

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

NO. 81332-9

2008 MAY 14 P 4: 04

BY RONALD R. CARPENTER

SUPREME COURT OF THE STATE OF WASHINGTON

RESIDENTS OPPOSED TO KITTITAS TURBINES,
KITTITAS COUNTY, and F. STEVEN LATHROP,

Petitioners,

v.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION
COUNCIL (EFSEC) and CHRISTINE O. GREGOIRE, Governor of the
State of Washington,

Respondents.

**BRIEF OF RESPONDENTS
WASHINGTON STATE ENERGY FACILITY
SITE EVALUATION COUNCIL (EFSEC)
AND
CHRISTINE O. GREGOIRE,
GOVERNOR OF THE STATE OF WASHINGTON**

ROBERT M. MCKENNA
Attorney General

William B. Collins, WSBA 785
Deputy Solicitor General

Kyle J. Crews, WSBA 6786
Assistant Attorney General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUES.....1

III. FACTS.....2

 A. Overall Scheme of RCW 80.502

 B. Preemption Provisions of RCW 80.50 and EFSEC’s Rules4

 C. Processing of Kittitas Valley Wind Power Project Application.....5

 D. Proceedings in Superior Court.....7

IV. ARGUMENT8

 A. The Legislature Has the Authority to Enact RCW 80.50.140 Under Article II, Section 26, of the Washington Constitution8

 B. The Standard of Review for This Appeal Should Be That Under RCW 34.05.570(4) for “Other Agency Action”15

 C. RCW 80.50 Gives the Governor and EFSEC Jurisdiction Over the Siting of Wind Power Projects Such as This One, Including the Authority to Preempt Local Ordinances19

 D. The GMA Does Not Override the Authority of the Governor Under RCW 80.50 to Preempt Local Land Use Regulations24

 E. EFSEC’s Determination That Its Rules Regarding Preemption Were Satisfied Was Not Arbitrary or Capricious and Was Supported by Substantial Evidence32

 F. Siting of the Project Did Not Violate SEPA.....38

G. The Appearance of Fairness Doctrine Has No Bearing on This Case.....	40
H. Thurston County Superior Court Did Not Abuse Its Discretion in Not Making Findings and Conclusions Regarding Alleged Irregularities.....	46
V. CONCLUSION	50

APPENDICES

- Chapter 80.50 RCW
- Former WAC 463-28-030
- Former WAC 463-28-040
- Council Order No. 826
- Council Order No. 831

TABLE OF AUTHORITIES

Table of Cases

<i>Anderson v. City of Seattle</i> , 78 Wn.2d 201, 471 P.2d 87 (1970).....	24
<i>Blueshield v. Office of the Ins. Comm'r</i> , 131 Wn. App. 639, 128 P.3d 640 (2006).....	18
<i>Burnside v. Simpson Paper Co.</i> , 123 Wn.2d 93, 864 P.2d 937 (1994).....	47
<i>Carpenter v. Butler</i> , 32 Wn.2d 371, 201 P.2d 701 (1949).....	24
<i>Cheney v. City of Mountlake Terrace</i> , 87 Wn.2d 338, 552 P.2d 184 (1976).....	38
<i>City of Bellevue v. King Cy. Boundary Review Bd.</i> , 90 Wn.2d 856, 586 P.2d 470 (1978).....	43
<i>City of Seattle v. Williams</i> , 128 Wn.2d 341, 908 P.2d 359 (1995).....	21
<i>General Telephone Co. of the Northwest, Inc. v. Washington Utilities and Transp. Comm'n</i> , 104 Wn.2d 460, 706 P.2d 625 (1985).....	28
<i>Green River Cmty. Coll. v. Higher Educ. Pers. Bd.</i> , 107 Wn.2d 427, 730 P.2d 653 (1986).....	25
<i>Harris v. Hornbaker</i> , 98 Wn.2d 650, 658 P.2d 1219 (1983).....	42
<i>Hillis v. Dep't of Ecology</i> , 131 Wn.2d 373, 932 P.2d 139 (1997).....	18, 34
<i>In re Elliott</i> , 74 Wn.2d 600, 446 P.2d 347 (1968).....	12

<i>In re Third Lake Washington Bridge</i> , 82 Wn.2d 280, 510 P.2d 216 (1973).....	12, 13, 14
<i>Kitsap Cy. Transp. Co. v. Dep't of Public Works</i> , 170 Wash. 396, 16 P.2d 828 (1932)	11
<i>Klickitat Cy. Citizens Against Imported Waste v. Klickitat Cy.</i> , 122 Wn.2d 619, 860 P.2d 390 (1993).....	38
<i>Littlejohn Constr. Co. v. Dep't of Labor & Indus.</i> , 74 Wn. App. 420, 873 P.2d 583 (1994).....	24, 26
<i>Lund v. Dep't of Ecology</i> , 93 Wn. App. 329, 969 P.2d 1072 (1998).....	47
<i>Magula v. Dep't of Labor & Indus.</i> , 116 Wn. App. 966, 69 P.3d 354 (2003).....	43
<i>Nationscapital Mortgage Corp. v. Dep't of Fin. Inst.</i> , 133 Wn. App. 723, 137 P.3d 78 (2006).....	18, 46
<i>North Bend Stage Line, Inc. v. Dep't of Public Works</i> , 170 Wash. 217, 16 P.2d 206 (1932)	10, 11
<i>Org. to Preserve Agric. Lands v. Adams Cy.</i> , 128 Wn.2d 869, 913 P.2d 793 (1996).....	38, 40, 45, 48
<i>Port of Seattle v. Pollution Control Hearings Bd.</i> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	15, 18, 19
<i>Preserve Our Islands v. Shoreline Hearings Bd.</i> , 133 Wn. App. 503, 137 P.3d 31 (2006).....	38, 39
<i>Pub. Util. Dist. No. 1 of Pend Oreille Cy. v. State, Dep't of Ecology</i> , 146 Wn.2d 778, 51 P.3d 744 (2002).....	15
<i>Raynes v. City of Leavenworth</i> , 118 Wn.2d 237, 821 P.2d 1204 (1992).....	41
<i>Rozner v. City of Bellevue</i> , 116 Wn.2d 342, 804 P.2d 24 (1991).....	24, 26

<i>Schrom v. Bd. for Volunteer Fire Fighters,</i> 153 Wn.2d 19, 100 P.3d 814 (2004).....	14
<i>SEAPC v. Cammack II Orchards,</i> 49 Wn. App. 609, 744 P.2d 1101 (1987).....	38
<i>Seattle v. Day,</i> 96 Wn.2d 646, 638 P.2d 546 (1981).....	21
<i>Skagit Surveyors and Eng'rs, LLC v. Friends of Skagit Cy.,</i> 135 Wn.2d 542, 958 P.2d 962 (1998).....	15
<i>State ex rel. Kurtz v. Pratt,</i> 45 Wn.2d 151, 273 P.2d 516 (1954).....	9, 10
<i>State ex rel. Shomaker v. Superior Ct. for King Cy.,</i> 193 Wash. 465, 76 P.2d 306 (1938)	9
<i>State ex rel. Thielicke v. Superior Ct. for Thurston Cy.,</i> 9 Wn.2d 309, 114 P.2d 1001 (1941).....	9
<i>State v. Bd. of Yakima Cy. Comm'rs,</i> 123 Wn.2d 451, 869 P.2d 56 (1994).....	21
<i>State v. Burke,</i> 92 Wn.2d 474, 598 P.2d 395 (1979).....	27
<i>State v. Elgin,</i> 118 Wn.2d 551, 825 P.2d 314 (1992).....	21
<i>State v. J. P.,</i> 149 Wn.2d 444, 69 P.3d 318 (2003).....	28
<i>State, Dep't of Ecology v. Campbell & Gwinn, LLC,</i> 146 Wn.2d 1, 43 P.3d 4 (2002).....	21
<i>Swift v. Island Cy.,</i> 87 Wn.2d 348, 552 P.2d 175 (1976).....	45
<i>Taggart v. State,</i> 118 Wn.2d 195, 822 P.2d 243 (1992).....	41

<i>Tapper v. Empl. Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	14
<i>Washington Pub. Employees Ass'n v. Washington Pers. Res. Bd.</i> , 91 Wn. App. 640, 959 P.2d 143 (1998).....	41, 42
<i>Washington State Disciplinary Bd. v. Johnston</i> , 99 Wn.2d 466, 663 P.2d 457 (1983).....	44
<i>Waste Management of Seattle, Inc. v. Utilities and Transp. Comm'n</i> , 123 Wn.2d 621, 869 P.2d 1034 (1994).....	28
<i>Western Petroleum Imp. v. Friedt</i> , 127 Wn.2d 420, 899 P.2d 792 (1995).....	20

Constitutional Provisions

Washington Constitution, article II, section 26	8, 9, 10, 11
Washington Constitution, article IV, section 4.....	10, 11
Washington Constitution, article IV, section 6.....	10, 11

Statutes

Laws of 1970, 1st Ex. Sess., ch. 45.....	2
Laws of 1970, Ex. Sess., ch. 25, § 18	28
Laws of 2001, ch. 214, § 2.....	21
Laws of 2001, ch. 214, § 2(2)	22
Laws of 2001, ch. 214, § 3.....	22
Laws of 2001, ch. 214, § 3(17).....	22
Laws of 2006, ch. 205, § 2.....	24

Laws of 2006, ch. 205, § 2(1)	24
Laws of 2006, ch. 205, § 16.....	25
Laws of 2006, ch. 205, § 17.....	25
RCW 34.05	7
RCW 34.05.010(2).....	15
RCW 34.05.455(1)(a)	49
RCW 34.05.570	16
RCW 34.05.570(3).....	16, 17, 18, 33
RCW 34.05.570(3)(e)	18
RCW 34.05.570(4).....	15, 16, 17, 33
RCW 34.05.570(4)(i)	17
RCW 34.05.570(4)(ii).....	17
RCW 34.05.570(4)(iv)	17
RCW 36.70A.....	24
RCW 36.70A.010.....	31
RCW 36.70A.020(1)-(13).....	31
RCW 36.70A.030(4).....	31
RCW 36.70A.040.....	32
RCW 36.70A.103.....	31, 32
RCW 36.70A.190(4)(b)	25
RCW 36.70A.200.....	31, 32

RCW 36.70A.200(1).....	32
RCW 42.36	43
RCW 43.21C.....	38
RCW 43.21C.090.....	38
RCW 43.330.904	43
RCW 70.94.422(2).....	41
RCW 80.50	passim
RCW 80.50.010	2, 29, 36
RCW 80.50.010(5).....	2, 29
RCW 80.50.020	22
RCW 80.50.020(5).....	30
RCW 80.50.020(11).....	20, 22, 23
RCW 80.50.020(15).....	20
RCW 80.50.020(15)(a)-(e).....	20
RCW 80.50.020(16).....	25
RCW 80.50.020(17).....	25
RCW 80.50.020(18).....	19
RCW 80.50.030	2
RCW 80.50.030(2)(b)	3
RCW 80.50.030(3)(a)	3, 40, 43
RCW 80.50.030(4).....	3

RCW 80.50.040	3, 29, 49
RCW 80.50.040(2).....	29, 41
RCW 80.50.040(4).....	30
RCW 80.50.040(5).....	29
RCW 80.50.040(6).....	41
RCW 80.50.040(8).....	16, 41
RCW 80.50.040(9).....	30, 43
RCW 80.50.060	22, 27
RCW 80.50.060(1).....	21, 22
RCW 80.50.060(2).....	passim
RCW 80.50.075	23, 24
RCW 80.50.090	42
RCW 80.50.090(1).....	17
RCW 80.50.090(2).....	5, 17, 26
RCW 80.50.090(3).....	17, 42
RCW 80.50.100	2, 4
RCW 80.50.100(1).....	3, 4
RCW 80.50.100(2).....	3, 15
RCW 80.50.100(2)(a)-(c).....	17
RCW 80.50.110(1).....	4, 26, 27, 28
RCW 80.50.110(2).....	passim

RCW 80.50.120(1).....	4
RCW 80.50.120(2).....	30
RCW 80.50.120(3).....	4
RCW 80.50.140	passim
RCW 80.50.140(1).....	passim
RCW 80.50.140(1)(a)	13
RCW 80.50.140(1)(a)-(d)	7
RCW 80.50.140(1)(b)	12
RCW 80.50.140(1)(c)	13
RCW 80.50.140(1)(d)	13
RCW 80.50.175(1).....	30
RCW 90.48.262(2).....	41

Regulations

WAC 365-195-020.....	25
WAC 365-195-340(1)(a)	32
WAC 365-195-340(2)(c)	32
WAC 365-195-745(1).....	25
WAC 365-195-765(2).....	31, 32
WAC 463-28-030 (2006).....	4, 5
WAC 463-28-030(1) (2006)	5, 6

WAC 463-28-030(2) (2006)	5
WAC 463-28-030(3) (2006)	5
WAC 463-28-040 (2006)	4, 5, 33
WAC 463-28-040(1) (2006)	33
WAC 463-28-040(1)-(4) (2006)	37
WAC 463-28-040(2) (2006)	35
WAC 463-30-050	44
WAC 463-38	42
WAC 463-39	42

Court Rules

RAP 4.2(a)(4)	12
RAP 13.4(b)(4)	12

Other Authorities

170 Washington Briefs Vol. 3, 152-250, No. 13	11
Joseph L. McCarthy, <i>Symposium – The Location of Electricity- Generating Facilities (Introduction – The Evolution of Washington’s Siting Legislation)</i> , 47 Wash. L. Rev. 1 (1971)	2
WSR 07-21-035	5

I. INTRODUCTION

Petitioners seek judicial review of a decision of the Governor of the State of Washington. The Governor, upon the recommendation of the Energy Facility Site Evaluation Council (EFSEC), approved a proposed alternative energy wind turbine project known as the Kittitas Valley Wind Power Project (Project). As part of her decision, the Governor preempted Kittitas County land use ordinances that were inconsistent with the Project and that duplicated EFSEC's authority and processes.

II. ISSUES

1. Is RCW 80.50.140, which grants this Court jurisdiction over this matter, constitutional?
2. Does RCW 80.50 govern the siting of wind power projects?
3. Was the authority given to the Governor and EFSEC in RCW 80.50 superseded by the Growth Management Act (GMA)?
4. Did the Governor and EFSEC err in concluding that the wind power project in question met the standards under EFSEC's rules for preemption of local land use plans and zoning ordinances?
5. Did the Governor and EFSEC err in concluding that the Project met the requirements of the State Environmental Policy Act (SEPA)?
6. Should the Governor's action or EFSEC's recommendation to her be invalidated based on alleged violations of the Appearance of Fairness Doctrine?
7. Did the Thurston County Superior Court err in certifying this matter to the Supreme Court without taking additional testimony and entering findings of fact?

III. FACTS

A. Overall Scheme of RCW 80.50

In 1970, the Legislature established a statutory framework for evaluating applications to site and operate large energy projects in Washington. Laws of 1970, 1st Ex. Sess., ch. 45 (currently codified at RCW 80.50).¹ The Legislature's intent was to develop a "procedure for the selection and utilization of sites for energy facilities" and to "identif[y] . . . a state position with respect to each proposed site." RCW 80.50.010. Among the Legislature's goals was "[t]o avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay." RCW 80.50.010(5).²

The Legislature conferred ultimate authority over the siting, construction, and operating conditions of these energy facilities to the Governor. RCW 80.50.100. The Legislature created a state agency, now called EFSEC, to receive and process applications for energy facilities. Currently, EFSEC has six fixed State members, and a varying number of additional members are added depending on the nature and location of the proposed project. RCW 80.50.030. With respect to the Project involved in this appeal, EFSEC consisted of the chair appointed by the Governor

¹ RCW 80.50 is attached as an Appendix to this brief.

² See generally Joseph L. McCarthy, *Symposium – The Location of Electricity-Generating Facilities (Introduction – The Evolution of Washington's Siting Legislation)*, 47 Wash. L. Rev. 1 (1971).

and representatives of the State Departments of Community, Trade, and Economic Development; Ecology; Fish and Wildlife; Natural Resources; and the Utilities and Transportation Commission, as well as Kittitas County. RCW 80.50.030(2)(b), (3)(a), (4).

EFSEC's role includes investigating the sufficiency of applications for energy facility locations, making independent studies of proposed sites, conducting hearings on the proposed location of facilities, preparing reports to the Governor that include a recommendation as to the disposition of the application, and drafting a site certification agreement for those applications that EFSEC recommends be approved. RCW 80.50.040.

Throughout RCW 80.50, the Legislature is clear that the process is to be expedited. EFSEC must provide a recommendation to the Governor within 12 months of receipt of an application unless a later time is agreeable to Applicant. RCW 80.50.100(1). The Governor must make a decision within 60 days of receiving EFSEC's recommendation. RCW 80.50.100(2). If the Governor sends the matter back to EFSEC for further work, EFSEC must react "expeditiously," and if EFSEC then resubmits a recommendation to the Governor, the Governor must again act on the resubmitted recommendation within 60 days. *Id.*

B. Preemption Provisions of RCW 80.50 and EFSEC's Rules

In establishing the statutory regime for consolidated and unitary energy facility siting, the Legislature expressly superseded all existing contradictory laws, RCW 80.50.110(1), and prospectively authorized the Governor to preempt the regulation and certification of location, construction, and operational conditions of energy facilities, RCW 80.50.110(2), including local land use plans and zoning ordinances. RCW 80.50.100(1). The Governor's siting decision includes making a decision about whether to preempt a county's land use plans and zoning ordinances. RCW 80.50.100. Gubernatorial approval of an energy facility site certification agreement is in lieu of any permit, certificate, or similar document required by, and is binding on, state agencies and political subdivisions of the State. RCW 80.50.120(1), (3).

During the time this application was being processed, EFSEC had in place rules regarding preemption of local land use plans and zoning ordinances. Former WAC 463-28-030 (2006)³ provided that if EFSEC determined that the site of the proposed energy facility is not consistent with local land use plans or zoning ordinances, the applicant had 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

³ Former WAC 463-28-030 and former WAC 463-28-040 are attached as an Appendix to this brief.

noncompliance.” Former WAC 463-28-030(1). This rule further provided that the applicant could request that EFSEC proceedings be stayed while the applicant tried to resolve the noncompliance, WAC 463-28-030(2), and that the applicant was to submit regular reports to EFSEC regarding the status of negotiations with local authorities on noncompliance issues. WAC 463-28-030(3). Another rule, former WAC 463-28-040 (2006), provided a mechanism for the applicant to request state preemption if it was unable to resolve the noncompliance issues with the local authorities.⁴

C. Processing of Kittitas Valley Wind Power Project Application

In January 2003, Horizon Wind Energy, LLC, through its subsidiary, Sagebrush Power Partners, LLC (Applicant), filed an Application for Site Certification with EFSEC for an alternative energy wind turbine project known as the Kittitas Valley Wind Power Project. (Administrative Record (AR) 1) The proposed Project is located about 12 miles northwest of Ellensburg. (AR 322)

In May 2003, EFSEC held the land use consistency hearing pursuant to RCW 80.50.090(2). (AR 14076) EFSEC found that the proposed land use was not consistent with the County’s land use ordinances and entered an order to that effect. (AR 14076)

⁴ EFSEC repealed WAC 463-28-030 and WAC 463-28-040 in October 2007. WSR 07-21-035.

Pursuant to former WAC 463-28-030(1), Applicant attempted to achieve compliance with local land use ordinances and was unsuccessful. In February 2004, Applicant filed a request for preemption with EFSEC. In September 2004, Applicant and the County jointly requested that EFSEC suspend its proceedings, which request EFSEC granted. In October 2005, Applicant withdrew its request for preemption. (AR 6155) Applicant then made a second attempt to achieve local land use consistency through working with Kittitas County. On June 6, 2006, the Kittitas County Board of County Commissioners denied the Project. (AR 8244-8252)

Applicant then renewed its request for preemption under the EFSEC process. EFSEC conducted public hearings and an adjudicative hearing in Ellensburg during September 2006. On March 27, 2007, by a six-to-one vote (with the Kittitas County member voting to deny), EFSEC recommended to the Governor that the Project be approved, including preemption of local land use regulations. (AR 14257) EFSEC sent this recommendation to the Governor on May 2, 2007. (AR 11294)

In June 2007, the Governor remanded the matter back to EFSEC for further consideration of the setback requirements of the wind turbines. (AR 11390) EFSEC conducted another public meeting in July 2007 and took additional public comments. EFSEC again voted six-to-one to

recommend the Project with revised modifications to the Site Certification Agreement (AR 11864) and transmitted its recommendation of approval to the Governor on August 14, 2007. (AR 11862) On September 18, 2007, the Governor approved the Project and signed the revised Site Certification Agreement. (AR 11907)

D. Proceedings in Superior Court

The Legislature provided that the Governor's final decision for site certification is subject to judicial review under RCW 80.50.140 and RCW 34.05 (administrative procedure act). A petition for review must be filed in Thurston County Superior Court. RCW 80.50.140(1). Under RCW 80.50.140, the 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.

RCW 80.50.140(1)(a)-(d).

In October 2007, F. Steven Lathrop (Lathrop) and the Residents Opposed to Kittitas Turbines (ROKT) and Kittitas County filed petitions for review with the Thurston County Superior Court (Supplemental Record⁵ (SR) 153), which the court consolidated. (SR 119) After allowing Petitioners discovery on their claim of procedural irregularities, the Superior Court determined that the criteria in RCW 80.50.140 for certification to this Court had been met and certified the consolidated petition to this Court on February 29, 2008. (SR 486)

IV. ARGUMENT

A. **The Legislature Has the Authority to Enact RCW 80.50.140 Under Article II, Section 26, of the Washington Constitution**

A threshold issue raised by this Court is whether the Court should retain jurisdiction over this appeal. RCW 80.50.140(1) provides that the Thurston County Superior Court “shall” certify petitions for review of a final decision under RCW 80.50 to the Supreme Court if certain conditions are met and that “[u]pon 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.”

⁵ The record of the proceedings in Thurston County Superior Court was transmitted to the Supreme Court, but it was not numbered as is usually the case with Clerk’s Papers. For the convenience of the Court, EFSEC has provided the Court and the parties a copy of this record that has been numbered.

RCW 80.50.140 falls within the power of the Legislature under article II, section 26, of the Washington Constitution, which provides: “The legislature shall direct by law, in what manner, and *in what courts*, suits may be brought against the state.” (Emphasis added.) This Court has acknowledged the Legislature’s authority under article II, section 26, to specify in what courts actions may be brought. *See, e.g., State ex rel. Shomaker v. Superior Ct. for King Cy.*, 193 Wash. 465, 469–70, 76 P.2d 306 (1938) (statute requiring action against the State be brought exclusively in Thurston County Superior Court); *State ex rel. Thielicke v. Superior Ct. for Thurston Cy.*, 9 Wn.2d 309, 310, 114 P.2d 1001 (1941) (same). In *State ex rel. Kurtz v. Pratt*, 45 Wn.2d 151, 273 P.2d 516 (1954), this Court upheld a statute that granted the Supreme Court original jurisdiction for the correction of errors and prevention of wrongful acts in connection with elections. According to the Court:

We need not pass upon the question of whether the issuance of an original extraordinary writ is authorized and proper in this case. *The legislature is unquestionably authorized by the constitution to provide for the proper conduct of elections.* Rem. Rev. Stat. § 5202 (*cf.* RCW 29.04.030), *is therefore a proper exercise of legislative power.* It creates a special procedure for the correction of errors and the prevention of wrongful acts in connection with elections.

Kurtz, 45 Wn.2d at 156 (emphasis added). Similarly, in this case, article II, section 26, authorizes the Legislature to determine in what courts an action against the State may be brought.

Petitioners make two arguments to support their claim that RCW 80.50.140 is unconstitutional. The first relies on *North Bend Stage Line, Inc. v. Dep't of Public Works*, 170 Wash. 217, 221, 16 P.2d 206 (1932). ROKT Br. 19-23; Kittitas Br. 10-11. Petitioners' reliance on this case is misplaced because the court in that case never considered the application of article II, section 26. In *North Bend Stage Line*, the Court held that a statute that provided for direct review by the Supreme Court of a decision of the Department of Public Works, without any review by the superior court, violated article IV, sections 4 and 6 of the Washington Constitution. The jurisdiction of the Supreme Court is set out in article IV, section 4, and the jurisdiction of the superior court is set out in article IV, section 6. The Court held that the statute was not within the Supreme Court's original jurisdiction because section 4 limited the Court's original jurisdiction to issuing writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and other original and remedial writs. *North Bend Stage Line*, 170 Wash. at 227. And the statute did not fall within the Supreme Court's appellate jurisdiction because that was limited to reviewing the final judgment, order, or decree of some inferior court,

not an administrative agency. *Id.* at 226, 228. *North Bend Stage Line* held that the statute violated article IV, section 6 because it deprived the superior court of its constitutional review and certiorari jurisdiction. *North Bend Stage Line*, 170 Wash. at 228.

North Bend Stage Line did not consider article II, section 26. Indeed, the briefing in *North Bend Stage Line* did not discuss or even cite to article IV, sections 4 and 6, or article II, section 26. 170 Washington Briefs Vol. 3, 152-250, No. 13. Moreover, in *North Bend Stage Line*, the Legislature sought to totally deprive the superior court of jurisdiction. In contrast, RCW 80.50.140(1) provides for jurisdiction in the Supreme Court only if the superior court certifies that certain conditions are met.

Article IV, sections 4 and 6, and article II, section 26, must be read together. In this case, the Legislature made the policy decision that when the State is sued over a siting decision made by the Governor following a recommendation from EFSEC, the Thurston County Superior Court should perform a gatekeeping function. If the required conditions are satisfied, then the case should be certified to the Supreme Court. Thus, the judicial review process under RCW 80.50.140 does not violate the Washington Constitution as bypassing the superior court.⁶

⁶ Even if this Court were to conclude that RCW 80.50.140 was unconstitutional, the Court can and should exercise its discretion to retain this case. In both *North Bend Stage Line*, 170 Wash. at 228-29, and *Kitsap Cy. Transp. Co. v. Dep't of Public Works*,

Although RCW 80.50.140 empowers the Supreme Court to hear a petition for review of a decision by the Governor based on a recommendation of EFSEC, it is not required to do so. That is a matter for the discretion of the Supreme Court. *In re Elliott*, 74 Wn.2d 600, 609, 446 P.2d 347 (1968). *In re Elliott* dealt with a statute that authorized the Supreme Court to decide questions of state law certified to it directly by a federal court without an intervening decision by a superior court. Although the statute used the term “shall,” the Court held this word can be interpreted as being discretionary and “even if it be intended to be mandatory it must be subject to the necessary limitation that a proper case has been made out for the exercise of the power.” *In re Elliott*, 74 Wn.2d at 609. Thus, although RCW 80.50.140 uses the term “shall” with reference to this Court and its processing of appeals under RCW 80.50, that term should be read as permissive rather than mandatory.

Petitioners’ second argument is that there are practical reasons why review of administrative decisions by the superior court in the first instance is preferable. They rely on *In re Third Lake Washington Bridge*,

170 Wash. 396, 398, 16 P.2d 828 (1932), the Court retained jurisdiction over cases that had been brought under a statute that the Court later concluded was unconstitutional. The Court recognized that the parties in those cases should not be penalized for following the method of review prescribed by the Legislature. In addition to that consideration, the present case meets the standards for acceptance of review by this Court set forth in RAP 4.2(a)(4) and RAP 13.4(b)(4) as involving issues of substantial public importance as is evidenced by the superior court’s determination that the petitions met this same criteria as set out in RCW 80.50.140(1)(b).

82 Wn.2d 280, 510 P.2d 216 (1973). But in RCW 80.50.140 the Legislature has addressed these concerns. In *In re Third Lake Washington Bridge*, the Court was concerned that the superior court was in a better position to ensure that the administrative record was in proper shape. 82 Wn.2d at 286, 288. Under RCW 80.50.140(1), the superior court can certify the matter to this Court only upon the condition that “[r]eview can be made on the administrative record” and that “[t]he record is complete for review.” RCW 80.50.140(1)(a), (d). In *In re Third Lake Washington Bridge*, the Court noted that a superior court would be better able to “tak[e] proofs as to alleged irregularities in agency procedure not shown on the record.” 82 Wn.2d at 286, 288. RCW 80.50.140(1) provides for a procedure for the superior court to take testimony and make findings on alleged irregularities not shown on the record before certifying the matter to this Court.

In *In re Third Lake Washington Bridge*, the Court was concerned about having every case go directly to the appellate courts when review by the superior court might resolve the case without further appeal or eliminate some issues. 82 Wn.2d at 288-89. The Court also opined that initial review by the superior court would be more “speedy and economical” for the parties. *Id.* at 285. Under RCW 80.50.140(1)(c), the superior court can certify the matter to this Court only if it determines that

“[r]eview by the supreme court would likely be sought regardless of the determination of the Thurston county superior court.” Accordingly, in cases that meet the criteria for certification to the Supreme Court under RCW 80.50.140, adding a layer of judicial review at the superior court level would impose additional costs on the parties and would delay ultimate resolution of the case, contrary to the express intent of the Legislature that review under RCW 80.50 be expedited.

The Court in *In re Third Lake Washington Bridge* also noted that the superior court would usually have more time than the appellate court to review the record and consider the arguments of the parties. 82 Wn.2d at 286, 288. However, if a case does go up on appeal to this Court, the Court reviews the case directly on the administrative record without consideration of the superior court’s decision (except as to additional findings made by the superior court). *Schrom v. Bd. for Volunteer Fire Fighters*, 153 Wn.2d 19, 24, 100 P.3d 814 (2004); *Tapper v. Empl. Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Accordingly, while it may be helpful to have the superior court’s view of the legal merits of the petition for judicial review, that is not necessary for this Court’s review and is in no way binding on this Court. Moreover, since the Supreme Court’s jurisdiction is discretionary, it can return the case to the superior court if it would be helpful to have the superior court’s views on the legal

merits. But there are certainly instances in which this Court has not found review by a lower court necessary and has directly reviewed administrative decisions without a prior decision by either the superior court or the court of appeals. *See Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 582-583, 90 P.3d 659 (2004); *Pub. Util. Dist. No. 1 of Pend Oreille Cy. v. State, Dep't of Ecology*, 146 Wn.2d 778, 789, 51 P.3d 744 (2002); *Skagit Surveyors and Eng'rs, LLC v. Friends of Skagit Cy.*, 135 Wn.2d 542, 553, 958 P.2d 962 (1998). For all the above reasons, this Court has and should retain jurisdiction over this matter.

B. The Standard of Review for This Appeal Should Be That Under RCW 34.05.570(4) for "Other Agency Action"

Under RCW 80.50.140(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 [APA] and this section." But for this statute, the decision by the Governor approving an application and entering into a site certification agreement under RCW 80.50.100(2) would not be reviewable, at least not under the APA. As a general matter, the Governor is not an "agency" under the APA and thus the APA does not apply to her decisions. *See* RCW 34.05.010(2) (Governor not an "agency" "except to the extent otherwise required by law").

Judicial review under the APA falls under RCW 34.05.570, which is divided according to the type of agency action for which judicial review is being sought. Petitioners contend that this matter is governed by RCW 34.05.570(3), which applies to “review of agency orders in adjudicative proceedings.” ROKT Br. 17-19; Kittitas Br. 9-10. Petitioners’ standard is incorrect. The standard of review of the Governor’s decision accepting the recommendation of EFSEC calls for the application of RCW 34.05.570(4), which governs review of “other agency action.” Review under subsection (4) more appropriately reflects the unique nature of the Governor’s decision-making role and is more consistent with the overall application of the APA.

Under the law, EFSEC prepares “written reports to the governor” rather than an order or an initial order under the APA. RCW 80.50.040(8). The reports 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.” *Id.* As part of the process for preparing the report, EFSEC must conduct “an informational public hearing in the county of the proposed site” and “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.” RCW 80.50.090(1), (2). EFSEC must also hold “a public hearing, conducted as an adjudicative proceeding under chapter 34.05 RCW[.]” RCW 80.50.090(3). When the Governor receives EFSEC’s report, she is authorized to “[a]pprove the application and execute the draft certification agreement; or [r]eject the application; or [d]irect the council to reconsider certain aspects of the draft certification agreement.” RCW 80.50.100(2)(a)-(c). This process is “other agency action” under RCW 34.05.570(4). The fact that one of the three hearings EFSEC is required to hold is “conducted as an adjudicative proceeding” does not render EFSEC’s report or the Governor’s decision an “order in adjudicative proceedings” governed by RCW 34.05.570(3).

Under RCW 34.05.570(4) the Governor’s decision to approve an application can be overturned by the Court only if it is found to be (i) unconstitutional, (ii) outside the statutory authority of the agency or the authority conferred by a provision of law, (iii) arbitrary or capricious, or (iv) taken by persons who were not properly constituted as agency officials lawfully entitled to take such action. The standards under RCW 34.05.570(4)(i), (ii), and (iv) are reviewed *de novo* as a matter of law.

Arbitrary or capricious action is action that is willful and unreasoning and taken without regard to the attending facts and circumstances. *Port of Seattle*, 151 Wn.2d at 589. “Where there is room for two opinions, and the agency acted honestly and upon due consideration, this court should not find that an action was arbitrary and capricious, even though the court may have reached the opposite conclusion.” *Id.* In addition, “RCW 34.05.570[4] provides that in reviewing matters within agency [here, gubernatorial] discretion, the court shall limit its review to assuring that the agency has exercised its discretion in accordance with the law and shall not undertake to exercise the discretion that the Legislature has placed in the agency.” *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 395, 932 P.2d 139 (1997). Furthermore, substantial judicial deference is appropriate when an agency determination is based heavily on factual matters that are complex, technical, and close to the heart of the agency’s expertise. *Id.* at 396. *Accord, Blueshield v. Office of the Ins. Comm’r*, 131 Wn. App. 639, 646, 128 P.3d 640 (2006); *Nationscapital Mortgage Corp. v. Dep’t of Fin. Inst.*, 133 Wn. App. 723, 738, 137 P.3d 78 (2006).

Even if this Court were to conclude that this appeal is governed by RCW 34.05.570(3), this would only add the standard that the order is not supported by substantial evidence. RCW 34.05.570(3)(e). The substantial

evidence test is whether the record contains a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. *Port of Seattle*, 151 Wn.2d at 588. The extensive record before this Court meets this substantial evidence test.

C. RCW 80.50 Gives the Governor and EFSEC Jurisdiction Over the Siting of Wind Power Projects Such as This One, Including the Authority to Preempt Local Ordinances

RCW 80.50.110(2) provides: “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.” (Emphasis added.)

RCW 80.50.060(2) states:

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.

(Emphasis added.) RCW 80.50.020(18) provides: “‘Alternative energy resources’ 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[.]” RCW 80.50.020(18). Reading these statutes together, it is clear that the State’s preemption authority in RCW 80.50.110(2) applies to an energy facility that exclusively uses wind.

ROKT argues that preemption does not apply because the term “energy facility” in RCW 80.50.060(2) is defined, and that definition does not include wind projects. ROKT Br. 38-40. Under ROKT’s theory, “energy facility” is defined as “an energy plant or transmission facilities[.]” RCW 80.50.020(11) (emphasis added). In turn, “energy plant” “means the following facilities together with their associated facilities[.]” RCW 80.50.020(15). These include “[a]ny stationary thermal power plant, . . . [f]acilities which will have the capacity to receive liquefied natural gas, . . . [f]acilities which will have the capacity to receive . . . crude or refined petroleum or liquefied petroleum gas, . . . [a]ny underground reservoir for receipt and storage of natural gas . . . , and [f]acilities capable of processing . . . petroleum into refined products.” RCW 80.50.020(15)(a)-(e). Since none of these facilities exclusively uses wind power, ROKT argues that RCW 80.50.060(2) does not apply to wind projects and, therefore, EFSEC has no jurisdiction over such projects.

To determine the meaning of the statute, a court first looks to the language of the statute. *Western Petroleum Imp. v. Friedt*, 127 Wn.2d 420, 423-24, 899 P.2d 792 (1995). If the language is clear and unambiguous, the plain language prevails. *Id.* However, if the language is subject to two or more reasonable interpretations, the statute will be construed in a manner which best fulfills the legislative purpose and

intent. *State v. Bd. of Yakima Cy. Comm'rs*, 123 Wn.2d 451, 869 P.2d 56 (1994). The court will “avoid a literal reading of a statute if it would result in unlikely, absurd, or strained consequences.” *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992). “The spirit or purpose of an enactment should prevail over the express but inept wording.” *Id.*, citing *Seattle v. Day*, 96 Wn.2d 646, 648, 638 P.2d 546 (1981). And the court will attempt to give “meaning to every word that the Legislature chose to include in a statute and to avoid rendering any language superfluous.” *City of Seattle v. Williams*, 128 Wn.2d 341, 349, 908 P.2d 359 (1995).

ROKT’s argument is not well taken. It renders RCW 80.50.060(2) meaningless. In 2001, when RCW 80.50.060(2) was enacted, RCW 80.50.060(1) already applied the preemption of local land use laws to facilities that met the definition of energy plants. Laws of 2001, ch. 214, § 2. In adding RCW 80.50.060(2), the Legislature intended to extend the reach of the EFSEC process, including preemption, to facilities that used alternative energy resources. ROKT’s literal reading of the term “energy facility” leads to the absurd result that RCW 80.50.060(2) does not apply to wind, even though wind is an alternative energy resource.

In interpreting statutes, it is also appropriate to consider legislative history. *State, Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). Here the legislative history is revealing. In

2001, when the Legislature amended RCW 80.50.060 to extend the reach of RCW 80.50 to “an energy facility *that exclusively uses alternative energy resources*” (Laws of 2001, ch. 214, § 2(2) (emphasis added)), it also defined that term to include “wind” and “wave or tidal action[.]” Laws of 2001, ch. 214, § 3(17). ROKT’s argument is based on limiting the term “energy facility” to the literal definition in RCW 80.50.020(11). However, in 2001, the Legislature also amended the definition section in RCW 80.50.020 to provide that the “definitions in this section apply throughout this chapter *unless the context clearly requires otherwise.*” Laws of 2001, ch. 214, § 3 (emphasis added). In this case “context clearly requires otherwise.” RCW 80.50.060(2) applies to an energy facility that exclusively uses alternative energy resources including wind.

Kittitas County makes a slightly different argument in an effort to give meaning to RCW 80.50.060(2). It argues that RCW 80.50.060(2) applies to energy facilities that would not be covered by RCW 80.50.060(1) because of the output requirements in the definition of “energy plant.” Kittitas Br. 18-28. An example would be a thermal plant that is powered exclusively by landfill gas—an alternative energy resource—that does not have the output required for a thermal plant to be covered by RCW 80.50.060(1). Kittitas argues that this construction is

necessary to give meaning to the phrase “regardless of the generating capacity of the project” in RCW 80.50.060(2).

This argument is flawed. It may give meaning to the phrase “regardless of the generating capacity of the project,” but it renders the words “wind” and “wave or tidal action” in the definition of alternative energy resources meaningless. A thermal plant could not be exclusively powered by wind or wave or tidal action. Under Kittitas County’s argument, to give some words meaning, other words must be read out of the statute. This is not a proper application of the canon of construction that the Court should give meaning to all the language in a statute. A reading that gives meaning to all the words in the context of RCW 80.50.060(2) requires that the term “energy facility” in that statute be given a broader meaning than the definition in RCW 80.50.020(11). All the words are given meaning if RCW 80.50.060(2) applies to an energy facility that exclusively uses wind, solar energy, geothermal energy, landfill gas, wave or tidal action, or biomass energy based on solid organic fuels to generate energy regardless of the facility’s generating capacity.

There is yet another reason why “energy facility” as defined in RCW 80.50.020(11) is different from an energy facility that exclusively uses alternative energy. Prior to 2006, RCW 80.50.075 authorized a

person filing an application for certification of an “energy facility” to apply to EFSEC for expedited processing. Laws of 2006, ch. 205, § 2. In 2006, the Legislature amended RCW 80.50.075 so that a person seeking certification of “an alternative energy resource facility” could also apply for expedited processing. Laws of 2006, ch. 205, § 2(1). Thus, the Legislature differentiated between “energy facility” and “alternative energy resource facility.” Subsequent legislative acts may be referred to in determining the Legislature’s intent in prior acts. *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347-48, 804 P.2d 24 (1991); *Littlejohn Constr. Co. v. Dep’t of Labor & Indus.*, 74 Wn. App. 420, 427, 873 P.2d 583 (1994). In such situations, the courts will accede to the construction the Legislature has subsequently placed on its own prior amendments. *Carpenter v. Butler*, 32 Wn.2d 371, 377, 201 P.2d 701 (1949); *Anderson v. City of Seattle*, 78 Wn.2d 201, 203, 471 P.2d 87 (1970). For the above reasons, the Court should reject Petitioners’ arguments that the Governor and EFSEC do not have authority over the siting of wind power projects.

D. The GMA Does Not Override the Authority of the Governor Under RCW 80.50 to Preempt Local Land Use Regulations

Petitioners claim that the enactment of RCW 36.70A, the Growth Management Act (GMA), removed the Governor’s power to preempt local land use laws when siting a facility through the EFSEC process. ROKT

Br. 68-78; Kittitas Br. 36-37. At the outset, there are two reasons to reject this claim. First, rules adopted by the Department of Community, Trade, and Economic Development (CTED) reject this interpretation. The Legislature delegated to CTED the authority to promulgate regulations implementing the GMA. RCW 36.70A.190(4)(b); WAC 365-195-020. CTED expressly acknowledged state occupation of the field of energy facility siting under RCW 80.50. According to CTED, plans and regulations adopted under the GMA “should accommodate situations where the state has explicitly preempted all local land use regulations, *as for example, in the siting of major energy facilities under RCW 80.50.110.*” WAC 365-195-745(1) (emphasis added). CTED’s rules implementing the GMA are entitled to deference because the Legislature expressly directed CTED to develop such rules. *Green River Cmty. Coll. v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 438, 730 P.2d 653 (1986).

Second, in 2006, the Legislature confirmed CTED’s interpretation of the GMA as it relates to RCW 80.50. The Legislature amended the definition of “land use plan” and “zoning ordinance” in RCW 80.50.020(16) and (17) to include comprehensive plans or zoning ordinances adopted under “36.70A RCW [the GMA].” Laws of 2006, ch. 205, §§ 16, 17. Under RCW 80.50, the initial step in deciding whether

preemption of local regulations is necessary is “to 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). The 2006 amendment makes it clear that the first step in the preemption analysis, determination of compliance with local land use laws, includes those adopted under the GMA. Thus, in the 2006 amendment, the Legislature made it clear that among the local regulations that the Governor has authority to preempt under RCW 80.50.110(2) are those adopted to carry out the GMA. The Court can refer to the 2006 amendment to ascertain the Legislature’s intent in prior acts. *Rozner*, 116 Wn.2d at 347-48; *Littlejohn Constr. Co.*, 74 Wn. App. at 427.

To support its claim that the GMA removes the Governor’s authority to preempt local land use laws, ROKT also points to the phrase, “which is now in effect under any other law of the state,” in RCW 80.50.110(1). ROKT argues that preemption does not apply because the GMA was not in effect when RCW 80.50.110(1) was enacted. ROKT Br. 68-71. This argument fails for two reasons. First, RCW 80.50.110(1) does not preempt local law. Preemption is found in RCW 80.50.110(2). RCW 80.50.110(1) provides:

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.

(Emphasis added.) There is no mention of preemption in RCW 80.50.110(1). On the other hand, RCW 80.50.110(2) provides:

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.

(Emphasis added.) There is no limitation in RCW 80.50.110(2) that would restrict its application to preemption with respect to a law which is now in effect. Rather, preemption applies to the “location, construction, and operational conditions” of energy facilities under RCW 80.50.060 “as now or hereafter amended.” This preemption applies to the 2001 amendment that added RCW 80.50.060(2) to the statute.

The second flaw in the argument is that ROKT reads the phrase “which is now in effect” in isolation. The courts determine the Legislature’s intent by “construing the statutory language in the context of the statute as a whole, rather than by looking at the phrase at issue in isolation.” *State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979). ROKT pulls three words from RCW 80.50.110(1) and reads them out of context. ROKT’s reading disregards the overall statutory scheme and the plain language in RCW 80.50.110(2) and other sections of the chapter and

would lead to absurd results. Moreover, the use of the words “now in effect” in RCW 80.50.110(1) is perfectly logical when one considers the history of the statute. The Legislature was simply saying that as of the moment when RCW 80.50 became effective, *i.e.*, February 23, 1970, the State was taking over the siting of energy facilities.⁷ It would be anomalous for the Court to construe these words to have exactly the opposite effect as intended.

Both ROKT and Kittitas County make another argument to support their claim. They argue that with the enactment of the GMA, the Legislature intended local governments to be responsible for planning for the location of energy facilities, and that EFSEC is required to comply with local comprehensive plans and land use regulations. ROKT Br. 72-74; Kittitas Br. 36-37. This argument is based on the notion that the GMA controls because it was enacted after the Legislature created EFSEC. However, an earlier-enacted statutory provision can prevail over a later-enacted one where the earlier provision is more clear and explicit than the last. *State v. J. P.*, 149 Wn.2d 444, 69 P.3d 318 (2003). “A specific statute will supersede a general one when both apply.” *Waste Management of Seattle, Inc. v. Utilities and Transp. Comm’n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994), *citing General Telephone Co. of the*

⁷ Laws of 1970, Ex. Sess., ch. 25, § 18 (emergency clause).

Northwest, Inc. v. Washington Utilities and Transp. Comm'n, 104 Wn.2d 460, 464, 706 P.2d 625 (1985). Under these principles, RCW 80.50 controls over the GMA: Exclusive state control over one type of development (energy facilities) versus local planning control over local land use and development in general.

In adopting RCW 80.50, the Legislature authorized a specific framework that EFSEC oversee the siting, construction, and operation of energy facilities covered by RCW 80.50. The purpose of RCW 80.50 is to establish a single, streamlined procedure for the selection and use of sites for energy facilities and the identification of the State's position with respect to each proposed site. RCW 80.50.010. The Legislature recognized the need for more energy facilities and intended, by enacting RCW 80.50, to "avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay." RCW 80.50.010(5). To accomplish this task, RCW 80.50.040 authorizes EFSEC 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[.]" RCW 80.50.040(2). EFSEC is also expressly directed to "receive applications for energy facility locations and to investigate the sufficiency thereof[.]" RCW 80.50.040(5). And, at the request of an applicant,

EFSEC may “conduct a preliminary study of any potential site prior to receipt of an application for site certification.” RCW 80.50.175(1). EFSEC is also empowered to “prescribe the form, content, and necessary supporting documentation for site certification[.]” RCW 80.50.040(4). The certification is “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.” RCW 80.50.020(5). The certification authorizes “the person named therein to construct and operate the proposed energy facility subject only to the conditions set forth in such certification.” RCW 80.50.120(2). EFSEC is required 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[.]” RCW 80.50.040(9). These statutes establish EFSEC’s primary role in the siting, construction, and operation of facilities subject to RCW 80.50.

On the other hand, the GMA is a statute that deals generally with local land use planning. The GMA does not assign similar responsibility to local government with regard to energy facilities subject to RCW 80.50.

The Legislature enacted the GMA in 1990 in response to its concern that communities in the State had experienced “uncoordinated and unplanned growth.” RCW 36.70A.010. The GMA requires certain cities and counties to implement comprehensive plans. A comprehensive plan is “a generalized coordinated land use policy statement of the governing body of a county or city[.]” RCW 36.70A.030(4). The GMA lists numerous planning goals, none of which includes energy facilities governed by RCW 80.50. RCW 36.70A.020(1)-(13).

Petitioners point to RCW 36.70A.103 and RCW 36.70A.200 to support their claim that EFSEC must comply with local land use regulations. RCW 36.70A.103 provides that “[s]tate agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter.” RCW 36.70A.103. However, in its regulations, CTED has interpreted RCW 36.70A.103 to apply to state agencies only when the agency itself is an applicant. WAC 365-195-765(2) provides that CTED:

construes the provision for state agency compliance to require that each state agency must meet local siting and building requirements *when it occupies the position of an applicant* proposing development Generally this means that *the development of state facilities is subject to local approval* procedures and substantive provisions[.]

(Emphasis added.) Here, the State does not “occup[y] the position of an applicant.” WAC 365-195-765(2). Rather, EFSEC is processing and the Governor is making the final decision on an application from a private applicant. RCW 36.70A.103 does not apply.

RCW 36.70A.200(1) provides that the “comprehensive plan of each county and city that is planning under RCW 36.70A.040 shall include a process for identifying and siting essential public facilities.” Essential public facilities are facilities such as “airports, state education facilities, [and] state and local correctional facilities.” RCW 36.70A.200(1); WAC 365-195-340(1)(a). A privately owned wind power facility is not an “essential public facility” as that term is used in RCW 36.70A.200. In any event, even if it were, CTED’s rules provide: “no comprehensive plan may directly or indirectly preclude the siting of essential public facilities.” WAC 365-195-340(2)(c). For the above reasons, the Court should reject Petitioners’ argument that the GMA superseded the Governor’s and EFSEC’s authority in RCW 80.50 in any respect.

E. EFSEC’s Determination That Its Rules Regarding Preemption Were Satisfied Was Not Arbitrary or Capricious and Was Supported by Substantial Evidence

Under EFSEC’s rules in effect when the Kittitas Valley Wind Project application was filed, EFSEC was required to consider four factors in making its recommendation to the Governor about whether land use

laws should be preempted. WAC 463-28-040 (2006). The four factors were:

(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.

WAC 463-28-040(1)-(4) (2006). EFSEC determined that Applicant satisfied each of the four factors (AR 14273-14283),⁸ and recommended that the Governor preempt Kittitas County land use laws related to this Project. (AR 14273) The Governor accepted this recommendation. (AR 11907)

Petitioners challenge EFSEC's recommendation and the Governor's decision. ROKT Br. 35-68; Kittitas Br. 29-36. This challenge should be rejected. The recommendation and the decision were not arbitrary and capricious under RCW 34.05.570(4). Even applying the substantial evidence standard under RCW 34.05.570(3), the recommendation and decision were supported by substantial evidence.

⁸ Council Order Nos. 826 (AR 14257-14332) and 831 (AR 14337-14341) are attached as Appendices to this brief.

The Court should accord substantial deference to EFSEC's views on this determination. *See Hillis*, 131 Wn.2d at 397. EFSEC was fully informed of and took into consideration the entire interaction between Applicant and the County.

With respect to the good faith effort requirement, EFSEC concluded that Applicant acted in good faith because it "worked through local land use processes to resolve inconsistencies very extensively, providing detailed information, expert testimony, and timely responses to [County] concerns, inquiries, and requests for updated documents." Council Order No. 826, p. 21. (AR 14277) In addition, Applicant made compromises in the scope and scale of the proposed Project by reducing the number of turbines as well as adjusting their placement [and] the Applicant suggested a variety of measures to mitigate the potential impacts of shadow flicker on nearby residents." *Id.* "Finally, the Applicant compromised on the minimum setback of turbines from nonparticipating residences, moving from 1,000 feet to 1,320 feet." *Id.*

ROKT's primary argument that Applicant did not act in good faith is that it would not supply data to the County to support its claim that turbine setbacks suggested by the County would render the Project economically unviable. Refusing to supply such information was not a breach of good faith. The County's authority over this wind project was

related only to the location of the Project, not its construction and operation, since EFSEC preempts the location, construction, and operational conditions for energy projects. RCW 80.50.110(2). The economic information sought by the County was irrelevant. Even if Applicant had proven that the Project would be economically unviable with the County's suggested setbacks, this has nothing to do with whether such setbacks are needed to mitigate the visual impacts of the Project.

The second element of the rule, that Applicant and the County were unable to agree, is not in dispute. WAC 463-28-040(2). ROKT argues that it was Applicant who walked away, but that is just another argument about good faith. There was an impasse. The County insisted on its setbacks and demanded economic information about the Project that was irrelevant to the issue of mitigation. Applicant could not make further concessions on the setbacks and still have an economically viable project.

EFSEC found that alternate wind farm sites in Kittitas County for the Project were "not acceptable." (AR 14278-14280) ROKT argues that there are other sites in Kittitas County that would have been acceptable and that the only reason EFSEC did not find them acceptable was that Applicant did not own them. This is inaccurate. In reviewing alternative sites, EFSEC explained that a "consulting meteorologist specializing in analyzing wind resources, called the KVVPP site 'one of the best wind

power project sites available in Washington.” (AR 14279) In addition, it “was undisputed that the KVVPP site is very close to several adequate transmission lines and that some of the alternate sites in Kittitas County share a similarly advantageous location with respect to interconnection to the existing electrical grid.” *Id.* However, EFSEC found that “the environmental constraints identified at several of the proposed alternate sites demonstrated appreciable obstacles to development of a suitable wind power project, hurdles not present at KVVPP.” *Id.* In addition, EFSEC noted that “the County’s zoning does not designate any site within Kittitas County as an approved area for development of a wind farm.” *Id.* EFSEC did note “the Applicant’s lack of control of the property at any of the alternative sites creates the most significant complication in finding any of the other possible sites acceptable.” *Id.* However, contrary to ROKT’s claim, “the Council did not rely on this as the determinative factor in its analysis about alternative sites.” *Id.*, n.76.

With regard to the interests of the State set out in RCW 80.50.010, EFSEC considered whether the Project had sufficient operational safeguards, environmental preservation and protection provisions, provided abundant energy at a reasonable cost, and avoided costly duplication of the siting process. (AR 14281-14283) ROKT argues that there is no need for additional electrical energy in Washington. But

EFSEC explained that “Washington is part of an integrated electrical system that incorporates most of the western portion of both the U. S. and Canada.” (AR 14282) As a result, “[d]uring the winter heating season the State of Washington becomes a net importer of electricity; at other times of the year, other portions of the U. S. and Canada become dependent on Washington’s surplus hydroelectric power.” *Id.* EFSEC concluded that the “addition of wind power resources to the State’s electrical grid may allow integration with the management of hydroelectric dams to provide additional flexibility in meeting the seasonal needs of federally protected species, including salmonids.” *Id.*

Kittitas County argues that EFSEC did not follow its rule because its motive for preemption was the preservation of the agency. Kittitas Br. 26-36. There is no basis for this claim. As the previous discussion proves, EFSEC carefully considered each of the four factors in WAC 463-28-040(1)-(4) (2006). Moreover, the County’s regulation of wind farms was inconsistent with the Legislature’s intent that EFSEC was responsible for the siting, construction, and operation of facilities subject to RCW 80.50. RCW 80.50.110(2). In sum, EFSEC did not act arbitrarily or capriciously in concluding that the requirements of its own rules to recommend preemption had been met; nor did the Governor err in accepting that recommendation.

F. Siting of the Project Did Not Violate SEPA

Kittitas County alone argues that the siting of the Project violates SEPA, RCW 43.21C. Kittitas Br. 38-41. The County claims that the Final Environmental Impact Statement (FEIS) for the Project (AR 9708-11283) failed to adequately analyze the visual impacts of turbines closer than one-half mile, and turbine setbacks of four times turbine height. This argument is not well taken.

The adequacy of an EIS is a question of law that the Court reviews *de novo*. *Klickitat Cy. Citizens Against Imported Waste v. Klickitat Cy.*, 122 Wn.2d 619, 860 P.2d 390 (1993). EIS adequacy determinations are to be accorded substantial weight. RCW 43.21C.090. *Org. to Preserve Agric. Lands v. Adams Cy.*, 128 Wn.2d 869, 913 P.2d 793 (1996) (*OPAL*). The data contained in the EIS is reviewed for legal sufficiency under the “rule of reason.” *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 614, 744 P.2d 1101 (1987). The rule of reason requires a reasonably thorough discussion of the significant aspects of probable environmental consequences. *Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338, 344-45, 552 P.2d 184 (1976). However, “an EIS is not a compendium of every conceivable effect or alternative to a proposed project, but is simply an aid to the decision making process.” *Preserve Our Islands v. Shoreline Hearings Bd.*, 133 Wn. App. 503, 539, 137 P.3d 31 (2006).

The visual impact of the Project was thoroughly discussed by the Council in its order. (AR 14314) As stated in Finding No. 48:

In general, the Applicant's and EFSEC's analysis agreed that after all mitigation measures are implemented, the visual impact of this Project would be low to moderate, with no significant adverse impacts on the existing visual environment.

(AR 14314) This finding is amply supported by information contained in the FEIS. (AR 10065-10107)

The Final EIS has an extensive view analysis that EFSEC used in formulating mitigation of the view impacts. (AR 10093-10107) As EFSEC noted: "Given its dimensions, there is little that can be done to mitigate the visual impact of a wind turbine." (AR 10093) EFSEC attempted to fairly balance the interests of the parties in reaching its recommendation to fix the setback requirements at four times the tip height of turbines located from the residences of nonparticipating owners. SEPA does not require more than what EFSEC did; namely, review the extensive analysis in the record and render a reasonable conclusion to mitigate the perceived environmental impacts. EFSEC's determination that there would be no significant impacts with the mitigation measures in place is supported by the record. The County has not presented sufficient evidence to the Court that it should be left with the definite or firm conviction that EFSEC has made a mistake. *Preserve Our Islands*, 133

Wn. App. at 539. EFSEC met its obligations under SEPA in analyzing the visual and other impacts of the Project and in coming to a decision as to appropriate mitigation requirements. The Court should reject the County's challenge to EFSEC's actions under SEPA.

G. The Appearance of Fairness Doctrine Has No Bearing on This Case

The Legislature established the membership of EFSEC by statute. RCW 80.50.030(3)(a). Besides the chair, EFSEC consists of representatives of the Departments of: (i) Ecology, (ii) Fish and Wildlife, (iii) CTED, (iv) Utilities and Transportation Commission, and (v) Natural Resources. Petitioners contend that the presence of a designee from CTED and DNR on EFSEC violates the Appearance of Fairness Doctrine. ROKT Br. 25-35; Kittitas Br. 49. There is no basis for this claim.

First, the Appearance of Fairness Doctrine applies to administrative decision-makers acting in a quasi-judicial capacity. *OPAL*, 128 Wn.2d at 889. EFSEC's consideration of the application for the Kittitas Valley Wind Power Project is not quasi-judicial. Several factors are relevant in determining whether an administrative action is quasi-judicial: (1) whether a court has been charged with making the agency's decision; (2) whether the action is a type which courts historically have performed; (3) whether the action involves the application of existing law

to past or present facts for the purpose of declaring or enforcing liability; and (4) whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators. *Washington Pub. Employees Ass'n v. Washington Pers. Res. Bd.*, 91 Wn. App. 640, 647, 959 P.2d 143 (1998). In determining whether a particular matter is quasi-judicial, the Court has directed that a flexible approach be taken giving ample consideration to the functions being performed by the entity in question. *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 243, 821 P.2d 1204 (1992); *Taggart v. State*, 118 Wn.2d 195, 204-05, 822 P.2d 243 (1992).

RCW 80.50 involves a multi-faceted process by which EFSEC develops a recommendation to the Governor regarding applications to site, construct, and operate energy facilities. EFSEC develops and applies environmental conditions regarding the type, design, location, construction, and operational conditions of projects. RCW 80.50.040(2). It obtains and evaluates independent scientific and technical studies of proposed projects. RCW 80.50.040(6). It develops project-specific siting criteria and drafts certification agreements for proposal to the Governor. RCW 80.50.040(8). It administers air quality and water quality programs with respect to specific projects and issues air quality and water quality permits to protect operators. RCW 70.94.422(2); RCW 90.48.262(2);

WAC 463-38; WAC 463-39. EFSEC provides for on-going monitoring of projects to ensure compliance with site certification agreements. RCW 80.50.040(9). It conducts public information and land use hearings and such other hearings as it deems appropriate, along with various other public meetings as part of environmental permitting and in compliance with SEPA. RCW 80.50.090.

Under the criteria in *Washington Pub. Employees Ass'n*, 91 Wn. App. at 647, these activities are not quasi-judicial. Courts have never been charged with performing any of these activities nor are they actions typical of those performed by the courts. EFSEC's activities do not resemble the ordinary business of courts. They represent the ordinary business of the executive branch performing administrative functions. The only basis for claiming that the EFSEC proceeding is quasi-judicial is that RCW 80.50.090(3) provides that "[p]rior 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." (Emphasis added.) The fact that the hearing is to be "conducted as an adjudicative proceeding" does not convert what is an administrative matter into a quasi-judicial one. See *Harris v. Hornbaker*, 98 Wn.2d 650, 660, 658 P.2d 1219 (1983). For this reason, the Appearance of Fairness Doctrine does not apply to EFSEC,

and the Court does not need to consider Petitioners' arguments in this regard further.

Second, even if the EFSEC process is quasi-judicial, the presence of a designee from CTED and DNR as members of EFSEC does not violate the doctrine. Petitioners claim there is a violation because CTED intervened in the proceeding to support the Project, and DNR leased some land to Applicant. However, this does not constitute a violation of the doctrine because the Legislature required EFSEC to include a member from CTED and DNR. RCW 80.50.030(3)(a). The appearance of fairness doctrine "is not constitutionally based." *City of Bellevue v. King Cy. Boundary Review Bd.*, 90 Wn.2d 856, 863, 586 P.2d 470 (1978). Thus, the Legislature may determine whether and how the doctrine is to be applied. For example, RCW 42.36 governs the doctrine as applied to local land use decision-making. In this case, the Legislature knew that CTED, as an agency, has an interest in energy projects (RCW 43.330.904) and that DNR leases common school trust land. Despite this fact, the Legislature required the two agencies to be represented on EFSEC. Since the presence of these members is required by the Legislature, it cannot be a violation of the Appearance of Fairness Doctrine. *See Magula v. Dep't of Labor & Indus.*, 116 Wn. App. 966, 972-73, 69 P.3d 354 (2003).

Third, it does not violate the Appearance of Fairness Doctrine to have one representative of an agency be a decision-maker on EFSEC, while another member of the agency supports the Project either for reasons of energy policy or for lease payments. In *Washington State Medical Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 663 P.2d 457 (1983), this Court rejected an appearance of fairness challenge to the procedures of the Medical Disciplinary Board under which the staff of the board investigated and prosecuted cases, while the Board decided the cases. This Court stated: “We must presume the board members acted properly and legally performed their duties until the contrary is shown.” *Johnston*, 99 Wn.2d at 479. Accordingly, there is “no inherent unfairness in the mere combination of investigative and adjudicative functions, without more, that would prompt invocation of the appearance of fairness doctrine.” *Id.* The Court concluded that the “bare fact that the same administrative adjudicators also are clothed with investigative powers does not mean the case will be decided on an improper basis or that there will arise a prejudgment on the ultimate issues.” *Id.* Similarly, in this case, there is no violation of the doctrine. The functions of the different agency employees are separate, and EFSEC rules prohibit council members from communicating with employees of their agency who have participated in the proceeding. WAC 463-30-050. Petitioners make no claim that there

were any improper *ex parte* contacts between the CTED and DNR members of EFSEC and their agencies.

Fourth, Petitioners have not met the burden of proof. A violation of the Appearance of Fairness Doctrine does not exist “if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.” *OPAL*, 128 Wn.2d at 890 (internal punctuation omitted). Petitioners “must present evidence of actual or potential bias to support an appearance of fairness claim.” *Id.* Petitioners must establish “prejudgment concerning issues of fact about parties in a particular case or partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party as distinguished from issues of law or policy. Prejudgment and bias are thus to be distinguished from the ideological or policy leanings of a decisionmaker.” *Id.* (citations and internal punctuation omitted). Petitioners would also have to prove that a member of EFSEC had “personal interest in a matter being acted upon[.]” *Swift v. Island Cy.*, 87 Wn.2d 348, 361, 552 P.2d 175 (1976). Petitioners have presented no such evidence with regard to the CTED and DNR members on EFSEC. Their only attempt at proof is the claim that the DNR member on EFSEC would be perceived as having a personal

interest because DNR will receive lease payments from Applicant.⁹ As we have already explained, this is not a violation because the Legislature has directed that a representative of DNR will be a member of EFSEC. Moreover, no reasonably prudent and disinterested observer would conclude that the DNR member has a personal interest in lease payments paid to his or her agency. *See Nationscapital*, 133 Wn. App. at 761.

H. Thurston County Superior Court Did Not Abuse Its Discretion in Not Making Findings and Conclusions Regarding Alleged Irregularities

A petition for judicial review under RCW 80.50.140 does not go directly to the Supreme Court. If “there are alleged irregularities in the procedure before the council not found in the record [the trial] court shall proceed to take testimony and determine such factual issues raised by the alleged irregularities[.]” RCW 80.50.140(1). In this case, Petitioners’ alleged procedural irregularities and the trial court directed EFSEC to respond to Petitioners’ public records request and permitted them to take the deposition of EFSEC chair Jim Luce and EFSEC member Chris Smith Towne. (SR 1204) The trial court considered the testimony, which consisted of the depositions of Mr. Luce and Ms. Towne and declarations filed by the parties, and concluded:

⁹ As EFSEC noted, the lease payments do not go to support DNR’s activities but rather go to support school construction under the control of the state board of education and to management of the common school trust. (AR 14141-14142) The Petitioners did not challenge this fact. (AR 14168)

I don't see the need for any further evidentiary testimony . . . because I don't think there's been a minimum threshold here that substantiates the allegation of impropriety. . . .

So there was a sufficient allegation of procedural irregularity to warrant this additional discovery, but after discovery was completed . . . I don't show any material disputed issue of fact that would require any further evidentiary hearing.

(SR 499-500) Petitioners argue that the trial court erred in refusing to take additional testimony and in not making findings that there were procedural irregularities in the EFSEC process. ROKT Br. 23-25; Kittitas Br. 12-18.

The Superior Court's decision that no further testimony was needed and to certify the petitions to this Court pursuant to RCW 80.50.140 is reviewed under the abuse of discretion standard. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107, 864 P.2d 937 (1994); *Lund v. Dep't of Ecology*, 93 Wn. App. 329, 969 P.2d 1072 (1998). The admission or refusal of evidence is largely within the discretion of the trial court and will not be reversed on appeal absent a showing of a manifest abuse of discretion. *Lund*, 93 Wn. App. at 334.

The trial court did not abuse its discretion because Petitioners failed to establish any procedural irregularities. Petitioners made four basic claims. First, Petitioners claimed that Mr. Luce violated the Appearance of Fairness Doctrine because of his view that preemption was necessary. However, having views about the law does not violate the

Appearance of Fairness Doctrine. The doctrine prohibits “prejudgment concerning issues of fact about parties in a particular case or partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party as distinguished from issues of law or policy. *Prejudgment and bias are thus to be distinguished from the ideological or policy leanings of a decisionmaker.*” *OPAL*, 128 Wn.2d at 890 (emphasis added). Petitioners did not present any evidence that Mr. Luce had prejudged a factual matter or was biased against a party.

Second, Petitioners claimed that Mr. Luce improperly lobbied other Counsel members outside the deliberative process. However, Mr. Luce testified that his communication with Ms. Towne was in the context of the deliberative process. With regard to documents discovered by the Petitioners, Mr. Luce stated: “It was shared with the rest of the EFSEC council during deliberations. There were, if you will, I would refer to them as my bench notes if I were an appellate court judge. These were the outline of my thoughts going into deliberations. . . . That email reflects my conclusions with respect to my review of the record as it had been fully submitted to EFSEC.” (SR 864)

Third, Petitioners alleged an improper *ex parte* communication between Mr. Luce and Darrel Peeples, an attorney for Applicant. However, there was no evidence of any improper *ex parte* communication.

RCW 34.05.455(1) provides that a “presiding officer may not communicate, directly or indirectly, regarding any issue in the proceeding other than communications necessary to procedural aspects of maintaining an orderly process, with any person employed by the agency without notice and opportunity for all parties to participate[.]” In this case both Mr. Luce and Mr. Peeples testified that they did not have *ex parte* communications about this proceeding. (SR 868-872; SR 881-882) As chair of EFSEC, Mr. Luce had additional responsibilities including dealing with stakeholders, including Mr. Peeples. *See* RCW 80.50.040.

Fourth, Petitioners allege an improper *ex parte* communication between Mr. Luce and the Governor. Mr. Luce sought to clarify general remarks about preemption under RCW 80.50.110(2) that the Governor made at an earlier event involving a different project. There was no discussion about whether the Governor should preempt local land use ordinances in this case. (SR 757-758) The trial court did not abuse its discretion in certifying this case to the Supreme Court.

V. CONCLUSION

For the reasons set forth above, Petitioners' petitions should be dismissed and the decision of the Governor to issue a site certification agreement for the Kittitas Valley Wind Power Project should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of May, 2008.

ROBERT M. MCKENNA
Attorney General



William B. Collins, WSBA 785
Deputy Solicitor General



Kyle J. Crews, WSBA 6786
Assistant Attorney General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200

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.
- [80.50.330](#) Preapplication -- Siting electrical transmission facilities -- Corridors.
- [80.50.340](#) Preapplication -- Fees -- Plans.
- [80.50.350](#) National interest electric transmission corridors task force -- Duties -- 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.

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, alternative energy resource, or electrical transmission 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 of at least 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.

(8) "Electrical transmission facilities" means electrical power lines and related equipment.

(9) "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.

(10) "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.

(11) "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.

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

(13) "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.

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

(15) "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.

(16) "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, or as otherwise designated by chapter 325, Laws of 2007.

(17) "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, or as otherwise designated by chapter 325, Laws of 2007.

(18) "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.

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

(20) "Preapplication process" means the process which is initiated by written correspondence from the preapplicant to the council, and includes the process adopted by the council for consulting with the preapplicant and with cities, towns, and counties prior to accepting applications for all transmission facilities.

(21) "Preapplicant" means a person considering applying for a site certificate agreement for any transmission facility.

[2007 c 325 § 1. Prior: 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:

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.]

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

(1) The provisions of this chapter 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 (15). 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)(a) The provisions of this chapter apply to the construction, reconstruction, or modification of electrical transmission facilities when:

(i) The facilities are located in a national interest electric transmission corridor as specified in RCW 80.50.045;

(ii) An applicant chooses to receive certification under this chapter, and the facilities are: (A) Of a nominal voltage of at least one hundred fifteen thousand volts and are located in a completely new corridor, except for the terminus of the new facility or interconnection of the new facility with the existing grid, and the corridor is not otherwise used for electrical transmission facilities; and (B) located in more than one jurisdiction that has promulgated land use plans or zoning ordinances; or

(iii) An applicant chooses to receive certification under this chapter, and the facilities are: (A) Of a nominal voltage in excess of one hundred fifteen thousand volts; and (B) located outside an electrical transmission corridor identified in (a) (i) and (ii) of this subsection (3).

(b) For the purposes of this subsection, "modify" means a significant change to an electrical transmission facility and does not include the following: (i) Minor improvements such as the replacement of existing transmission line facilities or supporting structures with equivalent facilities or structures; (ii) the relocation of existing electrical transmission line facilities; (iii) the conversion of existing overhead lines to underground; or (iv) the placing of new or additional conductors, supporting structures, insulators, or their accessories on or replacement of supporting structures already built.

(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 (15).

(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.

[2007 c 325 § 2; 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:

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.]

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).

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.

80.50.330

Preapplication — Siting electrical transmission facilities — Corridors.

(1) For applications to site electrical transmission facilities, the council shall conduct a preapplication process pursuant to rules adopted by the council to govern such process, receive applications as prescribed in RCW 80.50.071, and conduct public meetings pursuant to RCW 80.50.090.

(2) The council shall consider and may recommend certification of electrical transmission facilities in corridors designated for this purpose by affected cities, towns, or counties:

(a) Where the jurisdictions have identified electrical transmission facility corridors as part of their land use plans and zoning maps based on policies adopted in their plans;

(b) Where the proposed electrical transmission facility is consistent with any adopted development regulations that govern the siting of electrical transmission facilities in such corridors; and

(c) Where contiguous jurisdictions and jurisdictions in which related regional electrical transmission facilities are located have either prior to or during the preapplication process undertaken good faith efforts to coordinate the locations of their corridors consistent with RCW 36.70A.100.

(3)(a) In the absence of a corridor designation in the manner prescribed in subsection (2) of this section, the council shall as part of the preapplication process require the preapplicant to negotiate, as provided by rule adopted by the council, for a reasonable time with affected cities, towns, and counties to attempt to reach agreement about a corridor plan. The application for certification shall identify only the corridor agreed to by the applicant and cities, towns, and counties within the proposed corridor pursuant to the preapplication process.

(b) If no corridor plan is agreed to by the applicant and cities, towns, and counties pursuant to (a) of this subsection, the applicant shall propose a recommended corridor and electrical transmission facilities to be included within the proposed corridor.

(c) The council shall consider the applicant's proposed corridor and electrical transmission facilities as provided in RCW 80.50.090 (2) and (4), and shall make a recommendation consistent with RCW 80.50.090 and 80.50.100.

[2007 c 325 § 3.]

80.50.340

Preapplication — Fees — Plans.

(1) A preapplicant shall pay to the council a fee of ten thousand dollars to be applied to the cost of the preapplication process as a condition precedent to any action by the council, provided that costs in excess of this amount shall be paid only upon prior approval by the preapplicant, and provided further that any unexpended portions thereof shall be returned to the preapplicant.

(2) The council shall consult with the preapplicant and prepare a plan for the preapplication process which shall commence with an informational public hearing within sixty days after the receipt of the preapplication fee as provided in RCW 80.50.090.

(3) The preapplication plan shall include but need not be limited to:

(a) An initial consultation to explain the proposal and request input from council staff, federal and state agencies, cities, towns, counties, port districts, tribal governments, property owners, and interested individuals;

(b) Where applicable, a process to guide negotiations between the preapplicant and cities, towns, and counties within the corridor proposed pursuant to RCW 80.50.330.

[2007 c 325 § 4.]

80.50.350**National interest electric transmission corridors task force — Duties — Recommendations. (Expires July 1, 2009.)**

(1)(a) A legislative task force on national interest electric transmission corridors is established, with members as provided in this subsection.

(i) The chair and the ranking minority member from the senate water, energy and telecommunications committee or their designees;

(ii) The chair and the ranking minority member from the house of representatives technology, energy and communications committee or their designees;

(iii) The governor shall appoint five members representing the energy facility site evaluation council, local governments, resource agencies, or other persons with appropriate expertise.

(b) The task force shall choose its cochairs representing the senate and house of representatives from among its legislative membership.

(2)(a) The task force shall negotiate the terms of an interstate compact that establishes a regional process for siting national interest electric transmission corridors satisfactory to the national energy policy act of 2005.

(b) In negotiating the terms of the compact, the task force shall ensure that the compact reflects as close as possible the Washington state energy facility site evaluation council model under this chapter and its procedures to ensure appropriate adjudicative proceedings and mitigation of environmental impacts.

(c) The task force shall negotiate the terms of the compact through processes established and supported by the Pacific Northwest economic region for which the state of Washington is a party as referenced in RCW 43.147.010.

(3) Staff support for the task force members shall be provided from respective committees and appropriate agencies appointed by the governor.

(4) Legislative members of the task force shall be reimbursed for travel expenses in accordance with RCW 44.04.120. Nonlegislative members, except those representing an employer or organization, are entitled to be reimbursed for travel expenses in accordance with RCW 43.03.050 and 43.03.060.

(5) The task force shall report its preliminary recommendations on the compact to the appropriate committees of the legislature by January 1, 2008.

(6) The task force shall report its final recommendations on the compact to the appropriate committees of the legislature by September 1, 2008.

(7) This section expires July 1, 2009.

[2007 c 326 § 2.]

Notes:

Intent — 2007 c 326: "It is the intent of the legislature to create a regional process for the siting of new electric transmission lines related to the national energy policy act of 2005. This regional process will facilitate the siting of new cross borders electric transmission lines by providing a "one stop" licensing process. This act calls for the

creation of a legislative task force to establish an interstate compact to assert jurisdiction over national interest electric transmission corridors." [2007 c 326 § 1.]

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.]

Former WAC 463-28-030

WAC 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.]

Former WAC 463-28-040

WAC 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.]

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 KVVWPP), 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.

Table of Contents

1. INTRODUCTION..... 5

The Applicant and the Project..... 5

The Council and the EFSEC Review Process..... 6

Application for Site Certification 7

Compliance with the State Environmental Policy Act 7

Adjudicative Proceeding: Parties, Pre-Hearing Conferences, & Schedule.... 8

Land Use Consistency – Procedural History..... 10

Public Testimony and Comment 12

Council Action on Recommendation to Governor..... 13

2. SETTLEMENTS AND STIPULATIONS 13

3. LAND USE CONSISTENCY AND PREEMPTION OF KITTITAS COUNTY’S
WIND FARM OVERLAY ORDINANCE & LOCAL HEIGHT RESTRICTION..... 14

4. ISSUES..... 29

Project Configuration and Construction 29

Visual Resources 30

Socioeconomics/Property Values..... 33

Noise..... 34

Habitat, Vegetation, and Wetlands 35

Fisheries and Wildlife..... 37

Air Quality..... 41

Water Resources 41

Geological Resources and Hazards 42

Traffic and Transportation..... 43

Cultural and Archeological Resources..... 45

Health and Safety..... 46

Public Services..... 48

Site Restoration and Decommissioning..... 49

Cumulative Impacts..... 51

Term of the Site Certification Agreement 51

Conformance with Law 52

5. CONCLUSION 53

FINDINGS OF FACT..... 53

Nature of the Proceeding..... 53

The Applicant and the Application 53

Compliance with the State Environmental Policy Act (SEPA) 54

The Adjudicative Proceeding..... 54

The Land Use Consistency Process	55
Project Description and Configuration.....	56
Site Characteristics	57
Visual Resources/Light, Glare and Shadow Flicker.....	58
Socioeconomics/Property Values	58
Noise	59
Habitat, Vegetation and Wetlands	59
Fisheries and Wildlife	61
Air Quality	63
Water Resources	63
Geological Resources and Hazards	64
Traffic and Transportation.....	64
Cultural and Archeological Resources.....	66
Health and Safety	66
Public Services.....	67
Site Restoration	67
Cumulative Impacts.....	67
Term of the Site Certification Agreement	68
Conformance with Law	68
 CONCLUSIONS OF LAW	 69
ORDER AND RECOMMENDATION.....	70
SIGNATURES.....	71
APPENDIX A	72
Consistency With Kittitas County Comprehensive Plan	72
CONSISTENCY WITH ZONING CODE.....	75

MEMORANDUM

1. INTRODUCTION

The Applicant and the Project

The Applicant for the Kittitas Valley Wind Power Project (Project or KVVWPP) is Sagebrush Power Partners, LLC (Sagebrush or Applicant), a wholly owned subsidiary of Horizon Wind Energy. Sagebrush Power Partners, LLC, was created as a Delaware Limited Liability Company for the sole purpose of developing, permitting, financing, constructing, owning and operating the Kittitas Valley Wind Power Project.

The Applicant is proposing to build the Kittitas Valley Wind Power Project, a renewable energy generation facility with a maximum of 65 wind turbines and a maximum installed nameplate capacity of approximately 180 megawatts (MW). The Project would be constructed in central Washington's Kittitas Valley in designated corridors located on ridge tops between Cle Elum and Ellensburg, approximately 12 miles northwest of Ellensburg. Elements of the Project would be constructed consecutively, to include roads, foundations, underground and overhead electrical system collection lines, grid interconnection substation, step-up substation(s), feeder line(s) running from the on-site step-up substation(s) to the interconnection substation, meteorological stations, an operations and maintenance (O&M) facility, an informational kiosk, and associated supporting infrastructure. The entire Project area encompasses 6,000 acres, with approximately 118 acres required to accommodate the permanent footprint of the proposed turbines and related support facilities.

The Project area is currently zoned as Forest and Range and Agricultural-20. The majority of the KVVWPP site and proposed interconnect points lie on privately owned land. Parts of the Project site lie on land for which the Applicant has secured a long term-lease with the Washington Department of Natural Resources (DNR). The Applicant has obtained wind option agreements with landowners for all private lands within the Project site boundary and electrical collection feeder line corridors.

The Project would utilize a series of 3-bladed wind turbines on tubular steel towers to generate electricity. Turbines would range from 1.5 MW to 3 MW (generator nameplate capacity) with turbine rotor diameters ranging approximately from 80 to 90 meters (231 to 295 feet). Only one type and size of turbine would be used for the entire Project. For the Project's smallest contemplated turbines, each with a rotor diameter of 80 meters and nameplate capacity of 1.5 MW, the maximum contemplated 65 units would produce a total Project nameplate capacity of approximately 100 MW. For the largest contemplated turbines, each with a rotor diameter of 90 meters and nameplate capacity of 3 MW, the maximum contemplated 65 units would produce a total Project nameplate capacity of approximately 180 MW.

The Applicant has requested the latitude to select the turbine manufacturer prior to beginning Project construction. The size and type of turbine used for the Project would largely depend on such factors as safety, quality, price, performance and reliability history, power characteristics, guarantees, financial strength of the supplier, and the availability of a particular type of wind turbine at the time of construction. Regardless of which size of turbine is finally

selected for the Project, the turbines would generally be installed along the access roadways identified in the Application. All construction activities would occur within the corridors identified in the Application (as subsequently modified in the Final EIS), with any final adjustments to specific turbine locations made to maintain adequate spacing between turbines for optimized energy efficiency and to compensate for local conditions.

Water required for construction and operation of the Project will be purchased off-site from authorized sources, and transported to the Project area by truck. Sanitary wastewater produced during construction will be disposed of off-site at facilities authorized to accept such wastes. Sanitary wastewater produced during Project operation (mainly from bathrooms and a kitchen at the O&M facility) will be discharged to and treated in an on-site sanitary septic system constructed in accordance with Kittitas County requirements. The Project will not generate process wastewater during operation. Stormwater discharges generated during construction and operation of the Project would be managed in accordance with Washington State stormwater management practices and guidelines.

The Applicant is proposing to mitigate all permanent and temporary impacts on vegetation caused by the proposed Project, in accordance with the guidelines outlined in the WDFW Wind Power Guidelines for siting and mitigating wind power projects east of the Cascades, through protection of an approximately 539 acre mitigation parcel within the 6,000 acres of the Project area. The mitigation parcel is located in T19N, R17E, Sections 22 and 27.

The Project will interconnect with the Bonneville Power Administration (BPA) Grand Coulee to Olympia 287-kV and/or the Puget Sound Energy (PSE) Rocky Reach to White River 230-kV electrical transmission lines near Bettas Road. Interconnection to the electrical power grid at these locations does not require construction of any new major transmission feeder lines; however, power from the Project would be fed to step-up substations. The step-up substations would connect to the respective BPA or PSE feeder lines, which connect to the respective utility's interconnect substation.

The Council and the EFSEC Review Process

EFSEC was created to advise the Governor in deciding which proposed locations are appropriate for the siting of new large energy facilities. Chapter 80.50 RCW. The Legislature recognized that the selection of sites would have a significant impact on 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.

The Council has a comprehensive mandate to balance the need for abundant energy at a reasonable cost with the broad interests of the public. EFSEC serves as the state's "one-stop" permitting authority for energy facilities, allowing for the streamlining of the siting process. The Council is also charged to protect the health of citizens and recommend site approval for power plants where minimal adverse effects on the environment can be achieved. RCW 80.50.010; *see also* Washington Administrative Code (WAC) 463-47-110.

The Council conducted its review of this Application as an adjudicative proceeding pursuant to Chapter 34.05 RCW, as required by RCW 80.50.090(3) and Chapter 463-30 WAC.¹

Pursuant to its statutory obligations, the Council reviewed Application for Site Certification No. 2003-01, conducted hearings to determine if the proposed Project complies with local land use regulations, analyzed environmental impacts in accordance with the State Environmental Policy Act (SEPA), and conducted formal adjudicative and public comment hearings.

Council representatives participating in these proceedings to consider the Application are: James O. Luce, Council Chair; Richard Fryhling, Department of Community, Trade and Economic Development; Hedia Adelsman, Department of Ecology;² Chris Towne, Department of Fish and Wildlife;³ Judy Wilson, Department of Natural Resources;⁴ Tim Sweeney, Washington Utilities and Transportation Commission; and Patti Johnson, Kittitas County. Adam E. Torem, Administrative Law Judge, Office of Administrative Hearings, was retained by the Council to facilitate and conduct the hearings.

Application for Site Certification

The Applicant chose to obtain certification for the Project pursuant to RCW 80.50.060(2). On January 13, 2003, Sagebrush submitted to the Council an Application for Site Certification to construct and operate the KVVPP in Kittitas County, Washington.⁵

Compliance with the State Environmental Policy Act

The Council is also charged with the responsibility to apply the State Environmental Policy Act (SEPA), Chapter 43.21C RCW, which provides for the consideration of probable adverse environmental impacts and possible mitigation. WAC 463-47-140. Pursuant to SEPA, EFSEC is the lead agency for environmental review of projects under the jurisdiction of Chapter 80.50 RCW; the Council Manager is the SEPA responsible official. WAC 463-47-051.

¹ The Council reviewed Application No. 2003-01 pursuant to the provisions of Title 463 of the Washington Administrative Code in effect on January 13, 2003, the date the Application was filed.

² Hedia Adelsman replaced Charles Carelli as the DOE representative on January 2, 2004.

³ Chris Towne replaced Sue Patnude as the DFW representative on August 1, 2003. Ms. Patnude had replaced Jenene Fenton as the DFW representative shortly after the May 2003 land use hearing.

⁴ Judy Wilson replaced Tony Ifie as the DNR representative on July 1, 2005.

⁵ As originally proposed, the Applicant sought permission to construct between 82 and 150 wind turbines with a total nameplate capacity of approximately 181.5 to 246 MW. Prior to the adjudicative hearings held in September 2006, the Applicant reduced the scope of the proposed Project to no more than 65 wind turbines with a maximum total nameplate capacity of approximately 195 MW.

In this proceeding, the Council complied with SEPA requirements 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; issuing a Draft Supplemental EIS for public comment; conducting a public hearing and accepting written comments on the Draft Supplemental EIS; issuing an Addendum to the Draft EIS; and subsequently adopting and issuing a Final EIS.

On February 14, 2003, the Council issued a Determination of Significance and request for comments on the scope of the EIS. The Council held a meeting with interested federal and state agencies as well as a separate public comment meeting on the scope of the EIS in Ellensburg, Washington, on March 12, 2003. Nine people from nine agencies attended the agency meeting and approximately 150 people attended the public scoping meeting. The Council accepted written comments on the scope of the EIS until March 14, 2003. In April 2003, the Council issued the Scoping Summary report.

On December 12, 2003, the Council issued a Draft EIS prepared by an independent consultant. The Council held a public hearing to accept oral comment on the Draft EIS on January 13, 2004, in Ellensburg, Washington. The Council heard oral comments from 31 members of the public. The Council accepted written comments through January 20, 2004 (postmark deadline); the Council received 70 written comment letters.

On August 11, 2004, the Council issued a Draft Supplemental EIS prepared by EFSEC staff. The Council held a public hearing to accept oral comment on the Draft Supplemental EIS on August 25, 2004, in Ellensburg, Washington. The Council heard oral comments from five members of the public. The Council accepted written comments through September 13, 2004; the Council received 11 written comment letters.

On January 20, 2005, in response to a concern expressed as to the adequacy of the notice provided with regard to the public hearing on the Draft Supplemental EIS, the Council reopened the comment period on the Draft Supplemental EIS. The Council held another public hearing to receive additional oral comment on the Draft Supplemental EIS on February 2, 2006, in Ellensburg, Washington. The Council heard additional oral comments from four members of the public. The Council accepted written comments through the close of the February 2, 2006, public comment hearing; the Council received two additional written comment letters.

On December 23, 2005, as a result of the Applicant's decision to reduce the scope of the proposed Project, the Council issued an Addendum to the Draft EIS prepared by EFSEC staff. The Council did not hold a public hearing or otherwise solicit public comment on the Addendum to the Draft EIS.

A Final EIS was adopted and issued by the Council on February 1, 2007.

Adjudicative Proceeding: Parties, Pre-Hearing Conferences, & Schedule

On May 6, 2003, the Council issued its Notice of Intent to Hold Adjudicative Proceeding, Notice of Opportunity and Deadline to File Petitions for Intervention by June 26, 2003, and Notice of Intent to Hold Prehearing Conference.

Statutory parties to the EFSEC adjudicative hearings include the Applicant and the Counsel for the Environment. The Washington State Department of Community, Trade and Economic Development (CTED) filed a Notice of Intervention in the matter. CTED is entitled to intervene under Council rules; therefore, the Council granted party status. WAC 463-30-050. Upon petitions being filed, the Council also granted party status to Kittitas County, Residents Opposed to Kittitas Turbines (ROKT), Mr. F. Steven Lathrop, Ms. Chris Hall, Renewable Northwest Project (RNP), Sierra Club's Cascade Chapter, and the Economic Development Group of Kittitas County (EDG).⁶

The parties were represented in the various hearings as follows:

Applicant, Sagebrush Power Partners, LLC: Darrel L. Peeples, Attorney at Law, Olympia, WA; Timothy L. McMahan, Attorney at Law, Stoel Rives, LLP, Portland Oregon; and Erin L. Anderson, Attorney at Law, Cone Gilreath Law Offices, Ellensburg, Washington.

Counsel for the Environment: Michael Tribble,⁷ Assistant Attorney General, Office of the Attorney General, Olympia, Washington.

Washington State Department of Community, Trade and Economic Development: Tony Usibelli, Assistant Director, Energy Policy Division, Olympia, Washington.

Kittitas County: James Hurson, Deputy Prosecuting Attorney, Kittitas County Prosecuting Attorney's Office, Ellensburg, Washington.

Residents Opposed to Kittitas Turbines: James C. Carmody, Attorney at Law, Yakima, Washington, and Ed Garrett, Snohomish, Washington.

F. Steven Lathrop: Jeff Slothower, Attorney at Law, Ellensburg, Washington.

Chris Hall: Chris Hall, *pro se*.⁸

Renewable Northwest Project: Susan Elizabeth Drummond, Foster Pepper & Shefelman P.L.L.C., Seattle, Washington.

⁶ When granted intervenor status, EDG was known as the Phoenix Economic Development Group.

⁷ From June 2003 through July 2005, Counsel for the Environment was John Lane, Assistant Attorney General, Office of the Attorney General, Olympia, Washington. In May and June 2003, Counsel for the Environment was Michael Lufkin, Assistant Attorney General, Office of the Attorney General, Olympia, Washington.

⁸ Chris Hall withdrew as an intervenor in the proceedings by letter dated May 25, 2005, indicating that she had been able to resolve her issues with the Applicant through a settlement. *See also* Council Order No. 816, acknowledging Ms. Hall's withdrawal.

Sierra Club, Cascade Chapter: Louise Stonington, Seattle, Washington.⁹

Economic Development Group of Kittitas County: Debbie Strand, Executive Director, Ellensburg, Washington.

Prior to formal adjudicative hearings on the Application, the Council duly noticed, and conducted prehearing conferences on June 26, 2003; January 13, 2004; February 19, 2004; July 19, 2004; August 2, 2004; August 10, 2004; September 22, 2004; August 22, 2005; March 3, 2006; April 24, 2006; May 30, 2006; June 13, 2006; July 12, 2006; and August 17, 2006. The Council issued Prehearing Orders Numbers 1 through 26 (Council Orders Nos. 777, 778, 781, 782, 783, 786, 789, 790, 792, 793, 794, 795, 796, 799, 800, 801, 802, 804, 816, 817, 818, 819, 820, 821, 822, and 823).

The Council held a formal Adjudicative Proceeding regarding Sagebrush's Application, No. 2003-01, on September 18, 19, 20, and 21, 2006, in Ellensburg, Washington.¹⁰ Approximately one week prior to the formal Adjudicative Proceeding, on the evening of September 12, 2006, the Council held a public hearing in Seattle, Washington, at which 36 members of the public testified. On the evenings of September 20 and 21, 2006, the Council held public hearings in Ellensburg, Washington, at which 59 members of the public testified. The Council received 323 written comment letters regarding the Project.

Subsequent to the Adjudicative Proceedings, the parties filed post-hearing briefs.

Land Use Consistency – Procedural History

The Council is required to hold a public hearing to determine whether a proposed Project's use of a site is consistent with local or regional land use plans as well as zoning ordinances in effect at the time the Application was submitted to the Council. WAC 463-14-030. A land use consistency hearing was conducted on May 1, 2003, in Ellensburg, Washington. The Applicant and Kittitas County testified that the Project was inconsistent with Kittitas County's land use plans and zoning ordinances, specifically with a Wind Farm Overlay Ordinance that had been adopted by the Kittitas County Board of County Commissioners (BOCC) in December 2002. The Council heard from 14 members of the public who testified on the issue of land use consistency; the Council also received additional written comments, which were marked as exhibits. Upon considering the oral testimony and the documents presented at the land use hearing, the Council found the Project to be inconsistent with Kittitas County land use plans and zoning ordinances, and issued Council Order No. 776 to that effect. Pursuant to WAC 463-28-030(1) the Council directed the Applicant to make all reasonable efforts with Kittitas County to resolve the existing land use inconsistencies in the Project Application.

Council Order 776 gave the Applicant 90 days to resolve the inconsistencies, ask for preemption of local land use law, or request an extension of the time period for requesting

⁹ Sierra Club was accorded intervenor status but did not participate as such in the proceeding.

¹⁰ As detailed below, the adjudicative hearings were originally scheduled for August 2004 but postponed on several occasions.

preemption pursuant to WAC 463-28-040. The Applicant filed an application with Kittitas County seeking to comply with the Wind Farm Overlay Ordinance; the Applicant and the County worked together to obtain all necessary documentation and process the application. Upon timely requests received from the Applicant, the Council agreed to several extensions of the land use consistency deadline, initially through September 1, 2003, then through January 15, 2004, and again until February 12, 2004.¹¹ Shortly thereafter, the Applicant determined that it could not achieve land use consistency through the County's processes and therefore filed a Request for Preemption on February 9, 2004.

The Council scheduled several weeks of adjudicative hearings on the Application for Site Certification and accompanying Request for Preemption to commence in August 2004;¹² the adjudicative hearings were later postponed to late September and early October 2004 to allow time for consideration of the recently released Draft Supplemental EIS.¹³

On September 20, 2004, the Applicant and Kittitas County filed a Joint Motion to Continue the adjudicative hearings in favor of both parties prioritizing a separate application for the Wild Horse Wind Power Project and to allow further negotiations on resolving land use consistency issues. The Council granted this Joint Motion and postponed the matter indefinitely.¹⁴

On August 22, 2005, the Applicant informed the Council of its intention to reduce the scope of the Kittitas Valley Wind Power Project and file a new Development Activities Application (DAA) with Kittitas County.¹⁵ At the request of Kittitas County, on October 19, 2005, the Applicant withdrew its Request for Preemption.

Commencing in January 2006, the Kittitas County Board of County Commissioners (BOCC) and its Planning Commission jointly held a series of public hearings on the Applicant's DAA. The Kittitas County Planning Commission unanimously recommended denial of the Applicant's project on February 13, 2006.¹⁶ The BOCC held additional hearings on the DAA in March and April 2006. On May 3, 2006, the BOCC verbally decided to "preliminarily" deny the DAA, due to unacceptable visual impacts to private residences near the project site and

¹¹ See Council Order No. 789.

¹² See Council Order No. 790; *see also* Council Order No. 792.

¹³ See Council Orders No. 793, 794, and 795.

¹⁴ See Council Order No. 804.

¹⁵ See Council Order No. 816.

¹⁶ See Kittitas County Planning Commission's recommendation as contained in Applicant's Second Request for Preemption, at Exhibit 2.1; *see also* Planning Commission Transcript, February 13, 2006, as contained in Applicant's Second Request for Preemption.

additional concerns regarding "shadow flicker" from the turning blades of the wind turbines.¹⁷

In May 2006, the Applicant continued its efforts to address the BOCC's concerns as expressed at the public hearing of May 3, 2006. However, on June 6, 2006, the BOCC adopted Resolution No. 2006-90, formally denying the DAA.¹⁸ Shortly thereafter, the Council formally rescheduled the adjudicative proceeding to commence in September 2006.¹⁹

The Applicant filed a Second Request for Preemption on June 20, 2006.

Public Testimony and Comment

The Council is required to hold public hearings in which any person may be heard in support of, or in opposition to, an Application. RCW 80.50.090; *see also* WAC 463-14-030. The Council provided an opportunity for public witnesses to testify during the hearing on the Draft EIS and the Draft Supplemental EIS, the hearings on land use consistency, and the public hearing on the proposed Project.

EFSEC provided public notices of the following events: receipt of the Application; public meetings; land use hearing; intent to hold adjudicative proceedings; notice for filing of petitions for intervention and deadline for filing such petitions; notice of adjudicative hearings; Determination of Significance and request for comments on scope of the Environmental Impact Statement (EIS); Draft EIS comment period and public comment hearing; Draft Supplemental EIS comment period and public comment hearings; notice of availability of Addendum to Draft EIS; notice of availability of a Final EIS; and notice of Special EFSEC Meeting. The Council duly published all required notices of these proceedings.

The Council received oral comments during these hearings, as follows: the land use consistency hearing on May 1, 2003, in Ellensburg, Washington (17 members of the public); at a public hearing for comment on the Draft EIS on January 13, 2004, in Ellensburg, Washington (31 members of the public); at public hearings for comment on the Draft Supplemental EIS on August 25, 2005, in Ellensburg, Washington (5 members of the public) and on February 2, 2006, in Ellensburg, Washington (4 members of the public); and at public hearings on the proposed Project held September 12, 2006, in Seattle, Washington (36 members of the public) and on September 20 and 21, 2006, in Ellensburg, Washington (59 members of the public).

The Council received 17 comment letters from agencies and organizations, 53 comment letters from members of the public, and heard from 31 speakers for a total of 1,075 specific comments regarding the Draft EIS. The Council received an additional four comments from agencies and organizations, 13 comment letters from members of the public, and heard from nine

¹⁷ See BOCC Transcript, May 3, 2006, at 54-55, as contained in Applicant's Second Request for Preemption, at Exhibit 6; *see also* discussion of same as contained in Council Order No. 819.

¹⁸ See Kittitas County Resolution No. 2006-90, as contained in Applicant's Second Request for Preemption, at Exhibit 1.1; *see also* BOCC Transcript, June 6, 2006, as contained in Applicant's Second Request for Preemption, at Exhibit 6.

¹⁹ See Council Order No. 820; *see also* Council Order No. 823.

speakers for a total of 171 specific comments regarding the Draft Supplemental EIS. In addition, the Council heard from 17 speakers and received 25 written submissions regarding land use consistency.

The Council carefully considered both the specific comments of the witnesses and the topics they addressed as indications of matters significant to the public, as well as the written comments submitted by the public. The Council expresses its appreciation for these witnesses' testimony and all written comments submitted.

Council Action on Recommendation to Governor

In accordance with the requirements of Chapter 34.05 RCW and Chapter 80.50 RCW, on March 27, 2007, at a duly noticed Special Meeting conducted in Ellensburg, Washington, the Council voted by a majority of 6-1 to recommend preemption of Kittitas County's local Wind Farm Overlay Ordinance and further voted by a majority of 6-1 to recommend approval of the Project to the Governor of Washington state. The Council memorializes its action in this Order, Council Order No. 826, Findings of Fact, Conclusions of Law, and Order Recommending Approval of Site Certification on Condition.

2. SETTLEMENTS AND STIPULATIONS

In connection with Application No. 2003-01, the Council encouraged the parties to make all reasonable efforts to settle contested issues. Prior to the Adjudicative Proceedings, the Applicant noted a settlement with Ms. Chris Hall and presented a letter from Ms. Hall indicating her withdrawal from the proceedings.²⁰

On September 19, 2006, during the course of the adjudicative hearing, the Applicant entered into a verbal agreement with Counsel for the Environment (CFE). Although not reduced to writing, this stipulation addressed monitoring of mitigation measures related to wetlands, geology, and stormwater, and EFSEC's hiring of an independent environmental monitor for these items and related issues during project construction.²¹ The requirements and conditions agreed upon between the Applicant and Counsel for the Environment have been incorporated into the Site Certification Agreement.

On September 21, 2006, also during the course of the adjudicative hearing, the Applicant stated its commitment to wholly eliminate any demonstrated actual adverse impacts associated with the proposed Project caused by "shadow flicker" for homes within 2,500 feet of a turbine.²² The terms of this stipulation have also been incorporated into the Site Certification Agreement.

²⁰ See, *supra*, at footnote 8. No formal settlement document was presented to the Council.

²¹ See EFSEC Transcript, September 19, 2006, at 356-358, where CFE waived the opportunity to cross-examine witness Peggy O'Neill (Exhibit 27); see also EFSEC Transcript, September 20, 2006, at 567-568, where CFE waived the opportunity to cross-examine witness Michael Pappalardo (Exhibit 23).

²² See EFSEC Transcript, September 21, 2006, at 782-791 and at 804-807.

3. LAND USE CONSISTENCY AND PREEMPTION OF KITTITAS COUNTY'S WIND FARM OVERLAY ORDINANCE & LOCAL HEIGHT RESTRICTION

As noted above, the Applicant requested approval from the County to develop the Kittitas Valley Wind Power Project pursuant to the Kittitas County Comprehensive Plan and Zoning Code. A complete consolidated Development Activities Application was filed with Kittitas County on September 30, 2005, and deemed complete by County staff on October 17, 2005. Following public hearings conducted by the Planning Commission and the Board of County Commissioners, on June 6, 2006, the BOCC adopted Ordinance No. 2006-90, denying the DAA.

Shortly after the BOCC's action and its indication that the Project remains inconsistent with local land use plans and regulations, the Applicant filed a Second Request for Preemption and reported that efforts to resolve noncompliance had not been successful. Therefore, in accordance with WAC Chapter 463-28, the Council must determine whether or not to recommend to the Governor that the state preempt local land use plans or zoning ordinances for the site. In order to do so, a brief review of the BOCC's denial is provided, followed by an evaluation of the merits of the Applicant's Second Request for Preemption under the Council's regulatory criteria as contained in WAC 463-28-040.

Project's Inconsistency with Kittitas County Wind Farm Overlay Ordinance

The Applicant seeks to construct the Project in Kittitas County, on open ridge tops between Ellensburg and Cle Elum at a site located approximately 12 miles northwest of the city of Ellensburg. The Project area is currently zoned as Forest-and-Range-20 (FR 20) and Agricultural-20 (Ag 20). The FR 20 zone limits non-agricultural structures to 35 feet in height. Wind farms can be an allowed use within these rural zones, but only through application of the County's Wind Farm Resource Overlay Zone. As set out in the Kittitas County Code, Chapter 17.61A, approval of a Wind Farm Resource Overlay Zone requires four separate items:

- (1) an amendment to the Comprehensive Plan Land Use map to designate a wind farm resource district;²³
- (2) a site-specific rezone to create a wind farm resource overlay zone;
- (3) execution of a development agreement; and
- (4) issuance of a wind farm resource development permit.

In Kittitas County Resolution No. 2006-90, the BOCC denied the overall KVVPP proposal and individually denied each of the four elements required by KCC 17.61A.

In support of its action, the BOCC made findings of fact to demonstrate the inconsistency of the proposed Project with its Comprehensive Plan and zoning code, including, generally:

²³ Under the Growth Management Act (GMA), amending a county's comprehensive plan is a complex process and is typically permitted only once annually. Thus, the Council views as unusual the requirement for an amendment to a local comprehensive plan for *each* proposed project site.

- The proposed turbines exceed the 35-foot height limit for the FR 20 zone.²⁴
- The Project's visual impact, particularly on residences located within a half mile of a proposed turbine, is high, but can be mitigated with increased setbacks that must exceed the 1,320 feet proposed by the Applicant.²⁵
- "Shadow flicker" from the proposed turbines would impact up to 40 local residences, including one as far as a mile away from the closest wind turbine.²⁶

The BOCC then made additional findings of fact in Resolution 2006-90 that specifically delineate the basis for its denial of the Project, quoted verbatim as follows:

- The placement in the project area of the wind farm as proposed is not properly mitigated with adequate setbacks and is incompatible with the neighborhood.²⁷
- The proposal fails to properly mitigate the [visual and shadow flicker] impact. The exercise of substantive SEPA authority pursuant to WAC 197-11-660(1)(b) and KCC 15.04.200 allows for denial of the project due to the significant adverse visual and shadow flicker impacts, the reasonable mitigation of increased setbacks has been refused by the applicant and cannot be imposed in the development agreement without the consent of the applicant, and the denial is consistent with the SEPA policy of maintaining aesthetically pleasing surroundings.²⁸
- The project area is in close proximity to many individual nonparticipating²⁹ homeowners and property owners. This area of the county has the character of rural residential and agricultural mixed use. The introduction of turbines of this size and number to this area is incompatible in such close proximity to the current uses. The Draft EIS and other environmental analysis demonstrate that the project as proposed involves significant, unavoidable, adverse impacts to the visual environment. The mitigation offered to residents who may be affected by shadow flicker required the nonparticipating property owner neighbors to

²⁴ See BOCC Resolution 2006-90, Findings of Fact 11 through 13.

²⁵ See BOCC Resolution 2006-90, Findings of Fact 14 through 23.

²⁶ See BOCC Resolution 2006-90, Findings of Fact 24 through 26.

²⁷ See BOCC Resolution 2006-90, Finding of Fact 27.

²⁸ See BOCC Resolution 2006-90, Finding of Fact 34.

²⁹ In the context of this Project, the BOCC and EFSEC both defined "nonparticipating" to mean those property owners with parcels adjacent or close to the proposed wind farm who had not entered into a lease arrangement or otherwise reached some sort of accord with the Applicant with regard to impacts on their properties. By contrast, "participating" property owners had reached agreements with the Applicant and therefore do not object to the Project.

mitigate the impact on their own property. The project also included other low, medium and significant non-mitigated impacts associated with the project. The Board finds that the project as proposed is not a reasonable development of the subject property given its impacts.³⁰

- Kittitas County Code 17.61A.040 requires that a determination be made that the proposal is not detrimental or injurious to the public health, peace, or safety or to the character of the surrounding neighborhood. The Board is unable to make this determination due to remaining unresolved concerns including shadow flicker and the visual environment for the nearby rural residents. The Board finds that requiring residents to mitigate an adverse impact caused by the proximity of the Project to existing residences is detrimental to the public health, peace and safety. Location of the Project to a less populated site could negate shadow flicker as an adverse impact to existing residents and thus fully mitigate the issue of shadow flicker.³¹
- The Board finds that identified adverse impact could not be mitigated, either on site or off site, due to the proximity of the proposed facility to nearby residences and property. The Board finds that a minimum of 2500 feet separation from wind turbines and nonparticipating landowner's residences would be necessary to reduce the significant adverse impact rating of "high" down to moderate visual impacts for those residences. Even at a distance greater than 2500 feet, some areas will experience impacts greater than moderate.³²

Thus, in Resolution 2006-90, the focus of the BOCC's objections to and chief reasons for denying the Applicant's DAA were the visual impacts caused by the height of the proposed wind turbines and the shadow flicker impacts to nearby homes.³³

Despite the BOCC's findings, this Council's review of the Kittitas County Comprehensive Plan finds that the Project is *not* inconsistent with the overall goals and policies of the Kittitas County Comprehensive Plan or its implementing zoning designations.³⁴ Instead, the Project actually appears to reinforce the County's overall planning goals; the Project conflicts only with the local height restriction (35 feet) on FR-20 lands and the County's Wind Farm Overlay Ordinance, particularly with the site-specific mitigation measures requested by the

³⁰ See BOCC Resolution 2006-90, Finding of Fact 36.

³¹ See BOCC Resolution 2006-90, Finding of Fact 39.

³² See BOCC Resolution 2006-90, Finding of Fact 40.

³³ Although the BOCC does not explicitly state as much in Resolution 2006-90, it would appear to the Council that the BOCC concluded that the proposed Project complied with the County's Wind Farm Overlay Ordinance in nearly all respects, excepting concerns for height, visual impacts and shadow flicker effects.

³⁴ The Council's review of the County's Comprehensive Plan and applicable portions of the zoning code is set out in Appendix A to this Order.

BOCC as part of the development agreement under negotiation in the BOCC hearings. In essence, but for the existence of the Wind Farm Overlay Ordinance, the County could have evaluated the KVVPP as a whole through its conditional use permit process or reviewed each individual tower through a series of applications seeking variances from the local height restriction.

In an Application for Site Certification filed with EFSEC, site-specific details are not for a county or city to negotiate and impose, but are firmly within the jurisdictional realm of this Council. EFSEC is charged with unitary permitting authority for energy facilities seeking its site certification, allowing for a streamlined siting process. EFSEC's preemptive statutory power to certify and regulate the location, construction, and operation of energy facilities such as the proposed KVVPP simply cannot be usurped by local governments seeking to impose their own imprimatur on the siting process. Nevertheless, this Council does not lightly override local ordinances, particularly when they exist as expressions of local care and concern for protecting public health and safety and the character of the surrounding neighborhood.

Evaluation of Applicant's Second Request for Preemption

Under the preemption authority granted to EFSEC by RCW 80.50.110 and further delineated by WAC 463-28-040, an Applicant unable to resolve noncompliance issues with local land use authorities must address the following four areas in a request for state preemption:

- (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;³⁵ and
- (4) Interests of the state as delineated in RCW 80.50.010.

The Applicant's Second Request for Preemption contained all of these required elements. The merits of each is addressed here, in turn.

Good Faith Efforts to Resolve Noncompliance Issues. EFSEC's rules contain no express definition of "good faith" and the Council recognizes the abstract and intangible quality associated with this term. Even so, the Council believes this requirement to mean that an Applicant must work through local government land use processes to resolve inconsistencies as extensively as possible, but not to the point where further efforts would be futile. Further, reasonable compromises in position must be explored by both sides. Finally, a good faith effort

³⁵ This EFSEC requirement is to be distinguished from a similar sounding SEPA provision for private projects on a specific site that requires the lead agency to evaluate only the "no action" alternative along with reasonable alternatives for achieving the proposal's objectives on the same site. See WAC 197-11-440(5)(d).

to resolve a land use consistency dispute need not result in actual resolution of all underlying matters.³⁶

Here, the Applicant made two separate attempts to achieve land use consistency in Kittitas County, first in 2003-2004 and then again in 2005-2006. The details of these efforts are contained in the record.³⁷ As relevant to the Applicant's Second Request for Preemption, the Applicant filed a Development Activities Application with Kittitas County in late September 2005. At that time, the Applicant reduced the size of its Project from a maximum of 150 turbines to a maximum of 80 turbines and altered the proposed layout of the turbine strings. The Applicant worked with County staff in preparing the matter for review by the Kittitas County Planning Commission and, in turn, the Kittitas County Board of County Commissioners. As described below, that review process consumed five months.

In January 2006, the Kittitas County Planning Commission held a public hearing on the Project on three consecutive evenings, then conducted a deliberative session later in the month.³⁸ At the first of these meetings, the Applicant presented expert witnesses to explain the Project and its impacts. Public comments were presented that same evening and on the two following nights. The Applicant then provided a brief response to concerns raised in the public comments.³⁹ On January 30, 2006, the Planning Commission reconvened to deliberate and the Applicant made its representatives available to answer technical and other questions posed in that public session. Following discussion, the Commission voted to deny any amendment to the Kittitas County Comprehensive Plan,⁴⁰ deny a rezone,⁴¹ and to pass forward to the BOCC the Applicant's proposed development agreement "with no recommendation but a general sense that it's

³⁶ Darryl Piercy, Director of Community Development Services for Kittitas County, agreed with this approach, testifying that "a good faith effort in any project is a willingness and a desire to come to a satisfactory conclusion that is mutually agreeable to both parties," but that ultimate agreement between the parties was not necessary. See EFSEC Transcript, September 19, 2006, at 484-85.

³⁷ The Applicant's pre-filed testimony for witnesses Chris Taylor (Exhibit 20, at 7-14, and Exhibit 20-SUP, at 7-16 and 23) and Dana Peck (Exhibit 42-SUP, at 7-18, and Exhibit 42-SUP REB) set out a summarized version of events from the Applicant's point of view. The County's pre-filed testimony for witness Darryl Piercy (Exhibit 51, at 4 and at 11-18) discusses this topic from a County viewpoint.

³⁸ Exhibit 6 to the Applicant's Second Request for Preemption contains transcripts for these special meetings of the Planning Commission held on January 10, 11, and 12, 2006, as well as that held on January 30, 2006.

³⁹ See Planning Commission Transcript, January 12, 2006, at 167-188.

⁴⁰ See Planning Commission Transcript, January 30, 2006, at 87-94.

⁴¹ *Id.*, at 103-104.

acceptable.”⁴² On February 13, 2006, the Planning Commission adopted specific findings of fact in support of its prior decision and forwarded that document on to the BOCC.⁴³

On March 29, 2006, the Kittitas County Board of County Commissioners convened a special meeting to review the KVVWPP.⁴⁴ Initially, the individual Commissioners identified their primary issues as the actual number of turbines proposed, the boundaries of the Project area, methodology for calculation of the Applicant’s proposed 1000-foot setback, visual impacts between ½ mile and 1 mile from the turbines, restoration of roads impacted by Project construction, and local property values.⁴⁵ Following a staff report, the Applicant was given an opportunity to respond to the BOCC’s stated concerns.⁴⁶ The BOCC then heard public comment for the balance of that evening and the majority of the following night,⁴⁷ followed by closing comments from the Applicant.⁴⁸

On April 12, 2006, the BOCC reconvened its public hearing on the Project. Commissioner Huston clarified that the purpose of the BOCC’s review would be to ensure: that each and every one of these projects would be evaluated on a site-specific basis. That’s key: site-specific basis.⁴⁹

Commissioner Huston then detailed his concerns with the Project’s impacts, stating that his “stumbling block” was mitigating impacts to existing residences, and concluding that the 1,000-foot setback proposed was not adequate and was a “deal killer.”⁵⁰ Commissioner Crankovich inquired about the basis for the 1,000-foot setback and Chairman Bowen questioned the adequacy of the information provided for determining an appropriate setback.⁵¹ The BOCC then agreed that a site visit to an existing wind farm would help them to better evaluate the ability of distance to mitigate the visual impacts of the turbines.⁵² The BOCC also requested the Applicant

⁴² *Id.*, at 107-109.

⁴³ See Planning Commission Transcript, February 13, 2006.

⁴⁴ The BOCC had received and reviewed the Planning Commission’s findings of fact, transcripts of each of the Planning Commission meetings, and all other documents in the record.

⁴⁵ See BOCC Transcript, March 29, 2006, at 10-19.

⁴⁶ *Id.*, at 25-47.

⁴⁷ See BOCC Transcripts for March 29, 2006, at 47-175, and March 30, 2006, at 5-75.

⁴⁸ See BOCC Transcript, March 30, 2006, at 76-101.

⁴⁹ See BOCC Transcript, April 12, 2006, at 7; see also Chairman Bowen’s comments at 44-45.

⁵⁰ *Id.*, at 18-28 and 49-51 (“stumbling block” comment at 25; setbacks discussed at 27-28 and “deal killer” comment within discussion at 49-51).

⁵¹ *Id.*, Commissioner Crankovich at 34-35; Chairman Bowen at 43-44 and 48-49.

⁵² *Id.*, at 53-62. The Applicant endorsed the BOCC viewing an operating wind farm (at 56-57).

to present additional information to justify a particular setback distance that would mitigate the impacts on existing residences near the Project.⁵³

On April 27, 2006, the BOCC again reconvened its public hearing on the Project. Each commissioner reported on his independent site visit to Puget Sound Energy's Hopkins Ridge wind farm at Dayton, WA (near Walla Walla, WA).⁵⁴ The Applicant then reviewed its letter to the BOCC of April 25, 2006, sent in response to the commissioners' requests for additional information and suggesting a new and farther setback of ¼ mile (1,320 feet) from existing residences.⁵⁵ The BOCC acknowledged the letter but insisted that further discussion or negotiation not occur until the Applicant prepared a revised and up-to-date version of its proposed development agreement.⁵⁶ The Applicant agreed to provide the requested document the following week.⁵⁷

On May 3, 2006, the BOCC reconvened the process and discussion quickly focused on the setback issue. Chairman Bowen, in his opening remarks, stated that a setback designed to mitigate visual impacts and shadow flicker would be, at minimum, 2,000 feet from non-participating property lines and 2,500 feet from non-participating landowners' residences.⁵⁸ Commissioner Crankovich felt that one-half mile (2,640 feet) was more appropriate; Commissioner Huston suggested that it took a distance of at least 2,760 feet before he began "to lose the sense of these things looming over me," concluding that the appropriate setback should be between one-half mile to 3000 feet.⁵⁹ Despite these individual opinions, the BOCC did not adopt any agreed setback standard to impose on the Project. When the Applicant was afforded an opportunity to respond, Chris Taylor informed the BOCC that a setback of 2,500 feet would "render this project inviable."⁶⁰ Commissioner Huston then criticized the Applicant for not explaining what made a wind farm economically viable; however, the Applicant indicated its desire to have the BOCC vote to approve or disapprove the proposed Project.⁶¹ The BOCC then voted its preliminary denial of the Project.⁶²

⁵³ *Id.*, at 62-64.

⁵⁴ See BOCC Transcript, April 27, 2006, at 4-14.

⁵⁵ *Id.*, at 17-24. See also Applicant's Letter to BOCC, April 25, 2006, as contained in Exhibit 7 to Applicant's Second Request for Preemption, at 7.19 through 7.23.

⁵⁶ *Id.*, at 25-31.

⁵⁷ *Id.*, at 31-33.

⁵⁸ See BOCC Transcript, May 3, 2006, at 12.

⁵⁹ *Id.*, Commissioner Crankovich at 23-24; Commissioner Huston at 27-29.

⁶⁰ *Id.*, at 47.

⁶¹ *Id.*, at 47-52.

⁶² *Id.*, at 54-55.

The BOCC reconvened the process on May 31, 2006, and heard from County staff that the Applicant had continued discussions and exchanged correspondence with staff in an attempt to determine whether the Project could be reworked to satisfy the BOCC's recent statements about acceptable setbacks.⁶³ The Applicant explained its difficulties in modifying the Project layout without the BOCC providing a definitive setback distance.⁶⁴ The BOCC members then came to agreement that an acceptable setback would be 2,500 feet from nonparticipating residences.⁶⁵ Although the Applicant did not agree to the 2,500-foot setback, it indicated that it would try to fit the Project into that standard, reassuring the BOCC that all other comments the County had made with regard to deficiencies in the development agreement would not be an obstacle to favorably resolving the matter.⁶⁶

On June 6, 2006, the BOCC reconvened its public hearing on the Project for the final time. The Applicant provided no further input to the BOCC and the commissioners adopted Resolution 2006-90 (excerpted above) denying the Project.⁶⁷

As demonstrated by this five-month chronology, the Applicant worked through local land use processes to resolve inconsistencies very extensively, providing detailed information, expert testimony, and timely responses to BOCC concerns, inquiries, and requests for updated documents. Further, the Applicant made compromises in the scope and scale of the proposed Project by reducing the number of turbines as well as adjusting their placement. In addition, the Applicant suggested a variety of measures to mitigate the potential impacts of shadow flicker on nearby residents. Finally, the Applicant compromised on the minimum setback of turbines from nonparticipating residences, moving from 1,000 feet to 1,320 feet. Even after the BOCC's preliminary denial, the Applicant continued its attempts to receive a definitive setback standard and fit its proposed Project within the BOCC's criteria.

After reviewing the full record, the Council finds, 6-1, that the Applicant expended significant effort to navigate the County's permitting process and that these efforts to resolve the land use noncompliance issues were made in good faith. Despite these attempts, the Applicant was ultimately unable to reach an agreement or to otherwise resolve the local land use inconsistency issues posed by the County's Wind Farm Overlay Ordinance. Therefore, Council finds that the first prong of WAC 463-28-040 is satisfied.

⁶³ See BOCC Transcript, May 31, 2006, at 8-13 and 15-17; see also various correspondence between Applicant and County staff from May 2006, as contained in Exhibit 3 to Applicant's Second Request for Preemption.

⁶⁴ *Id.*, at 24-29.

⁶⁵ *Id.*, at 30-38. Chairman Bowen later referenced a different setback standard of 2,000 feet from nonparticipating property lines, at 53, but it appears that this was a position favored by Commissioner Crankovich and a possible point of negotiation, not a minimum standard being imposed.

⁶⁶ *Id.*, at 41-45; see also Exhibit 51.3, showing impact on Project layout of 2,500 foot setback.

⁶⁷ See BOCC Transcript, June 6, 2006. Commissioner Huston characterized Resolution 2006-90 saying "we could not get to the point where we could approve the project." *Id.*, at 7.

Minority Opinion of Patti Johnson, Kittitas County representative to Council. I respectfully dissent from the above-noted Council finding. In light of the Applicant's failure to respond to the BOCC at the May 3, 2006, meeting when asked to suggest a setback greater than 1,320 feet, I do not agree that the Applicant completed its negotiations with Kittitas County in good faith. Silence on the Applicant's part cannot be characterized as a "good faith attempt" to resolve the issue of negative visual impacts to the nearby residents; a review of that portion of the transcript reveals that none of the commissioners was happy to see discussion come to a halt.⁶⁸ In my opinion, the Applicant quit prematurely, abandoning the process and thereby preventing a good faith completion of the BOCC's review of the Project. Therefore, I cannot join my fellow EFSEC council members in finding the "good faith" required by WAC 463-28-040(1). Thus, I further cannot ultimately join the Council to recommend preemption of Kittitas County's local land use laws.

Applicant and Local Authorities Unable to Reach Agreement. As evidenced by Kittitas County Resolution 2006-90, the Applicant and the County did not reach an agreement resolving all of the land use noncompliance issues. The Council notes that a failure to reach agreement is not always equivalent to an inability to reach agreement. In this case, however, the Council concludes that following numerous public hearings and the good faith efforts already noted above, the Applicant and the BOCC were unable to reach agreement. Therefore, the Council finds that the second prong of WAC 463-28-040 is satisfied.

*Alternate Locations in Kittitas County Reviewed and Found Unacceptable.*⁶⁹ Alternate wind farm sites in Kittitas County were analyzed in EFSEC's Draft EIS for this Project (Chapter 2.7) and were the focus of EFSEC's subsequent Draft Supplemental EIS for this Project. The criteria for analyzing alternate sites consisted of:

- 1) sufficient wind resource (the most important factor);
- 2) proximate/adequate transmission facilities;
- 3) large land area;
- 4) absence of significant environmental constraints; and
- 5) property owner interest/property availability/control of property.

The Draft Supplemental EIS concluded that although other sites for wind power generation may exist in Kittitas County, none would satisfy the test for availability or practicability (fifth factor)

⁶⁸ See BOCC Transcript, May 3, 2006, at 49-55.

⁶⁹ WAC 463-28-040(3) requires that "alternate locations which are within the same county and city have been reviewed and have been found unacceptable." This language, adopted in 1978, was most likely intended to apply to the siting of a large coal-fired or nuclear power plant, with a strong likelihood that only one such energy facility would be sited in any single county. The Council recognizes that this factor may not be as directly applicable to alternative energy sites which have distinctly different environmental impacts from their non-renewable competitors. Nevertheless, this EFSEC preemption regulation requires analysis on this factor and efforts were made throughout the process to adapt the rule to the situation presented by a proposed wind farm, many of which might be appropriately sited in a given county.

for the Kittitas Valley Wind Power Project. Furthermore, competing companies are proposing to develop some of these alternate sites, making these locations unavailable to the Applicant.

According to the Applicant, it did consider other locations in the County but did not find any acceptable alternatives to the proposed site.⁷⁰ The Applicant believes there is no other site with a wind resource as robust and as well documented by long-term on-site data. Further, the Applicant notes the presence of multiple transmission lines of appropriate voltage and adequate capacity to carry the entire output of the Project, with no new feeder line construction required. In addition, the Applicant points out its existing land agreements with participating landowners securing the ability to use this site. Finally, the Applicant correctly notes that under current Kittitas County land use regulations, there are no pre-approved zones or specific sites for constructing wind farms in the entire county.

The Council has reviewed the record and heard testimony regarding the quality of the wind resources at the KVVWPP site. Witness Ron Nierenberg, a consulting meteorologist specializing in analyzing wind resources, called the KVVWPP site "one of the best wind power project sites available in Washington."⁷¹ It was undisputed that the KVVWPP site is very close to several adequate transmission lines and that some of the alternate sites in Kittitas County share a similarly advantageous location with respect to interconnection to the existing electrical grid.⁷² Further, the existence of a large land area was not a significant distinguishing factor for KVVWPP.⁷³ However, the environmental constraints identified at several of the proposed alternate sites demonstrated appreciable obstacles to development of a suitable wind power project, hurdles not present at KVVWPP.⁷⁴ In addition, the County's zoning does not designate any site within Kittitas County as an approved area for development of a wind farm.⁷⁵ Finally,

⁷⁰ See Applicant's Proposed Findings of Fact, Conclusions, and Order Recommending Approval of Site Certification on Condition, at 46-51 and 144-149, for its full exposition on the summarized contentions contained in this paragraph.

⁷¹ See Exhibit 26, at 7-9; see also EFSEC Transcript, September 20th, at 698-712, where Mr. Nierenberg specifically discusses the KVVWPP site in comparison to other sites in Kittitas County. When seen from a resource exploitation view, it is logical for developers to identify the least costly areas from which the resource can be extracted. If the wind industry is at all similar to the oil and gas industries, this approach illuminates their primary economic incentive to develop a particular site, allowing them to harness the most wind for the least cost.

⁷² See Draft Supplemental EIS, Table 2-1.

⁷³ *Id.* See also Figure 2.2 for map of identified potential off-site alternative locations.

⁷⁴ *Id.* The existence of extensive archaeological sites at the Boylston Mountains site complicates the development of this area, as does its current use for military training. Further, this site as well as the sites at Manastash Ridge, Skookumchuck Creek, and Quilomene contain or are adjacent to much more sensitive wildlife habitat.

⁷⁵ Evaluating alternate sites is impossible because of Kittitas County's failure to pre-designate specific wind farm development zones in its plans and regulations. This requires any and all potential sites to be evaluated only through individual applications to the BOCC under the Wind Farm Overlay

the Applicant's lack of control of the property at any of the alternative sites creates the most significant complication in finding any of the other possible sites acceptable.⁷⁶

A review of the available information demonstrates that the KVVWPP is the best available undeveloped wind resource remaining in Kittitas County. Further, the environmental constraints at alternate sites appear to be significantly more complex than those in evidence at the Kittitas Valley site. The Applicant has surveyed alternate sites and put forward what it believes to be the best choice for development of a wind farm. After considering the Applicant's contentions and evaluating the record, the Council concurs and finds that alternative sites for the KVVWPP are unacceptable. Therefore, the Council finds that the third prong of WAC 463-28-040 is satisfied.

*Interests of the State as Delineated in RCW 80.50.010.*⁷⁷ This statute recognizes that Washington needs additional sources of electrical energy but that selection of appropriate sites for its generation must balance a variety of broad public interests. The statute (quoted in its entirety below) sets out five main premises for the site selection process, including sufficient operational safeguards, environmental issues, provision of abundant energy at reasonable cost, an inapplicable reference to unfinished nuclear sites, and avoiding costly duplication of a timely decision-making process. Each of the four relevant premises is briefly addressed in turn.

Ordinance, KCC 17.61A, as described above. Therefore, it is currently impossible to identify any acceptable alternative sites within Kittitas County.

⁷⁶ The Council recognizes that this particular prong of the alternative site analysis is fraught with subjectivity and may appear to allow an Applicant to simply state the non-existence of lease agreements elsewhere in the surrounding area. However, it is also true that without the ability to control the necessary acreage, no Applicant can put forward a proposed Project. In this case, the Council did not rely on this as the determinative factor in its analysis about alternative sites.

⁷⁷ RCW 80.50.010 provides: 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.

Sufficient Operational Safeguards. The Application for Site Certification, Final Environmental Impact Statement, provisions of this Order Recommending Approval of Site Certification on Condition, and the accompanying Site Certification Agreement each address a wide variety of unique operational safety measures presented by wind farms. Although neither the federal nor the county government has adopted comprehensive standards for wind farms, safety issues such as tower collapse, blade throw, and ice throw have been extensively explored during the EFSEC process. Further, the Project will comply with all Federal Aviation Administration requirements for tower visibility and lighting. Therefore, the Council finds that the mitigation measures contained herein and in the SCA are more than sufficient to ensure that the KVVWPP will operate under stringent criteria designed to protect the public welfare.

Environmental Preservation and Protection Issues. The Final EIS, this Order, and the accompanying SCA each delineate the various mitigation measures required to ensure the KVVWPP is built and operated such that it preserves and protects the quality of its immediate environment as well as a range of more regional environmental interests. In the immediate category, the Project's environmental studies comply with the requirements set out in the Wind Power Guidelines adopted in 2003 by the Washington Department of Fish & Wildlife (WDFW). Further, the Project includes the purchase of a 539-acre mitigation parcel designed to offset any impacts to habitat. In the regional category, the generation of wind power to meet current and future energy demands (addressed further below) promotes air cleanliness and helps to meet increasing demand from utility customers for "green" energy.

The ability of the KVVWPP to enhance "the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources" is inevitably subject to differing views and debate. Construction of more than five dozen very tall wind turbines where none have previously existed will dramatically alter the visual environment for both local residents and regional travelers. However, a variety of evidence in the record, including public comment and the Council's own site visit, reveals that the Project's occupation of approximately 6,000 acres of rural land zoned for agriculture, forest, and range uses will increase the economic viability of these tracts of land, reducing the possibility of further residential subdivision of this part of the county. While some rural residents emphasized the undesirable nature of having one or more wind turbines as neighbors, others stated their preference for a wind farm as opposed to seeing agricultural or rangeland further subdivided and developed for uses more compatible with suburbia. The Council heard numerous voices calling for a variety of outcomes in this case.

This particular premise, when balanced with the other state interests examined herein, is served by certification of the KVVWPP site. As discussed elsewhere in this Order, the immediate visual impact falls on a very small number of nonparticipating residences. While the overall influence on the esthetic of the region is not to be trivialized, the benefits associated with this wind farm are much more widespread. When the broad interests of the public are balanced, the adverse impacts of the KVVWPP are outweighed and the interests of the State must take precedence. In this case, therefore, the Council finds that when all required mitigation measures are considered, environmental quality is sufficiently preserved and protected by recommending preemption of the local ordinances and approval of this Project.

Provision of Abundant Energy at Reasonable Cost. The stated purpose of the KVVWPP is "to construct and operate a new electrical generation resource using wind energy that will meet a

portion of the projected growing regional demands for electricity produced from non-renewable and renewable resources.⁷⁸ In its Second Request for Preemption and its post-hearing briefing materials, the Applicant sets out a variety of arguments as to why current economic conditions and trends support the need for this Project.⁷⁹ The evidence in the record indicates that the KVVPP will produce electricity at a reasonable cost, without the volatility shown by the fossil fuel market.⁸⁰

The Council recognizes that wind resources in the state of Washington are finite and limited.⁸¹ As noted above, the KVVPP site is one of the best available across the entire state.⁸² Further, the State of Washington is part of an integrated electrical system that incorporates most of the western portion of both the U. S. and Canada. During the winter heating season the State of Washington becomes a net importer of electricity; at other times of the year, other portions of the U. S. and Canada become dependent on Washington's surplus hydroelectric power.⁸³ The addition of wind power resources to the state's electrical grid may allow integration with the management of hydroelectric dams to provide additional flexibility in meeting the seasonal needs of federally protected species, including salmonids.⁸⁴

New sources of electrical generation are needed now and will continue to be important in the future. After reviewing all available information in the record, the Council finds that the Project will contribute to the availability of abundant energy at reasonable cost.

Avoiding Costly Duplication of the Siting Process. This statutory premise highlights the Council's main motivation in recommending preemption of Kittitas County's Wind Farm Overlay Ordinance. In accordance with Chapter 80.50 RCW, EFSEC is charged with the statewide responsibility for siting major energy facilities.⁸⁵ Applicants for alternative energy

⁷⁸ See Draft EIS, Section 1.2.

⁷⁹ See Applicant's Second Request for Preemption, at 17-22; see also Applicant's Proposed Findings of Fact, Conclusions, and Order Recommending Approval of Site Certification on Condition, at 54-60 and 149-155, for its full exposition on these issues.

⁸⁰ See Exhibit 43 (pre-filed testimony of Randy Hardy), at 2-9, and EFSEC Transcript, September 20, 2006, at 752-754 (cross-examination of Randy Hardy); see also Exhibit 60 (pre-filed testimony of Tony Usibelli), at 6-10, and Exhibit 60.3; see also Exhibit 70 (pre-filed testimony of Sonja Ling), at 5-12, and Exhibit 72.4 (introduced by Troy Gagliano).

⁸¹ See Draft EIS, Sections 3.5 and 3.6.

⁸² See, *supra*, footnote 71, and accompanying text regarding meteorological attributes of site.

⁸³ See EFSEC Transcript, September 20, 2006, at 634-636 (cross-examination of witness Tony Usibelli); see also Exhibit 60.

⁸⁴ See EFSEC Transcript, September 20, 2006, at 752-758 (cross-examination of witness Randy Hardy); see also Exhibit 43.

⁸⁵ See RCW 80.50.040; see also RCW 80.50.060(1) and (2).

facilities can choose between EFSEC's centralized process and other available local permitting processes. In either case, when an application is presented to EFSEC, all site-specific evaluation is to be conducted by EFSEC.

Kittitas County's Wind Farm Overlay Ordinance usurps EFSEC's role of site-specific project evaluation. The Board of County Commissioners failed to provide the Applicant in this case with a method for resolving land use inconsistencies without submitting itself to the local permitting process that focused on the specifics of the Project.⁸⁶ In this case, the Wind Farm Overlay Ordinance made it impossible for the Applicant to apply to Kittitas County only for an accommodation in the zoning code through the conditional use permit or variance process. Under the County's Overlay Ordinance process, the Applicant had to obtain its site-specific permits from Kittitas County, then return to the EFSEC process and obtain those same permits a second time. The Council finds this to be exactly the type of "costly duplication in the siting process" that EFSEC was created to avoid.

It is in the State's interest to see that applications for new energy facilities are processed in a timely and efficient fashion.⁸⁷ The site-specific process demanded by Kittitas County circumvents EFSEC's ability to achieve this statutory mandate and also seeks to preserve a local veto power over energy facility projects proposed for EFSEC approval. Therefore, the Council finds that the fourth prong of WAC 463-28-040 is satisfied by recommending preemption of the Kittitas County Wind Farm Overlay Ordinance.

EFSEC's Power of Preemption is Not Eliminated by the Growth Management Act

Parties in opposition to the Project have argued that the 1990 adoption of the Growth Management Act (GMA), Chapter 36.70A RCW, operated to eliminate EFSEC's ability to recommend preemption of local land use plans and/or zoning codes to the governor. A brief review of the rules of statutory construction and a glance at the GMA alongside its implementing regulations reveal the fallacy of this contention.

RCW 36.70A.103 requires state agencies to comply with local comprehensive plans and development regulations adopted pursuant to the GMA. However, no language within the GMA explicitly repeals RCW 80.50.110(1), which clearly elevates Chapter 80.50 RCW to override any conflicting law, rule, or regulation. This EFSEC statute establishing state preemption for the siting of energy facilities was adopted many years before the creation of the GMA. Neither the original language of the GMA nor its multiple amendments since 1990 have made any attempt to eliminate EFSEC's power of preemption.

⁸⁶ See, *supra*, footnote 49, citing to BOCC members explaining the site-specific nature of the Wind Farm Overlay Ordinance. See also EFSEC Transcript, September 19, 2006, at 469-479 (cross-examination of Darryl Piercy, conceding that under the terms of the County's ordinance, applicants filing for EFSEC site certification must also seek site-specific approval from Kittitas County).

⁸⁷ This premise set out in RCW 80.50.010(5) is further supported by RCW 80.50.100(1) which directs EFSEC to complete its review of each application, including SEPA compliance, the adjudicative hearings, and publishing of its recommendation to the governor within a 12 month period.

Further, the GMA's implementing regulations address that law's relationship with other statutory schemes. WAC 365-195-700 states, in pertinent part:

... These plans and regulations will take their place among existing laws relating to resource management, environmental protection, regulations of land use, utilities and public utilities and public facilities. Many of these existing laws were neither repealed nor amended by the Act.

In addition, under WAC 365-195-765(2), RCW 36.70A.103 is only applicable to state agencies when they occupy "the position of an applicant proposing development, except where specific legislation explicitly declares otherwise." Here, EFSEC is not the applicant for the KVVWPP and, in fact, EFSEC does not hold final decision-making authority in this matter. Rather, the governor, who is not a "state agency" holds that ultimate power.

Washington courts disfavor implied repeals,⁸⁸ yet this is the theory advanced by opponents of the Kittitas Valley Wind Power Project seeking to prevent EFSEC from recommending that the governor preempt the Kittitas County Wind Farm Overlay Ordinance. Given the clarity of RCW 80.50.110 and the acknowledgement contained in GMA implementing regulations that the GMA does not supersede other pre-existing laws, the Council rejects the argument that following enactment of the GMA, it no longer retains the authority to recommend preemption of local land use codes.

Council's Recommendation to Preempt

The Council considered the Applicant's Second Request for Preemption and finds that the Applicant has complied with all provisions and requirements of Chapter 463-28 WAC and that the Council has given due consideration to the local community interests and governmental interest affected by the project and shall provide for such in the SCA. Specifically, the Council finds that to the extent that it is in conflict with the present application herein, the height limit in the FR-20 zone and the Kittitas County Wind Farm Overlay Ordinance in KCC Chapter 17.61A should be preempted by the Council pursuant to RCW 80.50.110 and Chapter 463-28 WAC.

The Applicant made all reasonable efforts, in good faith, to resolve "noncompliance" issues with the County as required by WAC 463-28-030. In summary, the Applicant made two efforts to seek local consistency, reduced the project in half to minimize impacts, deployed substantial expert witness resources to the County process, and participated in numerous local hearings before the local Planning Commission and the Kittitas County Board of County Commissioners. The Applicant has met all Council-developed criteria for evaluating the exercise of EFSEC's statutory preemption power.

The Council notes that the existing uses of the Project's land area will not be permanently displaced or significantly disturbed by operation of a wind farm. After consideration of all available evidence, the Council finds and concludes that the Project is consistent with all applicable local land use laws and regulations except for the above-noted 35-foot height

⁸⁸ See Paulson v. Cy. of Pierce, 99 Wn.2d 645 (1983).

restriction in the FR-20 zone and the Wind Farm Overlay Ordinance, particularly its site-specific evaluation criteria.

For all of the reasons discussed in the body of this Order, the Council recommends to the Governor by a vote of 6-1 that the Kittitas County Wind Farm Overlay Ordinance, KCC Chapter 17.61A, be PREEMPTED, as required by RCW 80.50.110.

4. ISSUES

In addition to the land use consistency and preemption issues, the Council also had to consider issues such as air quality, noise, wetlands, wildlife, water quality and quantity, visual resources, health and safety/public services, seismic/volcanic hazards, traffic and transportation, cultural resources, site restoration and whether the Applicant made a prima facie demonstration that the Project met the requirements of law and was consistent with the legislative policy and intent of Chapter 80.50 RCW.

Further, EFSEC is responsible for applying the State Environmental Policy Act (SEPA), Chapter 43.21C RCW, which provides for the consideration and mitigation of probable significant adverse environmental impacts. WAC 463-47-140. Finally, the Council carefully considers all public comment received on proposed power facilities. RCW 80.50.090 and WAC 463-14-030.

Project Configuration and Construction

As indicated in the Draft and Final EIS, the Council reviewed the impacts of the Project on all elements of the environment for the range of turbine sizes and numbers proposed in the Application and its subsequent modification. The analysis performed in the EIS showed that, overall, the impacts from the various Project scenarios did not vary significantly from one scenario to the next. No scenario resulted in significant adverse environmental impacts on any element of the environment. The Council therefore finds that allowing the Applicant to select a suitable Project configuration from within the range described in the modified Application, and analyzed in the FEIS, is appropriate.

The Applicant shall be required to construct the Project within the time frame anticipated in the construction schedule presented in the Application, approximately twelve (12) months from the beginning of construction (*see* Application, Section 2.2.6). However, the Applicant shall not be restricted from operating and generating power from those individual strings of turbines that are completed while other strings of turbines remain under construction. Further, if the Applicant insists on the Project being constructed in phases over a period exceeding that presented in Application No. 2003-01 the Applicant may seek an amendment to the Site Certification Agreement at a later date, allowing for any required additional environmental impact analysis and, if relevant, confirmation of land use consistency at that time.

As stated above, parts of the Project would be constructed on lands to be leased from DNR. Because some of those leases may not have been finalized at the time of approval of this order, the Site Certification Agreement limits site preparation and construction activities to only those lands for which leases have been actually obtained and finalized at the time Project construction activities begin.

Visual Resources

The Project is located in a rural area of Kittitas County with scattered rural residential development. Therefore, consideration and analysis of the Project's impacts to visual resources must be accomplished from both a general perspective as well as with regard to the more specific impacts on nearby existing residents.

The Applicant hired qualified experts to carry out an extensive visual and aesthetic impact analysis which was based primarily on the Federal Highway Administration methodology for determining visual resource change and assessing viewer response to that change. The Applicant's expert used the photomontage module of the WindPro software program to create "before and after" visual simulation images to show the proposed Project from six simulation viewpoints (SVs) selected to be representative of views toward the Project from a range of locations, superimposing computer-rendered three-dimensional wind turbines on photographs of existing conditions. Levels of visual impact were classified as high, moderate, and low. In 2003, the Applicant's analysis and the Council's DEIS both found that the overall visual impact of the Project, as originally proposed, would be low to moderate. However, there were several simulated viewpoints that predicted a high or moderately high level of impact from the Project, particularly from portions of US 97, the ridges east of US 97, and certain national forest lands; in addition, panoramic regional views of the Stuart Range were impacted, mainly from southeast of the Project.

In 2005, the Applicant revised the layout of the Project, relocating or reducing the length of various turbine strings, reducing the number of turbines, and eliminating others altogether. Further analysis by the Applicant and the Council's Addendum to the DEIS agreed that the overall visual impact of the revised Project would remain low to moderate. In addition, along US 97, the Project's revised layout eliminated at least one area of high visual impact and reduced another from high to low. View impacts from several other areas were also mitigated by the revised layout. To further minimize visual impacts, the Applicant will undertake mitigation measures, such as painting the wind turbine towers with light-colored (neutral gray) low-reflective paints which allows for elimination of otherwise-FAA-required daytime lighting and potentially permits the turbines to blend into background colors. The Applicant's analysis and the Council's FEIS found that the overall visual impact of the Project would be low to moderate.

Despite the overall reduced visual impact of the revised Project layout, a number of private residences would remain within one-half mile of the Project's turbines. By definition (in the EIS analysis), any homes located within one-half mile have a high level of visual sensitivity to the turbines. However, "participating residences," those on private land being leased to the Applicant for placement of a turbine, have voluntarily accepted the Project's visual impacts. Thus, only the impacts to a smaller set of no more than sixteen (16) "non-participating" residences require further specific review. Although the Council recognizes it is not obligated to eliminate all negative impacts on nearby properties, the Council nevertheless believes that determination of an appropriate methodology to mitigate visual impacts to private homes, particularly "looming" (see below), is appropriate in this case.

Visual sensitivity is not equivalent to actual visual impact. Thus, the Council finds that a blanket prohibition on the siting of all turbines within one-half mile of existing non-participating

residences is unwarranted. Even so, neither the Applicant nor the Intervenors provided specific data or visual simulations with regard to topography or other potential obstructions to views of the turbines from each of the affected non-participating residences within one-half mile of the Project.⁸⁹ Therefore, individualized accommodations to best suit each affected non-participating residence or to address only each non-participating home's primary viewshed cannot be addressed herein or in the accompanying Site Certification Agreement (SCA). Further, as EFSEC is not equipped to receive and rule on non-agreed individual post-approval modifications to the SCA for the siting of one or more of the turbines (i.e. a variance process), a more generalized rule to best mitigate potential visual impacts to these nearby homes must be adopted for this Project.

The Applicant presented expert testimony that a quarter-mile setback (1,320 feet) would be adequate to mitigate against any potential effect of a turbine visually dominating the view from a residence.⁹⁰ The Applicant's expert explained that studies of visual dominance have established that an object ceases to dominate a person's normal field of view when seen from a distance of four times the height of the structure (4xh).⁹¹ Although cross-examination pointed out the subjective nature of how much any particular item of varying horizontal dimensions might visually dominate one's viewshed,⁹² the Council finds that for structures predominantly defined by height rather than by width, such as wind turbines, the Applicant's proffered formula for determining the minimum distance necessary for preventing visual dominance (also known as "looming") is appropriate.

The Council further finds that siting individual wind turbines to remove any "looming" effect on non-participating residences in the immediate surrounding area sufficiently balances the impacts on those homeowners with the public's interest in developing new sources of wind power. Therefore, the Council hereby adopts criteria to eliminate any potential "looming" effect to be caused by any turbine in the Kittitas Valley Wind Power Project, to wit: no KVVPP turbine may be placed closer to any point of a non-participating residential structure than four times that turbine's tip height (4xh; i.e. for the proposed 1.5 MW turbines with tip heights of 330 feet, the required minimum setback from a non-participating residence would be 1,320 feet; for

⁸⁹ The Applicant's expert surveyed potential view impacts to all 16 properties from above (via helicopter) and from the closest public road access. However, because some of these owners did not agree to allow the Applicant's consultant access onto their properties, he was not able to determine actual visual impacts to each of the non-participating residences within one-half mile of the Project. See EFSEC Transcript, September 18, 2006, at 274-279, 284, and 296-97.

⁹⁰ See Exhibit 34-SUP, at 11 (line 15-16) and at 16 (line 6-9).

⁹¹ See Exhibit 34-SUP, at 16-18; see also EFSEC Transcript, September 18, 2006, at 298-99 and 320.

⁹² See EFSEC Transcript, September 18, 2006, at 306-07 and 312-14.

the proposed 3 MW turbines with tip heights of 410 feet, the minimum setback would be 1,640 feet).⁹³

Minority Opinion of Patti Johnson, Kittitas County representative to Council. I respectfully dissent from the Council's findings with regard to Visual Resources. The overall viewshed of the western valley is an irreplaceable community asset for Kittitas County, particularly the panoramic views of the Stuart Range. Marring existing pristine views of the mountains with strings of wind turbines is an unacceptable impact of this Project, one which cannot be mitigated, even with the Project's revised layout. Without measures to preserve and protect these vistas, I cannot vote to approve this Project.

Light, Glare, and Shadow Flicker

The Project's location in a rural area populated with scattered residences limits its potential impacts from light or glare. The turbines will not add significant ambient light to their immediate surroundings. However, approximately 18 turbines will be marked with flashing warning lights required by the FAA to alert aircraft to their presence.

Shadow-flicker caused by a wind turbine is defined as alternating changes in light intensity when the moving turbine blades cast shadows on the ground or objects (including windows of residences). Shadow-flicker can occur in Project-area homes if a wind turbine is located near a home and is in a position where the blades interfere with very low-angle sunlight. The result can be a pulsating shadow in the rooms of the residence facing the wind turbine and subject to the shadow-flicker effect. Such a location is called a "shadow-flicker receptor." Visual obstacles (e.g., terrain, trees, or buildings) between the wind turbine and a shadow-flicker receptor can reduce or eliminate the shadow-flicker effect. Shadow-flicker frequency is related to the rotor speed and number of blades on the rotor. In addition to being an annoyance, concerns have been raised regarding shadow-flicker causing epileptic seizures; however, there are no documented adverse human health impacts from shadow-flicker rates associated with wind turbines.⁹⁴

The Applicant has stipulated that it is able to mitigate shadow flicker by programming the turbines to shut down during those specific times that significant shadow flicker occurs. The Applicant further stipulated that it would institute this mitigation for all existing residences on non-participating properties within 2,500 feet of a turbine that have a line-of-sight view (view of turbine not blocked by topography and/or vegetation) from the residences to that turbine, upon request of the non-participating land owner.

⁹³ Given the unique topographical characteristics associated with individual wind power generation sites, the setback explained herein shall not be considered a binding precedent for future EFSEC siting decisions.

⁹⁴ See Exhibit 40, at 5 (pre-filed testimony of Arne Nielsen). According to the Epilepsy Foundation, photosensitive epilepsy involves seizures triggered when flickering or flashing light occurs at rates of 5-30 flashes per second. Wind turbine flash rates are much lower, typically between 0.5 and 1 flash per second.

After considering and accepting the Applicant's proposed mitigation measures, the Council finds that the Project has no appreciable impacts from light or glare, including shadow flicker.

Socioeconomics/Property Values

The issue of the Project's potential effect on property values in the County was debated during the proceedings. Evidence in the record suggests that the rural location of the Kittitas Valley Project site should be beyond the geographic area where any potential negative impacts to urban property values might be experienced. Evidence was offered to show that Kittitas County remains a vibrant real estate market; property sales in developed and developing portions of the County remain robust. Further, evidence in the record demonstrates continued subdivision of rural lands in the vicinity of the affected area following announcement of the proposed Project;⁹⁵ however, commitment of 6,000 rural acres to the Project may prevent a trend toward further rural residential sprawl in the area. No evidence was offered to demonstrate any negative effect on property values, urban or rural, due to the publicity related to this or any of the other potential wind power projects in the area. Even so, the Council acknowledges that there is no objective means to demonstrate the actual impact on local property values until after the Project has actually been constructed. The Council found no conclusive evidence to demonstrate that the Project will have any probable significant adverse impact on the property values in the County. Thus, lacking such evidence, the Council cannot require mitigation of any speculative negative impacts.

Project construction will result in increased employment in Kittitas County. It is estimated that about 50% of the direct construction employment impact (253 full and part-time jobs) would occur within the local economies, with the remainder distributed elsewhere in the Northwest. Approximately 16-18 permanent jobs will be added for operation of the Project.

Total direct income (personal income in the form of wages, profits, and other income received by workers and business owners, plus income from other sources such as royalty payments to land owners who lease land for the turbines) generated during the construction phase of the Project is estimated to be \$5,814,500. This would be a temporary effect on the Kittitas County economy.

The Project's economic impacts are not expected to be limited to jobs. The Applicant estimates additional indirect and induced impacts to add another \$4,335,600 to the regional economy. Thus, the total direct and indirect income resulting to the County during the construction phase is projected to be \$10,150,100.

Surveys show that local housing supplies are adequate to accommodate the Project's construction-related demand for temporary rental housing. Further, no more than 6-7 families are estimated to require new housing based on jobs created by the operation of the Project. Thus, no adverse impacts are expected with regard to regional or local housing supply.

Total Project cost is estimated to be \$190 million. Thus, it is estimated that the Project will increase the total valuation of real property in Kittitas County by approximately 5%, from

⁹⁵ See BOCC Transcript, January 11, 2006, at 40-42 and 57.

\$2.5 billion to \$2.7 billion, thereby increasing tax revenues for Kittitas County. It appears that the Project will become one of the largest single taxpayers in Kittitas County, contributing revenues for state school funds, local schools, and local public services in the area, including county roads and county government. Finally, the Project could result in reduced property tax levy rates for local taxpayers.

In addition to increased local tax revenues, the Project will also financially benefit the state treasury. Several turbines are expected to be located on land managed by the Washington Department of Natural Resources (DNR). For these turbines, a rental fee for land will be paid to the State which then returns these funds to schools across Washington based upon the needs of individual school districts. The annual rental rate is estimated to be \$9,249 per turbine for the first 10 years of the Project, with incremental increases in the following 15 years until the rate reaches an estimated \$20,744 per turbine when the Project is 25 years old.

Noise

The Project will be designed to meet applicable Washington State Environmental Noise Levels, Chapter 173-60 WAC. Kittitas County does not have noise ordinances requiring control beyond state Noise Levels.

Because of the rural nature of the Project area, noise resulting from construction of facilities on the Project site is not expected to have adverse impacts on residences. Furthermore, the Applicant has committed to implement work-hour controls to limit noisy activities and blasting to daylight hours only and conduct all other noise-generating construction activity between the hours of 7:00 a.m. and 10:00 p.m.⁹⁶

The Washington Department of Ecology has established limits for environmental noise in WAC 173-60-040. The environmental designation for noise abatement (EDNA) limit for noise generated by an industrial facility is 60 dBA during daytime hours and 50 dBA during nighttime hours. The Applicant has extensively modeled the noise impacts from turbine operation using industry recommended models and procedures. The Applicant has assumed conservative noise emission values for the type of equipment being considered. According to the Applicant's modeling, the highest estimated Project noise level at a residential receptor is 49 dBA, which is within the nighttime regulatory limits adopted by DOE.⁹⁷ Even so, the operational noise from the turbine blades and nacelles may be discernible from some nearby homes, particularly when low wind speeds create only minimal background noise.⁹⁸

⁹⁶ WAC 173-60-050 exempts from its regulatory limits most construction-related noise, including blasting, if conducted between the hours of 7:00 a.m. and 10:00 p.m.

⁹⁷ See Exhibit 25-SUP, testimony of environmental engineer Mark Bastasch, at 3, and at Table 1 in accompanying Technical Memorandum (of 94 potential receptors analyzed, only 15 had estimated Project noise levels ≥ 40 dBA; the only receptor at 49 dBA was a participating landowner). This modeling methodology considered all possible sources of turbine noise at the particular residential site (i.e. all turbines within earshot of the home), not just a single turbine. See EFSEC Transcript, September 20, 2006, at 727-728.

⁹⁸ See EFSEC Transcript, September 20, 2006, at 719-723 and 736-737.

Noise from the high voltage feeder lines, substation transformers and high-voltage switching equipment will comply with levels specified in WAC 173-60-040.

Habitat, Vegetation, and Wetlands

The Applicant surveyed and mapped vegetation communities in the 6,000-acre Project area, and associated collection feeder line corridors. The Project is at the western edge of the Central Arid Steppe zone defined by the Washington State GAP Analysis. Vegetation communities within the KVVPP site consist primarily of sagebrush and grasslands. There are riparian zones along ravines and lithosol communities⁹⁹ along ridge tops. The higher portions of the Project area border the ponderosa pine zone. Habitat quality within the Project area ranges from poor in many of the valley bottoms to good along some of the ridge tops and flats. Generally, the ridge top habitats are in fair to good condition. More specifically, the ridge top lithosols are typically in good condition, containing a relatively intact vegetative structure and few non-native species. The deeper-soiled ridge top habitats are generally in fair condition, with certain areas dominated or co-dominated by non-native species in the grass layer.

The Project would result in temporary vegetation community impact of approximately 231 to 371 acres of which approximately 145 acres is shrub-steppe. Of the approximately 93 to 118 acres of permanent impacts, approximately 45 acres would occur in shrub-steppe. Shrub-steppe habitat is considered a priority habitat by WDFW.

The Applicant proposed to mitigate all permanent and temporary impacts on vegetation in accordance with the WDFW Wind Project Habitat Mitigation Guidance Document (WDFW Wind Power Guidelines 2003). An approximately 539-acre mitigation parcel has been purchased within the 6,000-acre Project area. The parcel meets or exceeds the required habitat replacement ratios under WDFW Wind Power Guidelines for any of the Project scenarios considered.

The Applicant would also implement BMPs to minimize introduction of weeds, implement a noxious weed control program, and would develop and implement a comprehensive post-construction restoration plan for temporarily disturbed areas, including habitat-reseeding programs, in consultation with WDFW. Sensitive habitat areas near proposed areas of construction would be flagged and designated off-limits to construction activities and personnel.

As noted above, in Section 2, the Applicant and Counsel for the Environment have agreed that the Environmental Monitor for construction of the Project should be an independent, qualified engineering firm to be hired directly by EFSEC. In addition, the "trenching protocol" adopted during construction of the Wild Horse Wind Power Project in spring 2006 shall be utilized for this Project.

⁹⁹ Lithosol (shallow soil) habitats are associated with soils distinctive in physical or chemical properties and can support unique vegetation communities not necessarily associated with a particular vegetation zone. Lithosols are both sensitive to disturbance and difficult to replace.

The Council finds that with the mitigation measures proposed by the Applicant, and required in the Site Certification Agreement, mitigation is consistent with the WDFW Wind Power Guidelines, and as a result no significant adverse impacts to habitat are expected to occur.

A rare plant investigation has been conducted on the Project site. There are no known populations of federally or state-listed endangered, threatened, proposed or candidate plant species in the Project area, or the corridors where collection feeder lines would be constructed. No impacts to protected plants are therefore expected to occur.

A wetland investigation was performed on the Project site. Potentially jurisdictional wetlands or waters of the United States have been identified at nine locations within or adjacent to the Project area. At four of the locations, the Project design will keep development away from streams and wetlands and avoid any impacts to waters of the United States. In five other locations, potentially jurisdictional streams (waters of the United States) were identified where impacts cannot reasonably be avoided.

Potential direct impacts to wetlands and waters from the Project will result from construction of road and underground electric cable crossings of seven intermittent streams, none of which provides fish habitat.

The Project has seven (7) proposed stream crossings; at the present time, each property where stream crossings will be located is used for grazing. Three (3) of the seven (7) stream crossing locations have existing dirt or gravel trails adjacent to or already crossing the streams. The total area of construction activities within jurisdictional waters (including all seven crossings) will be approximately 1,270 square feet or 0.03 acres.

All crossings are to be a minimum of one mile away from any stream reaches that support fish. Construction of the crossings will occur while the streams are dry, thus avoiding impacts to water quality or to water-dependent resources. Design of the crossings will allow the periodic stream flows to pass through the porous rock bases of the crossing without increasing erosion or turbidity. Each crossing will involve a backhoe excavating just enough streambed material to allow for the placement of roadbed crossing material or electric cables. Excavated material will be spread on the shoulders of the new and widened roads. New road crossings will be constructed of clean quarry rock and clean gravel excavated from the locations of Project wind turbine foundations, or brought in from offsite sources. Electrical cables will be placed within the roadbed where feasible. Road crossings will be no wider than 34 feet in order to accommodate the construction equipment and transport trucks required to construct the wind turbine project.

The final profile and grade of each stream crossing will be as close as possible to that of the original streambed while providing a load-bearing surface that functions as a ford crossing. All crossings will be constructed in compliance with the Project's construction stormwater NPDES permit and its erosion control plan, which will include erosion control details for stream crossings. The DOE Eastern Washington Stormwater Manual, modified as appropriate for Kittitas County, will be used for guidance in development of the erosion control measures. The total volume of materials anticipated to be removed from jurisdictional waters will be approximately 47.1 cubic yards; the total amount of clean rock and gravel placed within the ordinary high water mark of jurisdictional waters will be approximately 60.5 cubic yards.

A comprehensive mitigation plan will be implemented for this Project.¹⁰⁰ It consists of several categories of actions, including BMPs and mitigation by preservation and enhancement of 8 acres of riparian land contained in the mitigation parcel.

A Joint Aquatic Resource Permit Application (JARPA) was prepared and submitted for this Project and last updated with supplementary information provided to the U.S. Army Corps of Engineers on February 11, 2004. The JARPA is presently valid through April 3, 2008.

The Council finds that due to the mitigation for potential disturbance to the wetlands that may be affected by the Project, no significant adverse impacts to wetlands will occur as a result of construction and operation of this Project.

Fisheries and Wildlife

There are no fish-bearing aquatic resources anywhere within the Project area. The WDFW Priority Habitat and Species database does not identify any fish-bearing streams within the Project area. The nearest documented fish-bearing aquatic resources include the Yakima River, located more than one-half mile south of the Project area, and Swauk Creek, located more than one-half mile west of the Project area. Potential fish habitat within the Project area is limited to topographically low areas between ridges, which contain stream channels, and seeps that flow into the Yakima River. These streams are small, narrow channels with intermittent flows that do not provide habitat for resident or anadromous fish.

Given the lack of potential fish habitat for fish species with federal or state protected status within the Project area, no significant impacts on fisheries are anticipated to occur with the implementation of BMPs and applicable stormwater permits that would control runoff, erosion and sedimentation into water bodies during construction and operation of the Project. The construction methods and control measures proposed by the Applicant, and required in the Site Certification Agreement, will be adequate to protect all wetlands and riparian corridors, and will protect aquatic conditions downstream.

Project construction may affect wildlife through loss of habitat, potential fatalities from construction equipment (for smaller mammal, amphibian and avian species), and disturbance/displacement effects from construction and human occupation of the area. Potential mortality from construction equipment on site is expected to be quite low. Disturbance type impacts can be expected to occur if construction activity occurs near an active nest or primary foraging area. Wildlife displaced from these areas may move to areas with less disturbance; breeding efforts may be affected and foraging opportunities altered during the period of the construction.

Construction impacts to wildlife will be minimized through use of slow moving construction equipment and the relatively short window for construction that will affect only a single nesting season. The Council finds that mitigation measures implemented by the Applicant to protect habitat, as described previously, will compensate for these disturbance impacts.

¹⁰⁰ See FEIS, Section 3.2.4.

Beyond the direct impacts to habitat related to construction and operation of the Project the Council has also given careful consideration to the particular impacts of wind projects on wildlife. Primary concerns voiced by the public and the Counsel for the Environment were: significance of avian mortality due to collisions with turbine blades and towers, adequacy of baseline avian studies used to estimate mortality, and impacts to bats.

To establish baseline information about wildlife use of the Project site against which to evaluate impacts, the Applicant's consultant conducted a variety of wildlife surveys, including surveys for avian use (including bald eagles), raptor nests, and big game. The Applicant also reviewed unique and protected species lists and consulted with WDFW and the U.S. Fish and Wildlife Service (USFWS) to determine the potential occurrence of priority habitat and special and/or protected species. Sagebrush conducted and reported in its Application a thorough analysis of the potential impacts of the Project on wildlife in accordance with the study requirements of the WDFW Wind Power Guidelines.

Avian mortality. The Applicant identified a total of 97 species of birds during the avian point count surveys, in-transit travel, and incidentally while conducting other field tasks at the Project. The Applicant calculated relative exposure indices (use multiplied by proportion of observations where bird flew within the rotor-swept area) by species in order to identify which species may be most susceptible to collisions with turbine rotors. Spatial use of the Project area was also analyzed to determine whether there were areas of concentrated use by avian species within the Project site. No large differences in use were apparent.

The Applicant also considered mortality rates for similar species and similar habitats for other recently constructed and operating wind power projects, including projects in the Pacific Northwest region. This entire analytical procedure resulted in the estimation of mortality rates for avian and resident bat species for the Project.

Bird fatality projections of 0.46 to 3.08 per turbine year are anticipated, with most of the fatalities involving resident songbirds such as horned lark, vesper sparrow, western meadowlark, and other common species. Avian mortality is expected to be 30 to 200 individual passerines per year if 65 turbines are constructed. Low raptor mortality is anticipated, with a total of two to three birds per year, and mortality of bald eagles is not expected because of their infrequent use of the Project area. Mortality of other types of birds (upland game birds, occasional nocturnal migrating songbirds, waterfowl and other water birds) though expected, would be low.

The Project area is also located within the Pacific Flyway, one of four principal north-south bird migration routes in North America. However, given the limited riparian and other important stopover habitat (water bodies), use of the Project area by migratory birds is likely low.

The Applicant has incorporated several mitigation measures aiming at reducing avian mortality into the initial design of the Project. These measures include: minimizing construction of new roads by improving existing roads and trails; choosing underground (versus overhead) electrical collection lines wherever feasible to minimize perching locations and electrocution hazards; choosing turbines with a low rotation speed and use of tubular towers to minimize risk of bird collision with turbine blades and towers; using unguyed permanent meteorological

towers; equipping all overhead power lines with raptor perch guards; and spacing overhead power line conductors to minimize raptor electrocution.

Baseline studies. Several members of the public, representatives of the Audubon Society, and the Counsel for the Environment argued, however, that the one year term for baseline studies required by the WDFW Wind Power Guidelines was insufficient, and that baseline monitoring of existing avian populations should have been performed for a minimum of two years prior to construction of the Project. CFE's witness testified that a single season of bird sampling may not give an accurate picture of bird communities on the site, and if the number of existing birds is underestimated, so would be the mortality estimates. The commenters also indicated that other baseline monitoring, including nighttime migration studies, should have been performed.

The Council has given consideration to these issues, comments and requests. On the issue of avian mortality, the Council defers to WDFW to define the type, number, and duration of studies required. Here, the Council finds that the Applicant conducted its baseline monitoring and avian mortality analyses in conformance with WDFW's Wind Power Guidelines; therefore, the Applicant's studies are adequate for the environmental analysis required for this proposed Project. Based on the analyses performed by the Applicant, and the review of relevant data presented in the Draft and Final EIS, the Council concludes that there is no evidence indicating that the mortality rates estimated by the Applicant would cause a significant adverse impact to existing bird populations in the Project area.

Even so, implementation of a post-construction avian monitoring plan will be an important measure in assessing the accuracy of the mortality estimates. The plan will be used to quantify impacts to avian species and to assess the adequacy of mitigation measures implemented. The plan will include fatality monitoring involving standardized carcass searches, scavenger removal trials, searcher efficiency trials, and reporting of incidental fatalities by maintenance personnel and others, for a period of two years after the beginning of Project operation. The plan would also include a minimum of one breeding season's raptor nest survey of the study area (including a one mile buffer) to locate and monitor active raptor nests potentially affected by the construction and operation of the Project. The protocol for the fatality monitoring study will be similar to protocols used at the Vansycle Wind Plant in northeastern Oregon, the Stateline Wind Plant in Washington and Oregon, and the recently constructed Wild Horse Wind Power Project in Kittitas County, Washington.

On the issue of baseline monitoring, the Council defers to the Department of Fish and Wildlife in establishing guidelines consistent with and reflecting the Department's expertise in this area. However, the proposed SCA requires a number of mitigation measures that ensure that if avian mortality beyond the estimated values occurs, appropriate measures can and shall be taken to assess and address the situation. The Council has included in the SCA the Applicant's proposal for formation of a Technical Advisory Committee (TAC); however, the Council also requires that the TAC make recommendations to EFSEC if it deems that additional studies or mitigation are warranted to address unexpected impacts. Furthermore, the TAC would operate under Rules of Procedure to allow the TAC to function properly and efficiently. The Council retains ultimate authority to implement recommendations made by the TAC. The Council also commits to taking steps it deems necessary to impose specific conditions or requirements on the Certificate Holder as a consequence of situations where significant adverse impacts occur.

Big game. The Project is located within an area already subject to significant amounts of human activity. Nevertheless, some displacement impacts to wintering big game may occur within the Project area. Because these disturbance levels will not greatly increase beyond what already exists, only minimal impacts, if any, are expected from operation of the Project. In addition, construction impacts to wintering animals are expected to be low, as most heavy construction (road and foundation construction) will occur outside of the critical winter months.

Following completion of the Project, the disturbance levels from construction equipment and humans will diminish dramatically and the primary disturbances will be associated with operations and maintenance personnel, occasional vehicular traffic, and the presence of the turbines and other facilities. Since the construction effort would be similar for all scenarios, impacts on big game would be expected to be similar for all scenarios.

Bats. The potential for bats to occur in the Project area is based on key habitat elements such as food sources, water, and roost sites. Potential roost structures such as trees are, in general, limited within the Project. The various intermittent creeks within the Project area may be used as foraging and watering areas. Little is known about bat species distribution, but several species of bats could occur in the Project area based on the Washington GAP project and inventories conducted on the Hanford Site's Arid Lands Ecology Reserve located in Benton County to the south and east of the KVWPP site.

Impacts on bats or bat habitat on the site are unlikely during construction. During operation of the Project, bats would be susceptible to collisions with wind turbine blades and towers. Bat research at other wind plants indicates that migratory bat species are at some risk of collision with wind turbine blades and towers, mostly during the fall migration season. It is likely that some bat fatalities would occur during operation of the Project. Most bat fatalities found at wind plants have been tree-dwelling bats, with hoary and silver-haired bats being the most prevalent fatalities. Both species may use the forested habitats near the Project site and may migrate through the Project. Some mortality of mostly migratory bats, especially hoary and silver-haired bats, is anticipated during operation of the Project.

Although potential future mortality of migratory bats is difficult to predict, an estimate can be calculated based on levels of mortality documented at other wind plants. Operation of the Project could result in approximately two bat fatalities per turbine per year, or up to 130 bat fatalities per year. Actual levels of mortality could be higher or lower depending on regional migratory patterns of bats, patterns of local movements through the area, and the response of bats to turbines, individually and collectively. The significance of this impact is hard to predict since there is very little information available regarding existing bat populations in the Project area. The hoary bat, which is expected to be the most common fatality, is one of the most widely distributed bats in North America. Preconstruction surveys to predict impacts on bats would have been relatively ineffective, because current state-of-the-art technology for studying bats does not appear to be highly effective for documenting migrant bat use of a site.

The Council finds that the mitigation measures implemented for protection of avian species will also protect bats. Implementation of a post-construction avian monitoring program and presence of a TAC will also allow identification of any unanticipated impacts on bats.

Unique and protected species. The Applicant generated a list of state and federally protected species that potentially occur within the Project area to assess the potential for impacts on these species. Species were identified based on the WDFW Species of Concern list, which includes state listed endangered, threatened, sensitive, and candidate species; and the U.S. Fish and Wildlife Service (USFWS), Central Washington Ecological Services Office list of Endangered, Threatened, Proposed, Candidate and Species of Concern for Kittitas County, and consultation with the USFWS. Based on the habitat attributes present on the Project site and the habitats with which these species are associated, bald eagles and golden eagles have the potential to occur within the Project site.

Impacts to all protected, unique and special species were assessed in the Draft and Final EIS. The Project area may possess attributes for habitat for several species, and several species may occur at the Project site. However, it was determined that impacts due to construction and operation of the Project would not adversely impact the viability of these species.

Air Quality

Kittitas County is considered "in attainment" for particulate matter pollutants, meaning that ambient air concentration of particulate matter is below National and Washington State Ambient Air Quality Standards. No monitoring data for other criteria pollutants is available for this area. The Project will have a slight, but non-adverse, impact on local air quality during its construction phase, but little to no such impact upon commencement of operations.

During construction, the Project's emissions will consist of exhaust emissions from construction vehicles and equipment and a variety of sources producing "fugitive dust." These include construction-related road traffic on unpaved roads, construction-related blasting and excavation activities, as well as dust generated from the portable rock crusher and concrete batch plant. Mobile source emissions will be mitigated through encouraging carpooling for workers and rules to limit engine idling. Dust emissions will be mitigated through active dust suppression measures on unpaved roads and parking areas, seeding of disturbed areas to reduce wind-blown dust, regular housekeeping of the rock crusher and batch plant, and use of emission control devices (i.e. water sprays and fabric filters) at those facilities. A temporary air quality permit issued by EFSEC (one-year maximum) will govern operation of the rock crusher and batch plant.

The Council finds that the expected construction emissions associated with the Project will have no adverse affect on the ambient air quality in the Kittitas County airshed. The Project will not emit regulated air pollutants when operating, and is therefore not subject to federal or state emissions control requirements during operations. Fugitive emissions will continue to be mitigated using the same measures implemented during construction.

Water Resources

Ephemeral creeks are the primary naturally occurring surface water resources on the Project site. The Project is not located in any floodplains. There are existing residential wells for extraction of ground water on some portions of the Project site.

Construction impacts to surface water resources could result from soils eroded by precipitation being transported into creeks and springs. The Applicant will implement mitigation measures to minimize these impacts: Best Management Practices (BMPs) for management of stormwater (implemented through a construction stormwater pollution prevention plan (SWPPP)); setbacks of facility structures from creeks; and compliance with general National Pollutant Discharge Elimination System (NPDES) permits for construction activities, including any sand and gravel operations.

Excavation, drilling, and blasting activities for turbine foundations could provide temporary conduits for sediment-laden surface seepage, thereby temporarily increasing ground water turbidity. However, the duration of these construction activities is expected to be short (2 to 3 months), and these activities would occur primarily during the dry season. Therefore, significant adverse impacts to ground water resources are not expected to occur.

Operation of the Project is not expected to further impact water resources, given that implementation of BMPs used during construction will continue.

Construction of the Project will require water for road construction, wetting of concrete, dust control and other activities. Water will be procured from an off-site authorized source and transported to the site in water-tanker trucks. No water will be used from the site. Estimated water consumption for all construction-related needs is between 2 and 6.4 million gallons, dependent on the selected method of dust control. The Applicant shall provide proof of a contract for all needed construction water supplies.

During operations the Project will require water only for the limited needs of the O&M facility. The estimated daily water use will be less than 1,000 gallons per day. This water will be obtained from an exempt well that will be installed by a licensed contractor pursuant to Washington Department of Ecology and Kittitas County Health Department requirements.

During operations the Project will not produce industrial waste water. Sanitary waste water produced at the O&M facility will be discharged to an on-site septic system, constructed and operated in accordance with Kittitas County requirements.

Geological Resources and Hazards

The 6,000-acre Project site will remain largely intact, with up to 371 acres temporarily impacted by construction activities and only 118 acres permanently altered to accommodate the turbine foundations, the substations, and the O&M facility.

Volcanic activity in the region is well known. However, the most direct risk to the site is from ash fallout, which was experienced most recently at significant levels in 1980. Further, the risk of earthquake is low at this site. Nevertheless, all Project buildings, structures, and associated systems will be designed and constructed consistent with requirements including seismic standards of the Uniform Building Code (UBC) or the International Building Code (IBC), but no less stringent than those found in the Uniform Building Code of 1997. Application of these codes in the Project design will provide adequate protection for the Project facilities and ensure protection measures for human safety.

Construction impacts on geological resources will be minimized by local earth resources not being exported off-site. All materials excavated from the site will be used for on-site backfill as necessary, with any processing done at an existing quarry near the "G" turbine string; any off-site disposal will be subject to approval of an off-site disposal plan.

Local soils are potentially vulnerable to runoff, depending on the slope. The Project will be issued a stormwater construction permit and required to follow a detailed Stormwater Pollution Prevention Plan (SWPPP) with appropriate BMPs to reduce such impacts. Site-specific BMPs will be implemented on steep slopes (21 to 30 degrees) to reduce erosion and prevent landslides during cut and fill activities. Implementation of BMPs will be independently verified through EFSEC's on-site environmental monitor.

Further, a NPDES general permit will be required for construction activities. All construction disturbances will be stabilized and habitat restored, reducing the risk of any further erosion during operation of the Project. Operational BMPs to include landscaping, grass, and other vegetative covers will minimize ongoing erosion and sedimentation.

The Council finds that the Applicant's proposed mitigation measures will appropriately mitigate impacts to the site's geological resources.

Traffic and Transportation

Construction of the Project will result in significant traffic to and from the Project site during the several months of peak construction activities. These temporary increases in traffic will consist of construction truck deliveries of Project equipment and materials and approximately 160 construction workers commuting to the site during any one month. This traffic will primarily impact US 97 but will also affect Interstate 90. Workers will be encouraged to carpool, potentially reducing the number of trips. Vehicle parking will occur at the O&M facility and along access roads to the turbine strings.

The Applicant will prepare and follow a Traffic Management Plan approved by EFSEC to minimize construction traffic impacts. Landowners adjacent to transportation routes will be notified prior to construction activities. The Washington State Department of Transportation has reviewed and approved the accesses to the Project. Further, warning signs and flaggers will be employed to minimize the risk of accidents when large equipment is entering or exiting a public road. Finally, pavement conditions will be documented before construction begins, allowing EFSEC and/or Kittitas County to monitor any road deterioration associated with the Project. The Applicant will repair any such road damage and, in this regard, the Applicant has agreed to perform the following additional transportation mitigation measures:

- Access roads from state highways 10 and 97 shall be gravel and constructed with slope and culverts designed according to WSDOT and Washington state access management standards per Chapter 47.50 RCW and Chapter 468 WAC.
- Access from County Roads (Bettas Road and Hayward Road) shall be gravel and constructed with slope and culverts designed in accordance with Kittitas County standards.

- Project site roads shall be designed in accordance with Table 12-1 of the Kittitas County Road Standards for Private Roads with Low Density Traffic. In locations where road grades exceed the County's maximum of 12%, the roads shall be designed to ensure that fire vehicles can gain access to the site as necessary to provide emergency services.
- County roads, including shoulder pavement, shall be video-monitored before and after construction of the Project to identify road degradation. The Applicant shall reinstate all county roads degraded by Project construction to as near their pre-construction conditions as possible. The Applicant shall improve portions of Bettas Road and Hayward Hill Road.
 - The portion of Bettas Road used for Project construction and operations (approximately 1.4 miles from state highway 97 to Hayward Hill Road) will be improved, following construction, to the current applicable Kittitas County road standards.
 - The portion of Hayward Hill Road used for Project construction and operations (approximately 1.4 miles) will be improved to a 22-foot gravel road along that section from Bettas Road to the access road to turbine string B.
- Applicant shall construct a visitor's kiosk and public viewing area near the O&M facility off Bettas Road with adequate signs directing the public to a safe parking lot for viewing and learning about the Project.
- Applicant shall monitor traffic levels following completion of construction of the Project for a period of three years. After that time, Applicant shall continue monitoring of tourist and operations traffic to the Project upon written request from EFSEC. If this post-construction traffic exceeds WSDOT warrants as contained in Chapter 910 of the WSDOT Design Manual, the Applicant shall construct right and/or left turn lanes on state highway 97 in accordance with WSDOT guidelines.
- Project Site Access: Project access roads run across both private and public (DNR) lands. In order to avoid and minimize potential impacts to recreation on public lands, the Applicant will implement an adaptive management approach to allow access to and through the Project area for access to public lands for recreational purposes. Adaptive management allows for changes over time to the level of control and types of activities on the Project site, as needed. In general, the Applicant will permit controlled access to and through the site to public lands, so long as it does not interfere with or introduce adverse impacts on Project operations or personnel. At a minimum, Project site access during operation shall be allowed as follows:
 - Private property owners who wish to access their property from Project access roads will be allowed to do so as necessary under a formal access license and a key to a gated entrance;
 - Officials of DNR are currently allowed to access the Project site and will continue to be allowed such access by key; and
 - Others will be allowed to access the Project site on a case-by-case basis. Active recreation activities such as camping and off-road vehicle usage will not be allowed on

the Project site in order to avoid and minimize potential impacts to habitat and wildlife from such activities.

No significant increase in traffic is expected to occur during the operational phase of the Project. No more than 18 full-time workers are expected to staff the Project.

The Federal Aviation Administration (FAA) reviewed plans for the proposed Project to evaluate potential interference with local air traffic operations and has issued separate Determination of Non-Hazard (DNH) certificates for each of the proposed turbine and meteorological tower locations. The FAA considered existing as well as potential future approach and departure procedures for the Kittitas County Airport (Bowers Field), as well as flight communications issues. The individual FAA DNH certificates specify which turbine towers require lighting and which do not require lighting.

The Council finds that the Applicant's proposed mitigation measures will appropriately mitigate construction traffic and air navigation impacts.

Cultural and Archeological Resources

The Applicant conducted background research and an archaeological survey which covered the entirety of areas within the Project where ground-altering activities are proposed. Two previously unrecorded prehistoric archaeological "lithic scatter" sites were identified during this survey. Further, although the North Branch Canal, which is eligible for listing on the National Register of Historic Places (NRHP), is located just outside the Project area, no previously unrecorded historical sites were identified during the survey. The Project area does not constitute a cultural or rural historic landscape as defined by the NRHP.

In response to notification of receipt of the Project Application by EFSEC, the Yakama Nation stated that it is particularly concerned with the regional effects of the wind farms on flora and fauna, especially as these resources relate to tribal cultural practices. They also expressed concerns about impacts to important food resources and medicines.

In deference to standard precautions endorsed by the Department of Archaeology and Historic Preservation (DAHP), the Applicant shall maintain 100-foot design and construction buffers around the archaeological sites identified in its cultural resource survey, even though they do not meet the standard qualifications for NRHP. A Project archaeologist will flag off or otherwise delineate the archaeological sites with a 100-foot buffer and a professional archaeologist will monitor construction to prevent damage or destruction to both known and unanticipated archaeological resources. If any archaeological materials, including but not limited to human remains, are observed, excavation in that area would cease, and DAHP, EFSEC, the affected tribes, and the Applicant would be notified. At that time, appropriate treatment and mitigation measures will be developed and implemented. If the Project could not be moved or rerouted to avoid resources, the resources will be tested for eligibility for listing in the NRHP. Any excavation or disturbance to the archaeological sites will require an excavation permit from DAHP per RCW 27.53.060. The Project archaeologist will remove any flagging tape or pin flags at the end of the construction-monitoring phase of the Project. If a tribe requests to have one of its representatives present during earth-disturbing construction activities, the Applicant shall comply with its wishes.

The Council finds that with implementation of these mitigation measures no impacts on known culturally sensitive areas would occur under either of the proposed scenarios. Operation of the Project would not impact any of the archaeological or historical sites identified during this current cultural resource survey.

Health and Safety

The primary health and safety risks associated with the construction of the Project fall into three categories: fire risks; risks associated with the release of hazardous materials; and risks specifically associated with the operation of a wind generation facility.

Fire. The risk of fire is the primary health and safety concern associated with the proposed Project, regardless of which development scenario would be implemented. The incidence of fire or explosion during construction could be due to lightning strikes, terrorism, sabotage, vandalism, aircraft impact, or human activities associated with the construction work.

Because the Project site is generally arid rangeland with a predominant groundcover of grasses and sagebrush, the greatest risk of fire would be during the hot, dry summer season. Once started, a range fire could spread rapidly. Nearby residences could be impacted by a wildfire.

The same causes of fires would exist during operation of the Project; however, risks associated with human activity on the site would be reduced in comparison with the construction phase. Even though the Project site is in an area of relatively low lightning flash density, because of the nature of the terrain and area vegetation, the occurrence of lightning strikes may increase due to the presence of proposed Project structures. The wind turbine generators and substation would include lightning protection systems. Fires could also occur in the turbines and the Project's electrical equipment as a result of equipment malfunction, lightning strike, electrical short, terrorism, sabotage, vandalism, or aircraft impact. Sensors installed in the turbines and substation transformers would detect conditions related to a fire and send an alarm signal to the central Supervisory Control and Data Acquisition (SCADA) system, which would notify Project operators of the situation.

In addition to the monitoring systems described above, the wind turbines for the proposed Project would meet international engineering design and manufacturing safety standards including the International Electrotechnical Commission standard 61400-1: Wind Turbine Generator Systems—Part 1: Safety Requirements. Project facilities would be marked and lighted in accordance with FAA regulations to minimize the potential for a low-flying aircraft to collide with a structure. Finally, the conductors for the proposed feeder transmission line would be of sufficient diameter to control potential corona effects, if any, and special care would be employed during construction to minimize nicks and scrapes to any conductors.

The Applicant proposes to implement a comprehensive series of measures to prevent fires during construction of the Project, including but not limited to equipping vehicles with fire extinguishers, installing fire boxes with fire fighting supplies at various locations, maintaining a minimum of one water truck with sprayers on each turbine string road during construction activities during fire season, and using high clearance off-road vehicles.

The Applicant will be required to prepare a fire control plan in coordination with local and state agencies and response organizations. The Applicant has also entered into an agreement with Kittitas County Fire District No. 1 for fire protection services. The SCA requires that this agreement be maintained through the life of the Project.

Release of hazardous materials. The Applicant conducted a Phase I Environmental Site Assessment (ESA) for the Project site. The Phase I ESA did not reveal the presence or potential presence of any environmental contamination on the Project site. In the event that contaminated soil is encountered during construction, the Applicant will coordinate with the Washington Department of Ecology to determine the measures to be taken.

Construction and operation of the Project will, however, require the use of hazardous materials such as: diesel and gasoline fuels for operating construction equipment and vehicles; lubricating oils; transformer mineral oils; and cooling, lubricating and hydraulic fluids used in the turbines. The Applicant has proposed various supply and storage mechanisms depending on the type of fluid being handled.

The Applicant has proposed mitigation measures to prevent or control the occurrence of spills on site during construction and operation of the Project, including appropriate handling and storage facilities for the fluids of concern, and facility design to include sensors for fluid leaks as appropriate. In addition, the Applicant will be required to develop a Spill Prevention Control and Countermeasures (SPCC) Plan for both construction and operation phases of the Project. SPCC plans are required by regulation to be reviewed and updated, as appropriate, at a minimum every 2 years.

Hazards specifically associated with wind generation facilities. Several health and safety hazards are specific to wind generation facilities: ice and blade fragment throw from the turbine blades; turbine tower collapse; turbine blade throw; and shadow flicker (addressed above).

Ice can form on wind turbine towers and rotor blades. Moving rotor blades are subject to heavier buildups of ice than stationary blades. The Applicant has estimated that icing conditions could occur on an average of 3 to 5 days per year and that the distance of the maximum ice throw, if it were to occur, would be 328 feet. The ice throw hazard area would extend perpendicular to the wind direction and downwind from the turbine. The ice throw hazard area would extend about 80 feet upwind of the turbine. Blade fragment throw risk would be similar to that for ice throw. Blade fragment throw would most likely be the result of sabotage, vandalism, a lightning strike, or terrorism. The hazard zone for blade fragment throw should be approximately that for ice throw.

Due to restricted site access and because the distances from the proposed tower locations to existing residences and public roads well exceeds the estimated maximum ice or blade throw distance of 328 feet, the proposed Project should not result in any risk to the public from ice or blade fragment throw. In addition, the Applicant has agreed to implement safety setbacks of 541 feet for each of the turbine towers from any residence and a tip height setback (330 feet or 410 feet for KVVPP) from public roads and PSE or BPA transmission lines.

Testimony submitted to the Council indicated that incidences of tubular tower collapse are very rare, with only two incidences recorded, one due to an over-speed condition and the

other resulting from a weak weld in the tower flange. Restricted site access combined with the above-noted safety setbacks to existing residences and public roads should result in minimal risk to the public if a turbine tower were to collapse.

Possible causes of a loss of a turbine blade are equipment failure, improper assembly, sabotage, vandalism, a lightning strike, or terrorism. Only one occurrence of loss of a turbine blade has been documented, where a blade was thrown 50 to 75 meters. The failure analysis determined that the blade to hub fastening system had failed due to a combined manufacturing and design defect. The Applicant estimated the worst-case blade throw distance to be approximately one turbine tip height (330 feet or 410 feet for KVVPP). Restricted site access combined with the above-noted safety setbacks to existing residences and public roads should result in minimal risk to the public if a turbine blade were to be thrown.

Finally, health and safety and emergency plans for both the construction and operation phases will be prepared by the Applicant to protect public health and safety and the environment on and off the site in the case of a comprehensive list of major natural disasters or industrial accidents relating to or affecting the proposed Project. The Applicant will be responsible for implementing the plans in coordination with the local emergency response support organizations. The Project operating and maintenance group and all contractors will receive emergency response training as part of the regular safety-training program to ensure that effective and safe response actions will be taken to reduce and limit the impact of emergencies at the Project site.

Public Services

Construction of the Project will occur in an area that is susceptible to wildfires, especially during the hot, dry summer season. Risk of fires increases with the acreage of the Project site that is disturbed during construction, and the number of construction workers present on the site. To mitigate for this risk, the Applicant has entered into a Fire Services Agreement with Kittitas County Fire District #1 that will remain in effect for the life of the Project. As part of this Agreement, the Applicant will purchase a new fire truck (brush rig) for the fire district.

Temporary construction workers are not expected to move their families to the area during construction. Therefore, little additional demand on schools and police services is expected. Law enforcement activities would peak during a 1 to 2 month period when on-site employee numbers are greatest.

Demand for emergency medical services could increase slightly due to construction accidents on-site or within the Project vicinity. However, the Kittitas Valley Community Hospital has capacity for additional patients, and there are several ambulances available to service the Project area. No significant adverse impacts to medical services in the Project area are expected during construction.

Increased use of local recreational facilities during Project construction may occur. Some workers may decide to stay at parks and campgrounds that allow overnight camping, and some displacement of existing recreational users may occur. However, there is an adequate supply of recreational lodging to accommodate this increased demand, and worker demand may favor

weeknight use versus weekend use. No such issues accrued during construction of the Wild Horse Wind Power Project.

Project operation is not expected to adversely impact fire response, law enforcement, school and medical services; any impacts on these services will be lower than during construction. Even so, the Applicant will maintain fire and emergency response plans developed during the construction phase of the Project, and will also continue coordination with local service providers.

The Applicant has verified through analysis and modeling that operation of the wind turbines will not affect communication technologies in the Project area. All turbine locations and their infrastructure have been chosen to avoid impacts on existing communication paths in the area. Proposed turbine locations will not obstruct or interfere with any existing microwave telecommunication facilities, including those used by cellular telephone providers. Wind turbines do not interfere with cellular phone reception, and as a result there would be no obstruction from Project facilities or operations to cell phone service or the ability of cell phone users to contact emergency providers in the area using that means of communication.

Finally the Applicant commissioned an analysis of potential interference with television reception in the surrounding area. This study concluded that the Project would result in minimal to no degradation of television reception.

As stated previously, water for the Project will be obtained from authorized off-site sources and one on-site well at the O&M facility. Given the small amount of water required for sanitary uses during operations, there will be no adverse impacts to water supply in the area.

The Project will not require connection to local sewer systems. All sanitary wastes will be collected and disposed of off-site during construction; during operation, sanitary wastes will be handled by an on-site septic system. Solid wastes generated during construction and operation will be disposed of at appropriate waste handling sites. The amounts of waste generated will be relatively small, and are not expected to cause adverse impacts to solid waste disposal sites or services.

The Applicant has committed to a number of mitigation measures including its Agreement with Kittitas County Fire District #1. With these mitigation measures, no significant adverse impacts are anticipated for public services or recreational facilities.

Site Restoration and Decommissioning

WAC 463-42-655, as in effect on the date of submittal of the Application, requires an Applicant to provide a plan for site restoration in sufficient detail to identify, evaluate, and resolve all anticipated major environmental, public health, and safety issues. The rule requires that this plan address provisions for funding or bonding arrangements to meet the site restoration or management costs.

In its Application, Sagebrush briefly outlined the scope of activities that will be undertaken at the end of the Project's useful life. These activities included removal of Project

structures, removal of foundations to 3 feet below grade, and restoration of soil surfaces as close as reasonably possible to their original condition.

The Applicant shall provide EFSEC a Project Decommissioning Plan as required under WAC 463-42-655, containing sufficient detail to identify, evaluate, and resolve all major environmental and public health or safety issues which can reasonably be anticipated. The Plan must describe the process used to evaluate the options and select measures that will be taken to restore or preserve the site or otherwise protect all segments of the public against risks or danger resulting from the site. The Plan must also include a discussion of economic factors regarding the costs and benefits of various restoration options versus the relative public risk and shall address provisions for funding or bonding arrangements to meet the site restoration or management costs, to include evidence of sufficient insurance coverage in an amount justifiable for this Project and a site closure bond or other functionally equivalent financial instrument or security satisfactory to EFSEC compliance staff.

The Project will be decommissioned within twelve (12) months of the date of termination of the Site Certification Agreement. One potential cause of termination would be upon written request of the Council when the Certificate Holder demonstrates that the energy generated by the Project for the past 12-month period is less than 10% of the Historical Energy Production (as defined in the Site Certification Agreement).

Decommissioning of the Project will involve removal of the turbines and all component parts; removal of foundations to a depth of 3 feet below grade; re-grading the areas around the Project Facilities; removal of Project access roads and overhead cables (except for any roads and/or power cables that Project Area landowners wish to retain); and final reseeded of disturbed lands (all of which shall comprise "decommissioning"). Decommissioning will be scheduled with turbine removal as the first priority, with performance of all remaining elements immediately thereafter.

The Applicant has committed to posting funds sufficient for decommissioning in the form of a guarantee bond or a letter of credit to ensure the availability of said funds (the "Decommissioning Funds") to EFSEC prior to the end of the first year after commencement of construction. The Applicant also prepared an engineering estimate of the amount of the Decommissioning Funds that would be required and has committed to annual reevaluations of said costs during Project construction and once every five (5) years thereafter.

The Council has considered the above commitments, and, finding them to be appropriate, has incorporated them into the Site Certification Agreement; *provided* Sagebrush complies with EFSEC's site restoration regulations in effect at the time of Application submittal. Sagebrush must provide an initial site restoration plan to the Council prior to construction of the Project, and a detailed site restoration plan must be approved by the Council prior to decommissioning at the end of the useful life of the Project.

The above-noted decommissioning funding security requirements and those incorporated into the SCA may lapse in the event the owner of the Project is an entity which is an investor-owned electric utility regulated by the FERC and the Washington Utilities and Transportation Commission, such as Puget Sound Energy, in which case the obligation to fully decommission

the Project when due would be a general obligation of the investor-owned electric utility owner. Separate obligations in that regard must be addressed at an appropriate time in the future.

Cumulative Impacts

Potential impacts of the proposed Project were considered cumulatively with other potential development in the Project and surrounding areas. Two types of reasonably foreseeable development were identified: proposals for two other wind generation facilities to be located north of Ellensburg (Wild Horse Wind Power Project, now completing construction, and Desert Claim Wind Power Project), and additional economic and residential development within the County as a whole. It was determined that the construction of the Kittitas Valley Wind Power Project, in conjunction with other development considered, is not expected to result in significant adverse cumulative impacts for one or more of the following reasons: no significant adverse impacts were identified for each of the actions individually; impacts of the independent actions were localized to each project; the impacts of the actions are of a temporary nature; mitigation measures and requirements of county regulations reduce adverse impacts to non-significance; the KVVPP does not contribute to cumulative impacts because of the distance that separates it from other actual and proposed wind power development in the County.

A single cumulative impact involving development of all three wind power projects was identified with respect to visual resources: the impact of repetitive views of turbines in the County for residents and frequent visitors to the Valley could result in the impression of change in the overall visual character of the Kittitas Valley landscape. It does not appear that any mitigation measures are available to fully address this cumulative impact to visual resources.

Term of the Site Certification Agreement

The Council finds that there is a benefit to the public to have permitted facilities ready to be constructed whenever it becomes known that more generation capacity is needed. Further, it is in the state's interest to provide abundant energy at reasonable cost. Nonetheless, the Council recognizes that an unlimited build window for a proposed project is *not* appropriate, as over time, mitigation measures presented in an application may no longer be protective of environmental standards and conditions at the time the facility is constructed.

The Applicant's "build window" for the Project shall not exceed 5 years. The Applicant shall construct the Project such that substantial completion is achieved no later than 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 June 1, 2007, the approximate date by which the Governor of the State of Washington must act on this Order and Recommendation; *provided*, however, that such construction is not delayed by a force majeure event.

The Council finds that this build window appropriately balances the Council's concerns regarding the term of this Site Certification Agreement; *provided*, that the Applicant must submit a construction schedule to the Council demonstrating its intention to construct the entire Project within the construction schedule timeframe provided in the Application, i.e. that construction shall be completed within approximately twelve (12) to eighteen (18) months after beginning construction. Thus, at the latest, the Applicant could have until December 1, 2013, to complete

the Project, but the actual required completion date will be determined to be approximately 18 months from the date the Applicant commences construction.

Conformance with Law

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. RCW 80.50.010.

Consistent with legislative intent, the Council must consider whether an energy facility at a particular site will produce a net benefit after balancing the legislative directive to provide for abundant energy at a reasonable cost with the impact to the environment and the broad interests of the public. Here, as explained in further detail above, the Council finds that the Project conforms to the legislative intent expressed in RCW 80.50.010. The Council further finds that preempting the Kittitas County Wind Farm Overlay Ordinance in accordance with RCW 80.50.110 and Chapter 463-28 WAC conforms with that same legislative intent.

The Applicant proposes to construct the Project in accordance with applicable national and international building codes. Electrical and mechanical project components will comply with international design and construction standards. The Applicant proposes to implement a comprehensive employee safety plan during construction and operation of the Project. The Council therefore 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).

The Applicant has agreed to appropriate environmental mitigation requirements as discussed in the sections above. As a whole, the mitigation package preserves and protects the quality of the environment. It is the policy of the state of Washington to support the development of wind energy facilities.¹⁰¹ This Project will produce electrical energy without generating greenhouse gas emissions. As a renewable energy resource, the Project will 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. RCW 80.50.010 (2).

Finally, the evidence in the record supports the conclusion that the region needs to continue to add electrical generation capacity. 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.

¹⁰¹ See State Energy Policy, Guiding Principle #2, RCW 43.21F.015.

5. CONCLUSION

The Council has carefully considered its statutory duties, applicable administrative rules, and all of the evidence in the record in exercising its duty to balance the state's need for energy at a reasonable cost with the need to protect the environment and the health and safety of the residents of the local area.

One of the Council's principal duties is to ensure that the location of energy facilities will produce minimal adverse effects on the environment. We have considered the testimony of expert witnesses and members of the public, the settlement agreements, as well as the Draft and Final EIS in determining whether this Project, with its proposed mitigation measures and the requirements of the settlement agreements, is appropriate for this location. As currently proposed, and with mitigation for a number of impacts and the conditions of the Site Certification Agreement, the Project would have a minimal impact on the environment. One of the Council's additional duties is to ensure that the supply of energy, at a reasonable cost, is sufficient to ensure people's health and economic welfare. The record shows that this Project would serve those goals. The Council considered whether the total package of mitigation measures offset the environmental impacts of the Project. Viewed on balance, with respect to this Project, and in the context of mitigation proposed, the package offered by Sagebrush comports with the legislative policy of Chapter 80.50 RCW.

For all of the reasons discussed in the body of this Order, the Council recommends to the Governor that this Project be APPROVED for site certification.

FINDINGS OF FACT

Having discussed in detail above the facts relating to the material matters, as well as certain conclusions, the Council now makes the following Findings of Fact and Conclusions of Law and states its Decision. Any Findings of Fact, which are found to be Conclusions of Law, will be considered as such.

Nature of the Proceeding

1. This matter involves Application No. 2003-01 to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) for certification to construct and operate the Kittitas Valley Wind Power Project (Project), a wind powered energy generation facility with a maximum of 65 wind turbines and a maximum installed nameplate capacity of approximately 180 megawatts (MW). The Project is to be located northwest of the city of Ellensburg in Kittitas County, Washington, along ridge tops between Ellensburg and Cle Elum.

The Applicant and the Application

2. The Applicant, Sagebrush Power Partners, is a Delaware Limited Liability Company (LLC) formed to develop, permit, finance, construct, own and operate the Project. Sagebrush Power Partners, LLC is owned by one or more "parent" companies which are considered to be Site Certificate Holders, as defined in the Site Certificate.

3. On January 13, 2003, the Applicant submitted an Application for Site Certification to the Council seeking certification, pursuant to the RCW 80.50.060, to construct and operate the Kittitas Valley Wind Power Project in Kittitas County, Washington.

Compliance with the State Environmental Policy Act (SEPA)

4. EFSEC is the lead agency for environmental review under the State Environmental Policy Act, Chapter 43.21C RCW. The Council Manager is the SEPA responsible official. WAC 463-47-051.

5. On February 14, 2003, the Council issued a Determination of Significance and request for comments on the scope of environmental impacts. On March 12, 2003, the Council held a hearing on the scope of the Environmental Impact Statement (EIS) in Ellensburg, Washington. The deadline for written comments on the scope of the EIS was March 14, 2003.

6. On December 12, 2003, the Council issued a SEPA Draft EIS. On January 13, 2004, the Council held a public hearing regarding the Draft EIS in Ellensburg, Washington. The Council accepted public comments regarding the Draft EIS through January 20, 2004.

7. On August 11, 2004, the Council issued a Draft Supplemental EIS. On August 25, 2004, the Council held a public hearing regarding the Draft Supplemental EIS in Ellensburg, Washington.

8. On December 23, 2005, the Council issued an Addendum to the Draft EIS.

9. On February 2, 2006, the Council held an additional public hearing regarding the Draft Supplemental EIS in Ellensburg, Washington.

10. On February 1, 2007, the Council issued the Final EIS for the Project.

The Adjudicative Proceeding

11. The Council duly published notices of receipt of the Application, public meetings, commencement of the Adjudicative Proceeding and opportunity to file petitions for intervention, prehearing conferences, land use hearings, and the adjudicative hearings regarding Application No. 2003-01.

12. The Council duly noticed and conducted prehearing conferences on June 26, 2003; January 13, 2004; February 19, 2004; July 19, 2004; August 2, 2004; August 10, 2004; September 22, 2004; August 22, 2005; March 3, 2006; April 24, 2006; May 30, 2006; June 13, 2006; July 12, 2006; and August 17, 2006. The Council issued Prehearing Orders Numbers 1 through 26 (Council Orders Nos. 777, 778, 781, 782, 783, 786, 789, 790, 792, 793, 794, 795, 796, 799, 800, 801, 802, 804, 816, 817, 818, 819, 820, 821, 822, and 823).

13. Counsel for the Environment (CFE) was a party to the proceeding pursuant to RCW 80.50.080. The Council received a notice of intervention and granted party status to the Washington State Department of Community, Trade and Economic Development (CTED) which is entitled to intervene pursuant to WAC 463-30-050. Upon petitions being filed, the Council

also granted party status to Kittitas County, Residents Opposed to Kittitas Turbines (ROKT), Mr. F. Steven Lathrop, Ms. Chris Hall, the Renewable Northwest Project (RNP), the Cascade Chapter of the Sierra Club, and the Economic Development Group of Kittitas County (EDGKC).

14. On May 25, 2005, Ms. Chris Hall withdrew as an intervenor in the proceeding. The Council acknowledged her withdrawal at the prehearing conference held on August 22, 2005.

15. The Council held formal adjudicative hearings regarding Application 2003-01 on September 18, 19, 20, and 21, 2006, in Ellensburg, Washington.

16. On September 19, 2006, during the course of the adjudicative hearing, Counsel for the Environment and the Applicant announced a verbal agreement regarding independent environmental monitoring of Project construction. On September 21, 2006, the Applicant announced a commitment to fully eliminate any demonstrated adverse impacts associated with "shadow flicker." The terms of each of these agreements has been incorporated into the Site Certification Agreement.

17. The Council held public hearings regarding Application 2003-01 on September 12, 2006, in Seattle, Washington, and on September 20 and 21, 2006, in Ellensburg, Washington. A total of 95 members of the public offered comments.

18. The Applicant was given an opportunity to submit its post-hearing brief as well as its Proposed Findings of Fact, Conclusions of Law, and Order and Proposed Site Certification Agreement. All other remaining parties to the case were afforded an opportunity to submit responsive post-hearing briefs.

19. On March 27, 2007, the Council voted 6-1 to recommend approval of the Project to the Governor of the state of Washington.

The Land Use Consistency Process

20. The Council conducted a land use consistency hearing on May 1, 2003, in Ellensburg, Washington, after which the Council issued Order No. 776, finding that the Project was inconsistent with local land use plans and zoning ordinances.

21. Following discussions and unsuccessful negotiations with Kittitas County seeking to resolve land use inconsistencies, the Applicant filed an initial Request for Preemption on February 9, 2004.

22. In September 2004, the Applicant asked the Council to indefinitely postpone the scheduled adjudicative hearings for this Project in favor of expediting EFSEC processing of the Wild Horse Wind Power Project.

23. In summer 2005, the Applicant revised the scope of the Project and renewed its efforts to resolve land use inconsistencies with Kittitas County, withdrawing its initial Request for Preemption.

24. In October 2005, as required by Kittitas County's Wind Farm Overlay Ordinance, Kittitas County Code, Chapter 17.61A, the Applicant submitted a Development Activities Application to Kittitas County and sought to comply with all applicable Kittitas County local land use plans and zoning ordinances.

25. The Kittitas County Planning Commission held public hearings on the Project in January 2006 and later recommended to the Kittitas County Board of County Commissioners (BOCC) that they deny any amendment to the Kittitas County Comprehensive Plan and any related rezone required for the BOCC to permit the Project.

26. The Kittitas County Board of County Commissioners held public hearings on the Project in March and April 2006. On May 3, 2006, the BOCC voted to "preliminarily" deny the Development Activities Application, focusing on the question of mitigating visual impacts and shadow flicker through setbacks of up to one-half mile from neighboring residences.

27. The Applicant made additional attempts to modify the Project's layout so as to satisfy the criteria articulated by BOCC members in May 2006.

28. The Kittitas County Board of County Commissioners denied Sagebrush's Development Activities Application on June 6, 2006. The BOCC's determination was based on the Project's wind turbines exceeding the 35-foot height limit for the FR 20 zone, the visual impact of the wind farm, and the threat of shadow flicker to surrounding residences.

29. The Applicant filed a Second Request for Preemption on June 20, 2006.

30. The Council's processing of Application 2003-01 was significantly delayed while the Applicant and Kittitas County attempted to resolve land use inconsistencies.

Adequacy of Applicant's Second Request for Preemption

31. The majority of the Council finds, with one member dissenting, that the Applicant attempted in good faith to resolve local land use noncompliance issues with Kittitas County.

32. The Applicant and Kittitas County were unable to reach agreement to resolve the land use consistency issues.

33. The Applicant and the Council have reviewed alternate locations within Kittitas County and determined that none are acceptable for the siting of this Project.

34. Siting of the Kittitas Valley Wind Power Project at the Applicant's desired location supports the various interests of the State of Washington as delineated in RCW 80.50.010.

Project Description and Configuration

35. The Kittitas Valley Wind Power Project is a wind powered electrical generation facility in Kittitas County, Washington. It will consist of a maximum of 65 wind turbine generators with a maximum total nameplate capacity of approximately 180 megawatts (MW).

36. The Applicant analyzed and the Council initially considered the environmental impacts of three Project scenarios to capture possible Project impacts resulting from the selection of a turbine configuration within a range of turbine sizes identified in the Application. The Applicant later modified the Project and reduced the choice of scenarios from three to two.

37. The Site Certification Agreement will require the Certificate Holder to select a single Project configuration from within the range of the two scenarios. Both scenarios are limited to a maximum of 65 turbines, with the Applicant free to choose either the smaller 1.5 MW nameplate capacity wind turbine generators or the larger 3 MW nameplate capacity wind turbine generators.

38. Only one type and size of turbine shall be used for the entire Project. Regardless of which size of turbine the Applicant finally selects for the Project, the turbines would generally be installed along the access roadways and all construction activities will occur within the corridors identified in the Application for Site Certification, with any final adjustments to specific turbine locations made to maintain adequate spacing between turbines for optimized energy efficiency, to comply with setback requirements, and to compensate for local conditions.

39. The analysis performed in the EIS showed that, overall, the impacts from the different Project scenarios did not vary significantly from one to the next. No single scenario resulted in significant adverse environmental impacts to any element of the environment.

40. The Project will include access roads, turbine foundations, underground and overhead collection system electrical lines, a grid interconnection substation, step-up substation(s), feeder line(s) running from the on-site step-up substation(s) to the interconnection substation, meteorological stations, an operations and maintenance (O&M) center, an informational kiosk and associated supporting infrastructure and facilities.

41. The Council finds that the Project is to be constructed in accordance with the Application and the analysis performed in the Environmental Impact Statement, which presume a construction schedule of no more than one year. Therefore, the Site Certification Agreement shall require the Applicant to complete construction of the entire Project within twelve (12) months from beginning construction. However, the Applicant will be permitted to operate and generate power from individual strings of turbines as they are completed, while the remaining strings of turbines remain under construction.

Site Characteristics

42. The Project will be located approximately 12 miles northwest of the City of Ellensburg, on open ridge tops between Ellensburg and Cle Elum.

43. The Project will be constructed across a land area of approximately 6,000 acres in Kittitas County. Up to 371 acres will be impacted by temporary construction activities; the actual permanent facility footprint will comprise approximately 118 acres of land.

44. The majority of the Kittitas Valley Wind Power Project site and the proposed electric transmission interconnect points lie on privately owned lands. Parts of the Project site are owned by the Washington DNR, upon which the Applicant has secured a long term lease. The Applicant has obtained an option to purchase the privately held portions of the Project site and

options for easements and/or purchase from the landowners necessary for installation and operation of the transmission feeder line and interconnect substation.

45. The site is located within Forest and Range (FR) and Agriculture-20 (Ag-20) land use zoning designations in Kittitas County. Historically, the site has been used for grazing.

Visual Resources/Light, Glare and Shadow Flicker

46. The Applicant's visual simulations of the Project demonstrated existing conditions together with the expected post-construction images from a variety of viewpoints, allowing the Council to contemplate computer-generated visual simulations of the proposed layout of the wind farm from various viewpoints. The Council also made a site visit to better understand existing conditions and the potential visual impacts of the Project.

47. The Council recognizes that evaluation of visual impacts of wind farms is potentially controversial. Visual impact assessment based on evaluation of the changes to the existing visual resources that would result from construction, operation, and decommissioning of the Project can be conducted scientifically. However, assessing actual impact on existing aesthetic values remains largely a matter of individual taste and opinion.

48. The Applicant classified potential levels of visual impact as high, moderate, and low. In general, the Applicant's and EFSEC's analysis agreed that after all mitigation measures are implemented, the visual impact of this Project would be low to moderate, with no significant adverse impacts on the existing visual environment. However, one Councilmember dissents, asserting that the Project's impact on panoramic vistas and views of the Stuart Range is significant and cannot be adequately mitigated.

49. Residences within a half-mile of the Project are within a zone of high visual sensitivity to the individual wind turbines. The height of the turbines can produce a looming effect on some of the homes in this zone, depending on the topography and other characteristics of the landscape between a home and any nearby wind turbine.

50. In order to ensure that no individual turbine "looms" over any non-participating residence and thereby dominates its viewshed, the minimum setback from existing non-participating residential structures shall be four times the maximum tip height of the selected turbines.

51. The Project, including those turbines required by the FAA to display aviation warning lights, will not add significant ambient light or glare to the immediate surroundings.

52. The Project will be operated to eliminate any potential shadow flicker impact to local residences with line-of-sight views of turbines located within 2,500 feet of the residence.

Socioeconomics/Property Values

53. The rural location of the Project site greatly diminishes the potential for negative impacts to urban property values. Current predictions with regard to the Project's future impact on local property values are merely speculation and are not supported by any objective evidence

in the record. Based upon a review of all evidence contained in the record, the Council finds that construction and operation of the Kittitas Valley Wind Power Project will not have any significant negative impact on property values in Kittitas County.

54. Project construction and operation will result in increased employment in Kittitas County. Approximately one-half of all construction-related jobs created by this Project will be located within Kittitas and Yakima counties.

55. The Project will generate total direct income of approximately \$5,814,500 during the construction phase. Additional indirect income of just over \$4,335,600 is also anticipated during construction of the Project.

56. Adequate local housing supplies exist to accommodate the Project's demand for temporary rental housing.

57. The Project will cost approximately \$190 million. Thus, construction of the Project will increase the total valuation of real property in Kittitas County by approximately 5%, from \$2.5 billion to \$2.7 billion. Based on the assessed value of its real property, the Project will become the largest single taxpayer in Kittitas County. New tax revenues will benefit local and state schools, county government, county roads, and other local services.

Noise

58. The Project shall be designed to comply with applicable Washington State Environmental Noise Levels of Chapter 173-60 WAC.

59. Due to the rural nature of the site, the Council finds no significant noise impacts from construction or operation of the Project.

Habitat, Vegetation and Wetlands

60. The Project area is located at the western edge of the Central Arid Steppe zone as defined by the Washington State GAP Analysis. Vegetation communities within the KVVPP site consist primarily of sagebrush and grasslands, with some limited instances of shrub-steppe habitat, which WDFW considers a "priority habitat." There are riparian zones along ravines and lithosol (shallow soils) communities along ridgetops. The higher elevation portions of the Project area border on the ponderosa pine zone.

61. The Project will result in temporary vegetation community impacts on between 231 and 371 acres, of which approximately 145 acres is shrub-steppe. Permanent vegetation community impacts will occur on approximately 93 to 118 acres, of which approximately 45 acres will be shrub-steppe.

62. The Applicant has proposed to mitigate all permanent and temporary impacts on vegetation and habitat in accordance with the WDFW Wind Project Habitat Mitigation Guidance Document (WDFW Wind Power Guidelines). Sagebrush will purchase an approximately 539-acre mitigation parcel within the 6,000-acre Project area. The parcel meets or exceeds the

required habitat replacement ratios under the WDFW wind power guidelines for any of the Project scenarios considered, and will be protected for the life of the Project.

63. The Applicant will also implement Best Management Practices to minimize introduction of weeds, implement a noxious weed control program, and develop and implement a comprehensive post-construction restoration plan for temporarily disturbed areas, including habitat-reseeding programs, in consultation with WDFW.

64. The Trenching Protocol adopted during construction of the Wild Horse Wind Power Project shall be utilized during the construction of this Project. This requirement is included in the SCA and a copy of the Trenching Protocol shall be attached thereto.

65. There are no known populations of federally or state-listed endangered, threatened, proposed or candidate plant species in the Project area, or the corridors where transmission feeder lines would be constructed. Therefore, no impacts to protected plants are expected to occur.

66. A wetland investigation was performed on the Project site. Potentially jurisdictional wetlands or waters of the United States have been identified at ten locations within or adjacent to the Project area. At four of the locations, the Project design will keep Project developments away from streams and wetlands and avoid any impacts to waters of the United States. In seven (7) other locations, potentially jurisdictional streams (waters of the U.S.) were identified where impacts cannot be reasonably avoided. At the present time, the properties where stream crossings will be located are used for grazing. Three (3) of the seven (7) stream crossing locations have existing dirt or gravel trails adjacent to or actually crossing the stream. The total area of construction activities within jurisdictional waters (for all seven (7) crossings) will be approximately 1,270 square feet or 0.03 acres.

67. Potential direct impacts to wetlands and waters from the Project will result from construction of road and underground electric cable crossings of seven intermittent streams. The streams involved in the seven crossings are all intermittent streams and do not provide fish habitat. All crossings are a minimum of one mile away from any stream reaches that support fish. Construction is expected to occur while the streams are dry and thus no impacts to water quality or water-dependent resources are expected.

68. The design of the crossings will allow the periodic stream flows to pass through the porous rock bases of the crossing without increasing erosion or turbidity. Each crossing will involve excavating just enough existing streambed material to allow for the placement of roadbed crossing material or electrical cables. All work will occur when flows are absent or well below 5 cubic feet per second (cfs). Backhoes will be used to remove existing streambed material and excavated material will be spread on the shoulders of the new and widened roads. The new road crossings will be constructed of clean quarry rock and clean gravel excavated from the locations of project wind turbine foundations, or brought in from offsite sources. Electrical cables will be placed within the roadbed crossings wherever feasible. Road crossings will be no wider than 34 feet in order to accommodate the construction equipment and transport trucks required to build the wind turbine project.

69. The final profile and grade of each crossing will be as close to the original streambed as possible while providing a load-bearing surface that functions as a ford crossing. All crossings will be constructed in compliance with the Project's construction stormwater NPDES permit and its erosion control plan, which will include erosion control details for stream crossings. The DOE Eastern Washington Stormwater Manual, modified as appropriate for Kittitas County, will be used for guidance in development of the erosion control measures. The total volume of materials removed from jurisdictional waters will be approximately 47.1 cubic yards; the total amount of clean rock and gravel placed within the ordinary high water mark of jurisdictional waters will be 60.5 cubic yards.

70. A comprehensive mitigation plan will be implemented for this Project. It consists of several categories of actions including BMPs and mitigation by preservation and enhancement of 8 acres of riparian land located in the mitigation parcel. In addition, all construction work shall be accomplished within the limits of the Joint Aquatic Resources Permit Application (JARPA) obtained for this Project from the U.S. Army Corps of Engineers.

71. The Environmental Monitor for the construction of this Project shall be independent, hired directly by the Council, and be from a qualified engineering firm.

72. The Council finds that with the implementation of all mitigation measures proposed by the Applicant, the Project is not expected to result in significant adverse impacts on wetlands, vegetation, or habitat.

Fisheries and Wildlife

73. Given the lack of potential fish habitat for fish species with federal or state protected status within the Project area, no significant impacts on fisheries are anticipated to occur with the implementation of Best Management Practices (BMPs) and applicable stormwater permits that would control runoff, erosion and sedimentation into water bodies.

74. The Council finds that with the mitigation measures proposed, no significant adverse impacts are expected to occur on fish resources.

75. The Council finds that mitigation measures implemented by the Applicant to protect habitat, wetlands and vegetation, as described previously, will compensate for disturbance impacts to wildlife, including avian species, during construction and operation of the Project.

76. Bird fatality projections of 0.46 to 3.08 per turbine year are anticipated, with most of the fatalities involving resident songbirds. Avian mortality is expected to be 30 to 200 individuals per year if 65 turbines are constructed. Low raptor mortality is anticipated, with two to three birds per year, most probably American kestrels and/or red-tailed hawks; mortality of bald eagles is not expected because of their infrequent use of the Project area. Very low numbers of fatalities of upland game birds, nocturnal migrating songbirds, and waterfowl or other waterbirds (e.g. gulls) are anticipated.

77. The proposed design of the Project incorporates numerous features to avoid and/or minimize impacts to plants and wildlife, including: avoidance of construction in sensitive areas such as streams, riparian zones, wetlands, forested areas; minimization of new road construction

by improving and using existing roads and trails instead of constructing new roads; choice of underground (vs. overhead) electrical collection lines wherever feasible to minimize perching locations and electrocution hazards to birds; choice of turbines with low rotation speed and use of tubular towers to minimize risk of bird collision with turbine blades and towers; use of unguyed permanent meteorological towers to minimize potential for avian collisions with guy wires; equipping all overhead power lines with raptor perch guards to minimize risks to raptors; and spacing of all overhead power line conductors to minimize potential for raptor electrocution.

78. The Applicant conducted baseline monitoring and avian mortality analyses in conformance with WDFW's wind power guidelines.

79. The Applicant shall develop a post-construction monitoring plan for the Project to quantify impacts to avian species and to assess the adequacy of mitigation measures implemented. The monitoring plan will include the following components: 1) fatality monitoring involving standardized carcass searches, scavenger removal trials, searcher efficiency trials, and reporting of incidental fatalities by maintenance personnel and others, for a period of two years after the beginning of Project operation; and 2) a minimum of one breeding season raptor nest survey of the study area and a one-mile buffer in order to locate and monitor active raptor nests potentially affected by the construction and operation of the Project. The protocol for the fatality monitoring study will be similar to protocols used at the Vansycle Wind Plant in northeastern Oregon and the Stateline Wind Plant in Washington and Oregon.

80. The Applicant has proposed, and will be required to convene, a Technical Advisory Committee (TAC) to review pertinent monitoring and scientific data and to develop appropriate responses to impacts that exceed avian mortality projections made in the Application and EIS. The TAC will monitor all mitigation measures and efforts and examine information relevant to assessing Project impacts to habitat, avian and bat species, and other wildlife. The TAC will determine whether further mitigation measures would be appropriate, considering factors such as the species involved, the nature of the impact, monitoring trends, and new scientific findings regionally or at a nearby wind power facility. The TAC shall recommend mitigation measures to the Council; the ultimate authority to implement additional mitigation measures, including any recommended by the TAC, will reside with EFSEC.

81. Of several listed threatened, endangered or candidate wildlife species that have been identified by the U.S. Fish and Wildlife Service as potentially occurring on the Project site, only the bald eagle has the potential to occur within the Project site, based on the actual habitat attributes present on the Project site and the habitats with which this species is associated. Although there is only a small likelihood of bald eagle mortality during the life of the Project, the Applicant has submitted to USFWS a Habitat Conservation Plan and an application for an incidental take permit under the Endangered Species Act.

82. The Council finds that the studies and mitigation measures implemented by the Applicant are consistent with WDFW Wind Power Guidelines. The Council further finds that the Project will result in no significant unavoidable adverse impacts to wildlife.

Air Quality

83. During construction, the types of direct impacts to air quality would be typical of those associated with any large construction project. The primary types of air pollution generated during Project construction will be emissions from vehicle and equipment exhaust, along with fugitive dust particles from travel on paved and unpaved surfaces.

84. The Project will make use of existing local rock quarries but may utilize an on-site rock crusher and/or a temporary concrete batch plant. Any rock crusher or batch plant is to be temporary and used only during Project construction.

85. Exhaust emissions and fugitive air emissions from construction sites are exempt from air emission permitting requirements. Exhaust emissions and fugitive air emissions resulting from travel on Project roads during operation of the Project are also exempt from air permitting requirements. However, the Council finds that requiring a temporary air quality permit for operation of any on-site rock crusher or concrete batch plant is appropriate.

86. Operation of the Project will not result in any direct air emissions.

87. The Council finds that the Applicant's proposed mitigation measures are adequate to minimize fugitive dust impacts during construction and operation of the Project.

Water Resources

88. The Project is expected to require approximately two to 6.4 million gallons during construction. Water for construction will be purchased off-site from an authorized source, then delivered by truck to the Project site.

89. During construction, sanitary wastewater will be collected in portable tanks, and disposed of off-site at locations permitted to accept such waste. For operations, a septic system will be installed at the operations and maintenance facility site in compliance with Kittitas County septic system requirements to treat the domestic-type sanitary wastewater from the facility.

90. Wind energy facilities do not use water in the electrical generation process. There will be no operational use or discharge of water from the Project.

91. Water for domestic-type uses by operations and maintenance facility staff will be minimal, less than 1,000 gallons per day, primarily for bathroom and kitchen use. This water will be obtained from an exempt well to be installed at the O&M facility site by a licensed installer pursuant to Washington State Department of Ecology regulations and requirements.

92. Precipitation could result in surface runoff from Project facilities during Project construction and operation. However, the Project site-grading plan and roadway design will incorporate measures in compliance with the Storm Water Pollution Prevention Plan (SWPPP) and Best Management Practices (BMPs) to ensure that surface runoff will infiltrate directly into the surface soils surrounding Project facilities.

93. The Council finds there will not be significant adverse impacts to water resources or water quality from the Project.

Geological Resources and Hazards

94. There are no significant impacts on soil, topography, and geology resulting from construction of the Project. Risks associated with ground movements due to landslides, subsidence, expansive soils or similar geological phenomena are minimal; no special design or construction considerations are recommended or required.

95. Historically, the region has a low level of seismicity. Local crustal faults are not considered to pose a significant earthquake hazard to the proposed Project. Even so, Project buildings, structures, and associated systems shall be designed and constructed consistent with requirements, including seismic standards, of the Uniform Building Code (UBC) or the International Building Code (IBC), but no less stringent than those found in the Uniform Building Code of 1997.

96. The Project site is on or near ridgelines located above any floodplain, eliminating any risk of flooding.

Traffic and Transportation

97. Construction of the Project will result in a short-term increase of traffic in the local area, particularly on U.S. 97, through truck deliveries of equipment and materials. Operation of the Project will have no significant impact on local traffic patterns.

98. The Applicant's Traffic Mitigation Plan will adequately mitigate all adverse impacts identified in the FEIS. The Plan will include documentation of pavement conditions before construction begins, allowing Kittitas County and the City of Kittitas to monitor any road deterioration associated with the Project. The Applicant will repair any such road damage.

99. The Applicant has also agreed to perform additional transportation mitigation measures, specifically:

- Access roads from state highways 10 and 97 shall be gravel and constructed with slope and culverts designed according to WSDOT and Washington state access management standards per Chapter 47.50 RCW and Chapter 468 WAC.
- Access from County Roads (Bettas Road and Hayward Road) shall be gravel and constructed with slope and culverts designed in accordance with Kittitas County standards.
- Project site roads shall be designed in accordance with Table 12-1 of the Kittitas County Road Standards for Private Roads with Low Density Traffic. In locations where road grades exceed the County's maximum of 12%, the roads shall be designed to ensure that fire vehicles can gain access to the site as necessary to provide emergency services.
- County roads, including shoulder pavement, shall be video-monitored before and after construction of the Project to identify road degradation. The Applicant shall reinstate all

county roads degraded by Project construction to as near their pre-construction conditions as possible. The Applicant shall improve portions of Bettas Road and Hayward Hill Road.

- The portion of Bettas Road used for Project construction and operations (approximately 1.4 miles from state highway 97 to Hayward Hill Road) will be improved, following construction, to the current applicable Kittitas County road standards.
- The portion of Hayward Hill Road used for Project construction and operations (approximately 1.4 miles) will be improved to a 22-foot gravel road along that section from Bettas Road to the access road to turbine string B.
- Applicant shall construct a visitor's kiosk and public viewing area near the O&M facility off Bettas Road with adequate signs directing the public to a safe parking lot for viewing and learning about the Project.
- Applicant shall monitor traffic levels following completion of construction of the Project for a period of three years. After that time, Applicant shall continue monitoring of tourist and operations traffic to the Project upon written request from EFSEC. If this post-construction traffic exceeds WSDOT warrants as contained in Chapter 910 of the WSDOT Design Manual, the Applicant shall construct right and/or left turn lanes on state Highway 97 in accordance with WSDOT guidelines.
- Project Site Access: Project access roads run across both private and public (DNR) lands. In order to avoid and minimize potential impacts to recreation on public lands, the Applicant will implement an adaptive management approach to allow access to and through the Project area for access to public lands for recreational purposes. Adaptive management allows for changes over time to the level of control and types of activities on the Project site, as needed. In general, the Applicant will permit controlled access to and through the site to public lands, so long as it does not interfere with or introduce adverse impacts on Project operations or personnel. At a minimum, Project site access during operation shall be allowed as follows:
 - Private property owners who wish to access their property from Project access roads will be allowed to do so as necessary under a formal access license and a key to a gated entrance;
 - Officials of DNR are currently allowed to access the Project site and will continue to be allowed such access by key; and
 - Others will be allowed to access the Project site on a case-by-case basis. Active recreation activities such as camping and off-road vehicle usage will not be allowed on the Project site in order to avoid and minimize potential impacts to habitat and wildlife from such activities.

100. The FAA has reviewed plans for the proposed Project and has issued Determination of No Hazard (DNH) certificates for each of the proposed turbine and meteorological tower locations. The individual FAA DNH certificates specify which towers require lighting and which do not require lighting.

101. The Council finds that the Applicant's proposed mitigation measures will appropriately mitigate construction traffic and air navigation impacts.

Cultural and Archeological Resources

102. The Applicant conducted background research and an archaeological survey which covered the entire areas within the Project where ground-altering activities are proposed. Two previously unrecorded prehistoric archaeological sites were identified during this survey. Further, although the North Branch Canal, which is eligible for listing on the National Register of Historic Places (NRHP), is located just outside the Project area, the Project area itself does not constitute a cultural or rural historic landscape.

103. The Applicant proposes to maintain 100-foot design and construction buffers around the archaeological sites identified during this current cultural resource survey, even though the sites do not meet the standard qualifications for the NRHP. Ground disturbing actions within a specified radius of any archaeological sites, either recorded during the initial survey or previously documented, would be monitored by a professional archaeologist to prevent damage or destruction to both known and unanticipated archaeological resources.

104. The Applicant, in consultation with the Office of Archeology and Historic Preservation (DAHP), will develop a cultural resources monitoring plan for monitoring construction activities and responding to the discovery of archeological artifacts or buried human remains.

105. The Council finds that with implementation of these mitigation measures no impacts on known culturally sensitive areas would occur under any of the proposed scenarios. Operation of the Project will not impact any of the archaeological or historical sites identified during this current cultural resource survey.

Health and Safety

106. Because the Project site is generally arid rangeland with a predominant groundcover of grasses and sagebrush, the risk of fire during the hot, dry summer season is a primary health and safety concern associated with the proposed Project.

107. To mitigate the fire risk the Applicant will comply with electrical design that complies with the National Electric Code (NEC). The Project site roads will act as firebreaks and also allow for quick access of fire trucks and personnel in the event of a grass fire. The Applicant has entered into a fire protection contract with Ellensburg Rural Fire District #1. The Applicant will also prepare a fire control plan and an emergency plan, coordinated with local and state agencies to ensure efficient response to emergency situations.

108. Construction and operation of the Project will require the use of hazardous materials such as: diesel and gasoline fuels for operating construction equipment and vehicles; lubricating oils; transformer mineral oils; and cooling, lubricating and hydraulic fluids used in the turbines. The Applicant has proposed various supply and storage mechanisms depending on the type of fluid being handled.

109. The Applicant has proposed mitigation measures to prevent or control the occurrence of spills on site during construction and operation of the Project, including appropriate handling and storage facilities for the fluids of concern, and facility design to include sensors for fluid leaks as appropriate. In addition, the Applicant will be required to develop a Spill Prevention Control and Countermeasures Plan for both construction and operation phases of the Project.

110. Construction and operation of the Project will not result in the generation of any hazardous wastes in quantities regulated by state or federal law.

111. There has been no reported injury from ice thrown from wind turbines. Tower collapse is extremely rare and highly unlikely. Minimum setbacks incorporated into the proposed Project layout will reduce the safety risks associated with ice throw, tower collapse and other safety or nuisance issues.

112. There are no documented human or animal health impacts associated with shadow flicker from wind turbines. The Project will not produce shadow-flicker effects on any existing residences within 2,500 feet of any turbine; the Applicant has stipulated to the shutdown of any turbine within 2,500 feet of a non-participating residence if there is a line-of-sight view upon request of the affected non-participating landowner.

113. With the mitigation measures provided, the Council finds that the Project will not cause a significant adverse health and safety impact.

Public Services

114. The Project is not anticipated to have a significant adverse effect on any public services, including law enforcement, fire, water, medical, recreational, or schools.

115. The Project will not have any significant adverse impact on communication facilities or services in the area.

Site Restoration

116. In accordance with WAC 463-42-655 (as in effect in January 2003) the Applicant prepared an initial site restoration plan in the Application that addresses site restoration. At the end of the useful life of the facility, the equipment will be removed and the entire area returned to as near its original condition as reasonably possible.

117. Prior to initiating construction activities, the Applicant must post sufficient security funds to ensure complete decommissioning of the Project and provide the Council with a decommissioning plan as required by the SCA.

Cumulative Impacts

118. Potential cumulative impacts of the development of the existing Wild Horse, proposed Desert Claim and this proposed Kittitas Valley wind power projects, as well as other economic and residential growth in Kittitas County, were considered. With the exception of

visual impacts, the construction of the Project, in conjunction with other development actions, is not expected to result in significant adverse cumulative impacts, because such impacts are either not expected to occur, or mitigation measures shall be employed to reduce the impacts of individual development.

119. A single cumulative impact involving development of all three wind power projects was identified with respect to visual resources: the impact of repetitive views of turbines in the County for residents and frequent visitors to the Valley could result in the impression of change in the overall visual character of the Kittitas Valley landscape.

Term of the Site Certification Agreement

120. The Site Certification Agreement will authorize the Certificate Holder to construct 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 June 1, 2007, the approximate date by which the Governor of the State of Washington must act on this Order and Recommendation; *provided*, however, that such construction is not delayed by a force majeure event.

121. Construction of the entire Project shall be completed within approximately eighteen (18) months of beginning construction.

Conformance with Law

122. 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).

123. 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).

124. 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).

125. 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 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.

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.

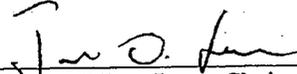
ORDER AND RECOMMENDATION

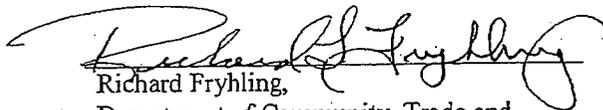
Based on the Findings of Fact, Conclusions of Law, the Draft EIS, the Draft Supplemental EIS, Addendum to the Draft EIS, and Final EIS, and the full record in this matter, the Council issues the following Order:

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.

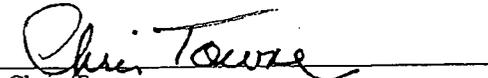
SIGNATURES

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

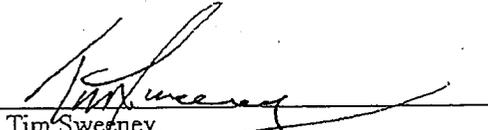

James Oliver Luce, Chair

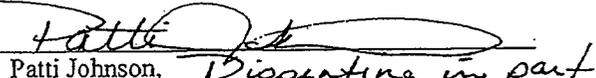

Richard Fryhling,
Department of Community, Trade and
Economic Development


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, *Disagreeing in part*
Kittitas County *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.

APPENDIX A

Consistency With Kittitas County Comprehensive Plan

Although the project has been deemed inconsistent with local land use plans, specifically with the Kittitas County Wind Farm Overlay Ordinance, the Project conforms to all relevant General Planning Goals, Objectives and Policies (GPO) defined in the Kittitas County Comprehensive Plan including, but not limited to the following:

GPO 2.1 - The maintenance and enhancement of Kittitas County's natural resource industry base including but not limited to productive timber, agriculture, mineral and energy resources.

Wind power development as proposed by the Kittitas Valley Wind Power Project enhances the energy portion of the County's natural resource industry. This is accomplished while also assisting to maintain the agriculture sector in the Project's vicinity which is zoned Agriculture-20 (A-20) and Forest & Range (FR) and planned for rural uses.

GPO 2.2 - Diversified economic development providing broader employment opportunities.

Wind power allows for economic diversification in Kittitas County. Construction of the project is expected to create up to 253 temporary jobs during construction and 16-18 permanent, family wage new jobs during operation. Revenue from the Project would also lower the effective property tax rates on landowners, a further benefit to the agriculture community. Wind power development of agricultural lands will aid agricultural landowners, helping to sustain long-term agricultural use of the properties, by helping to insulate rural landowners from economic cycles typical in the rural economy that might lead to pressures to subdivide the land for other uses (i.e. rural residential).

GPO 2.3 - The encouragement of urban growth and development to those areas where land capability, public roads and services can support such growth.

The Project area and vicinity are planned and zoned for forest and range and agricultural uses, not residential development. Plan policies and the zoning code specifically prohibit sprawling residential development in this area of the County, confirming that it is the County's GMA-based policy to avoid extension of urban services in the area. The Project will provide economic development without imposing demands on public utilities and services.

GPO 2.5 - Kittitas County should encourage residential and economic growth that will minimize the costs of providing public utilities and services.

As referenced above with relation to GPO 2.3, the Kittitas Valley Wind Power Project will not impose infrastructure costs on the County; however, tax benefits will be significant. To the contrary, if residential development occurs in the project area, the addition of homes would create demand for urban-like services and additional infrastructure costs for the County.

GPO 2.6 - Kittitas County will maintain a flexible balance of land uses.

With only 0.4% of the County's total acreage affected by the 6,000 acre Project area, and a fraction of that (90 acres) occupied by permanent Project improvements, ample opportunity remains for flexibly balancing land use countywide. By providing economic incentives for rural landowners within 6,000 acres of the A-20 and FR zones to sustain rural agricultural and natural resource management and development land uses, the Project should help reinforce the County's rural land use policies and help to maintain the Comprehensive Plan's flexible balancing of uses.

GPO 2.7 - Kittitas County will cooperate with the private sector and local communities in actively improving conditions for economic growth and development.

The Project enables sustainable agricultural and natural resource management uses in the vicinity. The Project provides an opportunity for economic growth and development in a rural area, without compromising the County's GMA-based Comprehensive Plan and zoning code policies and requirements for the protection and preservation of agricultural and natural resource-based land uses, practices and traditions.

GPO 2.11A - Much of Kittitas County receives little natural precipitation and is highly susceptible to fire hazard during much of the year. Meanwhile, more people are moving to previously uninhabited forest and rural areas. As this number increases, the need to provide adequate and efficient fire services to these areas also increases.

The Project's design provides benefits to fire district(s) concerned about wildland fire management, including development of access roads that serve as fire breaks; providing on-site equipment that supplements the fire district's own resources; and controlling site access and reducing the chance of fire. The Applicant has entered into a fire services agreement with FD #1 that will provide fire protection for the life of the Project, including areas which currently have no fire protection. In addition, under the terms of the Fire Services Agreement, the Applicant will purchase a new brush rig to allow the fire district to better fight fires in the area.

GPO 2.14 - Kittitas County will place a high priority in the Kittitas County Comprehensive Plan on the following state goal:

RCW 36.70A.020(6) Property Rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

GPO 2.110 - Oppose laws and regulations which restrict agriculture, and support laws and regulations which enhance agriculture.

The Project's payments to landowners, and the property tax payments to the County and other taxing districts which may reduce the tax burden on landowners, will enhance the economic viability of ranching and other agriculture operations. It meets the policies and regulations intended to protect rural land uses, and to discourage residential sprawl.

GPO 2.114 - Look at solutions to the problems of needing to sell house lots without selling farm ground.

The Project will provide support to the agricultural community, reinforcing agricultural and natural resource management land uses and rural traditions.

GPO 2.114B - Economically productive farming should be promoted and protected. Commercial agricultural lands includes those lands that have the high probability of an adequate and dependable water supply, are economically productive, and meet the definition of "Prime Farmland" as defined under 7 CFR Chapter VI Part 657.5.

The Project is sited on non-irrigated land, most of which is used for cattle grazing. The site's ongoing use for cattle operations will constitute a continuation of productive agricultural or farming use. Removal of only approximately 118 acres of rangeland is required for the overall Project footprint and will not significantly affect the productivity of cattle grazing operations on this land.

GPO 2.118 - Encourages development projects whose outcome will be the significant conservation of farmlands.

The Project promotes both economic development and agricultural land conservation. It may enable the conservation of a 6,000-acre area of Kittitas County, providing incentives for ongoing, sustainable agricultural and natural resource management uses.

GPO 2.122 - Look into additional tax incentives to retain productive agricultural lands.

Lease payments from the Project to the landowners are a non-tax incentive to retain potentially productive lands for agriculture use. The county as a whole will benefit from the Project, not only financially, but also through the prevention of rural lands conversion.

GPO 8.62 - Habitat and scenic areas are public benefits which must be provided and financed by the public at large, not at the expense of individual landowners and homeowners.

The Project conforms to the County's Private Property Planning Goals, Objectives and Policies, and others related thereto. The County places a high priority on private property rights. This includes the rights of rural landowners to continue agricultural and natural resource management and development of lands planned and zoned for rural land uses. Wind energy development is one strategy to enable and encourage ongoing rural land uses, and to provide incentives for rural landowners not to convert their lands to sprawling residential uses. Property rights considerations are a strong argument for approving this Project. The Project's landowners - including long-time residents interested in continuing family ranching and other agricultural and natural resource management and development uses - have partnered with the proposed Project to enable sustainable rural land uses in a large rural area of Kittitas County. These policies require that landowners should not be expected to forgo the opportunity to develop wind generation or other use on their properties due to potential, subjective visual effects on other properties. The Project will be located primarily on private open rangeland to be leased or purchased by the Applicant. Parts of the Project are proposed on land owned by the Washington Department of Natural Resources (DNR). The applicability of Plan Policy GPO 8.9 is particularly pronounced in this area of the County, where the rural landowners have a right to rely on the County's GMA-based planning and zoning, and have a right to expect that the

County will enable and encourage ongoing, sustained rural land uses, without infringement by incompatible residential sprawl.

GPO 8.7 - Private owners should not be expected to provide public benefits without just compensation. If the citizen desires open space, or habitat, or scenic vistas that would require a sacrifice by the landowner or homeowner, all citizens should be prepared to shoulder their share in the sacrifice.

GPO 8.9 - Projects or developments which result in the significant conservation of rural lands or rural character will be encouraged.

GPO 8.11 - Existing and traditional uses should be protected and supported while allowing as much as possible for diversity, progress, experimentation, development and choice in keeping with the retention of Rural Lands

The Project is compatible with traditional rural land uses and is an alternative to the development of residential subdivisions or other uses which do not preserve open space or encourage rural land conservation. The Project will provide significant economic incentives for ongoing rural/agricultural land uses. Through economic incentives to participating landowners, the KV Project will effectively preserve a 6,000-acre area for rural uses and rural character, fulfilling the promise of this Plan Policy. Traditionally, the Project area and surrounding lands have been used for cattle grazing, recreation, hunting and natural resource development, extraction and production, all of which are compatible with the Project. Generation of electricity substantially using wind power is a relatively new, rural land use which generates nominal revenues to landowners through royalty payments and the public through taxes and royalty payments to state agencies (DNR). In an area such as the Project site, this use is compatible with the traditional land uses, enabling the lands to retain their rural character, as opposed to residential development. In the Northwest, wind energy development is a relatively new rural, natural resource-based land use. Throughout the Northwest, wind energy generation has proved itself as a highly successful, progressive means of diversifying and developing rural natural resource industries and economies, fully compatible with ongoing cattle and other agricultural operations. It is a key choice in retaining rural land uses and traditions.

GPO 8.42 - The development of resource based industries and processing should be encouraged.

Wind energy production is a type of resource-based industry in that it uses a natural renewable resource. The proposed Project is consistent with this policy encouraging such industries.

Consistency With Zoning Code

1. The Project is consistent with the controlling purpose and intent of the underlying zoning districts:

A-20 – AGRICULTURAL ZONE

17.29.010 - Purpose and intent.

The agricultural (A-20) zone is an area wherein farming, ranching and rural life styles are dominant characteristics. The intent of this zoning classification is to preserve fertile farmland from encroachment by nonagricultural land uses; and protect the rights and traditions of those engaged in agriculture. (Ord. 83-Z-2(part), 1983; Res. 83-10, 1983)

Chapter 17.56

FOREST AND RANGE ZONE

17.56.010 - Purpose and intent.

The purpose and intent of this zone is to provide for areas of Kittitas County wherein natural resource management is the highest priority and where the subdivision and development of lands for uses and activities incompatible with resource management are discouraged. (Ord. 92-6(part), 1992)

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

In the Matter of Application No. 2003-1: COUNCIL ORDER No. 831

**SAGEBRUSH POWER PARTNERS,
L.L.C.**

**KITTITAS VALLEY WIND POWER
PROJECT**

**ORDER ON REMAND LETTER FROM
GOVERNOR GREGOIRE MODIFYING
THE DRAFT SITE CERTIFICATION
AGREEMENT ACCOMPANYING ORDER
NO. 826**

NATURE OF THE PROCEEDINGS: This matter involves the Application by Sagebrush Power Partners, L.L.C. for certification to build and operate the Kittitas Valley Wind Power Project in Kittitas County, Washington.

PROCEDURAL SETTING: The procedural history regarding this application and adjudication is explained in detail in Council Order No. 826 that was announced at open public meeting in Ellensburg, WA, on March 27, 2007, and served on all parties on March 28, 2007. In sum, Council Order No. 826 recommended that the Governor approve the Kittitas Valley Wind Power Project Application and preempt Kittitas County Land Use regulations subject to conditions set out in that Order and the accompanying Draft Site Certification Agreement (SCA).

On June 22, 2007, the Governor sent a letter to the Energy Facility Site Evaluation Council (EFSEC or Council) directing the Council to reconsider the setback criteria addressed in Article I (C)(7) of the Draft SCA. Specifically, the directive to EFSEC to reconsider the Draft SCA was "solely focused on the need to determine on this particular Project whether additional setbacks beyond the four times height (4xh) requirement for non-participating landowners are achievable while allowing the Project to remain economically viable."

COUNCIL PROCESS ON REMAND: On July 10, 2007, the Council, at its regular monthly meeting, discussed the Governor's remand letter. The Council determined that it would best be able to determine whether to reopen the adjudicative proceeding, in accordance with RCW 80.50.100(2)(c), if all parties to the proceeding and members of the public were afforded an opportunity to comment on the Governor's remand letter. Therefore, the Council issued a Notice of Public Meeting and Comment Opportunity (Tab 1)

On July 17, 2007, EFSEC held two public meetings in Ellensburg, WA. At the first meeting (afternoon), the parties to this adjudication addressed the Council and offered their views on whether additional opportunities for further mitigation of the Project's impacts could be identified within the evidence contained in the existing adjudicative record. In particular, the Council inquired of the parties as to their opinions on whether additional setbacks beyond the four times height standard previously recommended in Order No. 826 could be supported upon the existing adjudicative record. All parties who participated in the original adjudication attended the meeting, excepting Renewable

Northwest Project (RNP); which provided written comments, a transcript of the meeting was prepared (Tab 2). Various parties submitted excerpts from the existing adjudicative record in support of their positions and/or supplied supplementary materials for the Council's review (Tab 3).

At the second meeting (evening), a total of 39 members of the public addressed the Council. At least four of the sixteen non-participating landowners with residences directly affected by the Council's four times height setback standard provided their comments to the Council (three in person and one in writing). In addition, several other non-participating landowners with undeveloped land adjacent to the Project addressed the Council. A transcript of this meeting was also prepared (Tab 4). The Council advised the public that written comments would be accepted until the close of this meeting; a total of 85 written comments were received (Tab 5).

On Tuesday, July 31, 2007, the Council met to deliberate on how to respond to the Governor's remand letter.

Single Issue for Reconsideration

As noted above, the sole matter set out for the Council's further consideration in the Governor's letter of June 22, 2007, was the potential for achieving additional turbine setbacks beyond the four times height requirement for non-participating landowners' existing residences while allowing the proposed Project to remain economically viable.

Economic Viability

The Council is authorized to consider "economic viability" of proposed projects, but only at a very broad level. A developer's ability to construct a project and earn a reasonable rate of return on its capital investment is simply beyond EFSEC's expertise. Further, both the parties to this case and the general public were united in their comments during the July 17 meetings that the ultimate responsibility for determining the economic viability of a privately financed for-profit undertaking must remain in the hands of its proponent. EFSEC's governing statutes supports this position.

RCW 80.50.010 directs the Council to select and utilize sites so as to "provide abundant power at reasonable cost." However, RCW 80.50.040, which enumerates the Council's powers, does not further authorize any EFSEC function to determine the economic viability of the projects it considers. Instead, the Council's statutorily enumerated powers as to siting are limited to developing and applying "environmental and ecological guidelines in relation to the type, design, location, construction, and operational conditions of" certifying energy facilities. See 80.50.040(2). In essence, EFSEC is a siting agency, focused on land use and environmental responsibilities. The recommendations set out in Order No. 826 reflect this statutory charge and purposefully avoided any extended inquiry into the economic justifications for the Kittitas Valley Wind Power Project.

The Applicant provided at least two witnesses who commented on economic viability, either in pre-filed direct testimony or during cross-examination at the adjudicative proceeding. Chris Taylor's prefiled supplemental testimony briefly discusses the Applicant's efforts to downsize the original proposal and the economic impacts of reducing the number of turbines (see Exhibit 20 (CT-T), at 9-

Council Order No. 831 Order on Remand Letter
from Governor Gregoire Modifying the DRAFT
Site Certification Agreement accompanying Order No. 826

Page 2 of 5 Pages

19). Cross-examination of Mr. Taylor by Mr. Slothower also discussed the Applicant's view that turbine setbacks of 2,500 feet rendered the project economically unviable (*see* Hearing Transcript at 140-143). In addition, cross-examination of witness Dana Peck by the Kittitas County Deputy Prosecutor and ROKT's attorney yielded additional data on this topic (*see* Hearing Transcript at 215-226). Finally, transcripts from the Kittitas County Board of County Commissioners also discussed the issue of economic viability and varying setback distances (*see, e.g.,* May 3, 2006).

At the public meetings held on July 17, 2007, the Applicant demonstrated that its proposed setback distance of 1,320 feet allowed approximately 63 or 64 turbines to be constructed. However, under EFSEC's recommended four times height setback, the maximum number of turbines at the site would be reduced to 55. The Applicant indicated that the Project remained economically viable with this reduced number of turbines. Finally, the Applicant pointed out that increasing the setback to 2,500 feet would allow construction of a maximum of 39 turbines. According to the Applicant, this reduced scope would make the Project unviable. *See* transcript from July 17th Special Meeting beginning at 3:05 p.m., pages 42-43 and Exhibit 34-SUP, Pre-Filed Testimony of Thomas Priestly, at 6-11. There is no evidence in the record to allow a more specific analysis of economic viability.

The Council has reconsidered these portions of the existing adjudicative record and unanimously concludes that there is no statutory authority to reopen the adjudication and solicit additional evidence as to economic viability. The evidence available in the existing record demonstrates that only the Applicant can determine when a reduction in the number of turbines permitted will prevent construction of the Project.

Additional Setbacks for Non-Participating Landowners

At the public meetings on July 17, 2007, the testimony of the non-participating landowners indicated that moving the proposed turbines back several feet or several hundred feet beyond the four times height limitation recommended by the Council would not resolve their objections to the Project. *See* transcripts from July 17th Special Meeting beginning at 6:30 p.m. pages 18-20. It appears to the Council that the impact on these landowners can only be resolved to their full satisfaction through the cancellation of the Kittitas Valley Wind Power Project and the prohibition of wind turbine generators from their region of the county. Such an outcome is not supported by the record in this case, by Kittitas County's own land use and zoning codes, or even by the Kittitas County Board of County Commissioners' actions when they issued resolution No. 2006-90 in June 2006.

Maximum Mitigation through Micro-siting

EFSEC has considered the purpose behind the Governor's directive to reconsider the originally recommended setbacks and determined that, where possible, the location of individual turbines should reflect the highest possible consideration of the impact on non-participating landowners' existing residences. Past experience with the Wild Horse Wind Power Project has demonstrated that "micro-siting" of turbines, the establishment of the actual final location of the turbine foundations on the ground, can offer a varying degree of flexibility to EFSEC and to the Applicant. Environmental conditions such as avoidance of sensitive habitat or cultural resource sites might require moving one or more turbines in a string out slightly out of the path originally presumed on paper. Further,

Council Order No. 831 Order on Remand Letter
from Governor Gregoire Modifying the DRAFT
Site Certification Agreement accompanying Order No. 826

Page 3 of 5 Pages

geotechnical considerations such as subsurface stability or surface terrain obstacles can influence the exact placement of a turbine foundation. Finally, a long list of technical and engineering factors (i.e. wind speed, wake effects of other turbines, etc.) can limit the final siting of a turbine.

At the public meeting on July 17, 2007, the Applicant indicated its willingness to work with EFSEC during the micro-siting process to maximize the distance of each turbine from the existing residences of the non-participating landowners. See transcript from July 17th Special Meeting beginning at 3:05 pm, pages 41-42.

The Council, upon reviewing the record in this Application, has determined that this is the only feasible methodology for achieving additional setbacks beyond the four times height requirement.

COUNCIL ACTION:

The Site Certification Agreement shall be modified to include the following additional provisions:

ARTICLE I, SECTION C, SubSection 7 – Turbine Setbacks, shall include an additional requirement within the first bullet point describing the four times height restriction, as follows: “For each turbine located within 2,500 feet of a non-participating landowner’s existing residence, micro-siting determinations shall give highest priority to increasing the distance of the turbine from that non-participating landowner’s residence, even beyond the minimum four times height setback described above, so as to further mitigate and minimize any visual impacts on that non-participating landowner. (I don’t think it’s the residence that is impacted.) Prior to commencement of construction, the Applicant shall provide EFSEC with documentation demonstrating its engineering efforts to site the applicable turbine locations in this manner, indicating the various factors reviewed for each micro-siting recommendation.”

ARTICLE II: DEFINITIONS, shall incorporate an additional term defining “Micro-Siting” as follows: “Micro-siting” means the final technical and engineering process by which the Applicant shall recommend the precise placement of the final location of each wind turbine generator. The plans produced by this process shall be included in the Site Certification Agreement’s Construction Management Plan as required by Article IV, Section I and K.

ARTICLE IV, SECTION B – Mitigation Measures, second paragraph, shall incorporate additional language into its second sentence as follows: “For each of these mitigation measures, including the micro-siting of turbines required by Article I(C)(7), the Applicant shall further identify the construction plan and/or operation plan addressing the methodology for its achievement.”

ARTICLE IV, SECTION K – Construction Plans and Specifications. Paragraph (2) shall be replaced with the following language: “2. The Certificate Holder shall provide a final project layout plan to demonstrate that project structures comply with the setback conditions of Article I.C.7., to include the micro-siting determinations required to minimize visual impacts to non-participating landowners’ existing residences. The Council shall approve each individual turbine location, to include micro-siting decisions, in accordance with the mitigation priorities identified in Article I.C.7.”

Council Order No. 831 Order on Remand Letter
from Governor Gregoire Modifying the DRAFT
Site Certification Agreement accompanying Order No. 826

Page 4 of 5 Pages

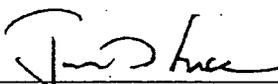
the micro-siting determinations required to minimize visual impacts to non-participating landowners' existing residences. The Council shall approve each individual turbine location, to include micro-siting decisions, in accordance with the mitigation priorities identified in Article I.C.7."

ORDER

THE COUNCIL ORDERS the Draft Site Certification Agreement accompanying its previous Order No. 826 be amended as described above and returned to the Governor for final action in accordance with RCW 80.50.100(2)(c).

DATED at Olympia, Washington and effective on this 8th day of August, 2007.

WASHINGTON STATE
ENERGY FACILITY SITE EVALUATION COUNCIL



James O. Luce, Chair

NO. 81332-9

SUPREME COURT OF THE STATE OF WASHINGTON

RESIDENTS OPPOSED TO KITTITAS TURBINES,
KITTITAS COUNTY, and F. STEVEN LATHROP,

Petitioners,

v.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION
COUNCIL (EFSEC) and CHRISTINE O. GREGOIRE, Governor of the
State of Washington,

Respondents.

CERTIFICATE OF SERVICE

ROBERT M. MCKENNA
Attorney General

William B. Collins, WSBA 785
Deputy Solicitor General

Kyle J. Crews, WSBA 6786
Assistant Attorney General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2008 MAY 14 P 4:05

CERTIFICATE OF SERVICE

BY RONALD K. CARPENTER
CLERK
I hereby certify that on May 14, 2008, I served a copy of the Brief of Respondents Washington State Energy Facility Site Evaluation Council (EFSEC) and Christine O. Gregoire, Governor of the State of Washington, on all parties or their counsel of record via email and first class mail, postage prepaid, as follows:

Jeff Slothower
Lathrop, Winbauer, Harrel,
Slothower & Denison LLP
PO Box 1088
Ellensburg, WA 98926
email: jslothower@lwhsd.com

Susan Drummond
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299
email: drums@foster.com

Gregory L. Zempel
Neil A. Caulkins
Kittitas County Prosecuting Attorneys
205 W. 5th Avenue, Suite 213
Ellensburg, WA 98926-2887
email: gregz@co.kittitas.wa.us
neil.caulkins@co.kittitas.wa.us

James C. Carmody
Velikanje Halverson PC
PO Box 22550
Yakima, WA 98907-2550
email: jcarmody@vhlegal.com

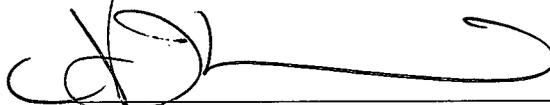
Darrel L. Peeples
325 Washington St. NE, #440
Olympia, WA 98501-1144
email: dpeeples@ix.netcom.com

Fred D. Gentry
PO Box 2317
Olympia, WA 98507-2317
email: fgentry@bgwp.net

Timothy McMahan
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
email: TLMCMAHAN@stoel.com

Narda D. Pierce
Benedict Garrat Pond & Pierce PLLC
711 Capitol Way South, Suite 605
Olympia, WA 98501-1236
email: pierce@benedictlaw.com

DATED this 14th day of May, 2008, at Olympia, Washington.

A handwritten signature in black ink, appearing to read "Nancy J. Hawkins", written over a horizontal line.

Nancy J. Hawkins
Legal Assistant