

MINUTES
ENERGY FACILITY SITE EVALUATION
COUNCIL OF WASHINGTON

August 10, 2004 Special Meeting
925 Plum Street S.E., Building 4, Room 308
Olympia, Washington 2:00 p.m.

ITEM NO. 1: CALL TO ORDER

CHAIR LUCE: The special meeting of the Washington State Energy Facility Site Evaluation Council for Tuesday, August 10, 2004, will come to order. The purpose for this special meeting is to take comment on the EFSEC Standards Rule Making. Clerk will call the roll.

ITEM NO. 2: ROLL CALL

EFSEC Council Members

Community, Trade & Economic Development
Department of Ecology
Department of Fish & Wildlife
Department of Natural Resources
Utilities and Transportation
Chair

(via phone) Richard Fryhling
Hedia Adelsman
Chris Towne
Tony Ifie
Tim Sweeney
Jim Luce

MR. MILLS: Chair?

CHAIR LUCE: Present.

MR. MILLS: I note there is a quorum.

OTHERS IN ATTENDANCE

EFSEC STAFF AND COUNSEL

Allen Fiksdal
Mike Mills
Ann Essko, AAG

Irina Makarow
Mariah Laamb
Shaun Linse, Court Reporter

EFSEC GUESTS

Charles Carelli – Independent Contractor for
EFSEC

Bill LaBorde – Northwest Energy Coalition

Cindy Custer – Bonneville Power Administration

Mark Anderson – CTED Energy Policy

ITEM NO. 3: EFSEC RULES

<i>Public Comment Hearing</i>	<i>Jim Luce, Chair</i>
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CHAIR LUCE: As Councilmembers and members of the public are aware, we have for nearly three years been embarked on a process of reviewing and proposing changes to the Energy Siting Council's rules, both substantive rules and procedural rules. We have entered into the process which now brings us to the subject of this meeting which is the CR 102. Is that correct, Allen?

MR. FIKSDAL: Yes. The Council has issued a CR 102, which is the notice of intent for rule making. With that notice was the notice of a public hearing, and that public hearing was noticed for 2:00 p.m., August 10.

CHAIR LUCE: This is the date and this is the time. So we have received some comments in writing, and I will note those for the record now. We have received comments from Renewable Northwest Project, from NESCO, otherwise known as the National Energy Systems Company, and I believe that we may also receive some additional comments perhaps from the Northwest Energy Coalition. So this being a public hearing, are there any public comments to be offered today? Are there any public comments to be offered today? Are there any public comments to be offered today? Councilmembers have the comments before them of the Renewable Northwest Project, and what I would propose is we can either review them now and discuss them, we could have Allen summarize them for us, or we're going to have another meeting. We have a meeting scheduled for September 7, and we're going to have a subsequent meeting to that.

MR. FIKSDAL: What we should probably outline is the process from here on, and I want to note that the two documents that you have before you, the June 16 letter from Renewable Northwest Project, and the August 5 letter from NESCO, National Energy Systems Company, will be considered as part of comments to this hearing. I think also as you know there have been many comments to the Council on its rules as it's progressed through rule making, and we have Mr. Carelli who is working for the Council to look at these and provide us with a Concise Explanatory Statement, draft statement for consideration at a later date. Mr. Carelli is looking at and has looked at previous comments to the Council, and those comments will be considered in the Council's deliberation and consideration of the rules. So I don't want people to think that the comments that we received just today or that we noted today are the only comments that the Council has received. Previous comments have been received. They may not be as applicable as they were because versions of the rules have changed over time, but I think it's important to note that we have looked at those comments, and that we will be responding to those comments as they pertain at least to the latest version of the rules and whether those rules answer the questions or the comments or how they deal with those.

CHAIR LUCE: Mr. Carelli will be preparing a short Draft Concise Explanatory Statement, and the Concise Explanatory Statement will be provided in draft to Councilmembers.

MR. FIKSDAL: If I might interrupt. I'm sorry.

CHAIR LUCE: No, go ahead.

MR. FIKSDAL: Mr. Carelli is confident that he will have a draft to you at the beginning of September. We don't feel that it will probably be ready for your action on the September 7 meeting. You may want to consider it, and I would hope that at your September 20 meeting you can take action. Our plan is for you to, if you are ready to issue the CR 103, that you go ahead and issue the CR 103 at your September 20 meeting. I think you will have been able to see and review comments on the Concise Explanatory Statement. You've already seen the Small Business Economic Impact Statement. Hopefully you will be ready to take action at your

September 20 meeting. With that, if you do take action on the September 20 meeting, we might be able to get or we will endeavor to get the CR 102 and all the associated documents to the Code Reviser by September 22, which is by noon on the 22nd. If that is the case, then it would be published in the October 6 State Register, and the rules would go into effect I believe it's one month from that day, which would be November 6 or 7.

CHAIR LUCE: That would be my recommendation is we take a chance to review these comments; that we look for other comments that may come in writing. I think some may come from the Northwest Energy Coalition. We review Mr. Carelli's Draft Concise Explanatory Statement, and then we take appropriate action on September 20. Does that make sense to the Councilmembers?

MS. ADELSMAN: What is the deadline for the comments?

MR. FIKSDAL: I believe at the end of the week, Friday the 13th.

CHAIR LUCE: I had a phone message from Sonja Ling from Renewable Northwest who wanted to make sure that their comments were received in time. They have been received in time, and she was particularly interested and concerned that the comments that they made regarding the WDFW guidelines for wind were incorporated into the rules and treated especially in the Concise Explanatory Statement, that EFSEC would be following the DFW guidelines for wind is appropriate, and I assured her that it was my expectation we would; that it would be reserved for final action by the Council. But she also addresses that in your comments on Page 2 of 6 and Page 3 of 6.

MS. TOWNE: Do you want to discuss any of these as we go?

CHAIR LUCE: I want to wait.

MS. TOWNE: I want to double back to that issue having read what she's recommending. It goes beyond that.

CHAIR LUCE: I want to remind Councilmembers that if we make any changes at this point in time we go back to -- any subsequent changes, we go back to square one and start all over, and that would not be something that I would anticipate at this time.

MR. FIKSDAL: I might note that Renewable Northwest comments were written prior to us listing the last revised portion of the rules, and I had indicated to Ms. Ling that she should look at those revisions, and if she still had comments to get them back to us. So hopefully we did address some of her concerns in the latest version, but we still will look at this letter and respond to the comments if we don't receive anything else. Are we done with that?

CHAIR LUCE: Yes.

MR. FIKSDAL: There's another issue. Ms. Makarow just pointed out to me that in the proposed rule making notice which is the CR 102, we had said the intended date of adoption was October 10, and because of the CO2 we may not be able to adopt it until October 10. I think when we looked at the schedule, that was the earliest date we thought when we issued this that we could take an action.

CHAIR LUCE: What's the exact language?

MR. FIKSDAL: It says date of intended adoption October 10, 2004. Note this is not the effective date.

MS. TOWNE: I would also point out it's a Sunday.

MR. FIKSDAL: Well, that is the problem then.

MS. ADELSMAN: That means the Monday after.

MS. TOWNE: The next Monday we're in Kittitas in hearing.

CHAIR LUCE: Let's take that up for advisement at this point in time. If that's necessary, then that's necessary.

MR. FIKSDAL: I just wanted to point that out.

MS. ADELSMAN: It can be later, but it cannot be sooner; is that correct?

CHAIR LUCE: Let's take a look at that issue. Okay? Anything else?

MS. TOWNE: There is a piece from NESCO.

CHAIR LUCE: Yes, I'm aware of that. I've discussed that with legal counsel, and I think NESCO's point was that it wanted to make certain that there was nothing in the rules that conflicted with their site certificate agreement, if I understood their comment right. Their site certificate agreement is a contract between themselves and the state, and nothing in the rules would preempt their contract. We are not going to breach their contract by virtue of our rules.

MS. ADELSMAN: So, you know, I personally haven't seen both of these comments before. Allen, do you feel in looking at them that they're actually not substantive; that they're things we have already taken care of in the rules or they're just implied in there?

MR. FIKSDAL: I think the comments from Renewable Northwest we have looked at before, and I think Mr. Carelli will have the answers he needs to address those comments.

MS. ADELSMAN: So we don't need to modify the rules.

MR. FIKSDAL: I don't believe we do, no. The National Energy Systems Company, NESCO, rules I think as Chair Luce noted they just want to be certain that the Council is abiding by their contract. It was never the intent I don't think of the Council or the rule making to have the rules change any contract or site certification agreement that's existed. There are conditions in the rules that may affect existing site certification or existing projects, but if the condition is listed in a site certification agreement that's a contract, and that's the condition of EFSEC rules not the new rule.

CHAIR LUCE: You can't breach a contract with a rule.

MS. ADELSMAN: No, but if they come back for changes.

MR. FIKSDAL: Then that rule is effective.

CHAIR LUCE: Then that's a different situation.

MR. FIKSDAL: Currently the site certification agreement that the Council has issued or the Governor has approved, let's put it that way, stand as they are and these rules do not change those.

MS. ADELSMAN: Unless the Applicant asks for modification.

CHAIR LUCE: That's right. That is a change in the Site Certificate Agreement. Any other questions? All right. Then we will close the public comment period today, the hearing on the EFSEC rules. We will close that hearing at 2:25 p.m. Comments can be received in writing by this Friday if, I understand it correctly.

MR. FIKSDAL: By 5:00 p.m. this Friday.

CHAIR LUCE: And we will look forward for Mr. Carelli to have this draft to us on or about September 1, and we'll review that, and we will look forward to taking action at the September 20 meeting.

MR. IFIE: One quick question. So the comment that we got now is this going to reflect on the new draft or are these comments more substantial? Maybe I missed that.

MS. ADELSMAN: That's the question I asked.

CHAIR LUCE: Allen answered that they were not substantive.

MR. IFIE: I understand that they're not substantial or the issues have already been addressed.

MR. FIKSDAL: Most of the issues have already been addressed, and Renewable Northwest in particular I think the one regarding the Fish and Wildlife guidelines have been addressed by the latest revision that you made in Chapter 42 of the rules.

MR. IFIE: So let's say there were some changes that are minor but would be nice to make in the rule. Do we have the latitude to make those changes at this time?

MR. FIKSDAL: Probably Ms. Essko would be best to answer, but I will say something first, and she can correct me. It's my understanding that you can have or correct scrivener's errors. If it's editing, if it's an "of" instead of an "or" or "an" instead of "and", but you can't change anything or add or take away anything that will substantively change the rule.

MS. ADELSMAN: You could modify, I think.

MR. FIKSDAL: If you were to substantively change the rules, you have to reissue a CR 102 for that rule or however you want to do it. The degree of modification I'm sure would depend on what it is and somebody's interpretation, but I think that's where we would be checking with Ms. Essko on what the extent of what that modification would be and whether it is a substantive change or not. But I guess it's my preference not to go down that route and get into a position where you have to start explaining and justifying what you did.

CHAIR LUCE: We have been three years about this. I want to be, the Chair wants to be very conservative about what changes we make now, very conservative. I think Allen said if it's "and" instead of "an" or an "or" is missed. Scrivener's error means scrivener's error.

MS. ADELSMAN: I think you could clarify.

CHAIR LUCE: Well, clarify can be a substantive change, and really we're playing with a little bit of a -- I don't want to play without -- I want legal counsel to take the lead here.

MR. IFIE: We have three comments, the ones that are attached here. I'm just looking at the comments, the one from the National Energy Systems Company.

MR. FIKSDAL: Yes.

MR. IFIE: There is a concern from reading the rules about some things that could be done, so it would help to clarify the intent of the rules. Now we have an option. One option is to say, well, let's interpret it differently. Interpret the rules to them based on our understanding of the rules or we can put into the rules something that says that from now on these rules are applied to future projects. They are not meant to be retroactive. To conclude my thinking on this, what is the intent of this comment if they're not going to be acted on? Are we asking people to provide comments without any room for using their comments?

MR. SWEENEY: This is Tim, Tim Sweeney. I looked through this and you're right. The whole point of public comment is to allow somebody to bring issues that are continued to follow through with the public hearing process. But this is an issue that I think we've been aware of from day one. It's been brought up and brought up and brought up, and we've got assurances from legal counsel and what have you, that our rules do not apply to the contractual relationship. So it's like the handholding they're asking for in here is unnecessary and certainly not needed and not necessary given the light that it's going to basically flummox our schedule on this thing. The only substantial remark in here that goes beyond the handholding part is, should the new applicant have to bring their facility back to original condition? Again, we have the right to say, yes, we heard your remark, but we don't agree with it. We've heard it throughout the process. So I guess your first part is shouldn't we honor the comments that come in and at least deliberate over them? Yes. The second part is we've deliberated over this numerous times, and I don't think we need to honor it now.

MS. ADELSMAN: That's why the response becomes so critical. I mean some of these questions we have addressed them before, and we don't think they are appropriate. And that's what Chuck needs to write in the concise response because that's an obligation we have is to say why aren't we addressing this.

CHAIR LUCE: That's what he's going to do. For example, on the Need for Power, if that issue comes up again, we can say we have moved a substantial way on the Need for Power issue and Chuck can recite that. On the particular NESCO issue, we can put something in the Concise Explanatory Statement, and what they're looking for is belt and suspenders. They've got the belt. They've got their contract. We can give them suspenders by saying there's no intent to abrogate a contract. It doesn't do much. You couldn't abrogate a contract anyway.

MR. FIKSDAL: I think one of the other issues that Tim just mentioned about site restoration back to the original condition that there is or there are many sections in that chapter and that rule that says the Council or even in that section it says if the Council hasn't addressed it, then by default that's what it is. But then the whole rest of the rule is how we're going to address site restoration, how to develop a plan, when the initial plan has to be filed, what the Council's action will be, the timing of the final restoration plan; that in fact if the facility is on an industrial site the Council should look at returning it back to a usable condition, not original, and it has all kinds of different methods for the Council to go beyond and address something for site restoration rather than back to the original. I think this, in my personal opinion, it's a very minor comment, and I think the rest of the rules concentrate on the terms.

MR. SWEENEY: And not well researched obviously.

MS. ADELSMAN: So, Ann, what does the rules say as to changes?

MS. ESSKO: Well, if after you look at the comments you conclude that there really is something new that you haven't already thought through and they're not just re-raising the same issue that you have already analyzed and dealt with in your rules, then you have two choices. If you think you need to make a change to the rule that is not substantially different from the prior rule, you can just go ahead and make the change. If the change is substantially different, then you can either file a supplemental notice with the Code Reviser and hold another hearing or you can adopt the substantially different rule anyway and then somebody can ask you to start over. They have to ask you within 60 days. And the definition of substantially different is that the revised rule affects a different person. So somebody wouldn't know that they were now affected by a rule that they thought they were before. It deals with a different subject matter, it deals with a different issue, or it has a different effect. So if it doesn't have one of those things, it doesn't have a substantially different rule, you can go ahead and modify it. Again, if you want to modify it, and it is substantially different, you can either have another hearing, put it in the code, have another hearing, or just full speed ahead. Do it anyway and let somebody ask you to appeal it. But, again, that's only if after you review it you think, oh, this is something new that we haven't already addressed.

CHAIR LUCE: There aren't any real new issues after three years. Mr. Carelli.

MR. CARELLI: The material you were just referencing, what's the citation on that?

MS. ESSKO: That's from the Administrative Procedures Act, RCW 34.05.340.

MR. CARELLI: Thank you.

CHAIR LUCE: Anything else or should we close this hearing and go onto the next hearing?

MR. IFIE: One quick question. Chris, you were mentioning the fact that you were referencing the comments from Renewable Northwest Project.

MS. TOWNE: Yes, and it was on --

MR. IFIE: You said there was comments that went beyond.

MS. TOWNE: Well, it's the applicability of the requirements for pre-project environmental study, and their recommendation is that the wind power guidelines of Fish and Wildlife be a surrogate for that investigation, that set of environmental studies, and that a letter from the Regional Office of Fish and Wildlife would suffice to meet our standards, and that I do not recall hearing before. I know that the way it's written now we cite to the guidelines and direct people to them, but we didn't say it is a functional equivalent of the pre-project environmental studies otherwise required. Now, whether these folks, I guess it's Sonja --

MS. ADELSMAN: I think we have strong language in the rules.

CHAIR LUCE: Would you give me the rule.

MS. ADELSMAN: Yes, on Page 17 in the guidelines.

MS. TOWNE: Let's go back. It's 463-42-332.

CHAIR LUCE: 463-32?

MS. TOWNE: 463-42-332(4), and it says the Applicant shall give due consideration to guidelines established by agencies for assessment of habitat, and wind power generation proposals shall consider the wind power guidelines. But it doesn't say anything that looks like what is being requested by RNP in this letter.

MS. ADELSMAN: I think if I look at that what they're looking at it's procedurally that we could eventually decide how we are going to implement the subsection more than substantive. This is maybe stronger than what we have in the rules now.

MS. TOWNE: It says you've got to go see them and look at them and consider them, and what she's saying for wind projects, however, we recommend the guidelines be applied and a letter of approval from the regional office be used to meet the standard, the direction to do these studies. Now, that is a different thing.

CHAIR LUCE: Here's where I'm coming from, Chris.

MS. TOWNE: I guess I am inclined to say before you give me the speech because I know what you're going say.

CHAIR LUCE: I am deferring to you.

MS. TOWNE: I would be prepared to say this is worthy of consideration but not now. We will take it up again separate from this rule making process, and once we get through the thrash of all our hearings, we will revisit the issue. Because they're going to have to round up some allies amongst the enviros, and a group will have to sit down and talk this through. I don't think we're prepared on our tight time line to make a change like this, and heaven knows we don't want to reopen and go back to another CR 102. So my recommendation would be revisit, give assurance in the comments that it is worthy of further consideration within six months, and we will be back to you or something.

MS. ADELSMAN: Can I add something quickly? This section actually I remember when we talked with Allen because there were many guidelines, including Ecology's wetland guidelines. There were several things that we had, and we decided, that we are not going to adopt all the agencies' guidelines. I mean you have to put the whole, all of the guideline in the rule in order for them to have the force of law, and we decided that that was not appropriate for EFSEC because we may want to do something different. So we used it as an example. So I am going to advocate that I don't think we want to do what they want to because that's really limiting us and taking the flexibility and not even revisit it in the future. Just say we have allowed for the guidelines to be considered, but I don't think we want to adopt the guidelines as far as saying we shall have the Department of Fish and Wildlife guidelines. So I'm going a little bit further.

CHAIR LUCE: I am going to defer to Chris, the DFW representative, on what the meaning of this is because she has some knowledge of the wind guidelines, and she is the DFW representative. If we want to open this up later and change it, I would have no opposition to that. Having read and haven't really scanned it carefully, read it carefully, I think it probably does go further. But the way that you could treat this, if you wanted to, you could interpret it in due consideration. In the explanatory statement you could say something of, what does due consideration mean. Again, if Chris wants to draft something for us in terms of what she thinks due consideration means, I would be fully supportive of that and having her shop that among the Council.

MS. ADELSMAN: One last comment. The only thing that makes me nervous about what Chris is proposing is leaving the door open to maybe taking this issue on next time on the basis that we have a short time, and I think if you leave that door open somebody is going to come back and say we want you to consider this now. And I'm saying I think we discussed that, and we decided that was not an appropriate thing to put in our rules, and our response shouldn't have come back later. But the language that we have is sufficient and accomplishes what we want to accomplish.

CHAIR LUCE: They will always come back later.

MS. ADELSMAN: Because we've gone through rule making enough at the Ecology Department.

CHAIR LUCE: I agree with that, but, Hedia, as a practical matter people are always going to come back later. If I was a stakeholder on the outside and EFSEC didn't give me what I wanted in these rules, I would wait until the Council changed and I would come back later. Knock, knock. Anybody home? Oh, Council's changed. I would like to talk about --

MS. TOWNE: Which they're free to do at any time.

CHAIR LUCE: Absolutely. That's the whole nature of the process. So why don't we leave it at that, Chris. If you have some language you would like to offer, that's fine. If you want to just stick with the way it is, that's fine. My recommendation would be to defer to the Councilmember who has the DFW portfolio.

MR. IFIE: It seems Chuck had a comment. Your hand was raised.

MR. CARELLI: You basically touched on it. This was originally raised in a letter from RNP around December 1, and at subsequent Council meetings. I don't remember which meeting it was. I know there was a discussion based on my review of the minutes, and the discussion was basically as Hedia recanted it, and the words that struck me in reading that were these aren't rules. We are only making them guidelines.

MS. ADELSMAN: Thank you, Chuck.

MS. TOWNE: That may well be the appropriate response is this is a set of rules. We could if the DFW had adopted the guidelines as rules gone through rule making. We could have incorporated them in lieu of our own process for wind power projects and left our rules for fossil. Because Fish and Wildlife didn't, we didn't. Maybe that's the answer for now, and we don't open the can of worms.

CHAIR LUCE: That works. Great. I am perfectly comfortable with that solution.

MS. TOWNE: Try that.

CHAIR LUCE: Any other solutions? We're doing great here.

MR. FIKSDAL: This is -- actually the discussion is very good. It helps Chuck to prepare his short explanatory statement. It gives him the basis from the Council for answering the questions.

CHAIR LUCE: Now, Renewable Northwest Project also dealt with state preemption which it looks to me to be a brand new issue that they brought up.

MR. FIKSDAL: I don't think that's a brand new issue. I think that is an issue actually other people have brought up that issue. I think if my recollection is correct the Council felt they had enough on their plate. This was such a meaty issue; that it was probably upcoming in some adjudicative proceedings. You just didn't want to tackle it. Their comments may be appropriate, and the Council may want to look at it, and I may even recommend it. But I think at this time the Council decided it just wasn't to be put on their plates.

CHAIR LUCE: Would the Councilmembers agree? Let's just have a little informal poll of the delegation here, and maybe get a voice comment. I mean we do have a preemption issue before us in an adjudicative proceeding, and a lot of these issues that have been raised here will be raised in that.

MS. ADELSMAN: So the response to this one is this is one that we could take on later on once we go through the process with Kittitas and Wild Horse, and so maybe come back if we learn something new. But at this time we don't. That's fine. I'm comfortable with that.

MR. SWEENEY: Yes, I am comfortable with that.

MR. IFIE: I am comfortable with that.

CHAIR LUCE: Are you comfortable with that?

MS. TOWNE: Yes.

MS. ADELSMAN: Ann, are you comfortable with that?

MS. ESSKO: If I had a vote, I would be.

MR. FIKSDAL: Dick, are you still on the line? Can you hear this?

MR. FRYHLING: Darn right I'm comfortable with it.

MS. ADELSMAN: Oh, we forgot about you.

CHAIR LUCE: The next thing they raised was public informational meeting and when. What do they say there? Proposed changes to allow EFSEC consider using general comments as part of the adjudicative proceedings.

MS. TOWNE: We've done that.

MS. ADELSMAN: We did that with BP.

MS. ESSKO: They don't want public comments to be part of the adjudicative proceeding record.

MS. TOWNE: Because they can't cross-examine.

MS. ESSKO: My understanding is that EFSEC does that as an attempt to harmonize the APA with the EFSEC process, and it's given long, hard thought to doing it the way it's doing it.

MR. FIKSDAL: Correct.

CHAIR LUCE: I think public comments should be part of the record.

MS. ESSKO: Otherwise, you have all this public comment, and then you have to write this order under the APA, and how do you get the public comment in, so that you can consider it? You want to consider it.

CHAIR LUCE: The public comment goes to the weight. It doesn't go to the admissibility of the public record. It goes to the weight. If somebody stands up and says I don't like this project, that's one thing. If the public stands up and says I don't like this project because I have good scientific information, let me explain this, and they bring forth lots of good, sound reasons, then you treat it differently. But it should be part of the record. It's just how the Council evaluates public comment. Would you agree with that, Tim?

MR. SWEENEY: We have this debate at my employer a lot because we have the same situation. You can't cross-examine the witness. We swear them in. In a blanket sort of way we say those of you coming to speak promise to tell the truth, but don't cross-examine. They're not necessarily considered experts, and what we do is we treat it as evidence and it is presented as

testimony. The transcript, and any written testimony is bundled up and we have public counsel who then presents it as an exhibit. It's just like you say. It goes to the weight. It has illustrative purposes as one attorney described it as, but it's not necessarily considered -- it doesn't have the same weight I guess as one person providing prefiled testimony and then having the opportunity to be cross-examined.

MR. FIKSDAL: In past practices the Council has done exactly that, and they have bundled up the public comments, whether it's letters or whatever, and it's entered into the record.

MR. SWEENEY: Yes, that's exactly. You put it in the record for what it's worth.

MR. FIKSDAL: That's exactly right. It becomes part of the Council's record in their decision.

CHAIR LUCE: Would other Councilmembers agree with that approach; that it goes to the weight, not to the admissibility, and this information should be appropriately part of our record? Councilman Ifie?

MR. IFIE: I agree.

CHAIR LUCE: Councilmember Chris Towne?

MS. TOWNE: Yes.

CHAIR LUCE: Councilperson Hedia?

MS. ADELSMAN: Yes.

CHAIR LUCE: Dick?

MR. FRYHLING: Yes.

MR. FIKSDAL: But it doesn't necessarily have to be in a rule that you're going to do this.

CHAIR LUCE: No.

MR. FIKSDAL: That's the point here.

CHAIR LUCE: No, it doesn't have to be a rule, but we should consider it.

MR. FIKSDAL: Yes.

CHAIR LUCE: Chapter 463-42 -- this is good. We've got this on the record.

MS. ADELSMAN: I was comparing her comments with the rules, and I think what Allen said before makes a lot of sense. Because we made a lot of changes and she's looking at the old thing, so it's really hard, you know, to go section by section because we already kind of made the change. It would be really good if they could look at that.

MR. FIKSDAL: That's what I suggested to Ms. Ling; that she look at it.

CHAIR LUCE: This is old language, so they're going to look at it again.

MS. ADELSMAN: It's not even there.

MR. FIKSDAL: If she does not or if RNP doesn't issue anything, I think what the response should be is thank you. We looked at it. We have addressed these concerns. The rule was changed, and here's what the changes of the rule says.

MS. ADELSMAN: Yes.

MR. FIKSDAL: That's how you address the comments.

MS. ADELSMAN: I think the Chair was going to read that section. It's 332?

CHAIR LUCE: Right. It's old stuff, but what we did discuss is the guidelines are guidelines.

MS. ADELSMAN: No, I'm asking is that section you're talking about are you talking about --

CHAIR LUCE: I was talking about --

MS. ADELSMAN: 332.

CHAIR LUCE: Yes. I was talking about the extent to which the guidelines should be binding on the Council.

MS. ADELSMAN: We took care of that.

CHAIR LUCE: What do we have, 463-42, Environmental Health? It's not clear. Has this been changed as well, Allen, the Sub 2?

MR. FIKSDAL: The Council decided they would just adopt the Department of Ecology's --

MS. TOWNE: We cut it all out. It referenced 173.

MR. FIKSDAL: I think the Council thought it was most appropriate to adopt the existing rules rather than try to invent the rule.

CHAIR LUCE: The answer to this is for purposes of simplification we adopted the State Noise Standards.

MS. ADELSMAN: None of the language that they cite in 332(e) to (g) before that's not in the guideline they changed.

CHAIR LUCE: Yes. What about 463 Standards, Construction and Operation Standards for energy facilities, has that been changed, Allen?

MR. FIKSDAL: I don't know.

MS. ADELSMAN: That section is gone.

CHAIR LUCE: One acre of habitat with one acre to compensate for temporal losses.

MR. FIKSDAL: We'll have to look.

MS. ADELSMAN: We moved all of that.

CHAIR LUCE: This is Ecology stuff, Hedia.

MS. ADELSMAN: Yes. Well, it's Fish and Wildlife. It's kind of combined mitigation. Where was it? Mitigation was to be based on science, be avoided. I think we said equivalent. I think we took some of that stuff off. Isn't it, Allen?

MR. FIKSDAL: I was trying to find the section.

MS. ADELSMAN: It should be Page 17.

MR. FIKSDAL: It says under your new Section 463-62-040 there's a test that's standard, Fish and Wildlife standard. Is that what this comment is getting at?

MS. TOWNE: Well, it's wetland mitigation one for one.

MS. ADELSMAN: But in here they're defining it to Fish and Wildlife.

MS. TOWNE: For wind power. This was distinguishing between fossil and wind power. The point is that cattle grazing lands do not need to be mitigated in kind because they don't have any habitat value.

MR. FIKSDAL: I think one of the concerns we did incorporate some of the information in Chapter 42 took Fish and Wildlife stuff. I think, if I recall correctly, the concern was if we start detailing for wind farms, we would have to detail for combustion turbine and would have to detail for nuclear power plants, then we would have to detail for wave energy, then we would have to detail for all the different specific types of energy facilities that came before the Council. Again, back to the simplicity rule. I think the rules reflect that simplicity in that we didn't want to go into that much detail for each specific type of energy facility that may come before EFSEC. That isn't to say that these different qualities, that the different types of facilities can't be looked at by the Council.

MS. TOWNE: Well, I think her point is -- reading between the lines. It's implied but not expressed. -- is that the Council does not leave itself sufficient discretion to apply its own rules to acknowledge the real differences, physical differences in an Eastern Washington wind power site versus a Western Washington CT.

MR. FIKSDAL: That's the crux.

MS. TOWNE: Yes.

MS. ADELSMAN: But I think the way we rewrote this whole area of Fish and Wildlife and Wetlands we took out a lot of this specificity and a lot of the detail of things and we have really provided us with flexibility. And actually the language --

CHAIR LUCE: Do you have the cite there, Hedia?

MS. ADELSMAN: I'm trying to think. Yes. Well, the whole section starts on Page 15 to 332.

MR. FIKSDAL: I think if you go back actually she's talking about in my interpretation if you look at Section 463-62-040 the standards, the new standards.

MS. TOWNE: Remember we made sure everything that was a standard locked together.

CHAIR LUCE: Okay.

MR. FIKSDAL: Now, when you get to 62-040, and if you go down to number 2(d), it says the ratios of replacement habitat to impacted habitat shall be greater than one to one compensation for temporal losses. Certainly performance of differences in functional values. So there I haven't looked at it carefully, but that might be the one to one that she's talking about.

MS. TOWNE: I assume it is.

MR. FIKSDAL: Your standard is one to one.

MS. TOWNE: She was basing it on another draft I think.

MR. FIKSDAL: If your standard is one to one, she may have a point.

MS. TOWNE: I think there is a real point here, but we did go through this drill and lacked the energy at that point in our proceedings to, as you say, differentiate amongst power generation equipment types.

MR. FIKSDAL: If you were really concerned and thought you had already addressed it, you might think to change this. The general guideline is one to one, but the Council may wish to look at the specific type of energy facility to adjust it to a more appropriate ratio. That is something if you were to change it.

CHAIR LUCE: It would seem to me you could also deal with that in the Concise Explanatory Statement. Not as perfectly because it does say shall, but you could put some -- effectively we're talking about legislative history here.

MS. TOWNE: Yes.

CHAIR LUCE: You could put some recognition in there that there was a differentiation between different types of projects, and that Council would entertain --

MS. TOWNE: At a later date.

CHAIR LUCE: At a later date discussion. It would also entertain views of the parties who believe that one to one. It seems to me like I don't want to change the one to one to shall compensate because that's a substantive change. You've got to throw the whole thing out. I don't want to do that, but I think you could put something in the explanatory statement that says we recognize there's a difference between east and west. If I recall, Ecology was suppose to draft rules. There is a distinction between east and west mitigation.

MS. TOWNE: They have separate rules, but they've never adopted the east.

CHAIR LUCE: They've never adopted the east.

MS. TOWNE: So everybody has to use the west.

MS. ADELSMAN: For their guidelines.

CHAIR LUCE: But they've never adopted the east guidelines.

MS. ADELSMAN: No, we have the east, it is being developed actually.

MS. TOWNE: Being developed, but there aren't any.

MS. ADELSMAN: I think we have the east actually.

MS. TOWNE: We didn't when Kittitas started because they had a note in the EIS they were instructed to use the west.

MS. ADELSMAN: I will check.

CHAIR LUCE: Because it was very bizarre. The east has been under consideration forever but never been adopted.

MS. ADELSMAN: It's not a surprise. You have Kittitas County there and all.

CHAIR LUCE: It would seem to me we could give some recognition to this in the explanatory statement, some legislative history to recognize that there are differences. So can we deal with it that way?

MS. TOWNE: Yes.

CHAIR LUCE: Then we'll take an additional look at that down the road.

MS. TOWNE: What we might want to look at is what flexibility EFSEC has allowed itself to acknowledge significant differences, and that a Class 1 Wetland is not the same as cattle grazing land, and do our rules allow us to behave sensibly when faced with that difference?

CHAIR LUCE: This sounds like Fish and Wildlife; doesn't it, Chris?

MS. TOWNE: Yes.

CHAIR LUCE: It seems to me like you just drew another assignment.

MS. TOWNE: Yes. All right.

MR. FIKSDAL: But I think it reflects the Council considered this comment.

CHAIR LUCE: Absolutely.

MR. FIKSDAL: They considered it and decided not change it at this time.

CHAIR LUCE: Right.

MS. ADELSMAN: I think the reason - it was the same as with the wind guidelines. We decided not to adopt all the different guidelines. We decided in this case on the wetland, referred to Ecology guidelines for developing fresh water wetland mitigation plans in projects.

CHAIR LUCE: This is just not wetlands. It's habitat.

MS. TOWNE: So it's shrub steppe or whatever, bunch grass or whatever.

CHAIR LUCE: Thanks. I think we've worked our way pretty well through everything that Renewable Northwest offered; haven't we?

MR. FIKSDAL: I hope so.

CHAIR LUCE: We have, and we've discussed NESCO's. I believe we're going to have some written comments from Northwest Energy Coalition.

MR. IFIE: If you have any other written comments those would be scheduled for discussion when?

CHAIR LUCE: At the September meeting.

MS. TOWNE: There's the one from the minister in Sumas.

CHAIR LUCE: The minister?

MS. TOWNE: Kroguletz or something like that.

MS. MAKAROW: That is with respect to the air rules, and it's separate.

MR. FIKSDAL: It's next on the agenda.

CHAIR LUCE: Then we will really close this hearing, and we'll look for the Draft Concise Explanatory Statement, and we may have some more discussion about this on the 1st. It seems to me like that might be reasonable, particularly since comments are going to be closing on this Friday. So we may schedule, I think we should schedule, Allen, some more discussion on the comments that we receive. That will allow us to develop our record more.

MS. ADELSMAN: On the 7th.

CHAIR LUCE: On the 7th. That will allow us to develop our record more completely. Chuck will be here.

MS. ADELSMAN: That's a good idea.

CHAIR LUCE: He could give us his explanatory statement based on what he hears.

MS. ADELSMAN: Could we by then -- like Chuck is going to develop a response for all of the comments, and there was some -- could we maybe just have him highlight the four, five really key ones with the response, and we could just focus on those?

CHAIR LUCE: Chuck is raising his hand.

MR. CARELLI: Those four or five, actually eight written comments that I'm aware of so far that will be in the form of a table with the questions or the issue described in the left column, and the Council's response in the right column.

MS. ADELSMAN: I'm not talking about the letters, the four or five letters, but issues that are really high and important, and we could just focus on those.

MR. CARELLI: I gave Allen a copy of the issues from the Renewable Northwest Project table this morning. There are 32 issues I believe in that letter, and we will put a response for each of those, and I've already done that for the other five that I have received prior to today. Maybe just a forewarning that concise seems to imply short.

CHAIR LUCE: The responses may be short. It's an oxymoron.

MR. CARELLI: The document is probably pushing 150 to 175 pages.

MR. FIKSDAL: That's with attachments and everything; is that right?

MR. CARELLI: No.

MR. FIKSDAL: No, that's without attachments.

CHAIR LUCE: All right. So by September 7, we will have the written comments. We will have had a chance to review what you need to review. We will discuss the written comments. We'll have the court reporter here. Chuck will have given us his draft, so we will all be ready to do that. Then on September 20 by that time we will really be able to adopt hopefully the final action on these rules, and that way we'll save ourselves a lot of time, hopefully on September 20. Right? Agreed?

MR. IFIE: Agreed.

CHAIR LUCE: Is that a yesable proposition?

MR. IFIE: Yes, that sounds good at this time.

CHAIR LUCE: I'm going to hold you to it; that sounds good at this time, Tony.

ITEM NO. 4: EFSEC AIR PERMIT RULES

<i>Adopt (CR 103) Revisions to WAC 463-39</i>

<i>Irina Makarow, EFSEC</i>

CHAIR LUCE: The next hearing is actually not a hearing. The next item is an action item. EFSEC Air Permit Rules. We have before us four actions, rule making order, updating EFSEC's air rules for energy facilities, Chapter 463-39 WAC to be consistent with Ecology requirements for new source review, Prevention of Significant Deterioration air operating permit as agreed permit programs for air emissions. We are updating EFSEC's adoption of the Federal New Source Performance Standards and their clarifying agency procedures for permit application form, source registration, and penalties for consistency with Ecology regulations and state laws. Is that correct?

MS. MAKAROW: Correct.

CHAIR LUCE: Irina, you also have a Draft Concise Explanatory Statement which is concise. Do you want to report to the Council the status of this matter?

MS. MAKAROW: At the last Council meeting on August 2 you were provided this Draft Rule Making Order and the Concise Explanatory Statement with regard to the revisions being made to our air rules, WAC 463-39. As indicated in the statement we only received one comment from Reverend Wally Kroguletz, and it is summarized under Item No. 4, Page 2 of the Concise Explanatory Statement. He indicated and requested that EFSEC never approve a site for any future power plant in a valley surrounded by four thousand foot tall mountains as that failed SE2 plant. Such plants spread a dangerous pollution covering the narrow valley. The response to that comment is that the adoption of the proposed rule amendments will ensure the most up-to-date, applicable state and federal requirements are considered and implemented in EFSEC's permit issuance process for state and/or federally regulated air emissions. The regulations adopted will determine the level of review required for each individual permit application to ensure that project emissions are protective of all applicable state and federal standards and that therefore modification of the proposed rule amendments is not required as a result of the comment being made. So at this time, staff recommends that the Council adopt the revisions to WAC 463-39 that have gone through the whole public comment process, so that we can file this with the Code Reviser tomorrow, and the rule amendments would therefore become effective 30 days from tomorrow.

CHAIR LUCE: Thank you.

MS. TOWNE: Move the adoption.

MR. SWEENEY: Second.

CHAIR LUCE: Call for the question.

MS. ADELSMAN: I have a real quick question. CR 103 said June 2004. What's that?

MS. MAKAROW: This is a new form that the Code Reviser started using in June 2004.

MS. ADELSMAN: Oh, okay.

CHAIR LUCE: Call for the question. All in favor say aye.

COUNCILMEMBERS: Aye.

CHAIR LUCE: Let it be shown that the ayes were unanimous, and the rule was adopted or the rule will be adopted when published at the appropriate time frame.

MS. MAKAROW: It will be adopted once the Council Chair signs it.

CHAIR LUCE: Well, I think I'm leaving right now.

MS. TOWNE: Quit while you're ahead.

ITEM NO. 5: OTHER

CHAIR LUCE: Any other items of business to come before the Council?

MR. SWEENEY: Next week's meeting.

MR. FIKSDAL: There are two. At the last Council meeting we suggested the Council cancel the next meeting, the August 16th meeting, and the Council agreed, but the reason was because of the pending KV hearing. Due to your decision earlier today that changed. We still recommend that the Council cancel the meeting. We don't have any pressing action for the Council to take. It would give everybody a breather.

CHAIR LUCE: Motion?

MS. ADELSMAN: It's already canceled, so we just don't want to bring it alive.

MS. TOWNE: No, they never did it yet.

MS. ADELSMAN: Oh, they never did it.

MR. SWEENEY: I move that we cancel the next meeting.

CHAIR LUCE: All in favor say aye.

COUNCILMEMBERS: Aye.

CHAIR LUCE: The other thing is that it's not on the agenda but just a discussion of what we heard about the KV, the original public meeting was scheduled, I believe for the 19th of August. That's going to be delayed. No, it was the Supplement EIS.

MS. MAKAROW: Yes, Supplemental Draft EIS.

MR. FIKSDAL: Right.

MS. MAKAROW: Right now we still have a public meeting scheduled in Ellensburg for August 24 which is a Tuesday. We need to schedule a meeting for the Supplemental Draft EIS on the Kittitas Valley Project, and we are looking at two options. One is to schedule it for the 25th, and that way you could travel to Ellensburg on the 24th, stay there during the day, bring some work, go to the meeting, and come back or schedule it for the following week in which case you would be traveling back and forth each of the weeks.

MR. FIKSDAL: If you were to stay for the day, you would have a day in Ellensburg where you have to occupy yourself because the meeting is for the 24th, the evening of the 24th for Wild Horse, then the next meeting if you scheduled for the 25th would be the evening of the 25th.

MS. ADELSMAN: I have a conflict that day.

MR. FIKSDAL: So even though you would be traveling you would have a day to do something. We tried to coordinate a site tour for the Columbia Generating Station. That fell through unfortunately, so it's up to you to decide when you want to do that.

CHAIR LUCE: So on the 24th we just chill for the day?

MR. FIKSDAL: The day of the 25th.

CHAIR LUCE: Okay. We have a meeting on the evening of the 24th, and then on the 25th we would just be there during the day, do whatever, study, bring our Supplemental EIS and read them, and then we have a meeting on the 25th, the evening of the 25th.

MR. FIKSDAL: Then the option is to have that on the 25th, so that is for the Kittitas Valley.

MS. TOWNE: Has the Wild Horse already been announced?

MS. MAKAROW: Yes.

MS. TOWNE: How about if Hedia has a conflict on the 25th, my suggestion would be do the Kittitas Draft Supplemental on Monday the 23rd evening and then the next day reading the Wild Horse EIS and be ready for the hearing at four o'clock or whatever and not do it at 7:00, do it at 4:00 or 5:00 when people are out of work.

MR. FIKSDAL: I don't have an issue with that. I think we would have to check with the County.

MS. MAKAROW: My recollection is that the County already had some kind of evening event planned on the 23rd.

MR. SWEENEY: Like the County Council meeting.

MS. MAKAROW: Something like that, yes.

MS. ADELSMAN: If not, I just have to go through all the records I suppose.

MR. FIKSDAL: So the option for you is do you want to do it on the 25th or do you want to wait a week and come back?

MS. TOWNE: No, that's dumb. Well, if we get through it fast enough, we can drive home that night.

MR. SWEENEY: I have a conflict the 30th through the 1st.

MR. FIKSDAL: It's up to you.

MS. TOWNE: One travel, one motel room, and we'll schedule it early on the evening of the 25th, five o'clock or six o'clock, and be out of there at 8:00, 8:30 and go home.

MS. ADELSMAN: The alternative for me is I have to drive after Wild Horse, so is Wild Horse what time, 7:00?

MS. MAKAROW: 7:00, correct.

MR. FIKSDAL: And that will probably be done by 9:00. Figure about two hours.

MS. ADELSMAN: Yes. Either that or I will skip Wild Horse and come the next day because I don't know if I could drive at night. My conflict is in the morning of the 25th, not in the afternoon or the evening. So maybe I will just have to work around that.

MR. FIKSDAL: So it appears that the evening of the 25th is acceptable to most Councilmembers.

MS. TOWNE: For the Kittitas supplement.

MR. FIKSDAL: For the Kittitas Supplemental Public Meeting starting at about six o'clock in the evening.

MR. SWEENEY: Sounds good to me.

MR. IFIE: Fine with me as well.

MR. SWEENEY: And staying the night that night.

MR. FIKSDAL: It would be your option. I guess we haven't thought about past the meeting whether on the evening of the 25th we drive home or stay again.

MS. TOWNE: I'd drive home.

MR. FIKSDAL: You're closer. Depends on what time we get done, but I'm assuming we would just assume drive back after that meeting.

MR. SWEENEY: Yes, absolutely.

CHAIR LUCE: I don't know how far it is from Vancouver.

MR. FIKSDAL: You're special. You don't count.

CHAIR LUCE: That's true. After three years I've finally learned that I don't count.

MR. FIKSDAL: In our configuring.

CHAIR LUCE: It's been a steep learning curve, but I finally got it.

ITEM NO. 6: ADJOURN

CHAIR LUCE: Meeting is adjourned.

(Whereupon, Council meeting adjourned at 3:11 p.m.)