



STATE OF WASHINGTON

ENERGY FACILITY SITE EVALUATION COUNCIL

PO Box 43172 • Olympia, Washington 98504-3172

June 12, 2007 Special Meeting Minutes

1. CALL TO ORDER

Chair Jim Luce called the June 12, 2007 special SB 6001 meeting to order at 925 Plum Street S.E., Building 4, Room 308, at 10:01 a.m.

2. ROLL CALL

Council members present were:

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| Jim Luce | EFSEC Chair |
| Dick Fryhling | Community, Trade & Economic Development |
| Jeff Tayer | Department of Fish and Wildlife |
| Judy Wilson | Department of Natural Resources |
| Tim Sweeney | Utilities and Transportation Commission |
| Patti Johnson | Kittitas County Representative |
| Vern Eaton | Cowlitz County Representative |
| Justin Erickson | City of Kalama Representative |
| Hedia Adelsman (Excused) | Department of Ecology |

Staff in attendance were:

Allen Fiksdal – EFSEC Manager, Mike Mills – Compliance Manager, Stephen Posner, - EFS Specialist, Kyle Crews – Assistant Attorney General, Tammy Talburt – Administrative Secretary

Guests in attendance were:

Tom Krueger - Energy Northwest, Merley McCall – Department of Ecology, Alan Newman – Department of Ecology, Charlene Andrade - Department of Fish and Wildlife, Danielle Dixon – Northwest Energy Coalition, Carrie Dolwick – Northwest Energy Coalition, Kim Drury – Climate Solutions, Judith Hillis – Golder Associates, Stacey Waterman-Hoey – Community, Trade and Economic Development, Liz Thomas - Kirkpatrick & Lockhart Preston Gates Ellis LLP

Guests attending via phone:

Michael Tribble – Counsel for the Environment, Brent Vanderheuveel – The Columbia River keepers, Nancy Holbrook – Snohomish PUD, Kevin Bell – Convergence Research, Irina Makarow - HDR Engineering

3. PURPOSE OF SPECIAL MEETING

Chair Luce explained the purpose of the meeting was to have a discussion of Engrossed Substitute Senate Bill (ESSB) 6001, a law pertaining to climate change and greenhouse gases emissions, and its relationship to Energy Northwest's Pacific Mountain Energy Center (PMEC) project. He summarized the parts of the law that affect EFSEC.

Section 1 - Is the legislative finding.

Section 1 (e) - Refers to greenhouse gas emissions standards to work in unison with the state carbon dioxide mitigation policy and its related rules for fossil fuel thermal electric generation.

Note: EFSEC's Assistant Attorney General Kyle Crews pointed out the words "in unison" are not defined anywhere and probably should be defined for clarity.

Section 5 sub (1)(a) – Sets a performance standard of 1100 lbs. a megawatt hour for greenhouse gases or average available greenhouses gas emissions output as determined by section 7. Chair Luce noted, that CTED will be monitoring the emissions standards every five years and may be adjusting the standards accordingly. In addition, this section states that everything that exists today is grandfathered in terms of base load thermal generation. All renewables are deemed to be in compliance with the standard.

Section 5 sub (4) – Concerns cogeneration facilities. No cogeneration facilities are pending before EFSEC.

Section 5 sub (6) – The Department of Ecology is to establish an output-based methodology and Ecology and EFSEC, will jointly conduct rulemaking that needs to be completed by June 30, 2008.

Section 5 sub (11) – Lays out the criteria for adopting the rules. Section 5 sub (11) and sub (13) are distinguished as two different arenas, one is prospective in terms of future applications, and section 5 sub (13) addresses those applications that are pending of which there is only one. Mr. Crews noted that if a project is in the application pipeline, the project could move forward if it meets certain requirements. He also noted that there does not seem to be a need for a set of rules for this one instance. Mr. Crews said that the requirements seem to be that there needs to be: 1) a carbon sequestration plan, 2) an explanation for reasons for sequestering in the manner in which it chooses, 3) why the system was chosen rather than the geological or other sequestration method, and 4) a persuasive argument that the greenhouse gas reductions are variable.

Mr. Fiksdal asked why Energy Northwest doesn't need to wait for rule making. Mr. Crews stated this ruling making is general versus specific. Mr. Crews noted that EFSEC is under its statutory mandate of 12 months for getting out the decision on this specific case [PMEC] and the rule making won't be completed until 2008. Since it is a specific case, there is the argument that it won't affect anything else, so it wouldn't be general rule making.

Chair Luce commented that the other factor is that there are parts of ESSB 6001 that are not well written. Council member Judy Wilson asked if the project in the pipeline follows the current rules, and when the project is done, and the rules are done, will the project not follow those newer rules? Chair Luce stated that you can argue no, because there are two different tracks contained in this law for meeting CO₂ obligations. He wondered what would happen if a plan is accepted by EFSEC and a plan

approved under 5(11) is greater, what would be the effect of a binding contract like an SCA between the certificate holder and the state in relation to this law?

Mr. Kevin Bell wondered who makes that determination for what is required, or does EFSEC just decide which rule is going to apply? Mr. Bell commented that EFSEC could arbitrarily decide that 5(13) is applicable and issue a site permit and there is nothing anyone can do about it.

Ms. Liz Thomas representing P MEC, said Senate Bill 6001 is far reaching. She understood that it was drafted rapidly and like many statutes, it isn't quite as clear as you might want it to be. She noted Energy Northwest has spent a great deal of time trying to understand precisely what is required under the statute. She said that Energy Northwest is developing a detailed plan that they think will satisfy ESSB 6001. They question whether rule making is necessary. Ms. Thomas noted that this isn't the first time that an agency has had to apply a statute in advance of the time of when it would apply. She said there is nothing in ESSB 6001 that indicates the legislature intended rule making to be complete prior to the time P MEC permitting is done. Subsection 5(13) says a project under consideration by the Council, is required to include the requirements of subsection 11 in its carbon sequestration plan. She felt that the legislature was aware of the 12 month permitting clock and used this language to say P MEC is on a schedule that's going to require completion of its permitting in advance of the time when EFSEC and Ecology have completed rule making. She noted that P MEC has included the substantive requirements of subsection 5(11) in its plan. To her, the legislature understood that P MEC is going to be out in front but it's going to have to meet those substantive requirements even though the rules won't have been completed.

Ms. Thomas noted Mr. Crew's comment that the key to determining if you need rule making is whether you are developing a rule of general applicability. She stated that the general theory is that if an agency is going to adopt a rule to apply to everyone, then those affected by that rule should have a chance to have some input in the rule. She indicated that was not the situation here. P MEC is the only one that falls under subsection 5(13) and EFSEC doesn't need to engage in a rule making for that because it will be just be duplicating the efforts that it is going to undertake during the adjudicative process. She noted that in the adjudicative process there will be discussion about what is the appropriate way to meet the substantive requirements of subsection 5(11). She added that P MEC has certain options available to it, but the mitigation option that is available under subsection 5 (13) is only available to P MEC.

Kevin Bell noted that in the words of Condoleezza Rice, "absence of evidence is not evidence of absence". He asked Ms. Thomas if when she talked to legislators and staff, whether those conversations indicated that the legislature intended to allow P MEC to proceed under the old rules.

Liz Thomas stated no and no. Energy Northwest agrees that ESSB 6001 applies to P MEC, however Energy Northwest feels that formal rule making is not prerequisite to EFSEC's application of the statute to P MEC.

Brett Vanderhevel representing Columbia River keepers asked Ms. Thomas that if subsection 13 includes all the requirements of subsection 11, whether she felt that if the first part of subsection 11 doesn't apply, then only the latter half of subsection 11 applies?

Ms. Thomas responded yes, because subsection 13 says a project is required to meet the requirements of subsection 11 and a project can't do rule making because that's a task for the agency. Therefore, the best reading of that is the substantive elements of subsection 11 apply.

Council member Jeff Tayer of Department of Fish and Wildlife addressed Ms. Thomas stating that it would be clearer if the law said what exactly all substantive issues should be, but it doesn't, so he wondered how do you get to the substantive parts?

Ms. Thomas replied that Energy Northwest's opinion of rule making is that if the legislature wanted to say the P MEC project can't go forward until rule making is complete they could have said that, and they could have amended the EFSEC time clock. She noted the legislators could have put something in like "notwithstanding the 12 month period called for under Chapter 80.50 RCW." She agrees it's ambiguous.

Ms Thomas stated the substantive requirements under subsection 5(13) is a unique provision of the statute. Under that section, P MEC has to submit a carbon sequestration plan that includes provision for geologic or other approved sequestration beginning within five (5) years of plant operation. Rules adopted to implement Section 5 shall include: a provision for monitoring the effectiveness of the sequestration plan; a provision to purchase emission reductions if the sequestration plan fails to operate as contemplated; provisions for financial assurances; penalties for failure to achieve implementation; and provisions for public notice and comment. She noted the requirements for public notice and comment will be fully covered by the usual EFSEC process. She said that Energy Northwest's plan will be subject to the adjudicative process, which will include prefiled testimony subject to review. Interveners and the public will have an opportunity to respond to the submittal and cross-examine the witnesses providing many opportunities in the existing EFSEC framework for comment on the plan.

Ms. Thomas said that Energy Northwest understands that it needs to make a good faith effort to implement the sequestration plan and if the sequestration plan isn't feasible under subsection 5(13) they have some opportunities that are not available to applications filed after the effective date of the statute, to provide certain mitigation. She noted that if the sequestration plan is not feasible, Energy Northwest needs to document that with the Council as a demonstration of what has been done to try to implement the plan. Energy Northwest will also have to document any technological and economic barriers. Then they have to provide notice to the Council that they intend to implement the provision that would require purchase of verifiable greenhouse gas emission reductions from an electric generating facility in the western interconnection.

Kevin Bell asked if there was anyone who actually believed there would be a viable sequestration plan at that location.

Ms. Thomas stated that sequestration is a challenge, it is a technological challenge and it is a regulatory challenge.

Brett Vanderheuvell representing Columbia River keepers stated that from a technical standpoint, the last place you would be a sequestration facility is on the Columbia River at Kalama and he felt it's not a serious proposal.

Chair Luce stated that Mr. Vanderheuvell's comment was interesting but that the discussion was not about where you would put it, but what the required elements of the sequestration plan are. Ms. Thomas stated that they would be happy to talk about the details of the plan once it's completed and everyone can take a look at it. Chair Luce asked for some details on when the plan will be available. Ms. Thomas said they will be meeting with the Energy Northwest board next week and then it would be submitted on their approval. Ms. Thomas said that they are going to recognize that there are

technical and regulatory uncertainties and they were going to include a tiered or phased plan that deals with some of these split ends.

Chair Luce stated that initially the proposal made by PMEC to the Council, showed hardware or machinery that would be put in with the plant when it was first constructed that would allow geological sequestration and asked if it was still in the plan. Mr. Krueger from Energy Northwest stated that it was still in the plan.

Ms. Thomas said that they have done some thinking about how to interpret the provisions of subsection 5(13) relating to the purchase verifiable greenhouse gas emission reductions from a generating facility in the western interconnection. She said that there are a number of plants, actually over a 1000 fossil fuel plants in the western interconnection, and they have evaluated what sorts of contractual arrangements with them would satisfy ESSB 6001. Energy Northwest believes that they could contract with an operating or permitted plant to impose operating restrictions or to implement process changes that would result in verifiably lower greenhouse gas emissions. They also think that they could contract to implement products that would result in verifiable greenhouse gas emissions reductions.

Chair Luce wanted to know if the plan will address where the reduction would not have otherwise occurred. Ms. Thomas stated that it would.

Council member Jeff Tayer noted that in subsection 5(13) the legislature seemed to be making a policy in terms of a special case for projects during the period of rule making, and he was wondering why this subsection exists, and if there might not be a different alternative for the reasoning behind why the subsection exists.

Chair Luce explained the legislative history of ESSB 6001 was a very dynamic process and he believes that it was a policy decision by the legislature on how to address the pending application before EFSEC at the time.

Council member Tim Sweeney stated that he believes there are at least two parts to subsection 13. The first is the submission of the plan and second is some later demonstration that the project made a good faith effort to implement the plan. He wondered what the standard proof was for a viable plan so that EFSEC would know it was looking at a viable plan before having to determine whether there was a good faith effort to implement the plan..

Ms. Thomas stated that she had not thought of it in that framework but it is a helpful framework to use. One of the difficulties is that the sequestration does not actually have to start until 5 years after operation. That gives Energy Northwest some time to take it on faith that the technical and regulatory frameworks are going to catch up. Energy Northwest is going to have to be making some of those kinds of assumptions in their plan.

Council member Sweeney stated that he was glad to hear Ms. Thomas mention the 5 years, because under the statute one might think that everything happens at once, but it really doesn't.

Chair Luce commented that with respect to sequestration, he's been in contact with Battelle Labs in the Tri-Cities, and they are doing state-of-the-art research with respect to geological sequestration. They also have invited EFSEC over for a presentation of their research.

Ms. Thomas commented on what it means to be in unison with Chapter 80.70 RCW, and how to harmonize the two. She noted that Chapter 80.70 RCW requires mitigation of 20% of a generating facility's total carbon dioxide emissions - defined as the amount of carbon dioxide emitted over three (3) years based on maximum generating capacity. There is a calculation that is done under Chapter 80.70 RCW and then that portion of emission needs to be mitigated. The language in ESSB 6001 says it works in unison with Chapter 80.70 RCW and says that Chapter 80.70 RCW isn't meaningless, but remains in force and it is not superseded by ESSB 6001. She felt that in the case of P MEC, any emissions that are sequestered or mitigated do not count for meeting the performance standard under ESSB 6001. She noted that Chapter 80.70 RCW might seem to require Energy Northwest to sequester or mitigate some of its emissions twice, first to meet the performance standard and then again to meet Chapter 80.70 requirements for 20% mitigation. But it seemed to her that it is double counting and it's punitive by making Energy Northwest first eliminate the impact by sequestering, and then second, mitigating for 20% of the impact that has already been eliminated. She didn't think that is what the legislature intended. She felt that Energy Northwest is required to first sequester and eliminate, and second to mitigate. It's either one or the other.

Chair Luce clarified that if impacts are eliminated there is nothing to mitigate. He noted that EFSEC will be contracting with Ecology to review the plan that is submitted by P MEC.

Chair Luce asked members of the public to speak.

Danielle Dixon representing the Northwest Energy Coalition stated that in her view the law is pretty clear and that subsection 5 (12)(b) sets the line: "that EFSEC shall contract for review of sequestration or the carbon sequestration plan with the department consistent with the conditions under (a) of this subsection, consider the adequacy of sequestration or the plan in its adjudicative proceedings and incorporate specific findings regarding adequacy in its recommendation to the governor." It seemed very clear from her perspective that it would be done before any recommendation went forward.

Ms. Dixon said the Northwest Energy Coalition was one of the leading stakeholders in the negotiation of this bill and worked very closely with the prime sponsor, Senator Pridemore, with members of the House and Senate, and with other stakeholders. She said that ESSB 6001 was modeled after the similar standard that was enacted in California in the fall of 2006, and it applies to a new utility long-term financial commitment, as well as to all new base load power plants that commence operation in Washington after June 30, 2008.

Ms. Dixon noted it's important to recognize up front, that unlike the CO₂ mitigation standard in Chapter 80.70 RCW, mitigation and offsets can not be used to meet the emissions performance standard. That was a critical component of the performance standard in that aspect of the law. The emissions performance standard is a technology performance standard that is designed to limit the amount of CO₂ released into the atmosphere as a result of major new investments in power plants. She said the best way to fight emissions is to prevent them in the first place, rather than to try to deal with them after they have occurred. She said that this law is basically about preventing digging the hole any deeper on climate changing emissions. She noted that the concept of how this works in unison with Chapter 80.70 RCW is a critical one and one that was subject to plenty of discussion particularly on the House side during the debates on this bill. Her understanding of the intent of this legislation is that the two of these pieces of statute actually do work together. Sequestration by an IGCC facility would allow it to meet the 1100 lbs per megawatt hour emissions performance standard. Then in addition to that, they would mitigate the additional 20% of the emissions. Only in the case where an IGCC facility is actually fully sequestering all of its CO₂ emissions, would it make sense to say that Chapter 80.70

RCW no longer applies because there are no mitigating emissions. Otherwise, the intent here was to have the 1100 lbs per megawatt hour standard and then do the additional mitigation to offset another 20%.

Council member Sweeney asked Ms. Dixon if the unsequestered portion must be mitigated.

Ms. Dixon said yes. The sequestered emissions don't actually count as emissions anymore and so when you read Chapter 80.70 RCW the mitigation is on the actual emissions. She felt the law is also clear so that a facility that proposes to meet the emissions performance standard by sequestering CO₂ emissions must provide substantial technical documentation, as well as financial assurances, that the sequestration will be safe, that it will be reliable, and it will be permanent. The plant is given 5 years to implement the sequestration plan and if they haven't done so in that time period then they face financial penalties. She felt the law specifically sets out that financial assurance must be sufficient to ensure successful implementation of the present sequestration plan, including construction and operation of the necessary equipment and any other significant costs. There must be full and sufficient technical documentation to support the plan, and there must also be provisions for monitoring the plan's effectiveness. Rules that are adopted by EFSEC and Ecology must include penalties for failure to implement the plan on schedule. She noted that Section 5(13) specifies that a power plant already in the permitting process must comply with all the provisions developing, submitting and implementing a technically and financially sound sequestration plan. The developer must make that "good faith effort" to implement the sequestration plan. In addition, if the sequestration plan fails, the developer must have evidence of the barriers to implementation and must submit those to EFSEC. Then the developer is given the option to meet the emissions performance standard as Ms. Thomas noted by paying to verifiably reduce an equivalent amount of emissions from another power plant that is in the western interconnection. That emissions reduction must be in addition to what would have otherwise occurred.

Ms. Dixon noted that it's important to recognize also that the law is specific that the sum of the emissions reduction must meet the emissions performance standard for the entire life of the facility. She felt it is critical to recognize that this provision for plans already in the permitting process is not intended to be an alternative compliance requirement for this facility. She thinks the law is very clear that the facilities that are already in the permitting process must submit a valid, detailed, financially sound sequestration plan and it must make every effort to implement that plan. If that fails, the developer has a very specific and narrow backstop option available. They can purchase emissions reductions from another power plant, that also have to be verifiable, and they have to be additional. She felt it is also critical to recognize in the discussion that has been happening about whether or not rule making needs to occur before the PMEC facility can move forward, that if EFSEC does move forward with addressing the carbon sequestration plan provisions for the PMEC facility separate from the rule making, there will be an affect on the rule making. She said that these two things will be happening simultaneously, and that what ESFEC decides in the PMEC process will set a precedent and will have an impact on rule making. Ms. Dixon noted ESSB 6001 relies on EFSEC and Ecology to develop strong rules, for implementing and enforcing the emissions performance standards. Those rules need to include specific criteria for evaluating carbon sequestration plans as well as the penalties for failure to achieve the plans on schedule. EFSEC and Ecology are in a position of determining whether the plans that are submitted are adequate, and they are in the position of enforcing the emissions performance standard and enforcing those plans. She noted that there is certainly, as always, a lot of responsibility on the agencies for implementing ESSB 6001, and that all those at this meeting need to ensure that this law does indeed result in reducing our CO₂ emissions and helping to stop us from digging the hole any further on climate change.

Council member Wilson asked Ms. Dixon how many sequestration plans there are.

Ms. Dixon stated that she wasn't aware of any, but there are efforts going on by the Big Sky group to look at pilot projects for permanent geological sequestration and they are looking at them in the northwest.

Mr. Alan Newman representing the Department of Ecology stated that the PMEC plan is the only plan intended to sequester CO₂, however there are others related to enhance oil and gas recovery in other parts of the country.

Council member Tayer asked Ms. Dixon what the mitigation must be in addition to.

Ms. Dixon said that technically it's not mitigation, it's an offset. She continued that they have to be verifiable and that Energy Northwest has to be able to demonstrate that the emissions are additional, additional in the sense that it needs to be something separate from what would have otherwise occurred. Therefore, if PMEC were going out contracting with one of the thousand other fossil fuel power plants in the region they would have to demonstrate that that power plant wasn't already going to make those changes to achieve an emissions reduction.

Chair Luce asked Ms. Dixon whether she or anyone else is aware of legislative history that supports the argument that work in unison with Chapter 80.70 RCW means that after you are meeting the responsibilities of subsection 5(13) and other substantive provisions, that you then also have to mitigate an additional 20%.

Ms. Dixon stated that unfortunately the final bill doesn't clearly address that interpretation.

Chair Luce stated that it is an important issue.

Mr. Mike Tribble, Counsel for the Environment, stated that he is in agreement with everyone about the procedural part of the process, but there are still plenty of questions to be asked and answered as far as what some of the substantive requirements will be.

Kim Furry representing Climate Solutions wanted to reiterate his understanding and recollection of the dynamic discussions that went on regarding the relationship with existing laws and ESSB 6001. His understanding is a project needs to both meet the intent of ESSB 6001 and reach the level 1100 lbs of CO₂ per megawatt hours and then meet Chapter 80.70 RCW to offset performance emissions standards.

Mr. Vanderhevel noted that Ms. Dixon summed up the River keeper's position pretty well. He wanted to reiterate that the Legislature provided very clear mandates for both EFSEC and Ecology for this process, and he didn't see how PMEC can go forward without rule making and without some sort of formal process to ensure that all the substantive requirements of subsection 11 are met. He noted that Ms. Thomas's suggestion that rule making would not apply to PMEC was a new interpretation of the legislation that seemed to have no basis in the actual language in the statute. He noted the sequestration plan is obviously a major component of the PMEC project, perhaps the major component, under consideration right now, and wondered how it would be handled during the SEPA process and whether SEPA is going to be reopened, whether is there going to be a supplemental EIS that comes out, that involves just the sequestration plan.

Mr. Fiksdal stated that he didn't know yet what was needed as EFSEC hasn't seen the sequestration plan. He said he'll have to wait and see if there are substantive environmental issues brought up by the sequestration plan that would require a supplemental DEIS.

Mr. Tribble commented that the very nature of ESSB 6001 and it's demands of what the sequestration plans entails, as well as any offsetting mitigation, should actually be part of the current DEIS, and it may render the current DEIS premature. He wondered how EFSEC could imagine not having a supplemental DEIS or whether or not there would be some other document that would satisfy it.

Mr. Fiksdal replied, "We'll have to look at the plan first."

Chair Luce stated there are very important issues in the Draft EIS as it is written, there is no doubt that the carbon sequestration plan is a very critical part of this application and it's probably just best to withhold any final determination with respect to whether a supplemental is required until we see the carbon sequestration plan.

Mr. Vanderheugel expressed concern over how he could comment on the environmental impacts of emissions if he doesn't know whether there's going to be sequestration or not. He was concerned that he might lose the legal rights if he didn't comment on the draft EIS. Mr. Vanderheugel stated that he is concerned that Energy Northwest has 5 years to implement sequestration and that technology is going to change in the future. He felt the statute makes it clear that EFSEC must make substantive assurances now that the sequestration is going to happen and that it shouldn't be based on any future changes, or plans or future hopes that sequestration might someday become available. The assurances in the statute require EFSEC to look at that and make those assurances today.

Chair Luce stated that this will be an ongoing discussion, and at the appropriate time our Assistant Attorney General will give EFSEC legal opinions with respect to what is required and that will happen as part of the adjudicative process in normal attorney-client relationship.

Chair Luce closed the meeting by noting that the Draft EIS comments are due tomorrow.

7. ADJOURN

The meeting was adjourned at 11:05 am.