached draft Site Certification Agreement, will promote the public interest.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Council makes the following conclusions of law.

1. The Washington State Energy Facility Site Evaluation Council has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Chapter 80.50 RCW and Chapter 34.05 RCW.

2. As set forth in Prehearing Conference Order No. 3, EFSEC has no jurisdiction over the natural gas pipeline.

3. As set forth in Prehearing Conference Order No. 3, EFSEC has no jurisdiction over the upstream impacts of withdrawing natural gas outside the state of Washington.

4. Application No. 94-2, as amended and as reflected in the attached draft Site Certification Agreement, complies with the guidelines contained in chapter 463-42 WAC for applications for site certification.

5. The settlement agreements and stipulations entered into between Chehalis Power and WSEO, Ecology, Fish and Wildlife and the CIC should be approved and should be incorporated into the Site Certification Agreement for the CGF. WAC 463-30-250.

6. Because the CGF uses high-efficiency gas-fired turbines, will only be built upon a showing of need and consistency, and is highly dispatchable and displaceable, the CGF will promote resource diversity and efficiency, and will help ensure availability of sufficient electrical energy resources. RCW 43.21F. 015(1), (2) and (3).

7. The conditions in the Site Certification Agreement will protect the interests of state and local governments and of the local community affected by the construction and operation of the CGF within the meaning of RCW 80.50.100.

8. The conditions in the Site Certification Agreement recognize and effectuate the purposes of the laws and ordinances, and of the rules and regulations promulgated thereunder, that are preempted or superseded pursuant to RCW 80.50.110. See RCW 80.50.100(1).

9. The terms, conditions and contents of the air emissions (PSD) permit contained in Attachment 3 to the Site Certification Agreement comply with the requirements of chapter 463-39 WAC.

10. The terms, conditions and contents of the NPDES permit contained in Attachment 4 to the Site Certification Agreement comply with the requirements of chapter 463-38 WAC. Effluent limitations and a compliance schedule for wastewater discharges of BOD and ammonia are hereby ordered and are contained in Attachment 9 to the Site Certification Agreement.

11. The proposed CGF site is consistent with and in compliance with applicable zoning ordinances and land use plans of the City of Chehalis and Lewis County, within the meaning of RCW 80.50.020(15) & (16), RCW 80.50.090(2), and chapter 463-26 WAC.

consistency
Determination

12. Chehalis Power's proposed construction and operation of the CGF constitutes an "action" and is not "categorically exempt" from the State Environmental Policy Act (SEPA) within the meaning of WAC 463-47-060.

13. EFSEC is the SEPA lead agency for the proposed action. As Council Manager, Jason Zeller is the SEPA responsible official. WAC 463-47-051.

14. Because the SEPA responsible official determined that the proposed action may have a probable significant adverse environmental impact, an environmental impact statement (EIS) is required.

15. EFSEC may satisfy the SEPA EIS requirement by adopting existing environmental documents prepared under NEPA. WAC 463-47-020; WAC 197-11-610. This approach is encouraged by EFSEC's rules. WAC 463-47-150.

16. The environmental documents and other materials adopted by EFSEC are adequate and meet all of EFSEC's responsibilities under SEPA, satisfying the requirements of Chapter 43.21C RCW, Chapter 463-47 RCW and Chapter 197-11 WAC. The adopted documents reasonably disclose, discuss and substantiate the probable significant adverse impacts of the CGF and alternatives and describe potential measures to mitigate those impacts.

17. The cumulative impacts of the CGF are adequately addressed by the adopted environmental review and mitigated by the conditions contained in the Site Certification Agreement.

18. It is not necessary for the Council to determine whether the CGF constitutes a "public project" or a "private project" within the meaning of WAC 197-11-440(5)(d), because the environmental documents and other materials adopted by EFSEC contain detailed discussions of on-site alternatives (including but not limited to water cooling), off-site alternatives (including but not limited to alternate locations and alternate technologies) and the no action alternative to the CGF. This discussion is sufficient to satisfy the requirements of RCW 43.21C.030 and chapter WAC 463-47, even as to a public project.

19. The CGF's use of reclaimed water is consistent with the Water Reclamation and Reuse Interim Standards issues by the departments of Health and Ecology. Chapter 90.46 RCW; SSB 5606 (1995 Laws, Chapter 342); Ecology's "Policy on Water Rights for Reclaimed Water." Ex. 30.

20. The CGF's use of reclaimed water is consistent with the antidegradation policies contained in the state Water Resources Act and Water Pollution Control Act. RCW 90.46.005.

21. The CGF's use of reclaimed water and Chehalis Power's acquisition of water rights will enhance the public's opportunity to enjoy the aesthetic and recreational benefits of the Chehalis River. RCW 80.50.010(2).

22. Given the nature of this proposal and the relative scope and complexity of the Facility, the Applicant should be allowed to comply with WAC 463-42-655 by presenting its initial Site Restoration Plan (Plan) six months prior to planned commencement of construction and allow the Council to review the proposed initial Plan before beginning construction. The

initial Plan must address aspects of site restoration, including funding, in the event construction is halted prior to completion of the Facility, and at least that element shall be resolved and approved before construction may begin.

23. The mitigation measures contained in the Site Certification Agreement and in the Application provide mitigation for probable significant adverse impacts that may result from construction and operation of the CGF.

24. The CGF will promote beneficial changes in the environment by promoting flexible operation of the region's hydro-electric generating system. Chehalis Power will also promote beneficial changes in the environment by implementing the "Further Mitigation Measures" set forth in Part V of Attachment 6 to the Site Certification Agreement. RCW 80.50.010(2).

25. Granting site certification upon the terms contained in the draft Site Certification Agreement is consistent with the Council's policy to avoid or mitigate adverse environmental impacts. WAC 463-47-110(1)(a).

26. Granting site certification upon the terms contained in the Site Certification Agreement is a practicable means of promoting the objectives contained in WAC 463-47-110(1)(b).

27. Granting site certification upon the terms contained in the Site Certification Agreement is consistent with each person's right to a healthful environment and each person's responsibility to contribute to environmental preservation and enhancement. WAC 463-47-110(1)(c).

28. In imposing the conditions contained in the Site Certification Agreement, the Council is giving appropriate consideration to presently unquantified environmental amenities and values, as well as economic and technical considerations. WAC 463-47-110(1)(d).

29. Construction and operation of the CGF consistent with the terms of the Site Certification Agreement will produce minimal adverse effects on the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life. RCW 80.50.010.

30. The Site Certification Agreement should be approved at this time, despite the fact that there may not be an immediate need for the CGF's power. The Site Certification Agreement prohibits construction until Chehalis Power demonstrates that the CGF's power is needed and that the project is consistent with certain power planning documents. RCW 43.21F.015(7); RCW 80.50.010; WAC 463-14-020. The Site Certification Agreement will allow construction to begin within ten years of the Site Certification Agreement's execution, with appropriate conditions as set out in Finding of Fact No. 138 to assure that the terms and conditions of the Site Certification Agreement remain sufficient to protect the public and the environment. The

Site Certification Agreement should provide that Council authorization be required prior to beginning construction.

31. Having balanced the demands for energy Facility location and operation with the broad interests of the public, the Council recommends that the Governor of the State of Washington approve the attached Site Certification Agreement between the State of Washington and Chehalis Power to permit construction and operation of the Chehalis Generation Facility. The binding effect of the Site Certification Agreement is contingent upon execution by the Governor of the State of Washington and Chehalis Power.

RECOMMENDATION AND ORDER

Based on the foregoing findings of fact and conclusions of law, the parties' briefs, and the record in this matter, the Council issues the following Order:

1. The Council hereby Reports to the Governor of the State of Washington that Application No. 94-2 as amended for Site Certification for the Chehalis Generation Facility is in compliance with applicable laws and regulations.
2. The Council recommends that the Governor approve the attached Draft Site Certification Agreement, with all Attachments, upon the terms and conditions set out therein, and in so doing approve the certification of the Chehalis Generation Facility Site for construction and operation of the Chehalis Generation Facility.
3. This Report and Recommendation, along with the attached Draft Site Certification Agreement and its Attachments, shall be and the same are hereby forwarded forthwith to the Governor of the State of Washington for his consideration and action.

NOTICE TO PARTIES

This is a final order of the Council. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within ten days of the service of this order, pursuant to RCW 34.05.470 and filed with the Council Manager pursuant to WAC 463-30-335.

**BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL**

In the Matter of Application No. 2001-03

Duke Energy and Energy Northwest

**Satsop Combustion Turbine Project –
Phase II**

WITH COUNCIL ORDER NO. 766

**FINDING OF CONSISTENCY GRAYS
HARBOR COUNTY LAND USE PLANS
AND ZONING ORDINANCES**

Nature of Proceeding

This matter involves an application to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) to amend the existing Site Certification Agreement for the Satsop Combustion Turbine Project.

Procedural Setting and Participation

This matter came on regularly for hearing on March 11, 2002, in Lacey, Washington, before Acting Chair Charles Carelli (Department of Ecology); and Council members James Luce, EFSEC Chair; Dick Fryhling (Department of Community, Trade and Economic Development); Jenene Fenton (Department of Fish and Wildlife); Tony Ifie (Department of Natural Resources); Jeffrey Showman (Utilities and Transportation Commission); Dick Dixon (Grays Harbor County); and Isabelle Lamb (Port of Grays Harbor).

Participants in this Land Use Hearing were:

Applicant: Duke Energy Grays Harbor and Energy Northwest
By Laura Schinnell and Katy Chaney
PO Box 1223
Elma, Washington 98541

Grays Harbor County: Grays Harbor Department of Public Services
By Paul Rogerson, Director of Planning and Building
100 W Broadway, Suite 31
Montesano, Washington 98563-3614

Memorandum

On November 19, 2001, the Energy Facility Site Evaluation Council received an application to amend the existing Site Certification Agreement for the Satsop Combustion Turbine Project. Duke Energy Grays Harbor (Duke Energy) and Energy Northwest (collectively, the “Applicant”), have submitted a request to construct and operate an additional 650 megawatt natural gas-fired combustion turbine electrical generation facility, referred to as Phase II, at the existing Satsop Combustion Turbine site, near Elma, Washington.

Pursuant to RCW 80.50.090 and WAC 463-26-050, the Council convened a public hearing on March 11, 2002, in Lacey, Washington to determine whether the proposed Satsop Combustion Turbine (CT) Project – Phase II site is consistent with Grays Harbor County’s land use plans and zoning ordinances.

At the hearing on March 11, 2002, Katy Chaney, representing the Applicant, appeared and testified and submitted six exhibits:

- Exhibit 1: Satsop Combustion Turbine Project Site Map, including both Phase I and Phase II;
- Exhibit 2: Council Order No. 668, Finding of Consistency with Grays Harbor County Land Use Plans and Zoning Ordinance;
- Exhibit 3: Figure 5.1-2, Existing Zoning in the Project Area from the Satsop Combustion Turbine Project - Application for Amendment 4;
- Exhibit 4: Grays Harbor County Comprehensive Zoning Ordinance No. 38;
- Exhibit 5: WAC 39.84.020(6); and
- Exhibit 6: Letter from Grays Harbor County, dated February 19, 2002, from Paul Rogerson, Director of Planning and Building.

Ms. Chaney’s testimony ended with a statement that it was her opinion that if EFSEC approved the proposed Satsop Combustion Turbine Project – Phase II amendment application, it would be consistent with applicable Grays Harbor County land use plans and zoning ordinances.

Paul Rogerson, representing Grays Harbor County, appeared and testified and submitted a letter dated March 8, 2002 (Exhibit 7) for the record, that supported the county’s finding, as expressed in Exhibit 6, that the proposed Phase II project is consistent with local land use plans and regulations, to include the Grays Harbor County Comprehensive Plan, the Grays Harbor County Shorelines Master Plan, and the Grays Harbor Zoning Code (Ordinance No. 241). Mr. Rogerson also provided clarification that the proposed project is considered to be an “industrial development facility”, as defined in RCW 39.84.020(6), whose use is permitted outright in the Industrial (I-2) zone district that the project is located in. He added that there are no controlling conditions that would effect that use. Mr. Rogerson’s testimony ended with the statement that it was the county’s position that the proposed Satsop Combustion Turbine Project – Phase II, is consistent with Grays Harbor County land use plans and zoning ordinances.

Exhibits 1-7 are hereby incorporated by reference.

Findings of Fact

Based upon the oral and written evidence presented in this proceeding, the Council makes and enters the following Findings of Fact:

1. On November 19, 2001, Duke Energy Grays Harbor and Energy Northwest filed with the Council an application to amend the existing Site Certification Agreement for the Satsop Combustion Turbine Project. The amendment application requests state approval to construct to construct and operate an additional 650 megawatt natural gas-fired combustion turbine electrical generation facility, referred to as Phase II, at the existing Satsop Combustion Turbine Project site, near Elma, Washington.

2. The Council convened a public land use hearing pursuant to due and proper notice on March 11, 2002, in Lacey, Washington.

3. The representatives of the Applicant who testified at the hearing are of the opinion that the proposed site of the Phase II project is consistent and in compliance with county and regional land use plans and ordinances.

4. The representative of Grays Harbor County who testified at the hearing is of the opinion that the proposed site of proposed Phase II project is consistent and in compliance with county and regional land use plans and zoning ordinances.

5. In accordance with WAC 463-26-090, the testimony and exhibits offered by Grays Harbor County attesting to the fact that the proposed project is consistent and in compliance with county or regional land use plans or zoning ordinances, are regarded as *prima facie* proof of consistency and compliance with such zoning ordinances or land use plans.

6. The Council finds that the proposed site of the proposed Satsop Combustion Turbine Phase II project is consistent and in compliance with Grays Harbor County and regional land use plans and regulations and zoning ordinances.

Conclusions of Law

Based upon the foregoing Findings of Fact, the Council makes and enters the following Conclusions of Law:

1. The Council has jurisdiction over the subject matter of this proceeding and the parties to it pursuant to RCW 80.50.090 and Chapter 463-26 WAC.

2. The Council concludes that the proposed site for the Satsop Combustion Turbine - Phase II project is consistent and in compliance with Grays Harbor County and regional land use plans and ordinances as required by RCW 80.50.090(2).

Consistency
Determination

Determination and Order

THE COUNCIL ORDERS that there is hereby entered as of record the Council's determination that the proposed site of the proposed Satsop Combustion Turbine Project – Phase II project, as described in Application No. 2001-03 of Duke Energy Grays Harbor and Energy Northwest, is consistent and in compliance with Grays Harbor County and regional land use plans and zoning ordinances.

Dated at Olympia, Washington this 27th day of March 2002.

**WASHINGTON STATE ENERGY FACILITY
SITE EVALUATION COUNCIL**

By: _____ /s/
Jim Luce
EFSEC Chair

ATTEST:

By: _____ /s/
Allen J. Fiksdal
EFSEC Manager

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of:

APPLICATION NO. 2002-01

BP WEST COAST PRODUCTS, LLC

BP CHERRY POINT
COGENERATION PROJECT

COUNCIL ORDER No. 803 REVISED

**Findings of Fact, Conclusions of Law,
and Order Recommending Approval of
Site Certification on Condition**

SYNOPSIS: The Energy Facility Site Evaluation Council (EFSEC or Council) has reviewed BP West Coast Products, LLC's application for site certification (Application), No. 2002-01; conducted public and adjudicative hearings; and by this Order recommends approval of the Application to the Governor of the state of Washington. The Applicant, BP West Coast Products, LLC, has entered into stipulations and settlement agreements with all parties to the proceeding. The Council approved each settlement agreement. As a result of the settlement agreements, Counsel for the Environment presented no contested issues to the Council. Whatcom County, although presenting evidence in the Adjudicative Proceedings, withdrew all evidence which was contrary to its settlement with the Applicant. As the result of the foregoing Settlements and withdrawal of evidence by Whatcom County and the evidence presented by the Applicant, the Applicant has made a prima facie showing that its proposal complies with all applicable laws. Furthermore, pursuant to the requirements of the settlements and the evidence presented during the hearing, the Applicant will provide offset and mitigation measures such that the planned project will produce minimal adverse impacts on the environment, the ecology of the land and its wildlife, and the ecology of the state waters and their aquatic life. Thus, the proposed project with its revisions and settlement agreement requirements meets the requirements of applicable law and comports with the policy and intent of Chapter 80.50 RCW.

Nature of the Proceeding: This matter involves an application for certification of a proposed site in the Cherry Point Industrial Area in unincorporated Whatcom County, approximately 15 miles Northwest of Bellingham and 7 miles south of Blaine, Washington, for the construction and operation of the BP Cherry Point Cogeneration Project (Project), a natural gas-fired energy production facility with an associated electric transmission line and natural gas pipeline. Approximately 180 acres of undeveloped land would be converted for: the cogeneration facility; gas, water, wastewater, and steam pipelines; construction laydown areas; access roads; and wetland mitigation areas. BP

West Coast Products, LLC, (BP or Applicant) seeks a Site Certification Agreement (SCA) to construct and operate a 720 megawatt (MW) natural gas-fired combined cycle combustion turbine electrical cogeneration facility, an approximately .8 mile 230-Kilovolt (KV) electric transmission line, and a 1,400-foot natural gas pipeline. The siting of the transmission line is under the jurisdiction of the Bonneville Power Administration (Bonneville).

Executive Summary: The Energy Facility Site Evaluation Council (EFSEC or Council) is the state agency charged with making a recommendation to the Governor as to whether a new major energy facility should be sited in the state of Washington. Chapter 80.50 RCW. The Council is aware of the region's need for energy and electrical generation capacity. The Council is also mindful of its duty to protect the broad public interest.

The Council determined, upon careful consideration of the state's need for energy at a reasonable cost and the need to minimize environmental impacts, that this facility with the agreed upon requirements of the various settlements and stipulated mitigation measures will provide the region with significant energy benefits while not resulting in unmitigated, significant adverse environmental impacts. The Council recommends that the Governor approve the siting of this project, as described in this Order and the accompanying Site Certification Agreement.

that the agreed upon provisions appropriately address future site restoration.

Term of the Site Certification Agreement

92. The Council finds that there is a benefit to the public in having permitted facilities ready to be constructed when it becomes known that additional generation is needed.

93. The Council finds that permits conditioning air, wastewater and stormwater discharges attached to the SCA contain requirements that they be updated periodically or must be extended if construction is not underway. This review process assures that current environmental standards are satisfied at the time the facility is constructed.

94. The Council therefore concludes that a ten year term to begin construction creates the balance necessary to protect the environment and the public as well as to recognize the need for facilities pursuant to the policy established in RCW 80.50.010.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the testimony received,, and evidence admitted during the adjudicative and land use hearings, the environmental documents and environmental determinations made by the Council, the settlement agreements presented to, and approved by, the Council, and the record in this matter, the Council makes the following conclusions of law:

1. The Washington State Energy Facility Site Evaluation Council has jurisdiction over the persons and the subject matter of Application No. 2002-01, pursuant to Chapter 80.50 RCW and Chapter 34.05 RCW.

2. The Council conducted its review of the BP Application 2002-01 as adjudicative proceedings and land use hearings, pursuant to Chapter 34.05 RCW as required by RCW 80.50.090(3) and Chapter 463-30 WAC.

3. EFSEC is the lead agency for environmental review of BP's Application pursuant to the requirements of Chapter 43.21C RCW. Because the SEPA responsible official determined that the proposed action could have one or more significant adverse environmental impacts, an Environmental Impact Statement (EIS) was required. The Council complied with Chapter 43.21C RCW, Chapter 197-11 WAC, and Chapter 463-47 WAC, by issuing a Determination of Significance and Scoping notice, conducting a scoping hearing, issuing a Draft Environmental Impact Statement (Draft EIS) for public comment, conducting a public hearing and accepting written comments on the Draft EIS, and adopting a Final Environmental Impact Statement (Final EIS).

4. The Prevention of Significant Deterioration/Notice of Construction (PSD/NOC) air emissions procedure is established in Title 40 CFR Part 52. Federal rules require PSD review of new air pollution sources that meet certain criteria, which includes this Project. The Council is the PSD permitting authority for energy facilities, which are 350 MW or greater, sited in the state of Washington per Chapter 463-39 WAC. The

Council's permit contractor from the Washington Department of Ecology prepared a Draft PSD/NOC permit, which the Council issued for public comment. The Council has appended a Final PSD/NOC Permit as a part of the Site Certification Agreement. The PSD/NOC permit would become effective upon execution of the Site Certification Agreement by the Governor, and approval by U.S. Environmental Protection Agency, Region 10.

5. Pursuant to its authority under Chapter 80.50 RCW, the Council has jurisdiction over process wastewater discharges for energy facilities 350 MW or greater sited in the state of Washington. The Council's permit contractor from the Washington Department of Ecology prepared a Draft State Waste Discharge permit, which the Council issued for public comment. The Council has considered public comments received to the draft permit, and has appended a Wastewater Disposal permit as part of the Site Certification Agreement. The Wastewater Disposal permit would become effective upon execution of the Site Certification Agreement by the Governor.

6. The Council's procedure for National Pollutant Discharge Elimination System (NPDES) water permits is established in Chapter 463-38 WAC. State regulations require storm water discharges to surface waters or wetlands to meet certain criteria. The Council is the NPDES permitting authority for energy facilities 350 MW or greater sited in the state of Washington. The Council prepared a Draft NPDES permit, which the Council issued for public comment. The Council has appended a Final NPDES permit as part of the Site Certification Agreement. The NPDES permit would become effective upon execution of the Site Certification Agreement by the Governor.

7. Section 401 of the federal Clean Water Act, and the Washington State Water Pollution Control Act require that the Council consider the application of conditions to prevent adverse impacts to jurisdictional wetlands and waters of the state. Pursuant to Chapter 80.50 RCW, the Council is the regulatory authority for energy facilities 350 MW or greater sited in the state of Washington. The Council's independent consultant prepared a Recommendation for 401 Water Quality Certification Conditions, which the Council issued for public comment. The Council has included 401 Water Quality Certification conditions in the Site Certification Agreement, which it recommends the Governor execute.

8. The Council is required to determine whether a proposed Project site is consistent with county or regional land use plans or zoning ordinances. RCW 80.50.090; WAC 463-14-030. The Council concludes that the proposed use of the site is consistent and in compliance with county land use plans and zoning laws.

Consistency
Determination

9. The legislature has recognized that the selection of sites for new large energy facilities will have a significant impact upon the welfare of the population, the location and growth of industry, and the use of the natural resources of the state. It is the policy of the state of Washington to recognize the pressing need for increased energy facilities and to ensure through available and reasonable methods that the location and operation of such facilities, so long as such facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and

their aquatic life. RCW 80.50.010.

10. The Council concludes that the certification of the Cherry Point Cogeneration Project, as described in Application 2002-01, with requirements of the settlement agreements, will further the legislative intent to provide abundant energy at reasonable cost, with minimal adverse impact to the environment. At the same time, the mitigation measures and the conditions of the proposed Site Certification Agreement ensure that through available and reasonable methods, the construction and operation of the Project will produce minimal adverse effects to the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.

ORDER AND RECOMMENDATION

Based on the findings of fact, conclusions of law, and the record in this matter, the Draft EIS and Final EIS, the Council issues the following Order.

1. The Council recommends that the Governor of the state of Washington approve certification for the construction and operation of the Cherry Point Cogeneration Project located in Whatcom County, Washington.

2. The Council orders that its recommendations as embodied in the findings of fact, conclusions of law and order, together with the Site Certification Agreement appended hereto, be reported and forwarded to the Governor of the state of Washington for consideration and action.

SIGNATURES

DATED and effective at Olympia, Washington, this ____ day of October, 2004.

James Oliver Luce, Chair

Richard Fryhling,
Department of Community, Trade and
Economic Development

Hedia Adelsman,
Department of Ecology

Chris Towne,
Department of Fish and Wildlife

Tony Ifie, P.E.,
Department of Natural Resources

Tim Sweeney,
Utilities and Transportation Commission

Dan McShane,
Whatcom County

NOTICE TO PARTIES: Administrative relief is not available through a petition for reconsideration.

APPENDIX K

463-30-270 << 463-30-300 >> 463-30-310

WAC 463-30-300

Hearing schedule guidelines.

In any adjudicative site certification proceeding the council shall, after consultation with the parties, schedule the hearing process so that the following general subject areas may be heard separately at specified times, to the extent they are in issue:

- (1) The description of the particular energy facility and the proposed site.
- (2) Consistency of the proposal with zoning and land use regulations.
- (3) Physical site suitability and related safety considerations.
- (4) NPDES, PSD, or other permits.
- (5) On-site and local impacts (physical): Such as aquatic, terrestrial and atmospheric.
- (6) On-site and local impacts (societal): Such as housing, services, recreation, economics, transportation, health, and tax base.
- (7) Peripheral area impacts (all categories).
- (8) Adverse impacts minimization and consideration of conditions of certification.

At the commencement of the hearing, the council shall publicly announce the proposed schedule by which the hearing is to be conducted. The council may alter the schedule.

[Statutory Authority: RCW 34.05.250. 98-01-083, § 463-30-300, filed 12/12/97, effective 1/12/98. Statutory Authority: RCW 80.50.040. 90-05-018, § 463-30-300, filed 2/13/90, effective 3/16/90; Order 109, § 463-30-300, filed 11/16/76.]

No. 36393-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

COLUMBIA RIVERKEEPER, a Washington nonprofit
corporation, and PETER HUHTULA, an Oregon resident,

Appellants,

v.

COWLITZ COUNTY, a Washington political subdivision,
ENERGY NORTHWEST, a Washington joint operating
agency, and PORT OF KALAMA, a Washington municipal
corporation,

Respondents.

CERTIFICATE OF DELIVERY

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PRESTON GATES ELLIS LLP

Attorneys for Respondent
Energy Northwest

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DEPUTY
COURT OF APPEALS
DIVISION II

I hereby certify that I served the foregoing Brief of
Respondent Energy Northwest on:

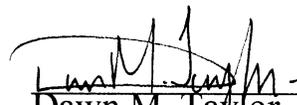
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by mailing true and correct copies thereof, contained in a
sealed, first class postage prepaid envelope, addressed to said
person(s) shown above at his/her last known address, on the
date set forth above.

Dated this 17th Day of September, 2007.


Dawn M. Taylor
Legal Assistant