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**ENERGY FACILITY SITE EVALUATION COUNCIL
STATE OF WASHINGTON**

In the Matter of Application
No. 2006-01:

Application No. 2006-01

ENERGY NORTHWEST

**STATE PARTIES' OPENING BRIEF
ON ESSB 6001 ISSUES**

PACIFIC MOUNTAIN
ENERGY CENTER

I. INTRODUCTION

The State of Washington, Department of Ecology (Ecology), Department of Community, Trade and Economic Development (CTED), and Counsel for the Environment (CFE) (collectively "State Parties") submit this brief in response to the Energy Facility Siting Evaluation Council's (EFSEC or Council) questions pertaining to ESSB 6001. The State Parties respectfully request that the Council reject Energy Northwest's Greenhouse Gas Reduction Plan (GGRP or Plan) as incomplete and stay further proceedings until Energy Northwest submits a plan or plans that comply with Chapters 80.70 and 80.80 RCW.

A. Description of the Parties Presenting Brief

1. Department of Ecology

Under RCW 43.21A.020, the Ecology is the state agency charged with the management and development of the air and water resources of the state in an orderly, efficient, and effective manner and to carry out a coordinated program of pollution control involving these

1 and related land resources. Under ESSB 6001,¹ Ecology is charged with adopting rules in
2 coordination with EFSEC for the purpose of implementing the greenhouse gases (GHGs)
3 emissions performance standard created by that law. RCW 80.80.040(10), (11). Ecology is
4 also charged with reviewing any sequestration plan that is developed by a facility in order to
5 comply with the performance standard. RCW 80.80.040(12).

6 **2. Department of Community, Trade and Economic Development**

7 CTED serves as the official state agency responsible for coordinating implementation
8 of the state's energy strategy. RCW 43.21F.045(2)(g). CTED supervises and administers
9 energy related activities and advises the Governor and the Legislature with respect to energy
10 matters affecting the state. RCW 43.21F.045(1).

11 The Legislature has declared that it is the continuing purpose of state government to
12 foster wise and efficient energy use and to promote energy self-sufficiency through the use of
13 indigenous and renewable energy resources consistent with the promotion of reliable energy
14 resources, the general welfare, and the protection of environmental quality. RCW 43.21F.010.
15 It is the policy of the state of Washington that the development and use of energy resources
16 shall be consistent with the statutory environmental policies of the state. RCW 43.21F.015(3).

17 CTED is often assigned responsibilities pertaining to implementation of Washington's
18 energy policies and initiatives. The Energy Policy Division of CTED is responsible for
19 establishing the average available GHGs emissions output allowable under RCW
20 80.80.040(1)(b) and to update this standard every five years. RCW 80.50.050.

21 CTED and Ecology serve as co-chairs of Washington's Climate Change Challenge
22 Program created by Governor Gregoire in Executive Order 07-02 and incorporated in Sections
23 403 and 404 of Chapter 348, Laws of 2007. The Executive Order directs the agencies to
24 develop strategies to achieve the GHG targets in the Executive Order and law.

25 _____
26 ¹ ESSB 6001 (Laws of 2007, ch. 307) is now codified in RCW 80.80. Citations to ESSB 6001 in this
brief shall be to the codified version.

1
2 **3. Counsel for the Environment**

3 CFE is an Assistant Attorney General who serves as an independent party directed by
4 statute to “represent the public and its interest in protecting the quality of the environment” in
5 administrative hearings before EFSEC. RCW 80.50.080. The role of CFE in the overall
6 review of an application for site certification is to solicit public input, provide general
7 information concerning the EFSEC process, help citizens inform EFSEC of their concerns, and
8 participate in the review process. An essential part of the application review process is to
9 ensure that the application, and the adjudicative proceeding, comply with all applicable laws
10 and regulations.

11 **B. ESSB 6001 (RCW 80.80)**

12 **1. Climate change/global warming**

13 “[W]hen carbon dioxide is released into the atmosphere, it acts like the ceiling of a
14 greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a
15 species-the most important species-of a ‘greenhouse gas.’” *Massachusetts v. E.P.A.*, ___
16 U.S.___, 127 S. Ct. 1438, 1446, 167 L. Ed. 2d 248 (2007). This phenomenon is commonly
17 referred to as “global warming” or “climate change.” As a party in *Massachusetts*, in its
18 Petition for Certiorari to the United States Supreme Court, the State of Washington joined
19 several other states in characterizing global warming as “the most pressing environmental
20 challenge of our time.” *Massachusetts*, 127 S. Ct. at 1446.

21 “The harms associated with climate change are serious and well recognized.”
22 *Massachusetts*, 127 S. Ct. at 1455. Our Legislature identified some of these harms in RCW
23 80.80:

24 Washington is especially vulnerable to climate change because of the
25 state’s dependence on snow pack for summer stream flows and because the
26 expected rise in sea levels threatens our coastal communities. Extreme weather,
a warming Pacific Northwest, reduced snow pack, and sea level rise are four
major ways that climate change is disrupting Washington’s economy,
environment, and communities

1
2 RCW 80.80.005(1)(a).

3 However, our state is actively working to protect the citizens from the threat of climate
4 change:

5 Washington has been a leader in actions to slow the increase of
6 greenhouse gases² emissions, such as being the first state in the nation to adopt
7 a carbon dioxide mitigation program for new thermal electric plants, mandating
8 integrated resource planning for electric utilities to include life-cycle costs of
carbon dioxide emissions, adopting clean car standards and stronger appliance
energy efficiency standards, increasing production and use of renewable liquid
fuels, and increasing renewable energy sources by electric utilities

9 RCW 80.80.005(1)(d).

10 While recognizing that these actions are significant, the Legislature declared a
11 continuing need to work to limit climate change:

12 [T]here is a need to assess the trend of greenhouse gases emissions statewide
13 over the next several decades, and to take sufficient actions so that Washington
14 meets its responsibility to contribute to the global actions needed to reduce the
impacts and the pace of global warming

15 RCW 80.80.005(1)(f). Although the Legislature identified a need to work comprehensively
16 with the Governor and climate change stakeholder groups over time, it specifically mandated
17 “immediate actions in the electric generation sector for the reduction of greenhouse gas
18 emissions.” RCW 80.80.005(3). To that end, the Legislature found as follows:

19 To the extent energy efficiency and renewable resources are unable to
20 satisfy increasing energy and capacity needs, the state will rely on clean and
21 efficient fossil fuel-fired generation and will encourage the development of
cost-effective, highly efficient, and environmentally sound supply resources to
provide reliability and consistency with the state’s energy priorities

22 It is vital to ensure all electric utilities internalize the significant and
23 underrecognized cost of emissions and to reduce Washington consumers’
exposure to costs associated with future regulation of these emissions

24 RCW 80.80.005(4)(a), (b).

25
26 ² “Greenhouse gases’ includes carbon dioxide, methane, nitrous oxide, hydrofluorocarbons,
perfluorocarbons, and sulfur hexafluoride.” RCW 80.80.010(14).

1 The policy for the state, as expressed in RCW 80.80, is to address energy and energy
2 capacity needs through efficiency and renewable resources. RCW 80.80.005(4)(a). The state
3 may resort to clean technologies for fossil fuel generation if the state's need for electricity
4 cannot be addressed through energy efficiency and renewable resources. RCW
5 80.80.005(4)(a). Ultimately, if fossil fuel generation is deemed necessary, the electric utilities
6 are to internalize the cost associated with emissions. RCW 80.80.005(4)(b).

7 **2. The goal of RCW 80.80 is climate stabilization by 2050**

8 To implement the policy of the state identified in RCW 80.80, the Legislature
9 enumerated clear, identifiable goals for greenhouse gas reduction:

10 (a) By 2020, reduce overall greenhouse gases emissions in the state
11 to 1990 levels;

12 (b) By 2035, reduce overall greenhouse gases emissions in the state
13 to twenty-five percent below 1990 levels; [and]

14 (c) By 2050, the state will do its part to reach global climate
15 stabilization levels by reducing overall emissions to fifty percent below 1990
16 levels, or seventy percent below the state's expected emissions that year

17 RCW 80.80.020(1)(a)-(c).

18 To accomplish the graduated goal of climate stabilization by 2050, the Legislature
19 tasked the Governor with studying several areas and making recommendations for a
20 comprehensive approach to GHG reduction. RCW 80.80.030(1). In addition to the resulting
21 approach to be taken after this study and recommendation, the Legislature implemented a
22 GHGs emissions performance standard, in effect right now, of 1,100 pounds of GHGs per
23 mega-watt hour (MWh).³ The performance standard applies to all baseload electric generation
24 sources that commence operation after June 30, 2008, and all existing baseload electric
25 generation sources that enter into long-term financial commitments after June 30, 2008.⁴

26 ³ This 1,100 lbs./MWh standard is likely to become more stringent as of July 1, 2012. Pursuant to
RCW 80.80.040(1)(b) and RCW 80.80.050, the performance standard will be reduced to the average available
GHGs output of new combined-cycle natural gas thermal electric generation turbines commercially available in
the United States. Energy Northwest has opined that the current commercially available turbines it will use in
PMEC would emit 800-900 lbs./MWh. See PMEC Greenhouse Gas Reduction Plan, § IV.B.

⁴ "Long-term financial commitment" is defined in RCW 80.80.010(15).

1 RCW 80.80.040(1), (2), .060-.070. For perspective on this performance standard, Energy
2 Northwest has predicted that the Pacific Mountain Energy Center (PMEC) would produce
3 approximately 1,500-1,700 lbs./MWh from burning coal or petroleum coke. See PMEC
4 Greenhouse Gas Reduction Plan, § IV.B.

5 **3. PMEC's responsibilities under RCW 80.80**

6 **a. PMEC must comply with the GHG emissions performance**
7 **standard.**

8 Baseload generation power plants with emissions above the performance standard (as
9 PMEC is expected to be) must reduce their counted emissions in one of three ways: inject them
10 permanently into geological formations (geological sequestration); permanently sequester them
11 by some other means approved by the Department of Ecology; or sequester or mitigate them
12 "as approved under subsection (13) [of RCW 80.80.040]." RCW 80.80.040(7)(a)-(c). The
13 third option is a specific option designed for the PMEC as the only "project under
14 consideration by the energy facility site evaluation council by July 22, 2007...."
15 RCW 80.80.040(13).

16 **b. The recipe for PMEC compliance with the GHG emissions**
17 **performance standard under RCW 80.80.040(13).**

18 EFSEC is charged with the duty of evaluating the PMEC application for site
19 certification, holding an administrative hearing under the Washington Administrative
20 Procedure Act (RCW 34.05), and making a recommendation for or against approval of the
21 project to the Governor. As a new part of this process since the enactment of RCW 80.80,
22 Energy Northwest must submit a carbon sequestration plan in order for Energy Northwest to
23 qualify for GHG emissions reductions to meet the GHG performance standard. RCW
24 80.80.040(13). In the plan, PMEC is required to include "at least" the following:

25 (a) Provisions for financial assurances, as a condition of plant
26 operation, sufficient to ensure successful implementation of the carbon
sequestration plan, including construction and operation of necessary
equipment, and any other significant costs;

1 (b) Provisions for geological or other approved sequestration
2 commencing within five years of plant operation, including full and sufficient
3 technical documentation to support the planned sequestration;

4 (c) Provisions for monitoring the effectiveness of the
5 implementation of the sequestration plan;

6 (d) Penalties for failure to achieve implementation of the plan on
7 schedule;

8 (e) Provisions for an owner to purchase emissions reductions in the
9 event of the failure of a sequestration plan under subsection (13) of this section;
10 and

11 (f) Provisions for public notice and comment on the carbon
12 sequestration plan.

13 RCW 80.80.040(11)(a)-(f), (13). EFSEC must contract with the Department of Ecology for
14 review of the plan to determine whether the “plan for sequestration will provide safe, reliable,
15 and permanent protection against the greenhouse gases entering the atmosphere from the
16 power plant and all ancillary facilities.” RCW 80.80.040(12)(a), (b). EFSEC must then
17 consider the adequacy of the plan for sequestration in its adjudicative proceeding and
18 incorporate specific findings regarding adequacy in its recommendations to the Governor.
19 RCW 80.80.040(12)(b).

20 After this rigorous review process takes place, and if the Governor decides to grant
21 final site certification of PMEC, Energy Northwest must make a good faith effort to implement
22 its sequestration plan. RCW 80.80.040(13). If Energy Northwest determines that the
23 implementation of the plan is not feasible, it must submit documentation of that determination
24 to EFSEC. RCW 80.80.040(13). This documentation must demonstrate: (1) the steps taken to
25 implement the sequestration plan, and (2) evidence of the technological and economic barriers
26 to successful implementation. RCW 80.80.040(13). Energy Northwest must then notify
EFSEC of its intent to implement the section of its sequestration plan relating to its purchase of
emissions reductions in event of implementation failure. RCW 80.80.040(13). If all of the
prerequisites described above occur, PMEC can meet the GHG emissions performance
standard by taking the following action:

[P]urchasing verifiable greenhouse gases emissions reductions from an electric
generating facility located within the western interconnection, where the

1 reduction would not have occurred otherwise or absent this contractual
2 agreement, such that the sum of the emissions reductions purchased and the
3 facility's emissions meets the standard for the life of the facility.

RCW 80.80.040(13).

4 II. ARGUMENT

5 A. Response to Council Questions About RCW 80.80

6 1. Rulemaking

- 7 a. Does [RCW 80.80] require that the PMEC gasification plant
8 proceedings be stayed until "... the energy siting council and the
9 department ... adopt rules to ... to implement and enforce the
10 greenhouse gases emissions performance standard?"

11 No. The adoption of rules to implement and enforce the GHG emissions performance
12 standard, by itself, is not a prerequisite to proceeding forward in this EFSEC adjudication. In
13 RCW 80.80.040(13), the Legislature mandated that Energy Northwest file a carbon
14 sequestration plan containing all of the mandatory elements that EFSEC and Ecology
15 rulemaking would cover. See previous Section I.B.3.b. This requirement created, in essence, a
16 parallel track allowing for review for any application filed prior to July 22, 2007, without
17 waiting for the completion of rules. However, review must include review of a carbon
18 sequestration plan containing all of the mandatory elements.

- 19 b. If rulemaking need not be completed under [RCW 80.80.040(10)]
20 prior to consideration of the PMEC project because the project was
21 pending before EFSEC on the effective date of [RCW80.80], does
22 the greenhouse gas plan "[include] all of the requirements of [RCW
23 80.80.040(11)] ..."? If so, why; if not, why not, and, if not, what
24 specific additional elements are needed.

25 For the preceding reasons, Energy Northwest may submit a sequestration plan for
26 PMEC during the site evaluation process prior to the completion of the rulemaking required
under RCW 80.80.040(11). However, any plan submitted must meet all of the elements
required by this provision: "A project under consideration by the [Council by the effective
date of this provision] is required to include all of the requirements of subsection (11) of this
section in its carbon sequestration plan submitted as part of the [Council] process."

1 RCW 80.80.040(13). Thus, the requirements listed in RCW 80.80.040(11)(a)–(f) must be
2 included in the plan.⁵

3 Energy Northwest has submitted a document that it entitles a “Greenhouse Gas
4 Reduction Plan.” The GGRP does not meet the requirements for a carbon sequestration plan.
5 The GGRP is scant on details, cursory and vague in its analysis, and wholly lacking the
6 information necessary to enable the Council, Ecology, and members of the public to evaluate
7 in a meaningful way what the Plan will accomplish and how the Plan will satisfy the state’s
8 objective of reducing in-state GHGs.

9 Although it is the Council’s role to make formal findings on the Plan’s sufficiency in
10 any final recommendation to the Governor on site certification, the Department of Ecology is
11 specially designated by the Legislature in RCW 80.80 as the expert the Council must call
12 upon for guidance on whether the Plan adequately provides “safe, reliable and permanent
13 protection against the greenhouse gases from the power plant and all ancillary facilities.”
14 RCW 80.80.040(12)(a)–(b). Therefore, the Council should give substantial weight to the
15 State Parties’ evaluation of what constitutes a bona fide carbon sequestration plan, and how
16 Energy Northwest’s Plan is deficient. *See, for example, Port of Seattle v. Pollution Control*
17 *Hearings Bd.*, 151 Wn.2d 568, 591-95, 90 P.3d 659 (2004) (substantial deference should be
18 accorded to Ecology’s interpretation of statutes that it implements and to Ecology’s technical
19 judgments). For the specific reasons set forth below, the Plan does not pass muster.

20 **(1) Financial assurance.**

21 RCW 80.80.040(11)(a) requires provisions for financial assurance “sufficient to ensure
22 successful implementation of the carbon sequestration plan, including construction and
23 operation of necessary equipment, and any other significant costs.” Energy Northwest’s

24 ⁵ In addition to a carbon sequestration plan required under RCW 80.80.040, an applicant for site
25 certification approval must also submit a carbon mitigation plan under Chapter 80.70 RCW. Carbon sequestration
26 and carbon mitigation plan requirements could be incorporated into a single document. However, the two laws
contain separate requirements and each set of requirements must be met in order for a facility to receive site
certification approval.

1 GGRP only briefly mentions financial assurances. *See* GGRP at 5. The Plan states that \$50
2 million will be spent on technology to capture 20 percent of the carbon dioxide emitted, and
3 that unspecified property “is reserved and designated for a water shifting expansion to
4 increase capture capability as viable storage is developed.” The Plan also cites 40 C.F.R.
5 § 258.74 as authority for Energy Northwest to rely upon bonding capacity rather than
6 establish a trust fund or letter of credit. Last, the Plan proposes to set aside \$200 million for
7 sequestration or mitigation as required.

8 Energy Northwest’s cursory discussion of financial assurance falls short in many
9 respects. First, Energy Northwest assumes that capture of 20 percent of the carbon dioxide
10 emissions will be sufficient and it bases its \$50 million investment on this assumption.
11 However, Energy Northwest is required to meet the performance standard under RCW
12 80.80.040(1), which could require sequestration of more than 20 percent of its GHG
13 emissions. The one-sentence description of how Energy Northwest will expand sequestration
14 capability lacks sufficient detail to ensure that Energy Northwest can provide financial
15 assurance to allow for expansion. Furthermore, a set-aside of \$200 million for sequestration
16 or mitigation is pure guesswork unsupported by any economic analysis demonstrating that
17 \$200 million will be sufficient.

18 Additionally, Energy Northwest’s intention to rely on bonding capacity is troubling.
19 The evidence in the adjudication will likely show that Energy Northwest (formerly
20 Washington Public Power Supply System) defaulted on billions of dollars of bonds intended
21 to fund construction of three nuclear reactor power stations. Considering Energy Northwest’s
22 history along with the newness of carbon sequestration technology, the uncertainty of the
23 future regulatory environment, and the volatility of oil and natural gas prices, the State Parties
24 are concerned that relying on bonding capacity alone is too risky. Therefore, the State Parties
25 believe that the types of financial assurance required to satisfy RCW 80.80.040(11)(a) include
26 trust fund, surety bond, letter of credit, insurance, or some combination of these mechanisms.

1 These types of assurances are expected to be consistent with the types of assurances that will
2 be authorized by rule under RCW 80.80.040(11). Declaration of John Stormon (Stormon
3 Decl.) ¶ 4, attached.

4 **(2) Provisions for sequestration.**

5 Next, a sequestration plan must contain “[p]rovisions for geological or other approved
6 sequestration commencing within five years of plant operation, including full and sufficient
7 technical documentation to support the planned sequestration” RCW 80.80.040(11)(b).
8 Energy Northwest’s Plan is remarkable for its lack of provisions for sequestration. It is clear
9 from the Plan that Energy Northwest has not done any significant portion of the work required
10 to put together a potentially viable sequestration plan.

11 The Plan’s entire discussion of sequestration is limited to a paltry nine pages. *See*
12 *GGRP* at 12-20. At the outset of its discussion, the Plan emphasizes the alleged infeasibility
13 of sequestration. *GGRP* at 12-13. Energy Northwest then commits to investing “up to” \$10
14 million to conduct site characterization. *GGRP* at 19. The Plan concludes with speculation
15 about alternatives to on-site geologic sequestration, such as forestry or agricultural emissions
16 reduction or off-site geological sequestration. *GGRP* at 19-20.

17 The State Parties are troubled by Energy Northwest’s failure to begin the process of
18 site characterization by this time. If Energy Northwest is as committed to sequestration as it
19 claims to be, it should have characterized the Kalama site and the areas adjacent to the site
20 prior to choosing it as the location for the project. By requesting final site certification
21 approval before characterizing the site, Energy Northwest has placed itself in a position to
22 claim that sequestration is not technically or economically feasible if it is later determined that
23 the Kalama site or the areas adjacent to the site do not contain geologic formations suitable for
24 permanent sequestration. RCW 80.80 protects against this result by requiring the
25 sequestration plan to be supported by “full and sufficient technical documentation to support
26 the planned sequestration” before final approval is granted. RCW 80.80.040(11)(b).

1 Energy Northwest's witness, Travis McCling, outlines a three step process for site
2 characterization. See Energy Northwest's Prefiled Testimony of McCling at 7. The first step
3 involves reviewing available literature pertaining to the geologic formations in the area, to
4 assess likely targets and associated risks, and to identify information gaps. This information
5 would then be used to develop a testing plan. The second step involves physical testing in
6 order to fill information gaps, which would include geophysics, drilling, hydraulic testing, and
7 a carbon dioxide injection test. Third, the project proponent chooses a site and conducts
8 economic and engineering studies to determine how to configure a sequestration facility at
9 that site.

10 The State Parties agree with this three step process and believe that technical
11 documentation obtained from performing steps one and two is a necessary element of the
12 sequestration plan. Without that documentation, there is no way to assess whether the project
13 proponent has selected an appropriate site for compliance with the sequestration requirements
14 of RCW 80.80. If the site characterization indicates there is no suitable geologic formation
15 for on-site storage, the project proponent is then required to consider alternatives, such as
16 off-site geologic sequestration or non-geologic alternatives.

17 Although this process may slow down the siting of PMEC, this process is consistent
18 with the plain language of RCW 80.80 and, therefore, consistent with what the Legislature
19 intended when it enacted this law. See *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128
20 Wn.2d 40, 53, 905 P.2d 338 (1995) (legislative intent is gleaned from the plain language of a
21 statute); see also *Union Oil Co. of Calif. v. State*, 2 Wn.2d 436, 442, 98 P.2d 660 (1940)
22 (courts should not presume that Legislature is ignorant of the meaning of the words they write
23 into laws). If the Legislature had intended to exempt PMEC from RCW 80.80, it would have
24 done so explicitly. Instead, the law is clear that a sequestration plan must be supported by full
25 and sufficient documentation, including PMEC's Plan as the only project under Council
26

1 review when RCW 80.80 became effective. The plain language of this law must be followed
2 even if that results in a delay in the siting, construction, and operation of the plant.

3 Other requirements for satisfying RCW 80.80.040(11)(b) can be found in the Model
4 Rules developed by the Interstate Oil and Gas Compact Commission (IOGCC).⁶ Stormon
5 Decl., Ex. A. The Model Rules are premised on an important fact—geologic sequestration is
6 already taking place for the purpose of enhanced oil and gas recovery. Stormon Decl., Ex. A
7 at 14. Therefore, notwithstanding the question of whether sequestration is economically or
8 technologically feasible for a certain facility, it is at least possible to put together a bona fide
9 sequestration plan that contains sufficiently detailed technical provisions. The IOGCC Model
10 Rules provide a useful outline of what a sequestration plan should contain and have served as
11 a model to state agencies for the rulemaking required under RCW 80.80.040(11). Stormon
12 Decl. ¶ 5.

13 Model Rule Section 4.1 sets forth the requirements for obtaining a carbon storage
14 project permit. Stormon Decl., Ex. A at 42-44. The first two requirements of the rule
15 encompass the type of technical documentation that the State Parties believe must accompany
16 a sequestration plan. This documentation includes: (1) a current site map of the geological
17 storage unit, including the location of all proposed CO₂ injection wells and the location of all
18 other wells and all pertinent surface facilities within the boundary of the carbon storage
19 project;⁷ and (2) a technical evaluation of the proposed carbon storage project, to include site
20 characterization, a review of data for all wells within the carbon storage project which
21 penetrate the CO₂ storage reservoir, or secondary seals overlying the reservoir.⁸ In addition to
22 these elements contained in the Model Rules, the State Parties believe a proposed schedule for
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24 ⁶ The Model Rules were developed by a task force consisting of representatives from IOGCC member
25 states and international provinces, state and provincial oil and gas agencies, federally sponsored Regional Carbon
26 Sequestration Partnerships, the Association of the American State Geologists, and independent experts. Stormon
Decl., Ex. A at 9.

⁷ Model Rule § 4.1(b)(1).

⁸ Model Rule § 4.1(b)(2).

1 implementation of the Plan needs to be included in order to meet the law's requirement that
2 sequestration occur "within five years of plant operation." RCW 80.80.040(11)(b). These
3 requirements for documentation will likely be almost identical to the requirements
4 incorporated into rules adopted under RCW 80.80.040(11). Stormon Decl. ¶¶ 5-6.

5 A plan that contains these elements would be supported by "full and sufficient
6 technical documentation to support the planned sequestration." In contrast, a plan that lacks
7 all of these elements would likely not satisfy this legal requirement. At any rate, Energy
8 Northwest's Plan is so lacking in technical detail that it does not even come close to meeting
9 the bar set by the Legislature. The adjudication should not proceed until Energy Northwest
10 can develop a plan and support it with sufficient technical documentation.

11 **(3) Monitoring provisions.**

12 RCW 80.80.040(11)(c) requires a sequestration plan to contain "[p]rovisions *for*
13 *monitoring the effectiveness of the implementation of the sequestration plan.*" (Emphasis
14 added.) Energy Northwest's Plan contains no provisions for monitoring the effectiveness of
15 implementation of sequestration. Rather, Energy Northwest states, "[r]egardless of the option
16 selected, emissions reductions will be verified by an independent third party review from an
17 entity approved by EFSEC to ensure actual GHG emissions reductions and compliance with
18 the law. For sequestration, long-term monitoring will be established to ensure permanency in
19 accordance with a plan submitted to EFSEC for approval once additional details are known."
20 GGRP at 5-6. This is legally insufficient.

21 A schedule for construction and operation of sequestration equipment is a necessary
22 component of monitoring for the effectiveness of implementation of sequestration. The
23 GGRP is deficient in this respect as it lacks a schedule for pipeline right of way acquisition (if
24 necessary), construction of equipment to separate CO₂ from the facility emissions,
25 construction of transportation pipelines, and wells suitable for injecting the CO₂ into the
26 ground. Declaration of Alan Newman (Newman Decl.) ¶ 5.

1 In addition to monitoring for adherence to a schedule, effective operational monitoring
2 is an integral part of a sequestration plan, as the Legislature contemplated when enacting
3 RCW 80.80. The IOGCC Task Force recognized the importance of comprehensive
4 monitoring in drafting its model rules: “the Task Force is recommending that the Model Rules
5 and Regulations require the operator to submit a comprehensive monitoring plan for
6 evaluation by [the state regulatory agency] that shall be tailored to the specific characteristics
7 of the site prior to issuance of a project permit.” Stormon Decl., Ex. A at 27. The Model
8 Rules provide a useful example of how to achieve effective monitoring.

9 Model Rule Section 4.1 contains two categories of monitoring requirements. First, it
10 requires submission of a CO₂ facility leak detection and monitoring plan for all wells and
11 surface facilities that must address potential releases to the atmosphere, potential degradation
12 of groundwater resources, and potential migration of CO₂ into any overlying oil and natural
13 gas reservoirs.⁹ Second, the rule requires submission of a geological storage unit leak and
14 detection monitoring plan to monitor any movement of CO₂ outside of the permitted storage
15 unit, also to address potential releases to the atmosphere, potential degradation of groundwater
16 resources, and potential migration of CO₂ into any overlying oil and natural gas reservoirs.¹⁰

17 The types of monitoring plan requirements contained in Model Rule Section 4.1 would
18 be sufficient to satisfy RCW 80.80.040(11)(c), although the state’s rules are likely to address
19 potential releases to the atmosphere and potential degradation of groundwater, but not
20 migration of CO₂ into oil and natural gas reservoirs. Stormon Decl. ¶ 7. Once again, Energy
21 Northwest falls far short of what is required. The adjudication should not proceed until
22 Energy Northwest can develop a bona fide sequestration plan which contains provisions for
23 monitoring the effectiveness of its planned sequestration.

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26 ⁹ Model Rule § 4.1(b)(7).
¹⁰ Model Rule § 4.1(b)(8).

1 **(4) Penalties for failure to implement the plan on schedule.**

2 Energy Northwest has stated that the penalty provisions under RCW 80.50.150 are
3 adequate in the event of failure to implement a sequestration plan on schedule. GGRP at 6.
4 RCW 80.50.150(5) allows EFSEC to penalize up to \$5,000 per day for each day that a person
5 violates a site certification agreement or a permit. RCW 80.50.150(1) allows a court to
6 penalize up to \$25,000 per day for each day of violation of a site certification agreement or a
7 permit. Thus, a party that does not implement a carbon sequestration plan according to a
8 schedule contained in a site certification agreement is facing a potential per day penalty for
9 this failure. As long as the schedule for implementation is contained within a site certification
10 agreement, the State Parties believe that this penalty authority is probably sufficient.
11 However, since the Council has primary enforcement authority, the State Parties defer to the
12 Council on this question.

13 **(5) Provisions for purchase of emissions reductions.**

14 RCW 80.80.040(11)(e) requires a plan to contain provisions for purchase of emissions
15 reductions “in the event of a failure of a sequestration plan under subsection (13) of this
16 section” Therefore, if Energy Northwest is unable to implement the provisions of a bona
17 fide sequestration plan, it can utilize the offset provisions of its Plan in order to meet the law’s
18 performance standard.

19 Purchase of offsets under RCW 80.80.040(13) can be credited to the facility only
20 when the purchase is from “an electric generating facility located within the western
21 interconnection” and only “where the reduction would not have occurred otherwise or absent
22 this contractual agreement” Thus, Energy Northwest cannot receive credit for
23 “purchasing” offsets from projects that are already in the process of implementing efficiency
24 improvements or other GHG reductions or that are legally required to implement such
25 reductions.

1 Energy Northwest provides three methods for purchase of offsets: (1) purchase of
2 emissions reductions which result from operational restrictions on an electric generating
3 facility; (2) purchase of emissions reductions from efficiency improvements installed at an
4 electric generating facility; and (3) development of renewable energy resources within the
5 western interconnection. GGRP at 21-22. Instead of providing a plan to implement these
6 methods, Energy Northwest states an intention to work with Climate Trust for future
7 identification and selection of reduction projects. GGRP at 21.

8 The State Parties agree that Energy Northwest can satisfy offset requirements by
9 purchasing emissions reductions through operation restrictions or efficiency improvements at
10 existing plants. However, the State Parties disagree that development of new renewable
11 energy resources counts towards meeting the performance standard. RCW 80.80.040(13)
12 plainly states that the project owner may meet the performance standard through “purchasing
13 verifiable greenhouse gases emissions *reductions* . . . where the *reduction* would not have
14 occurred otherwise.” (Emphasis added.) Development of new renewable resources may
15 prevent the introduction of new GHG emissions, but does not result in a *reduction* of GHG
16 emissions. Since the law requires the purchase of emissions reductions, Energy Northwest
17 may only meet the performance standard through purchases that reduce existing GHG
18 emissions within the western interconnection.

19 Although the State Parties agree that Energy Northwest could satisfy offset
20 requirements through its first two options, the State Parties want to emphasize again the
21 timing of doing so. RCW 80.80.040(13) sets forth a clear path for meeting the performance
22 standard. First, the project owner must submit a carbon sequestration plan as part of the
23 Council process.¹¹ Then, if the project owner receives final site certification agreement
24 approval, the proponent “shall make a good faith effort to implement the sequestration plan.”

25 _____
26 ¹¹ As noted above, the Council must consider “the adequacy of the sequestration or the plan in its
adjudicative proceedings under RCW 80.50.090(3) and incorporate specific findings regarding adequacy in its
recommendation to the governor under RCW 80.50.100.” RCW 80.80.040(12)(b).

1 If, at that time, the project owner determines that implementation is not feasible, “the project
2 owner shall submit documentation of that determination to the [Council]” to include “steps
3 taken to implement the sequestration plan and evidence of the technological and economic
4 barriers to successful implementation.” Only then may the project owner notify the Council
5 that it will meet the performance standard “by purchasing verifiable greenhouse gases
6 emissions reductions from an electric generating facility located within the western
7 interconnection” Through this clear sequence of events, purchase of offsets is not
8 permitted until the project owner has made a good faith effort to implement sequestration.

9 This sequence of events furthers the Legislature’s goal of ensuring that Washington
10 does its part to reduce harmful GHG emissions. See RCW 80.80.005(1)(b), (d), (f).
11 Sequestration is favored over the purchase of offsets because sequestration reduces
12 Washington’s GHG output. In contrast, the purchase of offsets does not further the
13 Legislature’s goal of reducing Washington’s output to 1990 levels by the year 2020, to reduce
14 Washington’s emissions to 25 percent below 1990 levels by 2035, and to reduce overall
15 emissions 50 percent below 1990 levels by 2050, or 70 percent below the State’s expected
16 emissions for that year. RCW 80.80.020.

17 In regards to the offset provisions themselves, the State Parties believe they lack
18 sufficient detail to allow for evaluation of what they will accomplish. Notably, Energy
19 Northwest has made no attempt to quantify the amount of emissions reductions that would
20 need to be purchased in order to meet the performance standard. However, it is possible to do
21 so based on the estimated GHG emissions for PMEC. For example, Exhibit A of the GGRP
22 portrays a method to estimate total GHG emissions from the proposed facility under one
23 operating scenario. But, Energy Northwest’s application and the GGRP also discuss a natural
24 gas only operating scenario and various scenarios based on use of natural gas and fuel from
25 the coal gasifier. An estimate of the annual GHG emissions for each of these scenarios needs
26 to be supplied. Newman Decl. ¶ 4. Therefore, in order to satisfy RCW 80.80.040(11)(e),

1 Energy Northwest should quantify the estimated amount of emissions reductions that need to
2 be purchased under various operating scenarios and eliminate the option of developing new
3 renewable resources as a mechanism for meeting the performance standard.

4 **(6) Public notice and comment.**

5 Last, RCW 80.80.040(11)(f) requires that a sequestration plan contain “[p]rovisions
6 for public notice and comment on the carbon sequestration plan.” Energy Northwest takes the
7 position that the Council’s adjudicative and public hearings process provides sufficient
8 opportunity for the public to review and comment on the Plan. GGRP at 6. The State Parties
9 agree that the Council process is sufficient to satisfy public notice and comment requirements.
10 However, in order for public notice and comment to be meaningful, there must be a bona fide
11 sequestration plan for the public to review. Stormon Decl. ¶ 8. Energy Northwest has not
12 submitted a bona fide plan. If Energy Northwest does submit an adequate plan, that plan can
13 be appropriately vetted with the public through the Council’s public process. At this point,
14 there is no plan for the public to review. This is another requirement of RCW 80.80.040(11)
15 that Energy Northwest has failed to meet.

16 **2. Sufficiency of the PMEC greenhouse gas reduction plan (GGRP).**

17 **a. Is this applicant’s GGRP legally sufficient for the application to**
18 **proceed?**

19 No. Energy Northwest’s GGRP is not legally sufficient for the application to proceed
20 because (1) an application cannot proceed without sufficient information in such detail to
21 enable Ecology and the Council to complete their reviews, and (2) the GGRP does not contain
22 all of the mandatory information to constitute a valid carbon sequestration plan under RCW
23 80.80.

24 The Legislature has said that it is the policy of the State of Washington that the siting of
25 energy facilities “will produce minimal adverse effects on the environment” RCW
26 80.50.010. Some of the underlying premises to be considered in energy facility siting are as
follows:

1 To preserve and protect the quality of the environment; . . . to promote
2 air cleanliness; and to pursue beneficial changes in the environment.

3 RCW 80.50.010(2). Under this policy and these premises, the Council evaluates applications
4 for site certification.

5 The Legislature delegated the general threshold for applications for site certification to
6 EFSEC by stating that applications “shall be supported by such information and technical
7 studies as the council may require.” RCW 80.50.060(6). The Council requires that
8 applications shall provide information in such detail to enable the Council to complete its
9 review. WAC 463-60-010.¹² Further, the application is required to identify “all information
10 known to the applicant which has a bearing on site certification.” WAC 463-60-065.
11 Applications for site certification “shall be complete and shall reflect the best available current
12 information and intentions of the applicant.” WAC 463-60-116(1).

13 To aid the applicant in meeting its obligation to provide a complete and detailed
14 application, the Legislature has directed Council staff to assist applicants in “identifying issues
15 presented by the application” and “recommend resolutions to issues in dispute that would
16 allow site approval.” RCW 80.50.085(1), (2). Moreover, “the council encourages applicants
17 to consult with appropriate agencies for guidance in gathering sufficient detailed
18 information . . . for inclusion in their application.” WAC 463-60-010.

19 With the enactment of RCW 80.80 after it filed its application for PMEC, Energy
20 Northwest became obligated to amend its application by filing a carbon sequestration plan.
21 Applicants can amend applications as a matter of right at least 30 days prior to the adjudicative
22 proceeding or only for good cause shown after the start of the adjudication.
23 WAC 463-60-116(2), (4). Energy Northwest attempted to meet this obligation by filing its
24 GGRP instead of a bona fide carbon sequestration plan. However, the GGRP is not sufficient

25 _____
26 ¹² The Council rules contained in WAC 463-60 are guidelines that may not apply equally to all energy
facilities; however, the applicant must address all sections of the chapter and substantially comply with each
section, show it does not apply, or secure a waiver from the Council. WAC 463-60-115.

1 to qualify as a carbon sequestration plan. See Section II.A.1.b., *supra*, for a more detailed
2 discussion on how the GGRP does not contain the mandatory elements of a carbon
3 sequestration plan.

4 Energy Northwest's application for site certification should not proceed until the GGRP
5 is amended and constitutes a bona fide carbon sequestration plan.

6 **b. Does the proposed PMEC greenhouse gas plan, on its face, "...work**
7 **in unison with the state's carbon dioxide mitigation policy, chapter**
8 **80.70 RCW and its related rules, for fossil fueled thermal electric**
9 **generation facilities in the State"? Why or why not, and if not, what**
10 **kind of modification of the plan would be needed for such "unison"?**

11 No, the GGRP does not work in unison with the state's carbon dioxide mitigation
12 policy because the Plan does not contain provisions for 20 percent mitigation of CO₂
13 reduction through one of the three methods authorized by Chapter 80.70 RCW. Furthermore,
14 Energy Northwest's position that compliance with RCW 80.80 constitutes compliance with
15 RCW 80.70 is legally erroneous.

16 Statutes relating to the same subject matter must be considered together to ascertain
17 legislative intent. *Bennett v. Hardy*, 113 Wn.2d 912, 926, 784 P.2d 1258 (1990). A court
18 must consider all statutory provisions pertaining to the same subject matter and harmonize
19 them so as to give a proper construction to each. *In re Piercy*, 101 Wn.2d 490, 492, 681 P.2d
20 223 (1984). Courts should construe statutes to give each word and clause effect so that no
21 part is rendered superfluous. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 25, 992 P.2d 496
22 (2000).

23 RCW 80.80 does not repeal or supplant Chapter 80.70 RCW. Instead, the Legislature
24 determined that these two enactments must work in unison: "A greenhouse gases emissions
25 performance standard will work in unison with the state's carbon dioxide mitigation policy,
26 Chapter 80.70 RCW and its related rules, for fossil-fueled fired thermal electric generation
facilities located in the state" RCW 80.80.005(1)(e). By explicitly referring to Chapter

1 80.70, it is obvious that the Legislature was aware of existing mitigation requirements and that
2 it intended to supplement those requirements through passage of RCW 80.80.

3 As discussed in Section I.B.2. of this brief, RCW 80.80 helps to reduce harmful GHG
4 emissions by setting a performance standard and establishing measures to meet that standard.
5 Specifically, the performance standard is set at 1,100 pounds of GHGs per MWh until it is
6 reset by rule every five years. The revised performance standard will be based on the average
7 available GHG emissions output determined by CTED under Section 7 of the Act. *See* RCW
8 80.80.040(1). The Council and Ecology are directed to adopt rules to implement the
9 performance standard, including criteria for evaluation of a carbon sequestration plan. RCW
10 80.80.040(10), (11). For projects already under consideration (i.e., P MEC), the project owner
11 may meet the performance standard through the purchase of offsets if the project owner has
12 made a good faith effort to implement a sequestration plan and has documented the
13 infeasibility of implementing such plan. RCW 80.80.040(13).

14 RCW 80.70.020(2)(a) requires an approved carbon dioxide mitigation plan to be
15 included in a proposed and final site certification agreement. An applicant for site
16 certification must include one or a combination of the following mitigation options as part of
17 its plan: (1) payment to a third party (a qualified organization recognized by EFSEC) to
18 provide mitigation; (2) direct purchase of permanent carbon credits (from a market approved
19 by EFSEC); or (3) investment in applicant-controlled CO₂ mitigation projects, including
20 cogeneration. RCW 80.70.020(3). Fossil-fuel burning facilities that receive final site
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1 certification approval must provide for mitigation of 20 percent of the “total CO₂ emissions”¹³
2 produced by the facility. RCW 80.70.020(5).

3 Chapter 80.70 and 80.80 RCW work in conjunction. Under the rules of statutory
4 construction, the statutes must be harmonized by giving effect to the provisions of both
5 statutes. Compliance with both statutes is possible and mandatory.

6 RCW 80.80 requires a facility to meet the performance standard through sequestration
7 or purchase of offsets. Once a facility has met the performance standard, Chapter 80.70
8 requires that any remaining carbon dioxide emissions be mitigated in accordance with the
9 requirements of that law. For example, if the performance standard is set at 900 pounds per
10 megawatt hour and a facility meets the performance standard through sequestration of CO₂
11 above 900 pounds, the 20 percent mitigation requirement applies to the 900 pounds of CO₂
12 that the facility continues to emit. If the performance standard is set at 900 pounds and the
13 facility emits 1,200 pounds, but purchases offsets equivalent to 300 pounds, the 20 percent
14 emission mitigation requirement applies to the 1,200 pounds of CO₂ that the facility emits.¹⁴
15 Thus, a facility must simultaneously meet the performance standard established by RCW
16 80.80 and the CO₂ mitigation requirement of RCW 80.70.

19 ¹³ “Total carbon dioxide emissions” is defined in RCW 80.70.010(17). Ecology’s WAC 173-407-050
20 sets forth the methodology for calculating total CO₂ emissions to be mitigated. Under Ecology’s regulation, the
21 mitigation requirement is calculated at the tons equivalent to 20 percent of operation at 60 percent capacity factor
22 for 30 years. For example, if the plan emits one million tons per year at full operation, the calculation is: one
23 millions tons/year X 60 percent X 30 years X 20 percent=3.6 millions tons. Under option one or three, the \$1.60
24 ton/mitigation cost in RCW 80.70.020(5), results in a need to spend \$576,000 on mitigation or offsets. Under
25 option two, a company would have to purchase 3.6 million tons of CO₂ at the market rate and hold those credits
26 for the life of the facility. EFSEC does not have a regulation equivalent to WAC 173-407-050 nor has EFSEC
incorporated Ecology’s rule by reference. However, the State Parties anticipate that EFSEC would utilize a
calculation methodology similar to the one used by Ecology to evaluate the quantity of CO₂ subject to mitigation
under RCW 80.70.

¹⁴ The reason that the 20 percent requirement applies to the full amount of CO₂ produced in the latter
instance is because Chapter 80.70 applies to “total carbon dioxide emissions” which would include the actual
amount emitted by the facility. CO₂ that is sequestered does not meet the definition of “total carbon dioxide
emissions” under RCW 80.70.010(17) and, therefore, the 20 percent mitigation requirement does not apply to
sequestered CO₂.

1 In its GGRP, Energy Northwest erroneously presumes that it can meet the
2 requirements of Chapter 80.70 RCW by meeting the requirements of RCW 80.80. *See* GGRP
3 at 7 (“To the extent that PMEC’s GHG emissions are sequestered or mitigated to comply with
4 ESSB 6001, such sequestration or mitigation will also count in unison toward PMEC’s
5 mitigation obligations under RCW 80.70.”) RCW 80.70 and ESSB 6001 are separate laws
6 with separate requirements, both of which can be simultaneously met, thereby harmonizing
7 the two statutes. Energy Northwest’s interpretation of the statutes disregards the plain
8 language of RCW 80.70.020(4), which requires “mitigation for twenty percent of the *total*
9 *carbon dioxide emissions* produced by the facility.” This provision does not exempt
10 emissions that have been offset. Instead, it requires 20 percent mitigation for the entire
11 emissions stream. The alternative reading urged by Energy Northwest risks rendering this
12 provision superfluous.

13 Energy Northwest’s erroneous interpretation also gives a competitive advantage to a
14 dirtier plant. Under Energy Northwest’s interpretation, a relatively dirty plant can
15 simultaneously meet the performance standard and the carbon dioxide mitigation
16 requirements as long as the performance standard is at least 20 percent below what the facility
17 would emit without sequestration or purchase of offsets. However, a cleaner plant that meets
18 the performance standard without the need to sequester emissions or purchase offsets would
19 still need to meet the 20 percent carbon mitigation requirements of RCW 80.70. Thus, the
20 cleaner plant is effectively penalized for utilizing cleaner fuels or more efficient technologies
21 at the outset. This result is contrary to what the Legislature intended in enacting RCW 80.80.

22 In order to satisfy the requirements of RCW 80.70, Energy Northwest needs to submit
23 a carbon dioxide mitigation plan that can be included with the proposed site certification
24 agreement submitted to the Governor. RCW 80.70.020(2)(a). Energy Northwest has not yet
25 submitted such a plan. Although its GGRP cursorily mentions RCW 80.70, the Plan does not
26 contain any of the detail required under that law.

1 Specifically, the Plan must quantify the emissions subject to mitigation and propose to
2 use one or more of the three mitigation options authorized by RCW 80.70.020(3). The Plan
3 must also provide sufficient detail of how the mitigation measures will enable Energy
4 Northwest to meet the 20 percent mitigation requirement. *See, for example*, WAC 173-407-
5 070(2) (applicants who make payment to a third party or purchase permanent carbon credits
6 must provide sufficient documentation of how the requirements will be satisfied); WAC 173-
7 407-070(3) (applicants who use self-directed mitigation projects must submit the entire
8 mitigation plan for review). Newman Decl. ¶¶ 6-9. Energy Northwest does not identify the
9 specific mitigation proposals that it intends to implement to meet its obligations nor does it
10 provide detail about how any proposals will meet the mitigation requirement. Since a plan
11 under RCW 80.70 needs to be part of the proposed site certification agreement, the
12 adjudication should not proceed until Energy Northwest submits a CO₂ mitigation plan.

13 **c. Is the P MEC GGRP, as submitted, a sufficient “good faith”**
14 **demonstration of compliance to warrant issuance of a conditional**
15 **certificate allowing construction? If not, what elements are lacking?**

16 No, the GGRP does not constitute a sufficient good faith demonstration of compliance
17 to warrant issuance of a conditional certificate. The standard under RCW 80.80 is not
18 “substantial compliance” or “good faith compliance” with sequestration plan requirements.
19 Rather, RCW 80.80 requires that an applicant submit a sequestration plan supported by “full
20 and sufficient technical documentation” and that the adequacy of this plan be considered
21 during the adjudicative proceedings. RCW 80.80.040(11)(b), (12)(b). If the applicant
22 receives final site certification agreement approval, the applicant must then “make a good
23 faith effort to implement the sequestration plan.” RCW 80.80.040(13). The “good faith”
24 standard applies to implementation of the plan, not development.¹⁵ RCW 80.80 does not

25 _____
26 ¹⁵ Even if the law did allow for a good faith effort in developing a plan, the State Parties seriously doubt
that Energy Northwest’s skinny plan would meet that standard. The GGRP is staggering in its lack of detail about
how sequestration might work for the proposed P MEC facility.

1 authorize the Council to issue a conditional certificate if the plan submitted does not contain
2 the elements required by RCW 80.80.040(11).

3 The legality and propriety of a conditional certificate are discussed in more detail
4 below in Section II.A.4. The required elements of a sufficient plan are discussed above in
5 Section II.A.1.b.

6 **d. If EFSEC were to issue a “final site certification agreement under**
7 **authority of RCW 80.50,” would the submitted sequestration plan**
8 **be capable of a demonstration of “good faith effort to implement**
9 **[the law],” and why or why not, with respect to the following**
10 **elements:**

- 11 • Financial assurances under [RCW 80.80.040(11)(a)]
- 12 • Geological or “other approved sequestration” commencing within 5
13 years of commercial operation under [RCW 80.80.040 (11)(b)] [Section
14 V.A. of PMEC Plan]
- 15 • Monitoring under [RCW 80.80.040 (11)(c)]
- 16 • Penalties for failure to achieve implementation under [RCW 80.80.040
17 (11)(d)]. If the project could not operate until EFSEC finds compliance,
18 would that be a sufficient penalty?
- 19 • Provisions for the purchase of offsets under [RCW 80.80.040 (11)(e)]
20 [Section V.B. of PMEC Plan]

21 No, the plan submitted by Energy Northwest is not capable of a good faith effort to
22 implement sequestration. This question, as phrased, assumes that Energy Northwest has, in
23 fact, submitted a sequestration plan. However, Energy Northwest has not submitted a
24 sequestration plan that meets the requirements of RCW 80.80.

25 Since Energy Northwest has not submitted a sequestration plan, there is no plan capable
26 of a good faith effort at implementation. The question as phrased also states that the plan must
be capable of a good faith effort to implement “the law.” However, this is not what RCW
80.80 requires. Rather, it requires that the project owner make a good faith effort to implement
the sequestration plan. RCW 80.80.040(13). Energy Northwest cannot meet the requirements
of RCW 80.80 unless it takes the initial step of developing a bona fide sequestration plan.

As discussed in Section II.A.1.b. above, the GGRP is deficient in most of the elements
required under RCW 80.80.040(11). The Plan does not contain sufficient financial assurance

1 to ensure successful implementation of sequestration. The Plan is not supported by any
2 technical documentation, including a site characterization to determine whether the site is
3 geologically suitable for sequestration. The Plan does not contain monitoring provisions. The
4 Plan does not contain sufficient detail related to the purchase of offsets. The Plan does not
5 allow for sufficient public participation because the Plan is so lacking in detail. Simply put,
6 the GGRP is not capable of a good faith effort to implement because there are no proposals in
7 the Plan capable of implementation. Energy Northwest has not submitted a bona fide
8 sequestration plan.¹⁶

9 e. **How may an applicant meet the requirement that “full and
10 sufficient documentation to support the planned sequestration” if
11 technology to support plans for geological sequestration does not yet
12 exist?**

12 The question, as phrased, assumes that technology supporting geological sequestration
13 does not yet exist. This is inaccurate. As demonstrated by the IOGCC’s Model Rules, the
14 technology for carbon sequestration exists and is currently being used for enhanced oil and
15 gas recovery. *See also* Stormon Decl. ¶ 3. Enough is known about sequestration to enable a
16 project proponent to put together a bona fide sequestration plan supported by sufficient
17 technical documentation. Although there may ultimately be technological or economic
18 barriers to implementing a specific plan, that determination must not be made until after the
19 project owner has developed a detailed, specific plan and has made a good faith attempt at
20 implementation. At this stage, the technology is developed enough to allow for a plan that
21 informs the Council, Ecology, and the public of a specific sequestration proposal.

22 The required technical documentation is discussed in Section II.A.1.b. above. In brief
23 summary, at the time of plan submittal, the project proponent should have completed the first
24 two stages of site characterization: (1) a review of existing literature pertaining to geologic

25 ¹⁶ Although Ecology is charged with reviewing a sequestration plan under RCW 80.80.040(12)(b),
26 Ecology has declined to review the plan submitted by Energy Northwest because there is basically nothing to
review. Stormon Decl. ¶ 9.

1 formations in the area, assessment of likely targets and associated risks, and identification of
2 information gaps; and (2) physical testing in order to fill information gaps, including
3 geophysics, drilling, hydraulic testing, and a CO₂ injection test. The project proponent should
4 also support its plan with a detailed site map and a technical evaluation of the project (which
5 includes the requirement of site characterization). The state of technology today allows a
6 project proponent to support sequestration with this level of technical detail. This is what
7 Energy Northwest is required to do under RCW 80.80.

8 **f. The applicant proposes to run the plant on natural gas for an initial**
9 **period and, if gasification is not feasible, to continue firing it with**
10 **natural gas indefinitely. Is this an adequate alternative, assuming**
11 **that emissions under natural gas operations are anticipated to be**
12 **lower than under gasification? If it operates as a natural gas-fired**
13 **facility, will it comply with the requirements of [RCW 80.80] and**
14 **RCW 80.70?**

15 If PMEC operates on natural gas, it is anticipated that PMEC will satisfy the
16 performance standard under RCW 80.80 without the need for additional measures (such as
17 sequestration or offsets). However, Energy Northwest will still need to meet the 20 percent
18 mitigation requirement of RCW 80.70. In order to do so, Energy Northwest will need to
19 submit a plan prior to site certification including sufficient detail of the options that it will
20 pursue to mitigate its total carbon dioxide emissions by 20 percent.

21 **3. Timing of GGRP support.**

22 **a. Must the applicant submit a facially adequate GGRP before the**
23 **adjudicative process may begin?**

24 Effectively, yes. EFSEC must contract with the Department of Ecology for review of
25 the Plan to determine whether the “plan for sequestration will provide safe, reliable, and
26 permanent protection against the greenhouse gases entering the atmosphere from the power
plant and all ancillary facilities.” RCW 80.80.040(12)(a), (b). EFSEC must then consider
adequacy of the plan for sequestration in its adjudicative proceeding and incorporate specific
findings regarding adequacy in its recommendations to the Governor. RCW 80.80.040 (12)(b).

1 If Energy Northwest's GGRP does not contain all of the elements of a carbon sequestration
2 plan mandated by RCW 80.80.040 (11) and (13), then EFSEC does not have a carbon
3 sequestration plan to contract with Ecology for review—or to evaluate during the adjudication.
4 *See* analysis in Section II.A.1.b., *supra*, for a more detailed discussion of how the GGRP does
5 not qualify as a carbon sequestration plan. *See also* Stormon Decl. ¶ 9 (Ecology declined to
6 review the GGRP due to insufficient detail).

7 **May the Council delay the adjudicative review of an application**
8 **until the applicant submits a legally sufficient GGRP?**

9 Yes. As discussed earlier, the applicant may submit a legally sufficient carbon
10 sequestration plan after the adjudication is commenced if good cause is shown.
11 WAC 463-60-116(4). The one year deadline to complete the application review process and
12 make a recommendation to the Governor can be extended upon agreement of the Council and
13 the applicant. WAC 463-64-020.

14 **b. If there is doubt under WAC 463-60-010 about the sufficiency of the**
15 **GGRP as submitted, should further application processing be halted**
16 **until the applicant submits a plan that is arguably adequate on its**
face, or may the applicant agree to modify its proposed GGRP
during the hearing process under WAC 463-60-116? Why?

17 The GGRP does not constitute a valid carbon sequestration plan under RCW 80.80.040
18 (11) and (13). Further application processing should be halted until the applicant submits a
19 valid plan for Ecology and EFSEC review unless the applicant can show good cause why a
20 later submission is appropriate. WAC 463-60-116(2), (4) (applicants can amend applications
21 as a matter of right at least thirty days prior to the adjudicative proceeding or only for good
22 cause shown after the start of the adjudication.)

23 As discussed in Section II.A.1.b., *supra*, the GGRP lacks several fundamental details
24 necessary in a carbon sequestration plan, such as site characterization. However, RCW 80.80
25 anticipates that there will be a bona fide carbon sequestration plan that Ecology can review
26 prior to the plan being considered in the adjudication. Furthermore, the parties to the

1 adjudication will want to examine the plan fully and be given a meaningful opportunity to
2 cross examine Energy Northwest's experts who develop the plan. Ultimately, the public has a
3 right to review and comment on the plan. RCW 80.80.040(11)(f). If Energy Northwest is
4 permitted to supplement its plan during the adjudication, these required processes will be
5 shortchanged. The most efficient and fair way to proceed would be to halt application
6 processing until Energy Northwest supplements its application by submitting a bona fide
7 sequestration plan.

8 **c. If the Council rules that a GGRP is deficient on its face and the**
9 **applicant may not supplement it during the adjudication, may the**
10 **applicant reapply or resubmit its application with a revised plan**
11 **and still be vested under the exemption of [RCW 80.80.040(13)]?**

12 The Council first needs to resolve whether the applicant has submitted a full application
13 such that the applicant is vested under RCW 80.80.040(13). Not only has the applicant failed
14 to submit a carbon sequestration plan, but the applicant has also failed to submit complete
15 NPDES and PSD applications as required by WACs 463-60-536 and -537. Therefore, the
16 Council could conclude that EFSEC's application is too incomplete and could halt the
17 adjudication on that basis.

18 If the Council decides to proceed on Energy Northwest's incomplete application and
19 determines that the GGRP is insufficient, Energy Northwest cannot reapply and remain vested
20 under RCW 80.80.040(13). Instead, EFSEC could issue an order staying the adjudication for a
21 period of time and condition recommencement of the adjudication upon a showing that the
22 applicant has submitted a carbon sequestration plan containing all of the elements mandated in
23 RCW 80.80.040(11) and (13). This would be consistent with the Legislative intent to allow for
24 the exemptions available to applications pending before EFSEC as of July 22, 2007. Under
25 this paradigm, the Council and the applicant can work with the other parties to agree to any
26 necessary timeline extensions beyond 12 months as are reasonable.

1 **4. Conditional permit possibility.**

- 2 **a. Must an applicant submit a legally sufficient GGRP before the**
3 **Council submits a draft site certification agreement to the**
4 **Governor, or may the Council condition operating authority on**
5 **later approval of such a plan, prior to operation?**

6 Yes, Energy Northwest must submit a legally sufficient GGRP to the Council. No, the
7 Council may not condition operating authority on the Council's later approval of a GGRP.

8 For the reasons stated in Section II.A.2.a. above, because Energy Northwest submitted
9 its application to the Council by July 22, 2007, it must submit a legally sufficient carbon
10 sequestration plan to the Council containing all the requirements of RCW 80.80.040(11)(a)-(f).
11 RCW 80.80.040(13).

12 According to RCW 80.80.040(12)(b), the Council must consider the adequacy of
13 Energy Northwest's sequestration plan during the Council's adjudication and the Council must
14 incorporate specific findings regarding the plan's adequacy when recommending approval or
15 rejection of the application for site certification to the Governor. RCW 80.80.040(12)(b) reads:

16 For facilities under its jurisdiction, the energy facility site evaluation
17 council shall contract for review of sequestration or the carbon sequestration
18 plan with the department consistent with the conditions under (a) of this
19 subsection, **consider the adequacy of sequestration or the plan in its**
20 **adjudicative proceedings conducted under RCW 80.50.090(3), and**
21 **incorporate specific findings regarding adequacy in its recommendation to**
22 **the governor under RCW 80.50.100.**

23 (Emphasis added.) The express language of RCW 80.80.040(12)(b) can only mean that the
24 Legislature did not give the Council the discretion to submit a draft site certification agreement
25 to the Governor conditioned on later approval of a sequestration plan.

26 Although RCW 80.50.100 provides that the Council may include conditions in its draft
27 certification agreement, RCW 80.80.040(12)(b) expressly provides that adequacy of the plan
28 must be fully adjudicated by the Council and that the Council must make findings regarding
29 adequacy of the plan in its recommendation to the Governor. The requirements of RCW
30 80.80.040(12)(b) should not be treated as a mere condition that must be met prior to operation
31 of the facility. Such an interpretation would negate the express language of RCW

1 80.80.040(12)(b) and would frustrate the purpose of RCW 80.80 to achieve the GHG reduction
2 goals established in RCW 80.80.020(1).

3 In addition, a forum for public participation and comment is an essential element of a
4 sequestration plan. RCW 80.80.040(11)(f). Conditional site approval would render moot the
5 opportunity for public comment mandated in RCW 80.80.040(11)(f).

6 **b. Is the issue of final “gas reduction” compliance with [RCW 80.80]
7 premature to consider at this time, given EFSEC’s authority to issue
8 a conditional certificate allowing construction, while reserving
approval of commercial operation until construction is completed
and all gas reduction goals established?**

9 No, consideration of compliance with RCW 80.80 at this time would not be premature.
10 As discussed in section II.A.4.a. above, the Council has a duty to consider the adequacy of the
11 plan during its adjudicative proceedings and to make specific findings regarding the plan’s
12 adequacy in its recommendation to the Governor.

13 The form of this question presumes that the Council is currently authorized to
14 recommend site certification in two phases: construction and operation. The rationale for this
15 presumption is not evident from RCW 80.50 or the Council’s rules. According to RCW
16 80.50.120(12), a site certification authorizes the applicant to construct and operate the facility,
17 subject only to the conditions set forth in the certification. This statute does not suggest that a
18 site certification agreement can be issued in two phases.

19 Further, WAC 463-30-320(6) provides that every recommendation to the Governor
20 shall contain a recommendation disposing of all contested issues. Under this rule, the Council
21 must dispose of all contested issues concerning an energy facility’s compliance with the
22 mandates of RCW 80.80. The Council cannot and should not delay consideration of such
23 critical issues until the facility becomes operational.

24 However, assuming for the sake of argument that RCW 80.50 authorizes the Council to
25 issue a conditional certificate authorizing construction, followed by a later approval allowing
26 operation, such authority is trumped by the express language of RCW 80.80.040(12)(b)

1 discussed above. The Legislature did not carve out an exception to RCW 80.80.040(12)(b)
2 that allows the Council to recommend approval of construction of an energy facility and
3 reserve adjudication of the merits of the applicant's sequestration plan when the facility is
4 operational. Pursuant to the express provisions of RCW 80.80.040(12)(b), the Council must
5 adjudicate the merits of the sequestration plan before it makes its recommendation to the
6 Governor.

7 Not only does the Council have a duty to consider the merits of the sequestration plan
8 before making its recommendation to the Governor, this statutory requirement is grounded in
9 sound public policy. Energy Northwest will make a significant financial investment
10 constructing the project. Once construction of the project is complete, the Council would face
11 enormous pressure to approve Energy Northwest's sequestration plan to enable the plant to
12 become operational. The best way to ensure that Energy Northwest develops a viable plan
13 consistent with the goals of RCW 80.80 is for the Council to consider adequacy of the plan
14 before Energy Northwest begins construction.

15 **III. CONCLUSION**

16 The State Parties respectfully request that the Council reject Energy Northwest's GGRP
17 as incomplete and stay further proceedings until Energy Northwest submits a plan or plans that
18 comply with Chapters 80.70 and 80.80 RCW.

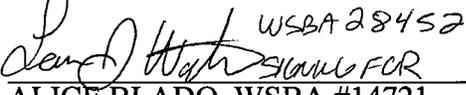
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