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BEFORE THE STATE OF WASHINGTON

ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2006-01	)	
ENERGY NORTHWEST	)	ANSWERING BRIEF OF INTERVENORS NW ENERGY COALITION, WASHINGTON ENVIRONMENTAL COUNCIL, AND SIERRA CLUB ON ENERGY NORTHWEST'S GREENHOUSE GAS REDUCTION PLAN
PACIFIC MOUNTAIN ENERGY CENTER POWER PROJECT	)	

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INTRODUCTION

In chapter 80.80 RCW, the legislature imposed demanding new limits for CO2 emissions from thermal electric power plants to address the severe threats that global warming poses to the state of Washington. The legislature recognized that meeting this emissions performance standard for some facilities might require innovative approaches that advance current technology, but sought to expand Washington's role as a leader in developing clean energy technology by requiring new power plants, including PMEC, to thoughtfully and aggressively pursue permanent sequestration of CO2 emissions. Energy Northwest's ("EN") Greenhouse Gas Reduction Plan ("Plan") offends each of these legislative goals.

In its brief, EN attempts to justify its Plan by asserting that sequestration is "impossible" for PMEC and arguing that it must be permitted instead to purchase emissions reductions to satisfy the emissions performance standard.[1] As Intervenors Northwest Energy Coalition, Washington Environmental Council, and Sierra Club ("NWEC") explained in their opening brief, these arguments are based on a one-sided presentation of the current state of sequestration science and a misunderstanding of the law. The facts, which EN continues to ignore in its opening brief, undermine EN's untested supposition that sequestration will not work at PMEC. While the law does not require EN to do the impossible by sequestering PMEC's carbon emissions in the face of specific evidence that sequestration will not work, EN is not entitled to leap to that conclusion devoid of such evidence. The requirement that EN develop and make a good faith effort to implement a sequestration plan is not designed simply to generate paperwork; the legislature sought to foster development of technology that can help meet the State's CO2

[1] EN's brief provides no justification beyond what is in its Plan for several of the elements required by RCW 80.80.0404(11), including penalties, public notices, and adequate financial assurances. Nor does it explain further the assumptions upon which the Plan is based. NWEC respectfully refers the Council to its Opening Brief for argument on those points.

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emissions goals set in chapter 80.80 RCW. Only after making a good faith effort to implement a valid sequestration plan may EN seek to meet the performance standard by purchasing verifiable emissions reductions.

In the face of these fundamental legal and factual errors, EN's brief does not present any reason why the Council should proceed with the adjudication. Indeed, all of the parties – including EN – agree that the Council should not delay consideration of EN's compliance with chapter 80.80 RCW by issuing a conditional permit for PMEC. The Council should reject the Plan and halt the adjudication until such time as EN produces a Plan that complies with the law.

ARGUMENT

I. THE PLAN VIOLATES THE REQUIREMENTS OF RCW 80.80.040.

EN's argument in defense of its Plan hinges entirely upon its opinion that sequestering its CO2 emissions is "impossible" and that it must today be permitted to invoke the limited exception that allows PMEC to purchase emissions reductions.[2] EN bases these contentions on a fatal combination of an incomplete description of the current state of sequestration efforts and a premature and heavily subjective assessment of what is "feasible" for PMEC.

A. EN's Conclusion that Sequestration is "Impossible" Contradicts the Available Evidence and the Purposes of Chapter 80.80 RCW.

As explained at length in NWEC's opening brief and in the declaration of Dr. George Peridas, the central assumption upon which EN's legal arguments are based – that permanent geological sequestration is "impossible" – cannot survive even modest scrutiny. See Energy Northwest's Opening Brief – Greenhouse Gas Plan ("EN Opening Br.") at 18. As NWEC

[2] Unless otherwise noted, "sequestration" as used in this brief refers generally to permanent geological sequestration under RCW 80.80.040(7)(a). EN has neither proposed – nor asked the Department of Ecology to approve under RCW 80.80.040(7)(b) – any methods of "other" permanent sequestration as part of this Plan. Indeed, with one exception, see infra at n.12, its brief focuses on its opinions about geological sequestration.

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previously noted, this opinion collides with the conclusions of several respected entities that have conducted far more detailed assessments of the sequestration landscape. Opening Brief of NW Energy Coalition, et. al ("NWEC Opening Br.") at 8-11 (discussing conclusions from Intergovernmental Panel on Climate Change, Massachusetts Institute of Technology, State of California, and the Declaration of George Peridas, Ph.D.)

To be sure, though the number of the large-scale geological sequestration projects continues to grow, sequestration at a commercial power plant has not yet been completed. NWEC Opening Br. at 10. However, as Dr. Peridas explained in his declaration, and as the Intergovernmental Panel on Climate Change ("IPCC") summarized, each of the elements necessary for successful carbon capture and storage ("CSS") is already being implemented elsewhere. See, e.g., Peridas Decl. at ¶ 4 (describing capture, transport, and sequestration, all of which have been accomplished – sometimes together – at other projects). Some of these other projects are already successfully sequestering the same amounts of CO2 that EN predicts would be necessary for PMEC to meet the emissions performance standard. See NWEC Opening Br. at 9 (discussing Sleipner, Weyburn projects). The task for EN in a sequestration plan is to tie each of these elements together for PMEC. Id. at 11 (citing Peridas Decl. at ¶11). Indeed, other entities in Washington State and elsewhere have produced detailed plans to adapt and apply sequestration techniques to CO2 emissions from power plants. NWEC Opening Br. at 12 (discussing FutureGen project and eastern Washington proposal).

It is telling that EN neither acknowledges nor addresses any of the published literature on sequestration in its Plan or in its opening brief. The Plan contains no discussion of comprehensive published reports from scientific bodies such as the IPCC, nor a mention of Dr.

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Peridas's presentation to the Board.[3] It is impossible to assess the accuracy of EN's conclusory description of the "current status of geological sequestration technology," EN Opening Br. at 9, n.5, when EN fails even to discuss the published literature and the information it obtained from experts as it prepared the Plan. See Plan at 13-20; Peridas Decl. at ¶¶ 2-3, 13 (discussing presentation to EN Executive Board). EN's failure to acknowledge and discuss the current state of the technology and the science is fatal to its conclusions about sequestration. The "Catch 22" that EN sees in the legislature's requirement that it make a good faith effort to implement a sequestration plan exists only in EN's imagination. See EN Opening Br. at 16.

The Council need not decide whether sequestration will ultimately be successful for PMEC to reject EN's claim that a sequestration plan is unnecessary. There is nothing unusual or "absurd" in requiring EN to develop a sequestration plan and to make a good faith effort to implement it even in the face of some uncertainty. EN Opening Br. at 16 (arguing that it would be "absurd" to prohibit EN from abandoning sequestration at this stage). For decades, technology-forcing statutes requiring both environmental and worker protection have required entities to meet standards even where the technology necessary to do so had yet to be perfected. For example, the Clean Air Act, 42 U.S.C. § 7401, et seq., contains numerous technology forcing standards that "require compliance with statutorily prescribed standards and time tables, *irrespective of present technologies*. . . . [these] standards presume that industry can be driven to develop the requisite technologies." Natural Res. Defense Council v. Reilly, 983 F.2d 259, 268, (D.C. Cir. 1993) (emphasis added); see also id. at n.12 (summarizing comments of Senator

[3] Indeed, the only *mention* of the IPCC report in the Plan is EN's reproduction of a flowchart taken from the Report. See Plan at 15. EN apparently ignored the IPCC's extensive assessment of past and current efforts to sequester CO2 and its conclusion that "*subsurface injection of CO_2 is not for the distant future, but is being implemented now* for environmental and/or commercial reasons." Id. at 204 (emphasis added) Exh. 1 to NWEC's Opening Br. at 204.

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Muskie at 116 CONG.REC. 42,381, 42,382 (1970) that "claims of technological impossibility not sufficient to avoid standards under the CAA"). Allowing economic feasibility to play a role does not alter the picture:

> [T]he mere fact that the provisions "seek to promote technological advances while also accounting for cost does not detract from their categorization as technology-forcing standards." The "Congress intended the agency to project future advances in pollution control capability. It was 'expected to press for development and application of improved technology rather than be limited by that which exists today.'"

Husqvarna AB v. EPA, 254 F.3d 195, 201 (D.C. Cir. 2001) (internal citations omitted).

Similarly, in setting standards to protect workers, OSHA may "impose a standard which requires an employer to implement technology 'looming on today's horizon,' and is not limited to issuing a standard solely based upon technology that is fully developed today." American Iron and Steel Inst. v. OSHA, 577 F.2d 825, 838 (3rd Cir. 1978); see also United Steelworkers of America v. Marshall, 647 F.2d 1189, 1264-1265 (D.C. Cir. 1980) ("At least where the agency gives industry a reasonable time to develop new technology, OSHA is not bound to the technological status quo. . . . So long as it presents substantial evidence that companies acting vigorously and in good faith can develop the technology, OSHA can require industry to meet [standards] never attained anywhere."). In short, the whole point of technology-forcing statutes like chapter 80.80 RCW is to encourage innovation to turn what may be uncertain at present into industry-standard technology.

Here, the legislature required EN and every other new power facility that will exceed the emissions performance standard to develop and implement a sequestration plan. Contrary to the statements peppered throughout EN's brief, there is nothing unique or unfair in requiring it to develop and implement such a plan. The only difference between the legislature's treatment of EN and any other applicant is that EN may purchase emissions reductions after it demonstrates

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that its good faith effort to implement its sequestration plan has failed. Other applicants may not build or operate their plants if implementation of their sequestration plan fails. There is nothing unreasonable in requiring EN to adhere to the legislature's command that it make a good faith effort to make sequestration work at PMEC before it seeks to purchase emissions reductions.

B. EN Cannot Declare Sequestration "Infeasible" Without First Attempting to Implement a Sequestration Plan.

Because EN's Plan does not contain the elements of a valid sequestration plan under RCW 80.80.040(11), its counsel spends the bulk of its brief arguing that EN should be permitted to immediately invoke the conditional provision that allows EN to meet the emissions performance standard by purchasing emissions reductions from other power plants if it determines, after a good faith effort to implement the plan, that sequestration is not feasible. See RCW 80.80.040(13). Springing from its unsupported opinion that sequestration is "impossible," EN argues that it would make no sense to require it to "spend time and money" on a sequestration plan before making a determination that implementation is not feasible. EN Opening Br. at 14. According to EN, the "statute does not expressly address the timing of Energy Northwest's [feasibility] determination," and so it may make that determination now. Id. See also id. at 15-16 (asserting that RCW 80.80.040(13) is "ambiguous as to the timing of the feasibility determination"). In short, EN seeks to summarily declare sequestration "infeasible" without having made even the most modest effort to determine whether it is.

Contrary to EN's argument, however, chapter 80.80 RCW sets out a clear and sequential five-step process for PMEC. In order to invoke the alternate compliance route the legislature established for PMEC in RCW 80.80.040(13), EN:

> (1) must assemble a sequestration plan that contains the elements required by RCW 80.80.040(11);
>
> (2) "shall make a good faith effort to implement the sequestration plan;"

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> (3) may determine that implementation is not feasible after a good faith effort to implement the plan;
>
> (4) must document the steps taken to implement the plan and provide evidence of the technological and economic barriers to implementation to the Council; and
>
> (5) must inform the Council that it will implement the plan to purchase emissions reductions.

RCW 80.80.040(13).

By arguing that a "feasibility" determination can be made now, EN ignores this clear step-wise process set by the legislature. The language describing this process admits of no exception and is not "ambiguous" or open to differing interpretations. See EN Opening Br. at 15. Nothing in this unambiguous structure allows EN to draw a conclusion about the feasibility of sequestration *now* before it has investigated the science or even conducted a single test of the Kalama site.[4]

Indeed, because the legislature crafted RCW 80.80.040(13) knowing that PMEC was the only facility it covered, EN's repeated invocation of this section to imply that the legislature somehow showed a preference for PMEC to proceed is off the mark. EN Opening Br. at 2, 9, 16. If the legislature intended for PMEC to be permitted regardless of its compliance with the process and substance of RCW 80.80.040, the legislature could easily have said so, as it did for existing plants. See RCW 80.80.040(2) ("All baseload electric generation facilities in operation as of June 30, 2008, are deemed to be in compliance with the greenhouse gases emissions performance standard established under this section . . . ."). It instead placed both substantive

[4] EN's conclusion that sequestration is not feasible is made without advancing the process to the point where it can support that conclusion with either "sufficient technical documentation" under RCW 80.80.040(11)(b) or the additional documentation required by RCW 80.80.040(13). For example, EN should already have completed the site characterization process and included the results in this Plan. See State Parties' Opening Brief at 11; Peridas Decl. at ¶ 13; NWEC Opening Br. at 12 (describing process followed by other facilities).

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and procedural conditions on the limited adjustment offered to PMEC. Sequestration and purchased emissions reductions are not, as EN supposes, interchangeable. If they were, the legislature would have allowed EN to choose between the two options at the outset rather that constructing the careful step-wise process that requires EN to first work toward sequestration. RCW 80.80.040(13). Rather than a safety valve if its good faith efforts to sequester fail, EN reads RCW 80.80.040(13) as a short-cut to purchase offsets. That position turns a carefully-tailored adjustment by the legislature into an all-encompassing exception that swallows the rule.[5]

Moreover, the argument that EN may take a proposed short-cut to emissions reductions ignores the technology-forcing purposes of the statute. The legislature's requirement that EN make a "good faith effort" to first implement a sequestration plan is a vital – and contrary to EN's protests, perfectly reasonable – prerequisite to any feasibility determination in a technology-forcing statute. An agency "or the courts may discover that a standard is infeasible only after industry has exerted all good faith efforts to comply." United Steelworkers, 647 F.2d at 1266; see also Am. Iron & Steel Inst., 577 F.2d at 835 ("[I]t may become evident that a particular safety and health standard is economically or technologically infeasible, or otherwise unreasonable, only after employers have made a good faith effort to comply."). In sum, when requiring entities to implement technology-forcing provisions, a good faith effort to comply acts to inform the objective determination of feasibility. EN's view that it may avoid making the required the good faith effort to implement a sequestration plan is based on a perfectly circular

[5] Though it attempts to assign "absurd results" to the other parties' interpretation of the statute, it is EN's interpretation that renders meaningless the legislature's technology-forcing command to meet the emissions performance standard by sequestering CO2 emissions. EN's position that sequestration is "impossible" is tantamount to asserting that the legislature set an emissions performance standard that it knew could not be met. As EN highlights elsewhere in its brief, statutes should not be construed to produce such absurd results. EN Opening Br. at 16.

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assertion that sequestration is infeasible for a power plant because no one has yet tried to make it work.

Chapter 80.80 RCW does not require EN to inject CO2 emissions into the ground if it knows that they will simply bubble back to the surface, but it requires far more than simply abandoning the effort at this preliminary stage of the process.

C. The Council is the Final Arbiter of Feasibility.

Regardless of the timing, EN's position that it may make its own unsupported feasibility determination finds no support in the statute. EN Opening Br. at 16. The Council plays a key role in determining that new power plants will meet the standards set by the legislature. The legislature assigned to the Council and the Department of Ecology the important task of reviewing an applicant's sequestration plan to ensure that it provides full and sufficient technical documentation to support sequestration and contains all of the elements required by RCW 80.80.040(11). See RCW 80.80.040(12)(b). For EN, which may seek to purchase emissions reductions if a good faith effort to implement its sequestration plan fails, this oversight role continues beyond this initial submittal. In order to avail itself of RCW 80.80.040(13), EN:

> shall submit documentation of [its] determination [that implementation of its sequestration plan is not feasible] to the energy facility site evaluation council. The documentation shall demonstrate the steps taken to implement the sequestration plan and evidence of the technological and economic barriers to successful implementation.

RCW 80.80.0404(13). There would be little point in requiring these steps if there was no role for the Council to play. This provision was not meant to produce paperwork, but to ensure that the applicant was not abandoning a sequestration plan on a flimsy premise.

The ultimate feasibility of the planned sequestration is an objective judgment that depends on hard data, not the preferences of the applicant. Rarely will a regulated entity choose to make changes to its operational preferences, but such a desire to avoid change does not make a

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method infeasible. That is why, for example, in determining what is Best Available Control Technology ("BACT") when issuing air quality permits, it is the *regulator* who determines "on a case-by-case basis" which standard is achievable to provide the "maximum degree of reduction for each air pollutant" for a specific facility. WAC 173-400-030(12). The need for objective review is heightened under the technology-forcing statutory scheme in chapter 80.80 RCW, which by its very nature, requires an objective decision-maker to review whether an entity has in fact looked beyond the current state of the technology and made a good faith effort to implement its sequestration plan. See supra at 8-9 (discussing importance of good faith effort).[6]

EN cannot – either now or later – offer subjective preferences or assessments of the feasibility of sequestration, detached from any rational feasibility assessment, to evade the requirement that it implement a sequestration plan. The Council plays an important and vital oversight role in reviewing this determination when and if EN properly documents a finding that implementation of its sequestration plan is not feasible.

D. EN's Definition of Feasibility is Arbitrary.

As explained in NWEC's opening brief, the only basis for EN's conclusion about feasibility rests on its conflation of "feasibility" with "commercial-scale" availability. NWEC

[6] Courts have provided some guidance to inform what objective factors play a role when determining technological feasibility. For example, courts have asked whether there is "a reasonable possibility that the typical firm will be able to develop and install engineering and work practice controls that can meet [the standard] in most ... operations," . . . not that 'the standard [is] *certainly* feasible for *all* firms at *all* times in *all* jobs....'" Forging Indus. Ass'n v. Sec'y of Labor, 773 F.2d 1436, 1452 (4th Cir. 1985) (citations omitted) (emphasis in original). See also United Steelworkers, 647 F.2d at 1266 ("Since 'technology-forcing' assumes . . . highly speculative projections about future technology, a standard is obviously not infeasible solely because . . . [there is] no hard evidence to show that the standard has [previously] been met."). To measure economic feasibility, the courts have determined that the "ultimate inquiry is whether [there is] 'a reasonable estimate of compliance costs and . . . a reasonable likelihood that these costs will not threaten the existence or competitive structure of an industry, even if it does portend disaster for some marginal firms.'" Forging Indus. Ass'n., 773 F.2d at 1453 (citation omitted).

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Opening Br. at 16-17. Rather than producing a realistic assessment of what sequestration might cost, EN has arbitrarily determined that sequestration is "infeasible" if it exceeds the $5/tonne that EN is willing to pay to make it work. NWEC Opening Br. at 17, 24-25. Based on this assessment, EN argues that it should be permitted to immediately purchase emissions reductions, presumably because they are less expensive. But see NWEC's Opening Br. at 20 (citing EN's prefiled testimony and studies showing price is already increasing and may rise rapidly in the next several years); Matthew Wald, *The Carbon Calculus,* N.Y. TIMES, Nov. 7, 2007 at H1 (discussing likely cost of carbon emissions under federal regulation and reporting "[t]he consensus in the energy business is that lawmakers will come up with a charge that could start at $10 per metric ton or more").[7] Feasibility is not a bare measure of whether one compliance method is cheaper than another. The legislature did not provide that EN may choose the "cheaper of either sequestration or purchased emissions reductions." Instead, the legislature required EN to sequester its emissions, but allowed it to purchase offsets only if it finds that it is not possible to do so and documents the technological and economic reasons to support that finding. EN's preference that sequestration become commercially available or cost-competitive with other compliance options cannot underpin a valid objective feasibility determination.

E. EN Has Not Included Provisions for the Purchase of Emissions Reductions Should its Sequestration Plan Fail.

EN's brief – like its Plan – contains no specific information about how it might satisfy the emissions performance standard through the purchase of emissions reductions if its good faith effort to implement sequestration fails. Indeed, the entire discussion of this issue is completed in

[7] The article is available from http://www.nytimes.com/2007/11/07/business/businessspecial3/07carbon.html?_r=1&ref=businessspecial3&oref=slogin (last viewed Nov. 7, 2007).

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a single paragraph. See EN Opening Br. at 17-18.[8] Putting off any investigation into the availability, price, or effectiveness of such reductions in the western interconnection does not put EN in a position to "implement the plan" to utilize emissions reductions if and when EN properly determines that sequestration is not feasible. See NWEC Opening Br. at 18-19 (citing RCW 80.80.040(13)).

In fact, EN's brief serves only to generate greater concern about its intentions. EN argues that it "may propose some sequestration projects as verifiable emissions reductions for a portion of PMEC's required emission reductions." EN Opening Br. at 4, n.1. EN defines "sequestration" to include such non-permanent projects as "forestry emission reduction and agricultural emissions." Id. See also Prefiled Testimony of Mike Burnett at 9. The argument that these types of actions qualify as "emissions reductions" directly contradicts the plain language of the statute, which requires that the reductions come from "*an electric generating facility* located within the western interconnection." RCW 80.80.040(13) (emphasis added). EN ignores this limitation and ends up conflating concepts like "mitigation" under chapter 80.70 RCW and potential "other permanent sequestration approved by the department" with those actual, verifiable, emissions reductions required by the statute.

F. EN Cannot Cure the Plan's Fundamental Deficiencies Through "Adaptive Management."

Though the phrase appears only once in its Plan, EN's promise to implement "adaptive management" to correct the Plan's failure to satisfy the statutory requirements forms a significant portion of its defense. EN Opening Br. at 5, 10-11. While a precise universal definition of "adaptive management" is difficult to articulate, the concept is not synonymous

[8] This brief discussion and lack of detail is puzzling in light of EN's hope that the Council will allow it to immediately invoke this method to comply with the emissions performance standard.

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with a vague assurance to figure it all out later.[9]

Other statutes and regulations as well as the courts have articulated definitions of adaptive management that call for far more detail than what EN provides in its Plan. For example, CTED has defined adaptive management in the context of the Growth Management Act as a process that "relies on scientific methods to evaluate how well regulatory and nonregulatory actions achieve their *objectives*." WAC 365-195-920(2) (emphasis added). When evaluating Skagit County's adaptive management program under this provision, the Washington State Supreme Court stressed the fundamental importance of an effective monitoring program: "Without a compliant monitoring system, the adaptive management program cannot be compliant as the county cannot adequately adapt its management of critical areas if it is unable to adequately detect changes to them." Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd., 166 P.3d 1198, 1209 (Wash. 2007); see also id. (noting growth management hearing board's finding that "'clear goals, objectives, performance standards, and a well-defined monitoring program' are essential to a successful adaptive management program"). Other Courts have stressed the need to ensure that an adaptive management program include clear objectives and action-forcing provisions to ensure that entities are capable of responding to any problems detected by monitoring. See Natural Res. Defense Council v. Kempthorne, 506 F. Supp. 2d 322, 356 (E.D. Cal. 2007) ("Here, the adaptive management process has no quantified objectives or required mitigation measures. Although the *process* must be implemented by

[9] For example, Washington State's forests practices law defines "'Adaptive management' [as] reliance on scientific methods to test the results of actions taken so that the management and related policy can be changed promptly and appropriately." RCW 76.09.020(1). Others have similarly defined the concept as "the process of implementing land management activities in incremental steps and evaluating whether desired outcomes are being achieved at each step." William H. Moir, *Adaptive Management on Public Lands in the United States: Commitment or Rhetoric?*, 28 Environmental Management 141- 148 (2001).

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holding meetings and making recommendations, nothing requires that any *actions* ever be taken.") (emphasis added). Generally, then, adaptive management demands a plan that identifies the *objectives* to be met, includes interim *milestones* or *triggers*, establishes a rigorous *monitoring program* to ensure that those milestones and triggers are met, and details the *consequences* or *next steps* to be taken when monitoring detects a problem.

EN equates its Plan Compliance Program, see Plan at 23-24, with "adaptive management." EN Opening Br. at 5, 9-11. But this portion of its Plan consists largely of a passive commitment to stay apprised of technological or economic advances made by others coupled with a promise to report that information to the Council as it becomes available. See Plan at 23-24. The Plan sets out no clear objective (e.g., sequestration at PMEC by 2013), provides no triggers or milestones for measuring progress toward reaching that objective, contains no monitoring plan to detect when the plan goes off-track, and fails to describe a single action or consequence if monitoring detects a problem or reveals a failure to meet an implementation milestone.

The absence of any of the components of adaptive management highlights the fundamental problem with relying on the "Plan Compliance Program" to cure all of the present deficiencies in the Plan – EN has failed to produce a plan with any objectives in the first place. The "Plan Compliance Program" merely perpetuates this problem several years into the future. Thus, while EN hopes that part of the Plan Compliance Program will include five-year reports that might propose "a plan for the transition to geological sequestration or other permanent sequestration," if it later concludes that it is feasible, id. at 23, the legislature required that this sequestration plan be prepared and submitted *now*, not at some unspecified point in the future based on EN's five-year review of sequestration feasibility. Cf. Swinomish Indian Tribal Cmty.,

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166 P.3d at 1208-1209 ("We are also unpersuaded by the county's argument that in the absence of an adequate benchmark, it does the 'next best thing' by proposing to monitor current conditions in an effort to develop a benchmark in the future."). Using "adaptive management" to be flexible in implementing a Plan that contains objectives, monitoring, milestones, and actions is one thing. Using it to put off until tomorrow what *must* be done today is quite another.

G. EN May Not Double-Count its Chapter 80.80 RCW Emissions Reductions to Satisfy the Mitigation Requirements of Chapter 80.70 RCW.

The legislature intended the emissions performance standard in chapter 80.80 RCW to "work *in unison* with the state's carbon dioxide mitigation policy, chapter 80.70 RCW and its related rules . . . ." RCW 80.80.005(1)(e) (emphasis added). EN insists that the only logical reading of this "in unison" language is that it permits the same emissions reductions used to comply with chapter 80.80 RCW to also count as mitigation under chapter 80.70 RCW. See EN Opening Br. at 12. ("[G]reenhouse gas reduction projects that comply with the requirements of both statutes should work toward compliance with both statutes. . . . PMEC will meet the twenty percent requirement [of chapter 80.70 RCW] in the course of meeting the requirements of chapter 80.80 RCW."). The Council should reject EN's interpretation of RCW 80.80.005(1)(e) because it is inconsistent with the plain language of the provision and would produce absurd and inequitable results.

At the outset, EN argues the plain language of RCW 80.80.005(1)(e) allows PMEC to "double-count" its emissions reductions toward compliance with chapter 80.70 RCW. EN Opening Br. at 11-12. However, the first definition of "unison" that EN offers implies that chapters 80.70 RCW and 80.80 RCW should work "'[i]n complete agreement; harmonizing exactly,'" not that operation of chapter 80.80 RCW should render parts of chapter 80.70 RCW ineffective. See EN Opening Br. at 11 (quoting American Heritage Dictionary of the English

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Language 1882 (4th ed. 2000)). Furthermore, EN does not explain how its interpretation of RCW 80.80.005(1)(e) squares with the express prohibitions on double-counting found in both statutes. See NWEC Opening Br. at 25-27. The plain meaning of "in unison" cannot be that compliance with the emissions performance standard through sequestration renders the requirements of chapter 80.70 RCW a nullity; if the legislature had intended chapter 80.80 RCW to supersede chapter 80.70 RCW, it would have said so. Anderson v. Dept. of Corrections, 159 Wn.2d 849, 858-59, 154 P.3d 220 (2007) ("We do not favor repeal by implication, and where potentially conflicting acts can be harmonized, we construe each to maintain the integrity of the other.") (citation omitted).

It is important to consider the statutory context in determining meaning of "in unison" as used in RCW 80.80.005(1)(e). See Advanced Silicon Materials, LLC v. Grant County, 156 Wn.2d 84, 89-90, 124 P.3d 294 ("The plain meaning of a statute 'is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.'") (citation omitted). While chapter 80.80 RCW requires power plants to *reduce* emissions in order to comply with an emissions performance standard, chapter 80.70 requires energy facilities to *mitigate* 20% of their "total carbon dioxide emissions." See NWEC Opening Br. at 24, 27-30. These two chapters, which take different approaches to GHG emissions, fit neatly together form a comprehensive scheme for accomplishing the state's goals for controlling GHG emissions. Specifically, in chapter 80.80 RCW, the legislature recognized that Washington is especially vulnerable to climate change and needed to significantly reduce its GHG emissions. RCW 80.80.005(1)(a)-(b). In furtherance of these findings, the legislature set the goal of "reducing overall emissions to fifty percent below 1990 levels, or seventy percent below the state's expected emissions" by 2050. RCW 80.80.020(1)(c). It was in the context of

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these findings and goals that the legislature ordered the emissions performance standard to work "in unison" with chapter 80.70 RCW's mitigation requirements.

EN's interpretation of RCW 80.80.005(1)(e) would also produce inequitable results that effectively punish cleaner energy facilities. Dirtier facilities, such as PMEC, would not be required to purchase mitigation under chapter 80.70 RCW so long as they take action to reduce emissions to the performance standard in chapter 80.80 RCW. But cleaner plants that already comply with chapter 80.80 RCW without the need for sequestration would still be required to mitigate 20% of their emissions under chapter 80.70 RCW. See NWEC Opening Br. at 28, n.16; see also State Parties' Opening Br. at 24. As EN readily admits, the Council should not interpret chapter 80.80 RCW to produce such absurdities. See EN Opening Br. at 16 ("it cannot 'be presumed that the legislature intended absurd results.'") (quoting Tingey v. Haisch, 159 Wn.2d 652, 663-64, 152 P.3d 1020 (2007)).

When a conductor instructs a choir to sing "in unison," surely the conductor has not called for a solo performance. Likewise, the legislature's command that the emissions performance standard work "in unison" with the mitigation requirements of chapter 80.70 RCW does not call for chapter 80.70 RCW to be rendered silent. Instead, the Council should harmonize the two statutes: carbon emissions reduced to satisfy the emissions performance standard do not count in the calculation of the "total carbon emissions" subject to the mitigation requirements of chapter 80.70 RCW. Whatever emissions remain after compliance with chapter 80.80 RCW are subject to the 20% mitigation requirement of RCW 80.70.020(4). This reading of RCW 80.80.005(1)(e) is consistent with the plain meaning of "in unison," gives effect both statutes, implements the purposes and goals of chapter 80.80 RCW, and avoids the absurd and inequitable results of EN's proffered interpretation.

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II. THE COUNCIL SHOULD REFUSE TO ISSUE A CONDITIONAL PERMIT FOR PMEC AND STAY FURTHER CONSIDERATION OF EN'S APPLICATION.

A. All Parties Agree That a Conditional Permit for PMEC is Inappropriate.

All of the parties agree – though EN has different reasons – that the Council should not issue a conditional permit that would allow construction of PMEC in the absence of a legally valid sequestration plan. See EN Opening Br. at 24-25 (asserting that "practically . . . . [l]eaving all of PMEC's compliance requirements for the future . . . would make financing the construction of PMEC impossible.").[10] Under these circumstances the Council need not consider issuing a conditional permit.[11] The Council should instead find that EN's Plan violates the law and halt the adjudication until such as EN submits a plan that complies with chapters 80.80 RCW and 80.70 RCW.

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[10] It is worth noting that EN's plea for prompt resolution supports NWEC's position that compliance with chapter 80.80 RCW is a fundamental issue that must be determined before the adjudication can proceed. See NWEC Opening Br. at 32, 33-35. Whether and how EN can comply with the statute determines whether the project moves forward at all.

[11] Though it opposes issuance of a conditional permit that leaves the ultimate determination of its legal compliance for a later date, EN confusingly argues that the Council could issue a permit that allows EN to delay detailing how it will actually comply with chapter 80.80 RCW at some point in the future. EN Opening Br. at 24 (arguing that approving the Plan's "path for compliance" will ensure that the Plan will someday be "'adequate' to meet the requirements of chapter 80.80 RCW"). As an initial matter, this argument is merely a restatement of EN's position that its "Plan Compliance Program" somehow assures compliance with the statute. See supra at 13-14. As discussed above and in NWEC's opening brief, RCW 80.80.040(12)(b) and the Council's rules prohibit it from issuing a site certification without ensuring compliance with the fundamental requirements of chapter 80.80 RCW. See NWEC Opening Br. at 34 (discussing complementary requirements that Council review sequestration plan as part of the adjudication and make a recommendation to governor only after deciding all issues raised in adjudication). Unlike the examples that EN cites from other facilities, EN Opening Br. at 23, compliance with chapter 80.80 RCW is not just another in a list of well-documented conditions that must be satisfied before it may build and operate PMEC. Instead, the legislature has made clear that EN must either comply with the emissions performance standard or forego the project. RCW 80.80.040(1).

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B. The Council is not Required to Proceed With the Adjudication Without a Valid Sequestration Plan.

While EN agrees that compliance with chapter 80.80 RCW must be determined before PMEC can receive site certification, nothing requires the Council to proceed with the adjudication once it determines that this Plan is legally insufficient. EN Opening Br. at 23-24 (arguing that the adjudication should proceed even in the absence of a valid Plan). As events in this adjudication demonstrate, even the general 12-month timeline for the site certification process in RCW 80.50.100(1) is flexible. See EN Opening Br. at 20 (acknowledging previous 6-month extension invoked to evaluate impact of chapter 80.80 RCW on its application). If the Council finds EN's Plan legally insufficient, nothing prevents EN from requesting another extension to provide the time necessary to develop a Plan that complies with the law.[12] Indeed, if the Council finds the Plan inadequate, the adjudication will necessarily be protracted to accommodate time for the Council to review – after another opportunity for input from the parties and the public – any Plan that EN may subsequently submit. Even estimated conservatively, the review process for the current Plan will have required four months to complete.

On the other side of the ledger, EN has identified no specific prejudice that would result from staying the proceedings until it complies with the law. Halting the adjudication until such time as EN complies with this legal prerequisite imposes no undue hardship on the applicant and would conserve the resources of the Council and the parties. Compliance with chapter 80.80

[12] NWEC explained in its opening brief why an entirely new sequestration plan is a major change that is not covered by the provisions of WAC 463-10-116. NWEC Opening Br. at 32-33. The changes needed to assemble a plan that complies with the law are not merely "additional commitments" or "modif[ications]." EN Opening Br. at 21. Rather, the fundamental deficiencies in this Plan demand that EN develop an entirely new sequestration plan. Many of the elements required for that Plan, such as site characterization studies, see supra at n. 4, may take some time to complete.

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RCW affects such fundamental elements as the physical configuration of the plant, the choice of fuels, and the environmental impacts that flow from these choices. There is simply no reason to proceed with a full-blown adjudication before the parties – including EN – know whether and in what configuration PMEC can be financed and built. See NWEC Opening Br. at 30-31, 34-35 (arguing that any modifications to the Project should be made now, before EN and the parties expend further resources).

CONCLUSION

Rather than present the Council and the public with a sequestration plan that describes with sufficient technical detail how it will achieve sequestration of CO2 emissions from PMEC, EN has instead submitted a "plan" that concludes that sequestration for PMEC is impossible without even reviewing the available literature or turning a shovelful of earth to investigate. At best, EN's Plan is nothing more than a plea to allow it to wait for others to commercialize sequestration methods for power plants in exchange for a non-binding assurance that it will consider adopting the technique at some point in the future. This wait-and-see approach violates both the letter and spirit of chapter 80.80 RCW. The Council need not doubt the sincerity of EN's future commitment to sequestration to reject this Plan. Rather, by any objective measure, EN has fallen far short of what the legislature commanded it to do. NWEC respectfully requests that the Council reject the Plan and stay the adjudication until such time as EN produces a Plan that complies with the law.

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Respectfully submitted this 8th day of November, 2007.

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On November 8, 2007, I served a true and correct copy of the following documents on the parties listed below:

1. Answering Brief of Intervenors NW Energy Coalition, Washington Environmental Council, and Sierra Club on Energy Northwest's Greenhouse Gas Reduction Plan.

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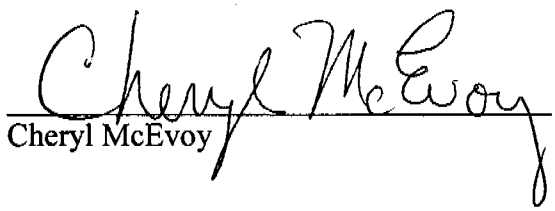
I, Cheryl McEvoy, declare under penalty of perjury that the foregoing is true and correct. Executed this 8th day of November, 2007, at Seattle, Washington.



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