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SUPREME COURT OF THE STATE OF WASHINGTON

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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.

KITTITAS COUNTY'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

Petitioner Kittitas County, by and through its attorneys of record, Gregory L. Zempel, Prosecuting Attorney, and Neil A. Caulkins, Deputy Prosecuting Attorney, assigns the following errors:

1. The Supreme Court lacks jurisdiction to hear directly this case on appeal as RCW 80.50.140 is an unconstitutional attempt by the Legislature to foist jurisdiction upon this Court.
2. Thurston County Superior Court Judge Richard Hicks committed reversible error in Thurston County Cause No. 07-2-02080-0 (Consolidated with this appeal) by stating that the threshold showing of procedural irregularities had not been made, and by failing to make factual findings pursuant to RCW 80.50.140 and/or RCW 34.05.562.
3. The Energy Facility Site Evaluation Council (EFSEC) (and therefore also the Governor) lacks subject matter jurisdiction to site a wind farm under Ch. 80.50 RCW or to preempt local land use regulation as to such siting.
4. EFSEC violated both its own statutes (Ch. 80.50 RCW) and the Growth Management Act (Ch. 36.70A RCW) when it recommended preemption to the Governor in this matter in both its Orders denominated as Nos. 826 and 831.

5. EFSEC violated the State Environmental Policy Act (SEPA) (Ch. 43.21C), by recommending turbine setbacks unsupported by scientific analysis in the SEPA documents, and the site Certification Agreement siting the project subject to those setbacks requirements, entered into by the Governor, similarly violates SEPA.
6. EFSEC violated the appearance of fairness doctrine during the proceedings leading to its recommendation of preemption to the Governor.

II. STATEMENT OF THE CASE

On January 13, 2003, the applicant (now Sagebrush Power Partners) submitted application No. 2003-01 to EFSEC for what has become the 65-turbine Kittitas Valley Wind Power Project. *CP 14309, 14310*. Party status was granted to the Department of Community Trade and Economic Development (CTED), F. Steven Lathrop, Kittitas County, Residents Opposed to Kittitas Turbines (ROKT), and to Renewable Northwest Project (RNP). *CP 14310*. Duly noticed public hearings were held and briefing submitted. *Id.* The Applicant filed a development application with Kittitas County, and eventually determined that it could not make the application consistent with local land use regulation. *CP 14267*. The applicant filed a request for preemption on February 9, 2004. *CP 14311*. In September of 2004, the applicant asked EFSEC to indefinitely postpone the scheduled adjudicative hearings to expedite

EFSEC's processing of the Wild Horse Wind Power Project. *Id.* On September 20, 2004, the applicant and Kittitas County filed a joint Motion to Continue the adjudicative hearings in an effort to resolve land use consistency issues, and that motion was granted. *CP 14267, 14311.* In August of 2005, the applicant re-applied with the County and withdrew its request for preemption with EFSEC on October 19, 2005. *CP 14267.* The Kittitas County Board of County Commissioners (BOCC) held public hearings on the applicant's application, eventually ending with the applicant refusing to answer questions as to setbacks because, as it claimed, the proposed setbacks would render the project no longer "economically viable" after which the BOCC voted to deny the project. *CP 14267, 14268, 14312.* On June 20, 2006, the applicant filed its second request for preemption with EFSEC. *CP 14268.*

EFSEC produced a Final Environmental Impact Statement (FEIS) for the project in which it state that "the project has the potential to create high levels of visual impact at 2 of the 12 viewpoint locations analyzed. Not every potential view receptor in the project area has been documented." *FEIS* at 3.9-32 (*CP 10128*). These high levels of visual impacts were upon residences one half mile from a proposed turbine, and the FEIS contained no visual analysis for turbines placed closer than one

half mile, nor did it contain any analysis of setbacks as mitigation for these visual impacts. *Id.*

EFSEC found that the applicant attempted in good faith to resolve local land use non-compliance issues. *CP 14312*. EFSEC also found that consistency with local land use had not been achieved, that alternative locations were reviewed and found unacceptable, and that the project as proposed met various interests of the state as delineated in 80.50.010. *Id.* EFSEC found that homes within half a mile of turbines were subject to “looming” effect of the turbines and so imposed a four times turbine height setback “to ensure that no individual turbine “looms” over any non-participating residence and thereby dominates its viewshed.” *CP 14314*. EFSEC stated that “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.” *CP 14287*.

Pursuant to RCW 80.50.090 and WAC 463-14-030, EFSEC concluded the application was not consistent with the County’s building height restrictions in its Forest and Range 20 zone and with the County’s Wind Farm Overlay Zone. *CP 14325*. EFSEC stated “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." *Id.* Elsewhere, EFSEC stated that this usurpation and duplication was "the Council's main motivation in recommending preemption of Kittitas County's Wind Farm Overlay Ordinance." *CP 14282.* EFSEC recommended preemption to the Governor in Order No. 826 on March 27, 2007. *CP 14326, 14327.*

The Governor, by letter dated June 22, 2007, remanded the matter to EFSEC with directions for reconsideration "solely focused on the need to determine on the particular Project whether additional setbacks beyond the four times turbine height (4xh) requirement for non-participating landowners are achievable while allowing the Project to remain economically viable." *CP 14337.* EFSEC found the determinations of "economic viability of a privately financed for-profit undertaking must remain in the hands of its proponent." *CP 14338.* Nevertheless, the applicant proposed, and EFSEC agreed to modify the SCA to provide for, "micro-siting"-a variance process for the non-agreed individual post-approval modification to the SCA for the siting of one or more of the turbines. *CP 14339.* EFSEC, with the amendment for micro-siting, again forwarded a recommendation of preemption to the Governor on August 8,

2007. *CP 14344*. The Governor accepted the recommendation and executed the SCA on September 18, 2007.

Petitioners Lathrop and ROKT filed their appeal on October 17, 2007 and the County filed its on October 18, 2007.¹ (*see Petitions on file herein*) The Respondents moved to certify the Petitions for Review to the Supreme Court on November 11, 2007.² An order temporarily denying that motion was entered on January 4, 2008 which provided for limited discovery into procedural irregularities alleged by the petitioners, the evidence of which was not included in the administrative record.³

Responding to the materials submitted in opposition to the Respondent's motion to certify, Thurston County Superior Judge Richard Hicks stated "I don't want to trivialize the remarks I made because there was some play on the sounds involved with Mr. Luce's [chairman of EFSEC] name and some concepts here. I did think he wrote with great lucidity, but I also was concerned about whether he was, for lack of a better word, a loose cannon in what he was expressing and then going after that to sit as the chairman of the deliberating body. I think this is a

¹ Appeal No. 81427-9, at the time of filing, appears likely to be joined with appeal-No. 81332-9, and so will be argued herein. As no index of clerk's papers currently exists, citations will be to the name and page of the document cited.

² *Motion to Certify on file herein*.

³ *Preliminary Order on Motion to Certify Petitions for Review to Supreme Court on file herein*.

decision for the Supreme Court, not me, but I think the record has to be clear on this because if he had said what he said in emails to other people and then he was a judge and sat on the case, he'd be brought before the Judicial Conduct Commission."⁴

After the allowed discovery and briefing, the Thurston County Superior Court, on February 29, 2008, issued an order certifying the matter to the Supreme Court, certifying certain documents that were products of that discovery and briefing as "Supplemental Record on the Issue of Alleged Irregularities in Procedure."⁵ A verbatim transcript of the Court's oral order of February 22, 2008 was incorporated therein and attached. *Id.* at 3.

In the oral order that was incorporated into the written order, Judge Hicks stated, after again apologizing for any play upon Mr. Luce's name, "I also think that the most difficult issue here or the most difficult problem here comes from Mr. Luce's conduct, but not so much because of the character of Mr. Luce but because of the many roles that he's playing—or working. And so there are these natural conflicts, which I think in some

⁴ Attachment "A" to State's Motion to Enter Preliminary Order pg 17.

⁵ Order Certifying Petitions For Review to Supreme Court For Direct Review at 4, 5.

ways can fairly be described as bias if you're on the other side of the issue especially when he takes a strong position on preemption.”⁶

The Court went on to say that there was no need for an evidentiary hearing as no facts were in dispute to warrant it.⁷ “So there was a sufficient allegation of procedural irregularities to warrant this additional discovery, but after the discovery was completed, when I look at the materials submitted by the parties, I don't show any material disputed issue of fact that would require any further evidentiary hearing.”⁸ Similarly, the Judge said that “what conclusions of law I guess one can draw from that regarding any impropriety is left to the Supreme Court because that wouldn't be a factual finding.”⁹ “[The Supreme Court] can decide whether this record does two things: First shows any impropriety or irregularities, or second, if from that record they disagree with my finding that there are not sufficient facts here in dispute. There are facts, but they're not in dispute, and they may rule that a further evidentiary hearing should be held.”¹⁰

⁶ *Transcript attached and incorporated into Order Certifying Petitions* at 7.

⁷ *Id.* at 8, 10.

⁸ *Id.* at 10.

⁹ *Id.*

¹⁰ *Id.* at 11.

The Court also used language of there not being a minimum threshold showing of irregularities,¹¹ and though certifying certain materials as supplemental to the record and stating there were facts and they were not in dispute, made no fact finding. Appeal from Judge Hicks' decision was made by the Petitioners herein, and said appeal has been transferred to this Court to be heard herewith.

III. ARGUMENT

A. Standard of Review

The standard of review was stated in *Nationscapital Mortgage Corp. v. State of Washington Department of Financial Institutions*¹². "We apply a substantial evidence standard to an agency's findings of fact but we review de novo its conclusions of law. We review an agency's interpretation of statutes and implementing regulations under the error of law standard, which permits us to substitute our judgment for the agency's. But when an administrative agency administers a special field of law and possesses quasi-judicial functions because of its expertise in that field, we accord substantial weight to the agency's interpretation of the governing statutes and legislative intent. Furthermore, we give substantial deference to agency views when it bases its determination on

¹¹ *Id.* at 9, 10.

¹² 133 Wn.App. 723, 137 P.3d 78 (2006).

factual matters, especially factual matters that are complex, technical, and close to the heart of the agency's expertise."¹³

B. Supreme Court Lacks Jurisdiction To Hear This Matter Directly.

This question has already been briefed in Kittitas County's Response To The Court's Letter of March 12, 2008, on file herein. The arguments made there are incorporated herein by reference and a copy of that document, for the Court's convenience, is attached hereto as Exhibit "A."

The Respondents' arguments for Supreme Court original jurisdiction are unsuccessful. First they argue that the Court has jurisdiction over this matter, despite it not being listed in the Constitution, in the same way that the Court takes certified questions.¹⁴ Taking an issue certified to it pursuant to RCW 2.60.020 is not taking jurisdiction over an entire matter, only that question, and so is not applicable to this action.¹⁵ Just because the Court can take certified question does not lead to the conclusion it can take appellate jurisdiction over an entire matter appealed from something other than a court.

¹³ *Id.* at 737, 738.

¹⁴ *Respondent Sagebrush Power Partners' Memorandum* beginning page 4, 5; *State's Second Supplemental Brief in Support of Motion to Establish Briefing Schedule* page 4, 5.

¹⁵ *Lige Dickson Co. v. Union Oil Co.*, 96 Wn.2d 291, 294-95, 635 P.2d 103 (1981).

The Respondents then argue that this court has jurisdiction because the Superior Court has a limited fact-finding role¹⁶ and that the Supreme Court has jurisdiction to hear appeals so long as no fact finding is required, and that fact finding has already been done by either the Superior Court or the administrative agency below.¹⁷ Neither of these arguments addresses the problem that, as stated in *Third Lake Washington Bridge v. King County Chapter*, the Supreme Court only has jurisdiction to hear appeals from “some judicial court established by the constitution or in pursuance thereof.”¹⁸ Neither the Governor nor EFSEC are such courts, and the fact that fact finding has already been done and that the Superior Court may have played some role in that, does not make the Governor or EFSEC “judicial courts established by the constitution.” Apart from the narrow question of Judge Hicks’ statement as to threshold showing of procedural irregularities that has been appealed, the matter before this Court now is not an appeal from one of the “judicial courts established by the constitution,” and so the Supreme Court lacks jurisdiction to hear the matter until such time as the matter becomes one. For these reasons, RCW 80.50.140, to the extent that it provides otherwise, should be declared unconstitutional.

¹⁶ *State’s Second Supplemental Brief* page 3.

¹⁷ *Respondent Sagebrush Power Partners Memorandum* page 2, 3.

¹⁸ 82 Wn.2d 280, 284, 285, 510 P.2d 216 (1973).

C. Judge Hicks Erred In Stating Threshold Showing Of Procedural Irregularities Not Met And By Not Making Factual Determinations.

RCW 80.50.140 provides in pertinent part that “If the court finds that review cannot be limited to the administrative record...because there are alleged irregularities in the procedure before the council not found in the record...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.”

Similarly, RCW 34.05.562(1) allows the Court to receive new evidence in an appeal of an administrative decision if it relates to “(a) Improper constitution as a decision-making body or grounds for the disqualification of those taking the agency action; (b) Unlawfulness of procedure or of decision-making process.” Despite the fact that a “more specific statute governs the more general APA,”¹⁹ and hence, under RCW 80.50.140, factual determinations should have been made following the allegations of procedural irregularities, the court used language indicating failure to make a threshold showing of procedural irregularities and did not denominate anything in its order as findings of fact.

¹⁹ *King County Water District No. 90 v. City of Renton*, 88 Wn.App. 214, 226, 944 P.2d 1067 (1997).

If the more general APA applies, Petitioners made the requisite threshold showing of procedural irregularities under the Administrative Procedures Act (APA) to warrant the court taking evidence additional to the administrative record. Bias or prejudgment is one aspect of the appearance of fairness doctrine. *Nationscapital Mortgage Corp. v. Depart. Of Financial Institutions*, 133 Wn.App. 723, 759, 137 P.3d 78 (2006). A violation thereof is grounds for removal of the biased person from the body taking agency action. *City of Hoquiam v. Public Employment relations Commission*, 97 Wn.2d 481, 488, 646 P.2d 129 (1982). Therefore, RCW 34.05.562(1)(a) would be satisfied by a preliminary showing of bias, as it allows taking additional evidence for matters that would justify disqualification of a member of a decision-making body. Similarly, ex parte communications can form the basis for invalidating agency action. “Certain ex parte communications between a decision maker and opponents or proponents of a proposal are prohibited and can provide a basis for invalidating a decision on the proposal.” *Organization to Preserve Agricultural Lands v. Adams County*, 128 Wn.2d 869, 886, 913 P.2d 793 (1996). RCW 34.05.455 defines a portion of ex parte communications as “(2)...a presiding officer may not communicate, directly or indirectly, regarding any issue in the proceeding, with any person not employed by the agency who has a direct or indirect

interest in the outcome of the proceeding, without notice and opportunity for all parties to participate.”

The threshold showing that would allow the court to take in new evidence outside the administrative record is described in *Nationscapital*.

Generally, under the appearance of fairness doctrine, proceedings before administrative tribunals acting in a quasi-judicial capacity are valid only if “a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.” The doctrine is intended to avoid the evil of participation in the decision-making process by a person who is personally interested or biased. Under the appearance of fairness doctrine, it is not necessary to show that a decision maker’s bias actually affected the outcome, only that it could have. But in the context of administrative proceedings, the appearance of fairness doctrine exists in tension with the presumption that public officials will properly perform their duties. To overcome the presumption, a party invoking the appearance of fairness doctrine must come forth with evidence of actual or potential bias. 133 Wn.App. at 759.

The Petitioners came forth “with evidence of actual or potential bias” and ex parte contacts so as to satisfy the threshold showing required to justify the court taking evidence additional to the administrative record. Petitioner presented an email dated February 24, 2004 from Mr. Luce (two years prior to the adjudicative proceeding on the merits in this matter) in which Mr. Luce indicated bias and prejudgment because he was driven by

concerns for EFSEC's credibility.²⁰ In this email, Mr. Luce voiced concern (1) that if EFSEC did not preempt Kittitas County's land use decision it would "lose credibility," (2) that the County's GMA-compliant process for siting wind farms "circumvented" and "subverted" EFSEC, and so warranted preemption, (3) that litigation by the County could cause the Legislature "to amend the statute," and (4) where he characterized the County's position as "very unpersuasive." *Id.* In another email,²¹ Mr. Luce's concern about the self-preservation of EFSEC was to such a degree that he wrote "if we don't preempt we are effectively out of business as a "State siting Council" and should turn siting power projects totally over to local jurisdiction...Shame on us for not forcing this issue earlier." Mr. Luce admitted in deposition that (1) his concern for EFSEC's viability if the County's decision was not preempted was the driving force towards a recommendation of preemption in the deliberations,²² (2) the belief that if EFSEC was not a "one-stop-shop" it would have no reason to exist and should be disbanded,²³ and (3) the belief that Kittitas County's GMA-compliant wind farm siting regulations "improperly usurp and unnecessarily duplicates EFSEC's statutory role in the siting of energy

²⁰ *Exhibit 14 to Deposition of James O. Luce.*

²¹ *Exhibit 8 to Declaration of James O. Luce.*

²² Deposition of James O. Luce at 36-38.

²³ *Id.* at 106.

facilities...[and]...must therefore be preempted.”²⁴ This material demonstrates bias and prejudice on the part of Mr. Luce in that the driving force in the deliberation that led to a recommendation of preemption was an overwrought concern for the agency’s self-interest and that commanded a recommendation of preemption because anything else would have would have undermined that agency’s status. The merit of the project and the energy concerns for the state of Washington took a back seat to the driving bias and prejudice in favor of agency self-preservation. This showing of bias and prejudice constituted the Petitioners having “come forth with evidence of actual or potential bias” and thus satisfying the threshold showing requirement articulated in *Nationscapital* and requiring the Superior Court to take additional evidence.

Similarly, the Petitioners came forth with actual evidence of ex parte communications that also required the Superior Court to engage in fact finding. In an email dated August 4, 2005, Mr. Luce initiated a dialogue with the Governor’s office on EFSEC’s preemption authority that eventually included him submitting a draft document to her as to what her position on preemption should be.²⁵ This was at a time when the only case

²⁴ *Id.* at 6.

²⁵ *Exhibit 2 and page 115 to Deposition of James O. Luce.*

with a request for preemption before EFSEC was the Kittitas Valley Wind Power Project.²⁶ Renewable Northwest Project (RNP), a party below, and Darrel Peeples, an attorney for the applicant, were both made aware of this overture, requested that Mr. Luce keep them apprised of the issue, and were each informed by Mr. Luce (RNP by telephone call, and Mr. Peeples by both telephone call and email), at the request of these parties, of the Governor's letter opinion on preemption.²⁷ None of these communications about preemption were disclosed to the public, and so no notice or opportunity to participate was afforded the public.²⁸ In fact Mr. Luce stated that he never discloses telephone calls unless the public specifically requests.²⁹ These revelations of actual prohibited ex parte communication about an issue in a proceeding (preemption) with proponents without notice for the public to participate were made to the Thurston County Superior Court, thereby satisfying the threshold requirement to require the court to engage in factual determinations.

The Superior Court's own statement indicates that the requisite threshold showing had been made. Judge Hicks said in relation to materials presented by Petitioners as to procedural irregularities "I think in

²⁶ *Id.* at 8.

²⁷ *Id.* at 17-20, 24, 28, and Exhibit 2.

²⁸ *Id.* at 17, 19, 28.

²⁹ *Id.* at 28.

some ways can fairly be described as bias if you're on the other side of the issue especially when he takes a strong position on preemption."³⁰ If this evidence can "fairly be described" as evidencing bias, then the threshold showing has been made. The requisite threshold showing is not necessarily one sufficient to win on the merits, but requires merely pointing to "evidence of actual or potential bias." If the material presented can fairly be described as evidence of bias, then that threshold showing is met.

Despite having made the above described threshold showing of actual bias, prejudice, and ex parte communications as required under *Nationscapital*, the Superior Court made no findings of fact in its order, thereby committing reversible error.

D. EFSEC Lacks Subject Matter Jurisdiction To Site Or Preempt Siting Of Wind Farms.

1. Ch. 80.50 Does Not Confer Subject Matter Jurisdiction To Site Or Preempt Siting Of A Wind Farm.

In interpreting a statute, a court seeks to ascertain the legislature's intent. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). Such intent is discerned by resorting to principles of statutory construction and relevant case law. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). All language within the statute must be given effect so that no

³⁰ Transcript attached and incorporated into Order Certifying Petitions at 7.

portion is rendered meaningless or superfluous. *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 1231 (1999). Appellate courts are duty bound to give meaning to every word the legislature includes in a statute and must avoid rendering any language superfluous. *City of Seattle v. Williams*, 128 Wn.2d 341, 349, 908 P.2d 359 (1995). When the legislature makes a material change in the wording of a statute, a change in legislative purpose is presumed. *State v. Russell*, 84 Wn.App. 1, 4, 925 P.2d 633 (1996). The legislature is presumed not to engage in unnecessary or meaningless acts. *Bailey v. Allstate Ins. Co.*, 73 Wn.App. 442, 446, 869 P.2d 1110 (1994).

Chapter 80.50 RCW does not confer upon EFSEC the authority to site wind farms nor the authority to preempt local land use decision to site wind farms. RCW 80.50.060 lists the facilities to which the chapter applies. Subsection (1) states that the chapter applies to the construction or reconstruction of "energy facilities" as described in RCW 80.50.020(7) and (15) and that no construction or reconstruction of such can be done without certification under that chapter. RCW 80.50.060(2) says that the chapter also applies to construction or reconstruction of an "energy facility that exclusively uses alternative energy resources and chooses to receive certification under this chapter, regardless of the generating capacity of the project." RCW 80.50.110 states that 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 80.50.020(11) defines an “energy facility” as being either an “energy plant” or a “transmission facility.”³¹ An “energy plant” is defined in RCW 80.50.020(15) as being one of five things: (1) a thermal power plant, either stationary or floating, with certain generating capacities, (2) a facility capable of receiving a certain volume of liquefied natural gas that has been transported on the sea, (3) a facility capable of receiving a certain amount of crude oil or petroleum that has been transported over the sea, (4) an underground natural gas reservoir with a certain daily delivery capacity, or (5) an oil refinery capable of processing at least 25 thousand barrels per day. A wind farm does not fit any of these definitions of an “energy facility.”

RCW 80.50.060(2), though not definitional, does mention “alternative energy resources.” RCW 80.50.020(18) defines these resources as wind, solar energy, geothermal energy, landfill gas, wave or tidal action, or biomass. Returning now to RCW 80.50.060(2), it states that the chapter also applies to (1) energy facilities that (2) exclusively use

³¹ The latter is not applicable, and so the County will focus upon the former.

alternative energy resources, and (3) choose to receive certification under Ch. 80.50 RCW, (4) regardless of the project's generating output.

The most difficult part of dissecting this statute is the last clause because, by definition, something can only be an "energy facility" under RCW 80.50.020(15) and (11) if it meets some output or production criteria. Because something can only get into the set of "energy facilities" by meeting a stated production threshold, saying "regardless of generating capacity" strictly speaking creates an empty set. Nothing is in that set of "energy facilities" that fails the production output criteria.³² So the Legislature must have meant something like "that which would otherwise qualify as an energy facility but for the production output." This would give meaning to the clause and not render it superfluous. It is important to point out that the legislative intent of having this clause here must relate to RCW 80.50.020(15) because that is the only place where generating capacity is mentioned or an issue. By pointing back to RCW 80.50.020(15), via mentioning generating capacity, it is clear that the statute is still describing "energy facilities" as otherwise there-defined.

³² It is akin to saying "this applies to the set of all red-headed men, regardless of their gender." The latter clause fails to include females because no females got into the set of red-headed men in the first place.

With that understanding, the meaning of the statute is clear. It applies to “energy facilities” (one of the five things listed in RCW 80.50.020(15)-thermal power plant, oil, gas, petroleum facility, or oil refinery) that (1) exclusively uses one of the six “alternative energy resources” listed in RCW 80.50.020(18) and (2) whose developers choose to have the project certified under the EFSEC process (3) even though the output or production would otherwise keep the project from qualifying as an “energy facility” in the first place. Hence, it could apply to a thermal power plant exclusively using geothermal energy, wind, biomass energy, or landfill gas, for example. This is not exactly what the Legislature wrote, but it is the only way to understand it and give the provisions meaning. A wind farm still does not fit in this definition because it is not an “energy facility”-a thermal power plant, an oil, gas, or petroleum facility, nor an oil refinery.

The only one of the five possible “energy facilities” that, exclusively using the “alternative energy resource” of wind, could possibly encompass a wind farm appears to be a “thermal power plant,” and so the question becomes, what is a “thermal power plant.” Webster’s Seventh New Collegiate Dictionary (1971) at page 917 defines “thermal” as “of, relating to, or caused by heat.” RCW 80.50.020(10) defines “thermal power plant” as “for purpose of certification, any electrical

generating facility using any fuel.” A wind farm does not meet this definition either because it is not “thermal” and because wind is never defined as a “fuel.”

The legislative history supports this reading of the statute. EFSEC began in 1970 as the Thermal Power Plant Site Evaluation Council. 1970 1st ex. Sess Ch. 45. The definition of “thermal power plant” found there has never been amended. The Governor who signed that legislation wrote that it was designed as “a significant step forward in availing ourselves of this newly developing power resource.” *Id.* Clearly, the phrase “thermal power plant” has historically referred to that which was the emerging technology in 1970. Although language about “alternative energy resource” has since been added, the term “thermal power plant” has remained unchanged, evidencing that its definition was not to change so as to include the newer “alternative energy resources.”

In the 1975-76 2nd ex. Sess. At Ch. 108, the definitional language of “energy facility” (basically as we now have it) was introduced, and the definition of “thermal power plant” was left unchanged. In the 2001 regular session at Ch. 214, the language about “alternative energy resources” was added to both RCW 80.50.060(2) and RCW 80.50.020 then (17). *Id.* Also added that session was language at the beginning of

RCW 80.50.020 stating that “the definitions in this section apply throughout this chapter unless the context clearly requires otherwise.” *Id.* Hence an apparent expansion to what EFSEC had jurisdiction over was done at the same time that the requirement to consistently maintain the definition of “energy facility” was added.

A wind farm might be an “alternative energy facility,” but that term is undefined in Ch. 80.50 RCW and EFSEC is not given siting or preemption authority over them. In 2006 Ch. 196 § 1 of the Session Laws, the Legislature amended RCW 80.50.020(6), dealing with “associated facilities” to include transmission lines to connect thermal power plants “or alternative energy facilities” to the northwest power grid. An “alternative energy facility” is nowhere defined in the Ch. 80.50 RCW, but it is called out distinctly from a “thermal power plant” and so cannot be a “thermal power plant.” A wind farm might be an “alternative energy facility,” but without any more definition than it not being a thermal power plant, one cannot say. RCW 80.50.060 only states EFSEC has jurisdiction of “energy facilities” (which are defined as described above and do not include an “alternative energy facility”) and RCW 80.50.110 only gives EFSEC preemption authority over “energy facilities” not “alternative energy facilities.”

Respondents will argue one of two things in support of EFSEC, under Ch. 80.50 RCW having jurisdiction and preemption authority over wind farms. First they may argue essentially that RCW 80.50.060(2) needs to be read as definitional and meaning basically that the chapter applies to energy facilities, which also includes any electrical generating facility that exclusively uses alternative energy resources, chooses to receive certification under this chapter, regardless of generating capacity. Besides the fact that this is not what the statute says, this renders the last clause meaningless or superfluous. If the definition is no longer related to RCW 80.50.020(15), then reference to generating capacity is meaningless, and if the only requirement to be one of these new things considered “energy facilities” is exclusive use of alternative energy resources, then the statement as to generating capacity is superfluous. Trying to say that RCW 80.50.060(2) creates a kind of “energy facility” completely different and unrelated to that specifically defined in RCW 80.50.020(11) and (15) also conflicts with the opening phrase of RCW 80.50.020 -“The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.”

Another way of describing the problem is that if one interprets RCW 80.50.060(2) to use the phrase “energy facility” in some sense other than as defined in RCW 80.50.020(11) and (15), as common parlance for

example, then the clause relating to generating capacity is superfluous and without meaning because it can only have meaning and relevance in conjunction with the definition of “energy facility” specified in RCW 80.50.020(15). This again returns to the concept that an “energy facility” can only be, apart from a transmission facility, one of the five types of things enumerated in RCW 80.50.020(15) and that does not include a wind farm.

Second, Respondents may argue that the definition of “thermal power plant” under RCW 80.50.020(10) as “any electrical generating facility using any fuel” would include a wind farm. The problems with this argument, as already pointed out, are that wind farms are not “thermal” and alternative energy resources are never defined as fuels. This also does not fit with the legislative history as thermal power plants were considered the emerging technology around 1970, and the definition in the statute has never changed. In contrast, alternative energy resources are a currently emerging technology whose definition has been added to the list of defined terms in this chapter, and there is no indication that the Legislature intended to include them into the never-amended definition of thermal power plants. “Thermal power plant” is actually called out separately from “alternative energy facility” in the recent amendment to RCW 80.50.020(6). Hence, whatever is contained in the set of “energy

facilities” that EFSEC has subject matter jurisdiction and preemption authority over under RCW 80.50.110 does not include wind farms.

2. The Legislature Has Not Clearly, Expressly, And Unambiguously Preempted Local Siting Of Wind Farms.

Article 11 § 11 of the Washington Constitution states “Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.” This power of a municipality to legislate may not be taken away unless the State Legislature clearly, expressly, and unambiguously does so. In *State v. Everett District Justice Court*, the Washington Supreme Court stated that “A statute will not be construed as taking away the power of a municipality to legislate unless this intent is clear and expressly stated.”³³ Speaking about a City (which derives its police power from the same constitutional section as does a county) the Court of Appeals in *Northwestern Industries, Inc. v. City of Seattle*, stated that “Absent a clear and unambiguous directive from the legislature, courts will not construe state statutes to interfere with the power of a first-class city such as Seattle over its own streets.”³⁴ Similarly, the Supreme Court in *Nelson v. City of Seattle*, stated that “It may be stated as a general rule that a state law will not be construed as impliedly taking away from a first

³³ 92 Wn.2d 106, 108, 594 P.2d 448 (1979).

³⁴ 33 Wn.App. 757, 759, 760, 658 p.2d 24 (1983).

class city an existing power. In order to accomplish that result, the state must be clear and unambiguous. A seeming conflict must be harmonized, if possible.”³⁵

As has been described above in section C1, EFSEC arguably does not have subject matter jurisdiction to site or preempt the siting of a wind farm. The legal standard for a state statute to actually preempt local land use decisions is that the language of the state statute must be clear, express, and unambiguous. There, as shown above in section C1, is nothing in Ch. 80.50 RCW that clearly, expressly, or unambiguously states that EFSEC and the Governor have preemption authority over the siting of a wind farm. EFSEC may have jurisdiction and preemption authority over “energy facilities,” but wind farms do not clearly, expressly, or unambiguously fit the definition of “energy facilities.”³⁶ Therefore, EFSEC and the Governor lack subject matter jurisdiction to preempt a wind farm. A county’s constitutional right to make land use decisions within its boundaries cannot be taken away by a statutory scheme written as this one is.

³⁵ 64 Wn.2d 862, 866, 395 P.2d 82 (1964).

³⁶ Various WAC provisions purport to refer to authority over wind farms and alternative energy facilities, but it is a well settled proposition that WAC provisions promulgated beyond the statutory authority of the agency found in the RCW are void. *Eldman v. State*, 116, Wn.App. 876, 886, 68 p.3d 296 (2003).

E. EFSEC Violated Its Own Regulations And The Growth Management Act In Recommending Preemption.

1. EFSEC Violated Its Own Regulation In Recommending Preemption.

The procedures for siting “energy facilities” and recommending preemption by EFSEC are described in the then-current versions of WAC’s 463-28-030, 463-28-040, and 463-28-060.³⁷ The process required

³⁷ **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 and 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.

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 alternative 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 463-28-060 Request for Preemption-Adjudicative proceeding. Should an applicant elect to continue processing the application and file a request with the council for state preemption, the council will schedule an adjudicative proceeding hearing on the application as specified under chapter 463-30 WAC. The council shall determine during the adjudicative proceeding whether to recommend to the governor that the state should preempt the local land use plans or zoning ordinances for a site or portions of a site for the energy facility proposed by the applicant. The factors to be evidenced under this issue are those set forth in WAC 463-28-040. The determination of preemption shall be by council order, and shall be included in its recommendation to the governor pursuant to RCW 80.50.100.

an applicant whose project was inconsistent with local land use to return to the municipality and make a good faith effort to resolve the land use inconsistency. WAC 463-28-030(1). If that effort failed, the applicant could file a request for preemption with EFSEC that addressed (1) the good faith effort they made to resolve inconsistency with the municipality, (2) that the effort to resolve land use inconsistency was unsuccessful, (3) that local alternative locations were evaluated and found unacceptable, and (4) how the project met the state's interests delineated in RCW 80.50.010. WAC 463-28-040. EFSEC was then to go through an adjudicative proceeding to determine if it would recommend preemption to the governor, and the factors to be considered in making that determination were those outlined in WAC 463-28-040. WAC 463-28-060.

In this case, EFSEC violated those statutes by basing its recommendation for preemption upon how it perceived the local regulation for siting wind farms rather than the factors it was allowed to consider. At page 26 of Order No. 826, EFSEC stated that "the Council's main motivation in recommending preemption of Kittitas County's Wind Farm Overly Ordinance" was that EFSEC perceived the ordinance as duplicating and usurping its role. Similarly, at page 17 of Order no. 826, EFSEC stated that "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.” Order No. 826’s Conclusion of Law #4 states “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.”

Instead of basing its recommendation for preemption upon the four criteria prescribed in WAC 463-28-040 (good faith effort to resolve local land use inconsistency, inability to reach agreement on local land use inconsistency, unacceptability of alternative sites after review, and how the project promotes state interests), EFSEC’s “main motivation” for recommending preemption was its characterization of the local regulation that it perceived as infringing upon its territory. This misapplication of the law compels remand.

This statutory scheme contemplates that municipalities will have some regulation with which the applicant may be inconsistent. It contemplates that the applicant must go back and work in good faith with the municipality to achieve consistency with whatever this local regulation is. It contemplates that EFSEC will make a determination if the applicant

in good faith was unable to resolve the inconsistency, whether alternative sites were reviewed, and if the application meets the state's interests. Nothing gives EFSEC authority to evaluate the nature of local regulation or to base its decision as to recommending preemption upon the nature of local regulation. In recommending preemption with the "main motivation" for such being the nature of the local regulation, EFSEC violated its own statutes.

EFSEC will undoubtedly argue that basing its recommendation upon the nature of Kittitas County's Wind Farm Overlay Ordinance was within its statutory authority because one of the interests of the state is avoiding duplication and unnecessary delay. WAC 463-28-040 references RCW 80.50.010 as delineating the interests of the state.³⁸ Clause (5) is

³⁸ **80.50.010** 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:

meant for EFSEC to make sure IT does not have duplication or unnecessary delay within ITS process, not for EFSEC to make sure no local regulation replicates its process. EFSEC has no power to seek and destroy local regulation that it deems duplicative of its own.

EFSEC's powers are delineated in and limited to those found in RCW 80.50.040.³⁹ Nowhere does it state that EFSEC has any authority to

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- (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.

³⁹ **RCW 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;

rule upon or make determinations about local regulation, much less to recommend preemption should it determine that local regulation duplicates something about EFSEC's site certification process. And, as

(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.

has been shown above, nowhere does EFSEC have the authorization to even consider the nature of local regulation in making its recommendations to the Governor. Its consideration of local regulation is limited to determining whether or not an application is consistent with that local regulation, not whether EFSEC finds something objectionable about that local regulation.

The fact that RCW 80.50.010(5)'s concern for avoiding duplication and delay is directed at EFSEC's own processes is borne out by the amendments EFSEC has subsequently made to its own regulations. The current versions of Ch. 463-28 WAC, which was amended in October of 2007, strip out all requirements that an applicant, whose proposal is inconsistent with local land use regulations, go back to the municipality and, in good faith, seek to resolve non-compliance issues and fail before EFSEC will move forward with proceedings that may lead to a recommendation of preemption. Attached hereto for the Court's convenience as Exhibits "B" and "C" are the current versions of Ch. 463-26 WAC and Ch. 463-28 WAC.⁴⁰

EFSEC has no authority to base a recommendation for preemption upon its evaluation of local land use regulation. It has no authority to to

⁴⁰As adopted regulations, this Court may take judicial notice of them.

seek and destroy local land use regulation that it perceives as duplicative of its process. The mandate to avoid duplication and delay only applies to its own processes both because it has no authority over the processes of other entities and because that is exactly what it has done with its own WAC's-removed requirements to work with municipalities in good faith because that may create duplication. EFSEC's recommendation of preemption whose "main motivation" was the nature of local regulation was beyond its statutory authority, a misapplication of the law, and arbitrary and capricious thereby justifying remand by this Court.

2. EFSEC's Recommendation of Preemption Violates the Growth Management Act.

RCW 36.70A.103 of the Growth management Act, adopted approximately twenty years after Ch. 80.50 RCW, states in pertinent part "State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter except as otherwise provided in RCW 71.09.250 (1) through (3), 71.09.342, and 72.09.333." EFSEC's preemption of the County's comprehensive plans and development regulations regarding wind farms, is contrary to the terms of RCW 36.70A.103.

Similarly, in doing so, EFSEC usurps the role of a growth management hearings board. Determining validity of land use regulations

is given to the hearings boards under RCW 36.70A.280. Comprehensive plans and development regulations are presumed valid upon adoption and compliant with the GMA. RCW 36.70A.320(1). In *Woods v. Kittitas County*, the Supreme Court stated that determinations of whether regulation is consistent with the comprehensive plan, and in turn the GMA, “is a matter within the exclusive jurisdiction of a [Growth Management Hearings Board.]”⁴¹ However, in this matter (*CP 14272*) EFSEC stated that “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 it’s [sic] implementing zoning designations.” EFSEC essentially made determinations of consistency with presumptively-GMA-compliant regulations, and so was making a determination reserved solely for a Growth Management Hearings Board. EFSEC basically found the County’s Wind Farm Overlay Zone Ordinance inconsistent with the County’s GMA compliant comprehensive plan, thereby saying it was inconsistent with the GMA, thereby improperly acting “within the exclusive jurisdiction of a [Growth Management Hearings Board.]” as the Court stated in *Woods*.

⁴¹ 162 Wn.2d 597, 614, 615, 174 P.3d 25 (2007).

F. Siting The Kittitas Valley Wind Power Project Violates The State Environmental Policy Act (SEPA).

SEPA requires that impacts and mitigation be analyzed in the environmental documents and be the product of the best available science.

RCW 43.21C.030 states in pertinent part that:

The legislature authorizes and directs that, to the fullest extent possible...all branches of government of this state, including state agencies, municipal and public corporations, and counties shall: (a) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment.

RCW 43.21C.060 provides that projects

may be conditioned only to mitigate specific environmental impacts which are identified in the environmental documents prepared under this chapter. These conditions shall be stated in writing by the decision maker. Mitigation measures shall be reasonable and capable of being accomplished.

The requirement that the environmental document analyzes impacts and proposed mitigation measures is further delineated in Ch.

197-11 WAC. WAC 197-11-402 provides in pertinent part

(6) The basic features and analysis of the proposal, alternatives, and impacts shall be discussed in the EIS and shall be generally understood without turning to other documents...(9) The range of alternative courses of action discussed in EISs shall encompass those to be considered by the decision maker. (10) EISs shall serve as the means

of assessing the environmental impact of proposed agency action, rather than justifying decisions already made.

WAC 197-11-440(6) states:

This section [Affected environment, significant impacts, and mitigation measures] of the EIS shall describe the existing environment that will be affected by the proposal, analyze significant impacts of alternatives including the proposed action, and discuss reasonable mitigation measures that would significantly mitigate these impacts...This section of the EIS shall...(iii) Clearly indicate those mitigation measures (not described in the previous section as part of the proposal or alternatives), if any, that could be implemented or might be required, as well as those, if any, that agencies or applicants are committed to implement. (iv) Indicate what the intended environmental benefits of mitigation measures are for significant impacts, and may discuss their technical feasibility and economic practicability, if there is concern about whether a mitigation measure is capable of being accomplished...(e) Significant impacts on both the natural environment and the built environment must be analyzed.

Finally, WAC 197-11-660(2) provides in pertinent part that “EISs should briefly indicate the intended environmental benefits of mitigation measures for significant impacts.”

The Final Environmental Impact Statement (FEIS) in this matter fails to analyze turbine setback as a mitigation measure, it fails to analyze visual impacts closer than one half mile, and it fails to analyze turbine setback of four times turbine height—the setback ultimately proposed and adopted. In failing to analyze the most contentious issue in this matter,

turbine setback as a mitigation, SEPA was violated and the decision based upon the defective SEPA , must be remanded. At page 3.9-32 of the FEIS (CP 10128) it states that “The project has the potential to create high levels of visual impact at 2 of the 12 view-point locations analyzed. Not every potential view receptor in the project area has been documented.” Pages 3.9-34 through 3.9-38 (CP 10130-10134) proceed to analyze those twelve view points, but never discuss turbine setback distance as a mitigation measure. No view less than at one half mile distance is analyzed anywhere in the FEIS. Nowhere is the distance of turbine setback every discussed as a potential mitigation measure or for any other purpose. Nowhere in the FEIS is the notion that a turbine setback of four times turbine height would provide any, much less acceptable, mitigation ever analyzed. SEPA requires, as cited to above, that mitigation measures be analyzed in the environmental documents, but that did not occur here. The SEPA documents are supposed to “indicate what the intended environmental benefits of mitigation measures are for significant impacts” (WAC 197-11-440(6)(c)(iv)) yet that is conspicuously absent in this project’s FEIS.

Instead, EFSEC’s sole basis for choosing four times turbine height as an acceptable mitigation measure was the testimony of an expert hired by the applicant. CP 14287; *Deposition of James O. Luce* page 103, 104.

Mr. Luce described the utter lack of standards, analysis, or scientific inquiry that went into this decision in his deposition on pages 103 to 104. He said “I wish we had had some standards. It would have made I think all of our lives a lot easier. We ended up following what I believe to be the only expert advice that we had in our proceedings, which was that four times the height of the [turbine] including blade tip would result in a project that was not, and I’ll use the words that the expert I believe used, looming, which is to say it wouldn’t stand up and stand out in an unreasonable way.”

Ultimately, instead of analyzing visual impacts of the turbines at any length, much less at four times turbine height, or even at anything less than half a mile, as SEPA requires for consideration of mitigation measures, EFSEC relied solely upon the testimony of the applicant’s paid expert. Rather than engaging in the sort of scientific documented inquiry that SEPA requires, EFSEC based its decision on the word of someone hired by a project proponent. This sort of thwarting of the goals and objectives of environmental protection with a decision that is not based upon a “systematic, interdisciplinary approach” and “integrated use of the natural and social sciences and the environmental design arts” compels remand.

G. Proceedings Violate Appearance of Fairness Doctrine.
**1. DNR's Continued Participation Despite Challenge,
Violates Appearance of Fairness.**

Despite numerous challenges to continued participation on appearance of fairness grounds, the DNR representative remained on the council despite the fact that the entity he represented was a landowner in the project and stood to receive significant revenue should the project be approved.⁴²

In *Narrowsview Preservation Association v. City of Tacoma*, 84 Wn.2d 416, 526 P.2d 897 (1974)⁴³ a planning commission member was employed by a bank that owned a collateral interest in property proposed for a rezone before the planning commission. *Id.* at 418. Following an affirmative vote by the planning commission, the city council enacted the rezone by ordinance which was challenged on appearance of fairness grounds. *Id.* The Court stated that "Members of commissions with the role of conducting fair and impartial fact finding hearings must, as far as practical, be open-minded, objective, impartial, free of entangling influences, capable of hearing the weak voices as well as the strong and must also give the appearance of impartiality. The doctrine is applicable

⁴² These timely challenges were all denied in Council Orders Nos. 778, 781, 782, 783, and 786.

⁴³ *Disapproved of on other grounds by Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn.2d 267, 552 P.2d 674 (1976).

to show an interest which might have substantially influenced a member of the commission even if that interest did not actually affect him. While the findings of fact make it clear Mr. Green would not personally benefit from either the granting or denial of the petition for rezone, the equally undeniable major benefit to his employer from the approval of this rezone brings this case squarely within the holding in Buell...It must be stressed that there is no evidence or inference that either the bank or Mr. Anderson applied any improper pressure of any nature on Mr. Green. It is the appearance to those affected, however, that is determinative under these facts.” *Id.* at 420, 421. The appearance of fairness doctrine had been violated.

Similarly in this case, the representative of the DNR remained on the council despite challenges to that participation, when the DNR stood to gain financially from the approval of the project. Whether there was or was not any influence exerted by the DNR upon its representative is immaterial as, in *Narrowsview*, the appearance of fairness is violated anyway.

The standard for violation of the appearance of fairness doctrine is stated in *Nationscapital Mortgage Corp. v. State of Washington Dept. of Financial Institutions*, 133 Wn.App. 723, 758, 759 137 P.3d 78 (2006).

“Generally, under the appearance of fairness doctrine, proceedings before administrative tribunals acting in a quasi-judicial capacity are valid only if “a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.” The doctrine is intended to avoid the evil of participation in the decision-making process by a person who is personally interested or biased. Under the appearance of fairness doctrine, it is not necessary to show that a decision maker’s bias actually affected the outcome, only that it could have. But in the context of administrative proceedings, the appearance of fairness doctrine exists in tension with the presumption that public officials properly perform their duties. To overcome the presumption, a party invoking the appearance of fairness doctrine must come forth with evidence of actual or potential bias.” In this case, the financial benefit the DNR stood to gain from the approval of this project is the “potential bias” required under *Nationscapital*, and is the same factual scenario resulting in the finding of appearance of fairness violation in *Narrowsview*. The reasonably prudent disinterested person would not look at a tribunal with a landowner’s representative sitting thereon and think “that all parties obtained a fair, impartial, and neutral hearing” when the landowner stood to gain financially from the project’s approval.

EFSEC will argue that it is not subject to the appearance of fairness doctrine because it is not a decision maker (it only makes a recommendation to the Governor who decides) and because it alleges not to be quasi judicial. The case law is otherwise. Recommending bodies are subject to the doctrine of appearance of fairness.⁴⁴ A Project-specific land use decision, such as what is involved in this case, are quasi judicial proceedings because it is “in effect an adjudication between the rights sought by the proponents and those claimed by the opponents.”⁴⁵

The appearance of fairness, as a common law doctrine, still exists and applies to things not covered by the codified doctrine in Ch. 42.36 RCW.⁴⁶ This would certainly make EFSEC subject to the doctrine.

2. Mr. Luce Violated The Appearance of Fairness Doctrine.

As already described in section B, as early as 2004, fully two years prior to the adjudication on the merits of this matter, in an email, Mr. Luce described the County’s position as “very unpersuasive” and was worried

⁴⁴ *Buell v. City of Bremerton*, 80 Wn.2d 518, 525, 495 P.2d 1358 (1972); *Save a Valuable Environment v. City of Bothell*, 89 Wn.2d 862, 874, 576 P.2d 401 (1978); *Chrobuck v. Snohomish County*, 78 Wn.2d 858, 870, 480 P.2d 489 (1971).

⁴⁵ *Kerr-Belmark Construction Company v. City of Marysville*, 36 Wn.App. 370, 373, 674 P.2d 684 (1984).

⁴⁶ Some very recent examples include *State v. Chamberlin*, 161 Wn.2d 30, 162 P.3d 389 (2007)(Challenge to Judge’s bias in criminal drug case); *Lang v. Washington Dept. of Health*, 138 Wn.App. 235, 156 P.3d 919 (2007)(Appeal in medical regulatory action); *Nationscapital Mortgage Corp. v. State of Washington Dept. of Financial Institutions*, 133 Wn.App. 723, 137 P.3d 78 (2006)(Regulatory action involving Mortgage Broker Practices Act).

that preemption was necessary just to maintain EFSEC's status and credibility, and that the County's process for siting wind farms "circumvented" and "subverted" EFSEC.⁴⁷ This concern for EFSEC's self-preservation came to the point where he believed that if the County's land use was not preempted that EFSEC would be out of business and "should turn siting power projects totally over to local jurisdictions" and be disbanded.⁴⁸ This obsession with EFSEC's self-preservation became the driving force in the deliberation, whipping the council towards a decision to preempt the County's lawful and GMA-compliant land use regulation and decision.⁴⁹

As also already described in section B, Mr. Luce engaged in undisclosed ex parte communications with the applicant's attorney Mr. Peeples and Renewable Northwest Project (RNP), an intervener in the action, about preemption.⁵⁰ This was at a time when the only application for preemption before EFSEC was that of the Kittitas Valley Wind Power Project.⁵¹ Mr. Peeples and the RNP representative discussed the Governor's position on the issue and asked Mr. Luce to keep them

⁴⁷ Deposition of James O. Luce Exhibit 14.

⁴⁸ *Id.* at page 106 and Exhibit 8.

⁴⁹ *Id.* at 36-38; Order 826 page 26.

⁵⁰ Deposition of James O. Luce pages 17-20, 24, 28, Exhibit 2.

⁵¹ *Id.* at 8.

informed once she clarified that position.⁵² They knew that overtures were being made to the Governor to clarify that position, that is why they asked for notice of the position taken. This afforded them the advantage of knowing what would be the most profitable time to lobby the Governor on the issue of preemption, because they knew it was something she was currently considering. Mr. Luce wrote a draft letter for the Governor suggesting what her position on preemption should be.⁵³ Once revisions were complete and the Governor sent the letter to Mr. Luce, he immediately notified RNP and Mr. Peeples and forwarded the letter to Mr. Peeples.⁵⁴ Mr. Luce never disclosed any of these communications.⁵⁵ Hence, the only ones securing the advantage of knowing when would have been the most opportune time to lobby the Governor as to the issue of preemption of energy facilities were the proponents of this project.⁵⁶ The reasonably prudent and disinterested observer would not conclude that all parties obtained a fair, impartial, and neutral hearing.

⁵² *Id.* at 17-20, 24, 28, Exhibit 2.

⁵³ *Id.* at 115.

⁵⁴ *Id.* at Exhibit 2, pages 17-20, 24, 28.

⁵⁵ *Id.* at 17, 19, 28.

⁵⁶ EFSEC will seek to defend by claiming alternatively that the discussion was about preemption in the context of the Wild Horse Project or was merely about preemption in the abstract. (1) It could not have been about Wild Horse because that project was already sited without the need for preemption. (2) When EFSEC has only one request for preemption before it, it is not a believable fiction that the discussion was in the abstract. When one has a 500 lb. gorilla in the living room, no discussion of primate behavior is in the abstract. (3) The APA at RCW 34.05.455 prohibits discussions of issues in proceedings, not just proceedings, and so an undisclosed discussion of preemption, which was THE issue in this proceeding, violated the APA.

Mr. Luce's bias also spilled out into the public hearings as seen at CP 15815-6, when Mr. Luce was cross-examining Darryl Piercy, Kittitas County Director of Community Development Services, attached hereto as Exhibit "D ." Mr. Luce's commented upon and denigrated Mr. Piercy's testimony. This does not show Mr. Luce as being "open minded, objective, impartial, free of entangling influences, capable of hearing the weak voices as well as the strong and [giving] the appearance of impartiality" in the words of the *Narrowsview* court. It instead shows bias and prejudgment against the opinions voiced by the County's representative and against the position of the County.

Looking at the totality of the Circumstances, there was (1) the representative of a landowner that stood to gain financially sitting on the council refusing challenges to step aside, (2) there was a council chairman driven by the concern for his entity's status and self-preservation to the point he admitted under oath that maintaining EFSEC's status was the driving force in the deliberation leading to the recommendation of preemption, (3) similarly, this same chairman had expressed these concerns for agency status, as well as saying he found the County's position very unpersuasive, two years prior to the adjudication on the merits of the project, (4) this chairman engaged in undisclosed ex parte communications with the applicant's attorney and RNP about the central

issue in the proceeding-preemption-thereby giving them the advantage of knowing when to lobby the Governor to the greatest effect, and (5) in the public hearing, while cross-examining a County witness, he repeatedly commented negatively about the testimony. How possibly would the reasonably prudent and disinterested observer conclude that all parties obtained a fair, impartial, and neutral hearing as stated in *Nationscapital*? “Under the appearance of fairness doctrine, it is not necessary to show that a decision maker’s bias actually affected the outcome, only that it could have.”⁵⁷ The County has shown that.

IV. CONCLUSION

The County has met its burden as to the issues argued herein. The Supreme Court lacks jurisdiction to hear this matter prior to it actually being an appeal from a court, and so the matter should be remanded to the Thurston County Superior Court for further proceedings, and RCW 80.50.140, to the extent it provides otherwise, should be declared unconstitutional.

Judge Hicks committed error in stating that the Petitioners had failed to make a threshold showing of procedural irregularities, and so that

⁵⁷ 133 Wn.App. at 759.

court should be directed to engage in fact finding on the issue of procedural irregularities.

The County believes it has shown that Ch. 80.50 RCW does not confer subject matter jurisdiction over wind farms and their preemption to EFSEC as wind farms do not fit within the definition of an “energy facility.” Alternatively, Ch. 80.50 RCW fails to give EFSEC and the Governor preemption authority over wind farms because the legislature has failed to express such preemption authority over wind farms clearly, expressly, or unambiguously. Without such a clear, express, and unambiguous statement, the County’s constitutional authority to regulate within its borders cannot be preempted. If the Court so finds, this matter must be dismissed for want of subject matter jurisdiction.

The County has met its burden showing that, in recommending preemption, EFSEC violated its own statutes, the GMA, SEPA, and the Appearance of Fairness Doctrine. All or any one of which require remand to EFSEC for further proceedings.

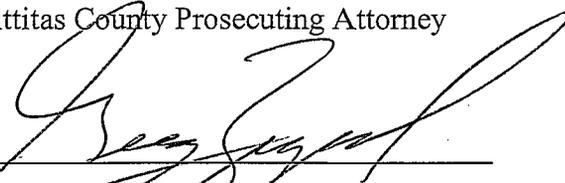
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Respectfully submitted this 17th day of April, 2008.

Kittitas County Prosecuting Attorney



GREGORY L. ZEMPEL WSBA #19125

Attorney for Kittitas County



NEIL A. CAULKINS WSBA#31759

Attorney for Kittitas County

EXHIBIT

"A"

NO. 81332-9

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SUPREME COURT OF THE STATE OF WASHINGTON CLERK

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.

KITTITAS COUNTY'S RESPONSE TO THE COURT'S LETTER
OF MARCH 12, 2008

GREGORY L. ZEMPEL WSBA #19125

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I. INTRODUCTION

Governor Gregoire issued her decision to preempt Kittitas County's land use decision as to the Kittitas Valley Wind Power Project on September 18, 2007. The Petitioners herein filed their respective appeals (which have been joined) on October 17th and 18th, 2007 in the Thurston County Superior Court pursuant to RCW 80.50.140 and 34.05.514(1). The Respondents moved to certify this matter to the Supreme Court on, or around November 28, 2007. On February 29, 2008, the Thurston County Superior Court certified the record to the Supreme Court with the addition of materials not found in the administrative record related to alleged irregularities of procedure.¹

Upon receipt of that certification, on March 12, 2008, the Supreme Court asked the parties to brief the issues of how the case should be processed and whether or not the Supreme Court has jurisdiction to hear the matter. Kittitas County herein responds to that request, taking the question of jurisdiction first. It is the County's position that the Supreme Court lacks jurisdiction to hear directly the appeal of an administrative decision such as this. The provisions of RCW 80.50.140 providing for

¹ Petitioners believe Judge Hicks committed error in the order certifying the record, and to maintain their ability to argue the issues of procedural irregularities, have filed an appeal in Division II of the Court of Appeals.

such review are unconstitutional. This leaves the matter to be processed under the provisions of the Administrative Procedures Act (APA). Hence, the matter should proceed before the Thurston County Superior Court where the Petitioners have already filed their appeals and before which this matter has been litigated for the last four months.

II. JURISDICTION OF THE SUPREME COURT

In *Marbury v. Madison*, the Supreme Court of the United States decided that it derived its jurisdiction from the constitution, and that it was not within the power of the legislature to confer further or additional jurisdiction upon it. 1 Cranch 137, 177-179, 5 U.S. 137, 2 L.Ed. 60 (1803). Numerous Washington cases hold that the same principle applies to the Washington Supreme Court and state that the Court's jurisdiction must be measured by the constitution of the state from which the court derives its existence and power, and acts of the legislature cannot add to nor subtract there from. *Winsor v. Bridges*, 24 Wash. 540, 546, 547, 64 P. 780 (1901); *North Bend Stage Line, Inc. v. Dept. of Public Works*, 170 Wash 217, 225, 16 P.2d 206 (1932); *Third Lake Washington Bridge v. King County Chapter*, 82 Wn.2d 280, 284, 285, 510 P.2d 216 (1973); *Maple Leaf Investors, Inc. v. Depart. Of Ecology*, 10 Wn.App. 586, 589-590, 521 P.2d 742 (1974).

The Supreme Court's jurisdiction is expressed in Article 4 §4 of the Washington Constitution and repeated verbatim in RCW 2.04.010. A Superior Court's jurisdiction is similarly expressed in Article 4 §6 of the Washington Constitution and repeated in RCW 2.08.010. In *Third Lake Washington Bridge v. King County Chapter*, while referring to *North Bend Stage Line v. Dept. of Public Works*, 170 Wash. 217, 16 P.2d 206 (1932), the Washington Supreme Court described the respective jurisdictions of the two courts and the legal route for appeals of decisions by administrative bodies-in that case the Shorelines Hearings Board. The Court stated

This court said in [*North Bend Stage Line*] that the jurisdiction of the Supreme Court and of the superior courts is defined in the constitution of this state. The import of that case is that Const. art. 4, ss 4 and 6, render plain the constitutional intent to make the Supreme Court the court of general appellate jurisdiction, giving to it certain limited original jurisdiction, and to make the superior court the court of general original jurisdiction. The appellate jurisdiction of this court, we said, is jurisdiction over appeals in actions of a purely judicial nature, which have been determined in some judicial court established by the constitution or in pursuance thereof. Citing and quoting *Winsor v. Bridges*, 24 Wash. 540, 64 P.780 (1901), we held that jurisdiction to review actions of administrative bodies, in the first instance, is in the superior court and that the legislature may not oust that court of such jurisdiction. 82 Wn.2d 280, 284, 285, 510 P.2d 216 (1973)

Similarly, in this matter, the legislature has passed a statute providing that the Supreme Court would be reviewing a decision of something other than “some judicial court established by the constitution or in pursuance thereof.” Neither the Governor nor EFSEC are judicial courts, and so jurisdiction for the review of a decision emanating from them rests in the superior court, not the Supreme Court, and legislation contrary to that is unconstitutional. The provisions of RCW 80.50.140 providing for expedited review consisting of record certification by the superior court and appellate review by the Supreme Court must be declared unconstitutional and therefore invalid.

This case is most like *North Bend Stage Line v. Dept. of Public Works*, with one important difference. In that case, the applicable statute provided for direct appellate review by the Supreme Court of an order of the State Department of Public Works. 170 Wash. 217, 218, 16 P.2d 206 (1932). The Court stated that

These constitutional provisions render plain the constitutional intent to make the Supreme Court the Court of general appellate jurisdiction, giving to it certain limited original jurisdiction; and to make the superior court the court of general original jurisdiction...So it seems plain to us that by chapter 119, p 363, Laws of 1931, the Legislature has assumed to give the right of appeal directly from an order of the department to this court. Now, recurring to the constitutional appeal jurisdiction of this court, we have seen that such jurisdiction is prescribed to

be “in all actions and proceedings,” with certain limited exceptions. This, we are of the opinion, means appellate jurisdiction in “actions and proceedings” of a purely judicial nature, which have been determined in some judicial court established by the constitution or in pursuance thereof. ..Reading the whole of the above-quoted provisions of article 4 of the Constitution, we are led to the conclusion that this is at all events the constitutional limit of the appellate jurisdiction of this court, which the Legislature does not have the power either to expand or limit. *Id.* at 221, 222.

The Court went on to declare the statute unconstitutional and to suggest that the action should be dismissed for want of jurisdiction. *Id.* at 228. But here is the one distinction between that case and the one at bar. In that case, by the time the statute was declared unconstitutional, the appeal period had run without the appellant appealing to what was determined to be the proper court, and so dismissal for want of jurisdiction would have resulted in the loss of appeal rights. *Id.* This led the Court to the decision to hear the matter on the merits under its certiorari jurisdiction. *Id.* at 229. That is not the case in this matter, because the Petitioners have appealed to the appropriate court (Thurston County Superior Court) and have been litigating there for the last four months. Declaring RCW 80.50.140’s provisions for expedited review in the Supreme Court unconstitutional will not result in any loss of appeal rights because those have already been perfected.

III. PROCESS FOR DECIDING CASE

The determination that the provisions for expedited review by the Supreme Court in RCW 80.50.140 are unconstitutional leaves the matter to be appealed according to the provisions of the Administrative Procedures Act (APA) like the appeal of any other administrative decision.² RCW sections 80.50.900 and .902 provide for severing invalid portions of Ch. 80.50 RCW from the remainder of the act. If the unconstitutional portions of RCW 80.50.140 are removed, the first three sentences of subsection one would presumably remain, in that they are not repugnant to the Constitution.³ That would mean that the appeal would be subject to judicial review under the APA and the venue would be Thurston County. Such appeal has already been made and proceedings have been conducted there for the last four months. Accordingly, this matter should be directed back to the Thurston County Superior Court for further proceedings.

² RCW 34.05.510 provides that "This chapter establishes the exclusive means of judicial review of agency action."

³ Those first three sentences read "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."

This corresponds with how our judicial system is organized. In *Third Lake Washington Bridge*, Justice Rosellini wrote that

These provisions for review at the trial court level, rather than by an appellate court, are significant. They afford the litigant who is aggrieved by an agency ruling a convenient, speedy, and economical method of obtaining judicial review. Further, experience has demonstrated that review at the trial court level is more efficient than is review by an appellate court. Trial judges can take more time than can appellate courts to explore carefully, with the assistance of counsel, the complexities of the administrative record and unravel the skeins of proof (which have an unfortunate habit, in administrative proceedings, of becoming badly tangled). If a day or two is required to get at the heart of the case, this much time can be taken in a trial court (whereas in appellate courts, an hour or so is ordinarily all the time that is available). What is more, the comparatively informal nature of trial court proceedings-permitting a judge thoroughly to master the case by asking searching questions of counsel and by taking proofs as to alleged irregularities in agency procedure not shown on the record-seems best calculated to assure the attainment of full and equal justice. 82 Wn.2d at 285, 286.

In this case, with a record approaching 18,000 pages in length and with allegations of procedural irregularities, the review of the administrative decision is certainly better done by a trial court than an appellate court.

Respondents' motions for expedited review in which they argue that the constitutionality of RCW 80.50.140 and the Supreme Court's

jurisdiction should be briefed and argued simultaneously with the merits should be denied. It makes no sense, and would waste everyone's time and resources, to argue the merits prior to a determination of jurisdiction. Doing so also runs the risk of prejudicing the court.⁴

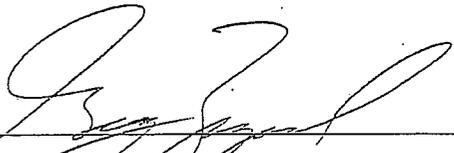
IV. CONCLUSION

The Supreme Court lacks jurisdiction to hear the appeal of this matter as the provisions of RCW 80.50.140 providing for expedited appellate review of a non-judicial decision are unconstitutional. The severability language in Ch. 80.50 RCW leaves the matter to be determined by the normal provisions of the APA, which appeal has already been made and which appellate proceeding has already been underway for four months. The matter should be directed back to the Thurston County Superior Court for further proceedings. This process best allows for, in the words of the *Third Lake Washington Bridge Court*, "attainment of full and equal justice."

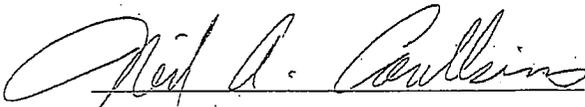
⁴ Respondents may not be heard to argue that their motion for certification of November 28, 2007 allows for review under the certificate of appealability provisions of RCW 34.05.518 because (1) no application for such was filed with the superior court within 30 days of the petition for review's filing, (2) the agency whose decision is being appealed has not issued a certificate of appealability, and (3) Respondents seek review before the Supreme Court, rather than the Court of Appeals provided for in RCW 34.05.518.

Respectfully submitted this 20 day of March, 2008.

Kittitas County Prosecuting Attorney



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

EXHIBIT "B"

Last Update: 10/11/04

WAC Sections

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

DISPOSITIONS OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

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

463-26-010

Purpose.

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

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

463-26-020

Notification of local authorities.

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

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

463-26-025**Public informational meeting.**

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

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

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

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

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

463-26-035**Introduction of counsel for the environment.**

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

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

463-26-050**Purpose for land use hearing.**

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

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

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

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

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

463-26-090

Procedure where certificates affirming compliance with land use plans and zoning ordinances are presented.

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

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

463-26-100

Procedure where no certificates relating to land use plans and zoning ordinances are presented.

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

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

463-26-110

Determination regarding land use plans and zoning ordinances.

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

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

Chapter 463-28 WAC
State preemption**EXHIBIT** " " C

Last Update: 10/9/07

WAC Sections

- 463-28-010 Purpose.
- 463-28-020 Authority of council -- Preemption by state.
- 463-28-060 Adjudicative proceeding.
- 463-28-070 Certification -- Conditions -- State/local interests.
- 463-28-080 Preemption -- Recommendation.

DISPOSITIONS OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

- 463-28-030 Determination of noncompliance -- Procedures. [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.] Repealed by 07-21-035, filed 10/9/07, effective 11/9/07. Statutory Authority: RCW 80.50.040(1).
- 463-28-040 Inability to resolve noncompliance. [Statutory Authority: RCW 80.50.040(1). 78-07-036 (Order 78-3), § 463-28-040, filed 6/23/78.] Repealed by 07-21-035, filed 10/9/07, effective 11/9/07. Statutory Authority: RCW 80.50.040(1).
- 463-28-050 Failure to request preemption. [Statutory Authority: RCW 80.50.040(1). 78-07-036 (Order 78-3), § 463-28-050, filed 6/23/78.] Repealed by 07-21-035, filed 10/9/07, effective 11/9/07. Statutory Authority: RCW 80.50.040(1).
- 463-28-090 Governing rules. [Statutory Authority: RCW 80.50.040(1). 78-07-036 (Order 78-3), § 463-28-090, filed 6/23/78.] Repealed by 04-21-013, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040 (1) and (12).

463-28-010
Purpose.

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

[Statutory Authority: RCW 80.50.040(1). 07-21-035, § 463-28-010, filed 10/9/07, effective 11/9/07. Statutory Authority: RCW 80.50.040 (1) and (12). 04-21-013, § 463-28-010, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040(1). 78-07-036 (Order 78-3), § 463-28-010, filed 6/23/78.]

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

The authority of the council is contained in RCW 80.50.040(1) and 8050.110(2) which provides that the state preempts the regulation and certification of the location, construction, and operational conditions of certification of energy facilities.

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

463-28-060
Adjudicative proceeding.

(1) Should the council determine under WAC 463-26-110 a site or any portions of a site is inconsistent it will schedule an adjudicative proceeding under chapter 463-30 WAC to consider preemption.

(2) The proceeding for preemption may be combined or scheduled concurrent with the adjudicative proceeding held under RCW 80.50.090(3).

(3) The council shall determine whether to recommend to the governor that the state preempt the land use plans, zoning ordinances, or other development regulations for a site or portions of a site for the energy facility or alternative energy resource proposed by the applicant.

[Statutory Authority: RCW 80.50.040(1), 07-21-035, § 463-28-060, filed 10/9/07, effective 11/9/07. Statutory Authority: RCW 80.50.040, 91-03-090, § 463-28-060, filed 1/18/91, effective 2/18/91. Statutory Authority: RCW 80.50.040(1), 83-08-031 (Order 83-2), § 463-28-060, filed 3/31/83; 78-07-036 (Order 78-3), § 463-28-060, filed 6/23/78.]

463-28-070

Certification — Conditions — State/local interests.

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

[Statutory Authority: RCW 80.50.040(1), 07-21-035, § 463-28-070, filed 10/9/07, effective 11/9/07; 78-07-036 (Order 78-3), § 463-28-070, filed 6/23/78.]

463-28-080

Preemption — Recommendation.

The council's determination on a request for preemption shall be part of its recommendation to the governor pursuant to RCW 80.50.100.

[Statutory Authority: RCW 80.50.040(1), 07-21-035, § 463-28-080, filed 10/9/07, effective 11/9/07. Statutory Authority: RCW 80.50.040, 91-03-090, § 463-28-080, filed 1/18/91, effective 2/18/91. Statutory Authority: RCW 80.50.040(1), 78-07-036 (Order 78-3), § 463-28-080, filed 6/23/78.]

EXHIBIT

"D"

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1 THE WITNESS: I think a good faith effort in
2 any project is a willingness and a desire to come to a
3 satisfactory conclusion that is mutually agreeable to both
4 parties.

5 CHAIR LUCE: Are you saying that to evidence
6 good faith the parties have to agree?

7 THE WITNESS: No, a willingness to get to
8 that agreement or at least a willingness to express a
9 desire to create discussion and conversation that perhaps
10 could lead to that agreement.

11 CHAIR LUCE: Okay. So there was a
12 three-year effort ongoing in this particular case to get
13 to an agreement. Right?

14 THE WITNESS: I'm not sure I would
15 characterize it as a three-year effort. It has spanned
16 three years.

17 CHAIR LUCE: All right. There was an effort
18 that has spanned three years to get an agreement.

19 THE WITNESS: However, the discussion at the
20 local level has been since October.

21 CHAIR LUCE: Well, that will stand as your
22 statement. Whether the Council agrees with that or not is
23 a separate thing.

24 THE WITNESS: I agree.

25 CHAIR LUCE: One of the criteria for EFSEC's

1 preemption is the applicant demonstrated a good faith
2 effort to resolve the noncompliance issue. So I think I
3 understand your statement of good faith to agree with me
4 when I say that good faith effort does not necessarily
5 result in agreement.

6 THE WITNESS: However, as I indicated in my
7 definition, it should have a willingness to try to achieve
8 an agreement.

9 CHAIR LUCE: A willingness.

10 THE WITNESS: I think I know where you're
11 leading with this question, and I might suggest if you
12 refer to the testimony and to the public process that the
13 County went through, I might suggest that standing before
14 the Board of County Commissioners silent when asked a
15 specific question by elected officials and refusing to
16 answer those questions does not demonstrate a good faith
17 effort towards coming to an agreement as far as seeking
18 resolution to the agreement.

19 CHAIR LUCE: That's your position on what
20 happened. That's your statement on what you believe
21 transpired in that particular County Commissioner meeting.

22 THE WITNESS: It's my suggestion that if you
23 review the transcripts.

24 CHAIR LUCE: I have. Thank you. Next
25 question. You have an applicant for a shopping center and