

MEMORANDUM

TO: The Honorable Gary Locke, Governor
FROM: Charlie Earl, President, Everett Community College
DATE: April 20, 2001
SUBJECT: **Improving Washington Energy Facility Site Evaluation Council**

I. EXECUTIVE SUMMARY

You asked me to assist you in finding possible reforms to the Washington Energy Facility Siting Evaluation Council to help ensure long-term affordability and abundance of electrical energy while maintaining an acceptable level of environmental protection. You requested specific suggestions that would “improve the EFSEC process without impairing environmental protection.” Here are 13 suggestions, organized as to their potential implementation timeframe: the short-term, medium-term, and long-term.

1. Short-Term Changes. These are suggestions to be implemented in the **next month:**

- Appoint a full-time chair to EFSEC
- Direct current and/or the new chair to initiate rule making to address ideas in this report
- Direct Agency Directors who assign agency personnel to EFSEC that they make the assignment the highest priority
- Add budget and additional staff to EFSEC
- Require a quarterly report from EFSEC on administrative/substantive issues
- Inform the public on the EFSEC process

2. Medium-Term Changes (requiring additional legal analysis). These are changes suggested for the next two to three months.

- Analyze whether expansion of existing plants to above 250 MW can occur without EFSEC review
- Explore setting out enhanced environmental criteria that will enable “fast track” processing and your support
- Work with the chairperson to remove current barriers to collaboration, communication and problem solving
- Explore use of the Department of Ecology’s coordinated permit process

3. Long-Term Policy and Legislative Proposals. These are expected to require at least **10 months** to complete.

- Create a concise state energy policy that includes siting and construction of electric energy facilities in Washington
- Propose a new structure for EFSEC to be composed of a part-time, 5 member; citizen siting authority, agency coordinating panel and stronger EFSEC staff role
- Link your support for a higher threshold for EFSEC jurisdiction to financial support and technical assistance for local government

Many of these suggestions have alternative or subcomponents that can be implemented separately or as a package. They will improve EFSEC without substantially altering the existing balance between industry expectations and environmental protections.

II. INTRODUCTION

A. Background

1. The Assignment

On February 21, 2001, you asked me to undertake a fact-finding assessment of the Energy Facility Site Evaluation Council (EFSEC) siting process. You stated, “effective siting of energy facilities should help ensure long-term affordability and abundance of the [energy] resource, while maintaining environmental protection.” Your assignment was to “suggest steps that should be taken to improve EFSEC process without impairing environmental protection. Recommendations should concentrate on potential executive action, although legislative solutions may be proposed.”

A key to the value of this assignment is what is meant by the term “improve.” The primary definition of improve is “to enhance in value or quality: make better.”¹ In the context of EFSEC, we can enhance the value or quality of the siting process by the following:

- *Create certainty for applicants and intervenors.* The financing of these projects has changed significantly over the last decade. They are no longer funded and owned in large part by vertically integrated utilities that have the monopoly position to sell the energy to “their own” customers. Instead, private developers need to create assurance for private venture capital to assist in financing.

¹ Mirriam-Webster’s Online Collegiate Dictionary. <http://www.m-w.com/cgi-bin/dictionary>.

Intervenors currently may have to commit substantial time and financial resources to effect siting decisions with little certainty of outcome. Enhanced certainty through better process and clearer public policy would reduce the risk for both applicants and intervenors and thus increase efficiency.

- *Improve the timeline of the decision process.* These decisions are made without a certain timeline. Given the large up-front fixed capital costs of these projects, this impedes the decision making to develop generating facilities. Further, the current system lacks clear incentives for developers to be able to save time by promising to meet or exceed the public interest up front.
- *Provide better quality input from participating agencies.* Agencies with EFSEC members should be provided the resources to cover their costs and thus be able to fully dedicate people to EFSEC assignments. In addition, the state should better coordinate its work to provide meaningful input into design and mitigation of projects.

2. The Process

I met with more than forty people over a two-month period to discuss possible improvements to the EFSEC process. These people represented business, environmental, power developer, electric utility, and public policy interests. I also met with EFSEC staff members, legislators, former EFSEC chairpersons and advocates holding different perspectives. A partial list of the persons interviewed is included as Attachment 1

These interviews were supplemented by a review of existing statutes and administrative rules related to the EFSEC process. I also examined past decisions of the Council and past efforts at reform legislation. The report of the Joint Legislative Task Force of December 2000 found a range of opinions on the scope and direction of reforms². The extensive interview process confirmed the lack of consensus of how to improve EFSEC. More important, however, is that there is little desire among most active participants to make extensive changes to EFSEC or its processes. This is not to say that there is a dearth of good ideas from various perspectives of how to improve the siting approval process – only that there is not much passion for extensive overhaul.

² The report states on page 5: “Some work group participants thought that the process was basically working well and needed only the minor changes put forth in the following recommendations. Others thought that a whole new siting process should be developed and were concerned that advancing the recommendations now could preclude a more comprehensive review. A third point of view was that the minor changes should go forward, but with the recognition that a comprehensive review was needed.” The report can be found at <http://www.efsec.wa.gov/taskforce/fin-rep.pdg>

In general, the interviews contained the full 180° range of opinion about a variety of topics. These included the following sampling:

- From ‘lower the MW threshold of EFSEC jurisdiction over plant siting’ to ‘raise the threshold.’
- From ‘strengthen the staff role’ to ‘the staff communicates too extensively with applicants.’
- From ‘the process is necessarily complicated and time-consuming’ to ‘the process should be faster and more certain.’
- From ‘there is a need for EFSEC to promulgate a CO₂ standard’ to ‘there is no provision in law for such a standard.’

Even with such a wide range of opinion, the Governor has the opportunity to initiate near term action to improve the EFSEC process. You can also initiate a longer-term decision process for the state to enhance the relationship of energy facility siting to public policy objectives for energy and the environment. The increasing depth and projected length of the western states’ energy crisis has provided new impetus for change. The landscape is different than what it was just a very few months ago.

B. Current Conditions

1. EFSEC Background

The Council was created in 1970 to provide “one stop” licensing for large energy projects. By establishing the Council, the State Legislature centralized the evaluation and oversight of large energy facilities in a single location within state government. The Legislature called for balancing demand for new energy facilities with the broad interests of the public. As part of the balancing process, protection of environmental quality, safety of energy facilities, and concern for energy availability are all to be taken into account by the Council. It is composed of the Departments of Agriculture, Ecology, Health, Fish & Wildlife, Natural Resource, Community Trade and Economic Development, Transportation, Military and the Utilities and Transportation Commission. Attachment 2 lists agency members over the last three years. The Council is augmented on particular applications by representatives from cities, counties, or port districts potentially affected by the project.

EFSEC has a non-salaried, citizen chair appointed by the Governor. The staff currently consists of the following five state employees including an exempt manager that reports to the Deputy Director of the Office of Community Development.

- Compliance Manager
- Two Energy Facility Site Specialists
- Administrative Secretary

The current chair has expressed her intent to resign from EFSEC effective June 30, 2001.

The Council's responsibilities derive from the RCW 80.50, and include siting large natural gas and oil pipelines, electric power plants above 250 megawatts and their dedicated transmission lines, new oil refineries or large expansions of existing facilities, and underground natural gas storage fields. Its authority does not extend to nonfuel-based power plants, such as geothermal, wind, solar, or hydro, to smaller electric plants, or to general transmission lines.

EFSEC has been delegated authority by the U.S. Environmental Protection Agency to issue permits under the Federal Water Pollution Control Act and the Federal Clean Air Act for facilities under its jurisdiction. EFSEC also ensures that effective and coordinated nuclear emergency response plans are in place and satisfactorily tested for the Columbia Generating Station nuclear power plant located at Hanford. Applications must comply with the State Environmental Policy Act, RCW 43.21C (SEPA). EFSEC is typically the lead agency for purposes of SEPA processing. The applicant bears the expense of the EIS preparation, but the consultant works for the Council. Current practice is that the EIS is processed at the same time the adjudicative process is conducted.

The adjudicatory proceedings are conducted in a quasi-judicial manner in accordance with the Washington State Administrative Procedures Act (RCW 34.05). Expert testimony is given and cross-examination is allowed. Typically the Council requires parties to prepare written, pre-filed direct testimony and rebuttal testimony. Cross-examination and redirect examination are also part of the hearing process.

2. Current Applications

The following six applications are currently under review by EFSEC.

- Sumas 2 Generating Facility
- Wallula Combustion Turbine
- Starbuck Combustion Turbine
- Mercer Ranch Combustion Turbine
- BP Cherry Point Cogeneration
- Satsop Combustion Turbine

All of these are for power generating facilities.³ Attachment 3 provides a list of all the applications considered by EFSEC since it was created. There appears to be at least two or three additional applications that will be submitted within the next year.

³ Olympic Pipeline, a process started several years ago, was withdrawn. There is some discussion as to whether a new application will be submitted sometime shortly.

3. Budget Process

All costs of staff, consultants, and associated expenses are covered by applicants and permit holders. Much of the budget burden falls on the existing permit holders for monitoring; particularly Energy Northwest's Columbia Generating Station. As new permit activity declines, a higher proportion of EFSEC indirect costs is billed to monitoring. An analysis would be needed to assure that charges are equitable. The wide fluctuation of application volume is the culprit, not inappropriate allocation. Attachment 4 shows expenditures for the last three years.

The budget does not cover the significant state financial burden for the agencies that have representatives who are members of the Council. Attachment 5 shows the number of council member-days in each of the last three years in adjudication and regular meetings that are not reimbursed by applicants. The total of 205 unreimbursed days does not include preparation time and special committee work for agency members nor the administrative time of the chair or the time of local government officials. Only the first 10 days of the adjudicatory proceeding are paid by the applicant. Furthermore, Counsel for the Environment and assistant attorney general costs are not covered by applicants. These nonreimbursed costs create significant burdens on participating agencies and frustrate attempts at making the EFSEC process a priority for agency personnel.

C. Recommendations are grouped by time of initiation

I have grouped suggestions into three timeframes: executive actions to be taken within the next month, executive actions to take over the next two to three months and executive initiatives requiring policy development and/or legislation over the next ten months. The latter two categories will require additional legal and policy analysis by the appropriate affected parties. Recommendations are highlighted in **bold type**.

III. RECOMMENDED EXECUTIVE ACTIONS OVER THE NEXT MONTH

1. **Full-time chairperson.** The resignation of the current chair creates a loss to the leadership of the agency. This position is currently part-time and does not adequately compensate chairpersons for the amount of work involved in the EFSEC process. I recommend that you **appoint a full-time chair, or alternatively convene a three-person panel to seek statements of interest and recommend at least three candidates to you.** If a panel is needed, the process will take four to six weeks to select final candidates. The panel should include environmental and developer perspectives and a person neutral to the process.

2. **Direct new Chair to Initiate Rulemaking.** There are several areas where the EFSEC rules could be modified to streamline and rationalize the adjudicatory process. Unfortunately, the normal rulemaking procedures can take months or years to develop. Under RCW 34.05.350⁴ emergency rulemaking can occur upon a finding of threat to public health, safety or general welfare. Recognition by your office that some or all of these rules are needed to mitigate current energy conditions would assist in establishing the need for these rules. I suggest these rules could address any or all of the following:

- **Adoption of the proposed emergency rules offered by EFSEC in January 2001.** These rules address the relationship of SEPA to adjudication, application criteria and defining when an application is complete. Confusion over what constitutes a complete application has led to delays in processing applications and fuzzy accountability with respect to the 12-month statutory timeline for consideration. Having the SEPA process completed before submission of the application would provide the agency with needed environmental information at the front end of the application review process where it can best be used.
- **Enhance fees to assess a greater proportion of agency time spent on the application.** EFSEC members have other duties within the agencies where they are employed and thus experience conflicts in scheduling between those and their EFSEC duties. Agencies cannot always make the EFSEC process a priority with staff dedicated to completing the work of the Council. Covering all agency costs in supporting members would help alleviate the agency's burden and "free up" EFSEC members. Preparation and deliberation time should be part of the total costs of processing the application.
- **Deliberation of adjudicated applications in open session.** The process for reaching a decision should be accomplished in open session. This would provide all the parties the opportunity to hear the rationale of the Council in considering these complex matters. Land use decisions at the local level are typically done in this fashion providing maximum visibility into decision making. Currently EFSEC holds public hearings and then goes into executive session to discuss application testimony and other relevant information. Final votes are taken in open session. For consistency of decisions over time, more public understanding, and quality communication, the discussions should be in open session.

⁴ This section requires a finding by the agency "that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest." RCW 34.05.350(i)(a).

- **Enable more applications to utilize the expedited review process.** The current rules allow for expedited processing where the environmental impacts and costs of the project are relatively minor. See WAC 463-43-030. This process should be extended to allow more costly and complex projects with known and assessed impacts to be expedited. There may be an opportunity to give incentives to applicants to save time by promising more public interest value. Another possible route is to require environmental enhancements for expedited processing as discussed in Section IV below.
3. **Direct agency directors under your authority to assign the highest priority to EFSEC proceedings.** These proceedings will move forward more promptly if agencies recognize the pressing need to process these applications. Direct agency directors to make Council matters the top priority for the individual employee assigned to the Council. This would be facilitated by the improved funding to the agency as recommended above. You should ask other agency heads, such as DNR and Attorney General to follow your example by making it a priority with their employees as well. In addition, you should direct agencies not to appoint multiple persons to the same position on the Council. Continuity, consistency, and efficient decision making will suffer with multiple members from each agency.

Further, assure that someone with an economic or business background is appointed by at least one of the agencies (CTED, for example). The Council would be more balanced with a member having economic development credentials.

4. **Add more budget and staff to EFSEC.** The Council is experiencing a significant increase in applications creating large workloads for the current five-person staff. As application volume increases coincident with rulemaking, the staff must have enough employees, consultants, and legal professionals to keep the decision process from slowing down. The budget needs to be flexible enough so that EFSEC can respond in a timely manner commensurate with the application volume and complexity.

In addition, fees should be enhanced to capture more of the actual costs of the application process. Other state agencies are bearing a significant burden in shouldering the hidden technical and legal costs of processing the application. At a minimum, the applicant should be responsible for the full Council adjudicatory costs.

5. Governor should **require a quarterly report from EFSEC** to cover application status, expected applications, administrative/substantive issues (an example in the near term would be progress in rulemaking), and finances

6. **Inform the public that EFSEC is not the culprit.** The current drought and market imperfections create an unstable, crisis climate. This is not the best time to make wholesale changes to an EFSEC process that has worked fairly well over the decades. The appropriate consideration of complex projects will more accurately reflect the public interest with processes that remain relatively fixed.

IV. **RECOMMENDED EXECUTIVE ACTIONS OVER THE NEXT TWO-THREE MONTHS**

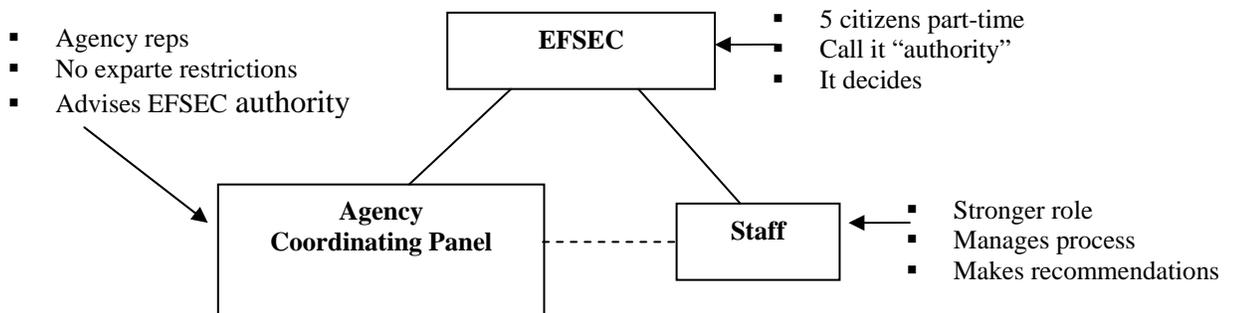
1. **Initiate legal analysis to evaluate the idea that plants less than 250 MW can expand capacity above 250 MW without EFSEC approval.** Currently energy facilities of 250 MW or greater require EFSEC approval⁵. There is a legal question of whether proposals to expand capacity of existing plants sited by local authority by an increment less than 250 MW could be considered locally. Efficiencies in land use and plant design can make expansion of existing facilities a favorable policy goal. The legal question may be an opportunity for your office, EFSEC, and applicants to cooperate with local governments to consider expansion.
2. **Consider development of application guidelines to application criteria and performance standards.** Greater specificity in the application process would facilitate processing energy plant applications. The current process provides no incentive to offer environmental enhancements in exchange for added certainty and/or reduced time in obtaining site certification. A list of environmental enhancements that, with appropriate application to local conditions could provide a significant incentive to mitigate the effects of these power plants and provide environmental amenities to the affected community.
3. **Working with the new chair and legal counsel, reinterpret what have become barriers to collaboration, communication, and problem solving,** including:
 - **Exparte guidelines.** There is a fairly widespread belief that the current interpretation of exparte barriers is unreasonable. This perception/reality needs to be explored with the goal of enhancing communication between the state agencies, intervenors, and applicants to solve problems.
 - **Clarify and strengthen the staff role** in making recommendations to council and communicating with applicants, intervenors, and others.

⁵ See RCW 80.50.020(14) & 80.50.060.

4. **Explore efficiencies that may exist by utilizing DOE's coordinated permit process.** See Attachment 7 for an outline of DOE's coordinated process. There may be efficiencies for those receiving EFSEC certification in coordinating the balance of permit processes utilizing that system.

V. **RECOMMENDED EXECUTIVE INITIATIVES IN POLICY DEVELOPMENT AND PROPOSED LEGISLATION OVER THE NEXT 10 MONTHS**

1. **Write a state energy policy.** The state energy strategy is largely a descriptive document rather than a proscriptive one. Though a challenge to develop, Washington should have an energy policy in law based on today's industry structure, science, demand-side management and renewable potential, environmental understanding, and market. Lawmakers should define the public interest. A policy that articulates the preferred mix of generating facilities and the quantity of projected power needs would simplify the siting process. We have the advantage in the region of having the Northwest Power Planning Council that can provide excellent assistance in developing this policy. This opportunity should be utilized to provide greater certainty for both industry and environmental interests.
2. **Make EFSEC a citizen siting authority.** Senator Fraser and others have developed an outline of reform process and structure that has merit. You should evaluate it closely and adopt the good stuff as part of the Governor's proposed legislation. If you are willing to forego the Governor making final decisions then a new agency structure could be designed as indicated below. EFSEC would be reorganized around a five-citizen authority that is the adjudicatory body. The staff role would be strengthened to communicate with applicants, intervenors, agencies, and citizens and manage the process. An agency panel would be created to coordinate agency requirements as representatives not bound by exparte barriers.



Moving forward on some improvements immediately does not preclude the need for more substantive change in the long run.

3. **Link your support of a higher jurisdictional threshold to a strong state technical assistance team available to local governments.** This could be used especially in light of the significant increase in applications to site new facilities and necessary consideration of GMA. The resources of local governments for siting major energy facilities are easily overwhelmed by developer, community, and environmental interests. Providing an objective source of quality information and new resources to local governments would preclude handing them an unfunded mandate by raising the threshold. Suggestions for technical assistance include:
 - Application fees
 - Siting, environmental, and legal expertise on loan from the state

VI. CONCLUSION

Discussions for change and updating EFSEC have been ongoing for some time. I don't pretend that over two months I have uncovered some magic remedy. To the contrary, I simply listened to the varying points of view and now forward on to you those that I feel may help the process. I encourage you to quickly appoint a new chair and direct that person to spearhead your efforts for reform. Current EFSEC members and staff are capable, knowledgeable people who with your direction can best pursue the short-term suggestions. They should be consulted with respect to the longer-term changes as well.

I hope these recommendations are responsive to your request and have value. Please let me know if I may respond to any questions or be of further assistance.