



STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

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James Luce, EFSEC Chair
1300 South Evergreen Park Drive SW
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December 24, 2012

The Honorable Christine Gregoire
Olympia Washington, 98504

Dear Governor Gregoire:

Transmitted herein as provided by RCW 80.50.320 is a "Report Evaluating the Operations of the Energy Facility Site Evaluation Council" (hereafter Council or EFSEC).

My preference is that we adopt the state of Oregon's EFSEC model, as previously recommended by the Honorable Charles Earl in his 2001 Report to Governor Locke. That will take time, and require a complete rewrite of EFSEC's organic statutes.

In the interim, I recommend immediately achievable administrative and legislative initiatives to streamline the siting process. These initiatives reflect "lessons learned" during my ten year service as your EFSEC Chair. In my opinion, they will expedite decision-making, minimize duplication of process, and protect the quality of our state's environment.

Report recommendations have been discussed with EFSEC stakeholders. All agree that EFSEC is at a critical juncture and needs significant change if it is to remain viable. While the recommendations are my own, I am hopeful that they reflect the views of a broad cross section of our stakeholder community.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Luce".

James Luce
EFSEC Chair

A REPORT EVALUATING THE OPERATIONS OF THE ENERGY FACILITY SITE EVALUATION COUNCIL
AND
RECOMMENDING CHANGES

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Prepared for: The Honorable Christine Gregoire, Governor

Prepared by: James Luce, EFSEC Chair

Submission
date: December 24, 2012

EXECUTIVE SUMMARY

The Energy Facility Site Evaluation Council was created in 1970 at a time when our state believed it was facing a critical energy shortage. Its purpose was to identify “...a state position with respect to each proposed [energy] site;” RCW 80.50.010.

Since 1970, EFSEC laws have been amended to fit the circumstances of the moment. There has not been a substantial stepping-back to look at the big picture and decide what works best for today.

This report steps back and looks first at the “current landscape.” It then proposes what I believe are readily achievable administrative and legislative changes that will improve EFSEC efficiency. The emphasis is placed on administrative change recognizing that legislative proposals can require time to enact.

Recommendations are supplemented by Appendices A-F which lay out state energy policy and describe how we got to where we are today. And the “where we are today” is an increasingly dysfunctional EFSEC Council with very limited jurisdiction and an unnecessarily lengthy and costly decision-making process.

This has led to most energy siting being done by local government. While local review has many positive aspects, it does not consider potentially adverse impacts to state interests in protecting the ecology of the land and its wildlife, and the esthetic and recreational benefits of air, water, and land resources.

Nor does local review consider potential impacts to the need for an appropriately balanced infrastructure to ensure the safe and reliable operations of electrical generating and energy transmission systems in Washington and the Pacific Northwest region.

The reality is that EFSEC jurisdiction is so limited that it sites very few facilities. EFSEC review is the exception rather than the rule. Thermal generation facilities are “sized” to avoid the 350 megawatt threshold for EFSEC jurisdiction, and alternative resources like wind have the ability to “opt in” to the EFSEC process at any time, even if local government rejects an application.

In summary, state policy guiding energy facility siting is wholly disconnected from reality. This needs to change. My recommended changes are the subject of this report.

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MEMORANDUM

To: The Honorable Christine Gregoire, Governor
From: Jim Luce, Chair, Washington State Energy Facility Site Evaluation Council
Date: December 24, 2012
Subject: **Energy Facility Council Efficiency Recommendations**

The Current Landscape

It has been my honor to serve as Chair of the Washington State Energy Facility Site Evaluation Council (EFSEC) since 2001. Your support and that of former Governor Locke has been greatly appreciated.

My report fulfills the requirement of RCW 80.50.320 which calls for, "...an evaluation of the operations of the council to assess means to enhance its efficiency." It proposes administrative and legislative changes and summarizes where I see EFSEC today, and where I believe it can fruitfully play a role in our state's energy future. Several earlier reports, described in *Appendix A*, are important to understand EFSEC's history and the issues it faces. Not surprisingly, many of the same issues are repeated over time.

EFSEC's current role is substantially different than what was envisioned in 1970; then, it was seen as having the lead role in identifying a "state position with respect to each proposed... energy project;" RCW 80.50.010. This was to be achieved by requiring EFSEC review and gubernatorial approval of most generating projects. EFSEC's legislative policy directives are set forth more completely in *Appendix B*.

While statutorily state policy is unchanged, EFSEC's role is significantly different and the state's role in energy siting has been substantially reduced. Local governments have replaced the state and now make most of our state's energy siting decisions.¹

¹ To be clear, in my opinion this is regrettable. Local governments look at local issues, especially jobs and tax base. They do not "balance" the "broad interests of the [state] public" to "assure operational safeguards as stringent as the federal government" nor to "preserve and protect the quality of the [state] environment to enhance the [broader] public's opportunity to enjoy the esthetic and recreational benefits of [state] air, land, and water resources to promote air cleanliness and pursue beneficial changes in the environment." Nor is local government mandated to "provide abundant energy at reasonable cost;" RCW 80.50.010.

The reasons underlying this diminished role relate directly to the fact that renewable resources and many thermal energy projects are not required to use the EFSEC process. This change has accelerated during the past decade; the underlying reasons are described in *Appendix C*.

And given the choice, developers avoid a process they see as slow, costly, arguably redundant, and at times suspect of being influenced by policy considerations not directly related to their project; they are largely correct. Both because of developer changes to project applications, and adjudicative process strategies and tactics, EFSEC is challenged to meet its directive to:

“...report to the governor its recommendations as to the approval or rejection of an application...within twelve months of receipt of the application, or at such later time as mutually agreed by the council and the applicant;” RCW 80.50.100.²

The EFSEC process is described more fully in *Appendix D*. Its increasing complexity and requirements, multiplied by the requirement to use the Administrative Procedure Act’s (APA) adjudicative process, afford many opportunities for slowing decision-making. This is yet another reason to move away from the adjudicative process to a non-adjudicative APA hearing.

EFSEC’s siting role is not limited to generating resources. It also has a limited role in siting electric and gas transmission projects although here, too, developers are able to design projects to avoid EFSEC review.³

My hope is that your successor and the legislature will pursue significant changes to EFSEC’s organic statutes; changes which would provide it with greater jurisdiction and a streamlined process comparable to that of the state of Oregon.⁴ Under this model, EFSEC would license most power projects thirty five megawatts or greater and most transmission facilities.

As an aside, the EFSEC model should be considered for other, non-energy issues involving critical state infrastructure. Such a “State Siting Council,” with preemption power and original

² Initial applications are frequently modified because of technical issues and information gleaned during the SEPA process.

³ A current example is Cascade Natural Gas, which proposes a new line to serve the Hanford vitrification project. The 2006 grant of EFSEC authority to license large electric transmission lines extends the “opt-in” provision for “alternative resources to electric transmission facilities.”

⁴ See ORS 469.300. For a more complete description of the Oregon law see the following link: <http://cms.oregon.egov.com/energy/Siting/Pages/juris.aspx>. See also a comparison of Washington, Oregon, California, and Montana siting laws and rules at: <http://www.oregon.gov/energy/Siting/Pages/compare.aspx>

Supreme Court jurisdiction, could expedite decision making on infrastructure projects of state-wide significance and ensure that the broad public interests so well stated in RCW 80.50.010 (1)-(5) are considered.⁵ In my opinion, this concept warrants careful consideration in today's process laden environment where delay in local decision-making can affect our entire state, leaving critical decisions unresolved while project costs increase and uncertainty causes related problems. But a "State Siting Council" is a separate issue which, while related, is beyond the scope of this report.

For EFSEC, which is the subject of this report, the organic changes I believe are needed would be very difficult. They currently lack the stakeholder support to make them happen; see *Appendix E*. For this reason, I propose what I believe is "achievable change"; change which will improve EFSEC efficiency in the near future. These administrative and legislative actions will give de facto, if not de jure, meaning to the legislative policy of having a "state position with respect to each proposed...energy project."

⁵ Previous suggestions for EFSEC review of critical infrastructure have included regional airports and deepwater ports. A comparable and current example would be coal export facilities.

Achievable Administrative Change

Immediate Actions

1. Modify or Adopt New Rules for

a. Siting standards

The Council adopted siting standards for thermal resources in 2001. It also later considered, but then abandoned, adoption of “alternative resource” standards. At that time, the Council believed that thermal resource standards could be applied to most resources, that few alternative resources would use the EFSEC process, and that issues specific to renewable resources, such as “visual impacts,” could be considered on a case-by-case basis. The failure to adopt specific standards for renewable resource issues, especially visual impacts, was a mistake. It is cited by developers as a reason for not using the EFSEC process. If EFSEC is to play a greater role in reviewing alternative resources, it needs to adopt specific statewide or area wide alternative resource standards. This is especially important if EFSEC becomes primarily a “cooperating agency” in local government siting proceedings, as recommended below. Such standards will provide a consistent basis for review which can be considered by the local government siting entity.

b. Preemption and land use consistency

The existing statute directs preemption as a matter of law when EFSEC accepts an application. The statutory language is absolute and unambiguous; see RCW 80.50.010. For this reason, the Council’s land use consistency hearing required by RCW 80.50.090(2) should be treated as “for information purposes only.” WAC 463-28 and WAC 463-43 are inconsistent with this interpretation by requiring a finding of consistency, and EFSEC itself has erred in following these rules too long; both should be modified or repealed.

c. Expedited processing

The Council’s “expedited processing” authority under RCW 80.50.075 is self-explanatory. It is intended to speed the EFSEC process when there is a finding of no significant environmental impact, or where such impacts can be mitigated. To conclude otherwise would be to conclude that the legislature intended “expedited processing” to require greater process than EFSEC’s normal processing. This misinterpretation must be corrected for expedited processing to be

effective. To this end, WAC 463-43 should be amended and “local land use” consistency treated as informative but not determinative in both proceedings.

d. Require developers to commit to local or state siting

The Council should adopt, as part of its application process, a rule that precludes developers who have been denied local project approval from filing an application with EFSEC for the same project if they are unsatisfied with the local decision. This is unfair to local governments which proceed in good faith to decide controversial siting applications, only to have the developer get a “second bite at the apple” through EFSEC review and the preemption power.

In my opinion, rulemaking would suffice for this purpose. However, if rulemaking is not feasible, EFSEC should work with local government and seek legislation to accomplish this result.

e. Council Role in the siting process

Council members currently participate in the entire siting process. This requires member time away from their agency responsibilities, and slows review by requiring significant coordination of schedules. On occasion, it also encourages parties to “play to the galleries” by redundant witness testimony and unnecessary, lengthy cross-examination.

Physical attendance is required of Council members during *only* the “informational” and “land use” hearings; see RCW 80.50.090(1)(2). Council members are not required to participate in the adjudicative hearing; see RCW 80.50.090(3).

I believe Council decision-making would be better served by following the Oregon model. There, the adjudicative hearing is conducted by an administrative law judge (ALJ) alone, with Council staff support. The full Council then reviews and approves, or modifies, the law judge’s findings and staff recommendations. Full Council hearings are held for this more limited purpose.

f. Adopt a pre-application requirement for both transmission and generating resources

EFSEC rules require a pre-application process for siting transmission lines; see WAC 463-61. While a somewhat comparable “preliminary site study” is authorized for power projects, it is not mandatory, must be approved by the applicant, and is rarely used; RCW 80.50.175.

A pre-application process should be required for both power and transmission projects. WAC 463-61 should be expanded to include generating facilities. It is based on Federal Energy Regulatory Commission (FERC) guidelines, and requires potential applicants to meet with EFSEC staff, local governments, and interested parties to attempt to resolve siting issues before adjudication. Requiring a pre-application process and funding it through the EFSEC application will expedite the siting process.

2. EFSEC participation in local government siting process through “cooperating agency status”

Local government siting of energy facilities is, in many ways, beneficial. It is local impacts that are most closely associated with such facilities, and local officials are closely attuned to local interests and needs.

Through the SEPA process, local and state interests can work together. State interests – and policy – have as a goal protecting the “broad interests of the public” in many ways, including:

“preserv[ing] and protect[ing] 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;” RCW 80.50.010.

EFSEC can fulfill, at least, some of this responsibility through use of SEPA’s “cooperating agency status” in local siting proceedings.

As a cooperating agency, EFSEC would review local government SEPA documents and measure them for consistency with EFSEC siting standards and other state interests, including the “broader interests of the public.” In this way, it can further the legislature’s policy goals that state interest be considered.

For efficiency purposes, EFSEC should be designated as the state agency lead. This can be facilitated by the Governor’s Office designating EFSEC as such, and memorializing its role with a “Memorandum of Understanding” between EFSEC and other agencies, including the Utilities and Transportation Commission, and the Departments of Commerce, Ecology, Fish and Wildlife, and Natural Resources.

By this means, our state will speak with “one voice” on local projects. Coordinated state comments, provided through EFSEC, will inform local governments and project sponsors regarding consistency with state standards and suggest, if appropriate, modifications to achieve compliance with those standards and other state interests. If necessary, EFSEC could request an assistant attorney general to represent the state in local siting hearings.

3. Other actions

EFSEC should review its application process to ensure most efficient coordination with SEPA and other permitting requirements, including coordination with the state’s Regulatory Reform Act.

Longer Term Measures

1. Adopt a state energy policy that integrates siting roles and responsibilities

Our state’s energy policy is developed by the Department of Commerce. I recommend greater EFSEC involvement in developing this policy and that the policy fully considers statewide interest in siting issues. By this means, we can better plan to capture efficiencies in the development of needed energy facilities. Such planning could include a cumulative impacts review, recognizing, early on, that overbuilding can have positive as well as negative environmental and economic impacts.

The state of Oregon’s Department of Energy recently proposed energy policy is generally recognized by resource developers as a good model for this approach; see <http://www.oregon.gov/energy/Ten Year/docs/Oregon Energy Task Force Report.pdf>

2. Resolve EFSEC’s role regarding permitting authority under the Federal Clean Air Act

EFSEC is intended to be a “one-stop shopping” forum for permits needed to build and operate energy facilities; it is not, as regards Federal permits.

EFSEC permitting authority is especially limited in issuing permits required under the Federal Clean Air Act; see RCW 80.50.040(12). Currently, EFSEC has only a limited authority which requires EPA as a co-signatory for air permits. A request for full authority was filed years ago with the Environmental Protection Agency (EPA) but EPA has never acted. There are many reasons for this decade long delay but the issue needs to be resolved.

Longer Term Legislative Change: The Art of the Possible

EFSEC's organic statute – RCW 80.50 – needs substantive and procedural change. Change is possible, but only with stakeholder consensus. Currently, no such consensus exists. There are, however, some proposals which might find acceptance; these include:

1. Replace the adjudicative proceeding requirement with a non-adjudicative hearing

The purpose of a siting hearing is to gather information helpful to decision-makers, and to compile a record to be used to review the reasonableness of the decision, if appeal is taken. While an adjudicative hearing may have been needed for this purpose when EFSEC was created in 1970, this is no longer the case; the Administrative Procedure Act provides for non-adjudicative hearings and guarantees the right of appeal.

Other newer laws accomplish these same information gathering purposes. For example, information is gathered and judicial review is possible under SEPA. Federal and state air and water permits add even more information, and are likewise judicially reviewable.

There is no shortage of due process protection, and repeal of the adjudicative hearing requirement would mean a less contentious, less expensive, and more likely expedited proceeding.

2. Governance: A citizen council with final decision authority

This was the recommendation of the 2001 *Earl Report*, requested by Governor Locke. It was a good recommendation then, and it is still a good recommendation.

Under current law, the EFSEC Council is composed of state agency representatives and a Chair appointed by the Governor. EFSEC recommends a decision, but the Governor makes the decision.

EFSEC Council members represent designated state agencies. This expertise is beneficial. The question is whether there would be value added by replacing some, or all, of these state agency representatives with citizen members. Agency input could still be received through testimony, or through memorandums of agreement to provide input to the SEPA process.

A separate but related question is who makes the final decision; EFSEC, or the Governor? The argument for the Governor as decider is “political accountability.” The argument for change is that the Governor may be influenced by policy issues unrelated to the project. On the other hand, if the Governor appoints Council members who make the final decision, is the Governor any less accountable?

3. Need for power

RCW 80.50 assumes a need for power, “it is the policy of the state of Washington to recognize the pressing need for power.” This provision is more explicit in WAC 463-60-021, “...applications for site certification need not demonstrate a need for the energy facility.”

When the EFSEC was created, the “need for power” was a given. However, as is well recognized, shortage turns to surplus and back again; the cycle is repeated over time and the “need for power” is not always absolute.

Building unneeded power projects and transmission lines has negative economic and environmental impacts. The legislature should consider modifying the “need for power” assumption, and direct EFSEC to consider this threshold question as a “rebuttable presumption” in its hearing. Guidance on this issue can be provided from the State Energy Office, other state offices and the Northwest Power and Conservation Council’s Power Plan.

4. Judicial review

The legislature provided original Supreme Court review because it provided “expedited review” not available through normal judicial process. There is no “trial” of EFSEC’s recommendation and the Governor’s decision. Review of the administrative record is contemplated.

Pursuant to RCW 80.50.140, petitions for review are filed in the Thurston County Superior Court. The Court is asked to certify that procedural conditions are met, including that a complete administrative record is available, that review on the record is possible, and that Supreme Court review will be sought regarding the Superior Court decision.

There is, however, an anomaly. Superior Court review also requires a substantive finding that is inconsistent with “review on the administrative record.” The Court is asked to certify that, “Fundamental and urgent interests affecting the public interest and development of [the] energy facilities involved...require a prompt determination;” RCW 80.50.140(b).

This finding is inconsistent with “review of the administrative record” and invites review of the EFSEC decision that is inconsistent with well established principles of administrative law. The Superior Court should not retry the decision of EFSEC and the Governor before certifying the “record” to the Supreme Court.

For this reason, I recommend striking RCW 80.50.140(b) from the findings the Superior Court must make before certification to the Supreme Court.

5. Expedited processing and choice of local or state siting

These issues should be addressed first through rulemaking, as discussed above. If “land use consistency” is, as I believe, an informational matter and not a substantive requirement, expedited processing will not require legislation. Likewise, rulemaking is recommended for limiting EFSEC applications to those which have not otherwise been considered.

Summary

This report has been prepared to “...evaluate...the operations of the council [EFSEC] to assess means to...enhance its efficiency,” RCW 80.50.320. These recommendations for administrative and legislative change will, in my opinion, make EFSEC more efficient, while falling short of the substantial changes needed to protect the “broad public interest.”

And while I encourage legislative workshops and discussions on these more substantial changes, the reality is that more significant change will require stakeholder consensus which does not currently exist. Until such time as consensus can be found, the “achievable change” measures outlined above are the best chance for protecting the public’s interest and improving the efficiency of energy siting in our state.

Acknowledgments

This report and its recommendations are mine alone, based on 10 years of service as Chair of the Energy Siting Council. I have, however, discussed its recommendations and listened carefully to the following individuals:

1. Energy Siting Council Members
 - a. Richard Fryhling – Department of Commerce
 - b. Hedia Adelsman – Department of Ecology
 - c. Jeff Tayer and Joe Stohr – Department of Fish and Wildlife
 - d. Dennis Moss – Utilities and Transportation Commission
 - e. Doug Sutherland – Skamania County
 - f. Andrew Hayes – Department of Natural Resources
2. Legislative Staff
 - a. Scott Richards and Kara Durbin – Research Analyst, Counsel to House Energy Committee
 - b. William Bridges – Counsel to Senate Energy Committee
3. Governor’s Office: EFSEC Oversight
 - a. Keith Phillips – Office of Finance and Budget
 - b. Dave Danner – formerly Office of Management and Budget
4. Legal Counsel Appearing before EFSEC
 - a. Karen McGaffey – Perkins Coie
 - b. Elizabeth Thomas – K&L Gates
 - c. Tim McMahan – Stoel Rives LLP
5. Local Government Representatives
 - a. Carl Schroder, Dave Catterson, and Victoria Lincoln – Association of Washington Cities
 - b. Laura Merrill – Association of Washington Counties
6. Public Interest Representatives
 - a. Nancy Hirsh – Northwest Energy Coalition
 - b. Kevin Gorman and Michael Lang – Friends of the Columbia Gorge
7. Energy Facility Site Evaluation Council Staff
 - a. Stephen Posner – Acting EFSEC Manager
 - b. Al Wright – former EFSEC Manager
 - c. Kayce Michelle – Administrative Assistant 3
 - d. Tammy Talburt – Commerce Specialist 1

Appendix A

Previous EFSEC Reports

There are several previous such reports, including the *Joint Legislative Task Force on Energy Siting (J-LARC)* conducted in 2000.⁶ *J-LARC* discussed many of the issues raised in this report, including the possibility of (1) creating an alternative resource category that could “opt-in” to the EFSEC process and (2) increasing EFSEC thermal jurisdiction from 250 MW to 350 MW. The adoption of “standards” for thermal projects was suggested, along with changes to governance. All of these changes were made, either legislatively or administratively. As such, *J-LARC* is an important source document and deserves careful review.”⁷

The subsequent 2001 *Earl Report*, prepared at Governor Locke’s request, focused on some of the same EFSEC issues raised by *J-LARC*, in particular the need for clear, quantifiable siting standards and strengthening the EFSEC Council.⁸ Some, but not all, of the *Earl Report* recommendations were adopted. Several are again recommended.

The *Krogh Report* of 2002 built on the *Earl Report*.⁹ It summarized a year-long stakeholder discussion that led to EFSEC’s adopting clear, quantifiable standards for siting thermal facilities.¹⁰ It also led to the state’s first “greenhouse gas” law, requiring power plants to provide financial mitigation for emissions.¹¹

What these reports show is that the EFSEC issues are well understood by key stakeholders, have been the subject of repeated studies addressing many of these same issues, and that some change has occurred, both with intended and unintended consequences.

⁶ The *JLARC Report* is set forth in its entirety on the EFSEC web page at:

<http://www.efsec.wa.gov/taskforce/default.shtm#finrep>. It raised important issues including the later enacted “opt in” provision for alternative resources.

⁷ Particularly valuable is Appendix D to the final report prepared by my predecessor as Chair, Deborah Ross. See; <http://www.efsec.wa.gov/taskforce/app-a-f-2.pdf>

⁸ The *Earl Report* was prepared in the wake of the “Sumas” decision, discussed infra:

<http://www.efsec.wa.gov/FILES/Earl%20Report%202001.pdf>

⁹ The *Krogh Report* is found at: <http://www.efsec.wa.gov/standards/kroghtoc.shtm>

¹⁰ By their nature, some are more quantifiable than others.

¹¹ RCW 80.70.010

Appendix B

State Policy for Energy Facility Siting

Energy siting policy is found in RCW 80.50.010.

After finding that “...there is a pressing need for increased energy facilities...” the legislature states that each proposed site is to be examined:

“...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...*” (Emphasis added) ¹²

To ensure that this “pressing need” is met, decisions are to be made promptly and without duplication of process:

“To avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay.”

An active state role is important because energy facilities impact the economy and the environment of the entire state. Impacts are not limited to where the facility is located:

“...the location and operation of such facilities shall be carefully considered to...produce minimal adverse impacts on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.”

And finally, the “need for abundant power at reasonable cost” is a high priority to be achieved:

“...while preserving and protecting...the quality of the environment, the public’s opportunity to enjoy the esthetic benefits of the air, water, and land resources, promot[ing] air cleanliness, and [pursuing] beneficial changes in the environment.”

¹² Generating facilities of 250 megawatts and larger until amended in 2000 to 350 megawatts

Appendix C

Energy Developers Abandon EFSEC

Developers avoid state review, using EFSEC only “if all else fails.”

This change began in earnest in 2000 and accelerated in 2001. It began with the legislature changing EFSEC thermal jurisdiction from 250 megawatts to 350 megawatts and the adoption of RCW 80.50.020 (2) allowing renewable resource developers the ability to bypass EFSEC.

1. Thermal facilities

EFSEC was created in 1970 to site nuclear projects. At the time, coal was the only viable alternative. Perhaps this is why EFSEC jurisdiction was set at 250 megawatts.¹³

Natural gas was not a significant factor. However, that changed rapidly in the 1990’s with economic, environmental, and the technological improvements.¹⁴

Clark Public Utilities “River Road” project was EFSEC’s first test. It presented the Council with an opportunity to review a natural gas plant. But Clark wanted to avoid state review. Local approval was sure to be quick and certain. Clark designed a name plated project of 248 megawatts. Credible engineering studies showed the plant was greater than 250 megawatts, and local residents asked EFSEC to assert jurisdiction; EFSEC declined. To be on the safe side, Clark pointed to the 2000 J-LARC study and persuaded the legislature to change EFSEC jurisdiction to 350 megawatts.

This marked the beginning of the end for EFSEC’s jurisdiction over most thermal plants. Developers can now design and build economic projects below 350 megawatts; and they do.¹⁵

But perhaps EFSEC could still be used for controversial projects. The test case was Sumas, a 660 megawatt facility located in Whatcom County near the Canadian border. Proposed in 2000 at the height of the “California Energy Crisis” the plant was a state-of-the art facility. However,

¹³ See commentary regarding EFSEC jurisdiction by Danielle Dixon at page 17 of J-Lark:

<http://www.efsec.wa.gov/taskforce/app-a-f-2.pdf>.

¹⁴ http://www.naturalgas.org/overview/uses_electrical.asp

¹⁵ Fredrickson Power, LLC – 318.3 MW; Goldendale Energy Inc – 166 MW; Sumas Power Plant – 87.8 & 37.7 MW; River Road Gen Plant – 248 MW; Fredonia – 247.2 mg; Tenaska Ferndale Cogen Station – 253.4 MW; and Mint Farm Generation – 310 MW; by comparison 1668.4 megawatts have been developed without EFSEC involvement.

opponents in both Whatcom County and British Columbia raised air quality and other environmental issues. After a lengthy hearing and deliberation, EFSEC recommended denial, notwithstanding the fact that there was credible testimony that all Washington State, United States, and Canadian air quality standards were met.¹⁶

The public reaction was “how could they?” The state needed the power, and Sumas was widely seen as economically viable, environmentally sound, and in the public interest. Approved on rehearing, the Sumas decision nonetheless irreparably damaged EFSEC’s credibility. If the state would not quickly approve a good plant in an energy crisis, when would it?

Political leaders reacted. Governor Locke commissioned the *Earl Report*, which recommended that Washington adopt the Oregon EFSEC model, especially clear standards. Some changes were made. A full time Chair was appointed and the Council adopted thermal siting standards to provide certainty to future project developers. Other recommendations that would have provided for a citizen Council, and made Council decisions final were not adopted.

Sumas did lasting damage. Presented with the choice of a lengthy and costly state process, and unable to approve a state-of-the-art facility in a time of crisis, developers designed projects to avoid EFSEC review. Of the eight thermal projects built between 1972 and 2008, only 3 sought EFSEC review. Of these three, two were never built. One was abandoned mid-way through the EFSEC process when the legislature retroactively adopted air emission standards that the project could not meet.¹⁷

Today, the pattern continues: Energy Northwest is pursuing a name plated 348 megawatt gas project in Kalama, Washington, just below the 350 megawatt level requiring state review. Local approval is being sought. It takes less time, costs less money, and it is all but guaranteed. Bizarrely, if local approval is denied, the law still requires EFSEC to consider the application.

2. “Renewable resources”

The most important post-Sumas change created a new category of “alternative energy resources,” including wind power.¹⁸ While exempt from EFSEC review, these resources still retain the right to “opt-in” to state review if it is to their advantage.

¹⁶ The Council’s recommended denial rested on a number of issues in addition to air quality. There was concern about the highway access to the project and the proposed oil-fired back up.

¹⁷ RCW 80.70 - Air emissions law

¹⁸ RCW 80.50.020(18)

The “opt-in” proposal was initially included in the J-LARC Report. The idea was to encourage alternative resource development by exempting it from state review. But, of course, if EFSEC could improve its process, developers would instead beat a path to EFSEC’s door. The catch-22 is that EFSEC’s process – which the law requires – is increasingly complex and time consuming. It is impossible for EFSEC to compete.

The result is anything but a level playing field. Developers promise local government an increased tax base and jobs. And as noted above, *even if local government denies a project, or encounters local opposition that makes permitting difficult, EFSEC is still required to accept the application and initiate the siting process.* This is not hypothetical; it happened in the Desert Claim review after Kittitas County denied siting approval.

The significance of the “alternative resources” exemption took on additional significance with the adoption of the Federal Production Tax Credit, and the passage of I-937 which requires utilities to purchase these resources. Since 2001, more than 2,800 megawatts of wind power have been built in Washington State. EFSEC has reviewed facilities totaling 638.8 megawatts, only 22.8 percent of this total. ¹⁹

¹⁹ Desert Claim

Appendix D

The EFSEC Process

The EFSEC process takes too long and costs too much. This is not what state policy intends. EFSEC is directed to “...avoid costly duplication [with]...decisions made timely and without unnecessary delay;” RCW 80.50.010(5).

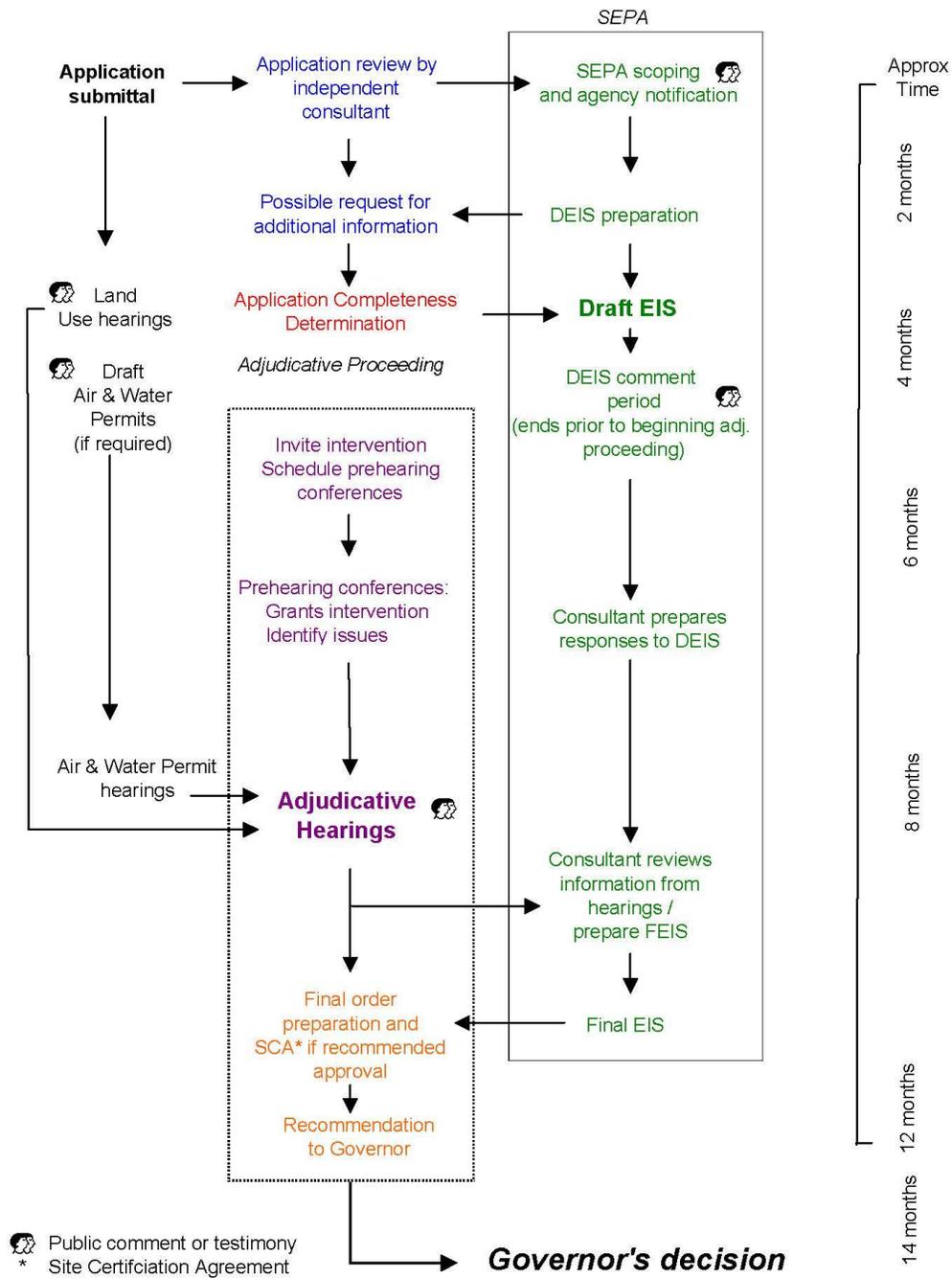
Initially, the EFSEC process was a “one track” affair. An adjudicative hearing, including consideration of local land use laws and zoning, was required. It was expeditious.

Over time, things changed. Passage of the State Environmental Policy Act, and new Federal and State Clean Air and Water laws, created a far more complex, time consuming, and multi-track process. A diagram is helpful. Reproduced on the next page is the EFSEC process as it existed in 1970 and as it exists today.

Today’s process has three parallel paths, and project supporters and opponents use this process to their advantage. This is not a criticism. Concerns can be well founded, and comments informative. They add value and influence EFSEC recommendations. However, they significantly slow review.



GENERALIZED SITING PROCESS



Appendix E

EFSEC Stakeholders

- Local government. Local government has consistently opposed state siting, unless a project that local government supports is challenged.²⁰ The arguments are that EFSEC does not understand local issues, that impacts are local, and that therefore decisions should be made locally. Particularly grating to local government is the fact that EFSEC preempts all other laws, rules, and regulations.
- Developers generally agree with local government, arguing that the EFSEC process is lengthy, costly, and uncertain. There are also concerns that the Governor is the decider, and may be swayed by policy issues not specific to the project under consideration. However, if local governments or citizens oppose a project, developers will seek EFSEC review because EFSEC “preempts” local laws, rules, and regulations and provides a direct path to review by the Supreme Court, if the project is challenged.
- Environmental interests, community activists, and tribes want state involvement but only where local government is not responsive to their interests. These interests vary greatly but frequently involve aesthetics, cultural resources, water quality, and wildlife.
- The Legislature must be convinced that a new law is needed, or an existing law amended. It looks for consensus among EFSEC stakeholders before doing so. Since EFSEC’s creation in 1970, change has been incremental, and intended to deal with specific issues. The J-LARC and Earl Reports have suggested the need for systemic change. I agree. Whether that is possible remains to be seen.
- The Executive Branch. The Governor’s Office sets state energy priorities in all areas, including siting. The priorities have been global warming and development of renewable resources. Energy siting is a “second tier” issue, limited primarily to reviewing EFSEC siting recommendations and providing tacit support for certain legislative proposals. This is not a criticism. The governor’s priorities are driven by the recessionary economy and the need for energy initiatives to create jobs and protect the environment. Renewable resource development and global warming impacts are seen to further these goals.

²⁰ Whistling Ridge

Within the Executive Branch agencies and offices with energy responsibilities, there is, in my opinion, the need for heightened coordination. Energy issues have been “siloed” within state government since the state’s Department of Energy was abolished in July 1996.²¹ To address this, Governor-elect Inslee should, in my opinion, seriously consider reconstituting the Department of Energy as a cabinet level department. The state of Oregon’s Energy Office is a good model, and allows the state to speak with one voice on these important economic and environmental issues.

Until such time as this may happen, EFSEC is located within the Utilities and Transportation Commission. Energy policy is the purview of the Department of Commerce.²² Such coordination as does occur is facilitated by the Governor’s Office of Finance and Management; it is issue specific and largely focused on legislative issues.

²¹ Energy issues are currently spread throughout the Departments of Commerce, Ecology, Fish and Wildlife, Agriculture, Natural Resources, the Washington State University Energy Office, the Utilities and Transportation Commission, and the Northwest Power Planning Council.

²² Washington State’s 2012 Energy Policy is found at: <http://www.commerce.wa.gov/site/1327/default.aspx>.

Appendix F

Recommended Statutory Changes

Energy Facility Site Evaluation Council

RCW Chapter 80.50

Color codes:

Yellow – delete

Green – add

RCW 80.50.010

Legislative finding — Policy — Intent

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

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

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

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

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

(3) To provide abundant energy at reasonable cost.

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

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

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

RCW 80.50.030

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

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

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

(b) The governor shall also appoint with the advice and consent of the senate two citizen members of the council who shall have a vote on matters before the council. One member shall reside east of the Cascade mountain range and one shall reside west of the Cascade mountain range. Citizen members shall represent the broad interests of the public consistent with the policy directive of RCW 80.50.010 and have demonstrated knowledge in energy issues. They shall serve a term coextensive with the term of the governor and shall be removable for cause. They may receive reimbursement for travel expenses consistent with 2(a) above.

The chair or a designee shall execute all official documents, contracts, and other materials on behalf of the council. The Washington utilities and transportation commission shall provide all administrative and staff support for the council. The commission has supervisory authority over the staff of the council and shall employ such personnel as are necessary to implement this chapter. Not more than three such employees may be exempt from chapter [41.06](#) RCW. The council shall otherwise retain its independence in exercising its powers, functions, and

duties and its supervisory control over non administrative staff support. Membership, powers, functions, and duties of the Washington state utilities and transportation commission and the council shall otherwise remain as provided by law.

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

(i) Department of ecology;

(ii) Department of fish and wildlife;

(iii) Department of commerce;

(iv) Utilities and transportation commission; and

(v) Department of natural resources.

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

(i) Department of agriculture;

(ii) Department of health;

(iii) Military department; and

(iv) Department of transportation.

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

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

(5) The city legislative authority of every city within whose corporate limits an energy facility is proposed to be located shall appoint a member or designee as a voting member to the council.

The member or designee so appointed shall sit with the council only at such times as the council considers the proposed site for the city which he or she represents, and such member or designee shall serve until there has been a final acceptance or rejection of the proposed site.

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

RCW 80.50.075

Expedited processing of applications.

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

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

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

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

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

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

Notes: Effective date -- 1989 c 175: See note following RCW [34.05.010](#).

RCW 80.50.060

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

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

(2) The provisions of this chapter apply to the construction, reconstruction, or enlargement of a new or existing energy facility that exclusively uses alternative energy resources and chooses to receive certification under this chapter, regardless of the generating capacity of the project, provided however that alternative energy resources which choose not to receive certification under this chapter shall be precluded from later seeking such certification, and provided further that the council shall adopt rules governing this preclusion.

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

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

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

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

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

(4) The provisions of this chapter shall not apply to normal maintenance and repairs which do not increase the capacity or dimensions beyond those set forth in *RCW [80.50.020](#) (7) and (15).

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

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

[2007 c 325 § 2; 2006 c 196 § 4; 2001 c 214 § 2; 1977 ex.s. c 371 § 5; 1975-'76 2nd ex.s. c 108 § 34; 1970 ex.s. c 45 § 6.]

Notes:

***Reviser's note:** RCW [80.50.020](#) was alphabetized pursuant to RCW [1.08.015](#)(2)(k), changing subsections (7) and (15) to subsections (21) and (12), respectively.

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

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

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

RCW 80.50.090

Public hearings.

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

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

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

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

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

Notes:

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

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

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

Effective date -- 1989 c 175: See note following RCW [34.05.010](#).

RCW 80.50.140

Review.

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

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

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

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

(c) The record is complete for review.

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

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

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

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

Notes: Severability -- 1988 c 202: See note following RCW [2.24.050](#).

RCW 80.50.100

Recommendations to governor — Council Decision

Expedited processing — Approval or rejection of certification — Reconsideration.

(1)(a) The council shall report to the governor its recommendations as to the approval or rejection of approve or reject an application for certification within twelve months of receipt by the council of such an application, or such later time as is mutually agreed by the council and the applicant.

(b) In the case of an application filed prior to December 31, 2025, for certification of an energy facility proposed for construction, modification, or expansion for the purpose of providing generating facilities that meet the requirements of RCW [80.80.040](#) and are located in a county with a coal-fired electric generating [generation] facility subject to RCW [80.80.040](#)(3)(c), the council shall expedite the processing of the application pursuant to RCW [80.50.075](#) and shall report its recommendations to the governor approve or reject the application within one hundred eighty days of receipt by the council of such an application, or a later time as is mutually agreed by the council and the applicant.

(2) If the council approves an application for certification, it shall also submit a draft be accompanied by with a certification agreement with the report. The council shall include conditions in the draft certification agreement to implement the provisions of this chapter, including, but not limited to, conditions to protect state or local governmental or community interests affected by the construction or operation of the energy facility, and conditions designed to recognize the purpose of laws or ordinances, or rules or regulations promulgated thereunder, that are preempted or superseded pursuant to RCW [80.50.110](#) as now or hereafter amended.

(3)(a) Within sixty days of receipt of the council's report the governor shall take one of the following actions:

(i) Approve the application and execute the draft certification agreement; or

(ii) Reject the application; or

(iii) Direct the council to reconsider certain aspects of the draft certification agreement.

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

(4) The final certification agreement is a contract offer, and the applicant shall have sixty days within which to accept the certification agreement or the offer shall be deemed withdrawn.

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

[2011 c 180 § 109; 1989 c 175 § 174; 1977 ex.s. c 371 § 8; 1975-'76 2nd ex.s. c 108 § 36; 1970 ex.s. c 45 § 10.]

Notes:

Findings -- Purpose -- 2011 c 180: See note following RCW [80.80.010](#).

Effective date -- 1989 c 175: See note following RCW [34.05.010](#).

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