ENERGY FACILITY SITE EVALUATION COUNCIL
STATE OF WASHINGTON

In the Matter of Application No. 2006-01: ENERGY NORTHWEST PACIFIC MOUNTAIN ENERGY CENTER	Application No. 2006-01 STATE PARTIES' RESPONSE BRIEF ON ESSB 6001 ISSUES

I. INTRODUCTION

The State Parties submit this brief in response to the opening brief filed by Energy Northwest. Energy Northwest fails to establish that its Greenhouse Gas Reduction Plan (GGRP or Plan) satisfies the requirements of RCW 80.80. Therefore, the State Parties respectfully ask the Council to reject the Plan and stay proceedings until a valid plan is submitted.

II. ARGUMENT

A. Sufficiency of the Sequestration Plan

1. The law is unambiguous in terms of what is required and the timing of those requirements.

Unambiguous laws are interpreted according to their plain language. *See, for example, Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002). A statute is not ambiguous merely because different interpretations of that statute are conceivable; rather, ambiguity arises when there are two or more *reasonable* interpretations of a statute. *Cerrillo v. Esparza,* 158 Wn.2d 194, 201, 142 P.3d 155 (2006).

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The language of RCW 80.80.040 regarding the submission of carbon sequestration plans is not susceptible to two or more reasonable interpretations. These requirements are crystal clear and apply to PMEC as a "project [already] under consideration" when the law went into effect. RCW 80.80.040(13). Specifically, PMEC is required to "include all of the requirements of subsection (11) . . . in its carbon sequestration plan submitted as part of the energy facility site evaluation council process." *Id.* Subsection (11) lists the six mandatory elements that PMEC must include in its plan, including adequate financial assurances, provisions for sequestration supported by full and sufficient technical documentation, provisions for monitoring for the effectiveness of implementation, penalties for failure to implement on schedule, provisions to purchase emissions reductions if the sequestration plan fails, and provisions for public notice and comment on the plan. RCW 80.80.040(11).

RCW 80.80.040 is equally clear on the timeline for submission and implementation of the plan:

1. PMEC must submit the plan to the Council as part of the application process: PMEC "is required to include all of the requirements of subsection (11) of this section in its carbon sequestration plan submitted as part of the energy facility site evaluation council process." RCW 80.80.040(13).

2. The Council must consider the adequacy of the plan during the adjudicative proceeding: "[T]he energy facility site evaluation council shall contract for review of sequestration or the carbon sequestration plan with [Ecology and] consider the adequacy of sequestration or the plan in its adjudicative proceedings conducted 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).

3. If PMEC receives final site certification agreement approval, Energy Northwest must make a good faith attempt to implement the sequestration plan: "A project under consideration by the energy facility site evaluation council by July 22, 2007, that

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receives final site certification agreement approval under chapter 80.50 RCW shall make a good faith effort to implement the sequestration plan."[1] RCW 80.80.040(13).

4. If it is determined that implementation of the plan is infeasible, the project owner will submit documentation to the Council demonstrating the steps taken to implement the plan and the barriers to successful implementation: "If the project owner determines that implementation is not feasible, the project owner shall submit documentation of that determination 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." *Id.*

5. Last, the project owner can then notify the Council that it intends to implement the portion of its plan that allows for purchase of emissions reductions: "The project owner shall then provide to the energy facility site evaluation council notification that they shall implement the plan that requires the project owner to meet the greenhouse gases emissions performance standard by purchasing verifiable greenhouse gases emissions reductions from an electric generating facility located within the western interconnection, where the reduction would not have occurred otherwise or absent this contractual agreement . . . ." *Id.*

This ordered sequence of events does not allow PMEC to shortcut the process by leaping straight to the fifth step allowing purchase of offsets. Rather, PMEC must comply with steps one through four before step five becomes an option.

The policy undergirding RCW 80.80 supports this preference for sequestration over other forms of mitigation, such as purchase of offsets. The goal of Washington State is to significantly reduce its contributions to the global problem of greenhouse gas (GHG) emissions, and to set incremental emissions reduction goals to be measured in the years 2020, 2035, and 2050. RCW 80.80.020. The Legislature recognized that Washington's own

[1] Final site certification agreement approval occurs when the Governor approves the project under RCW 80.50.100.

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emissions continue to increase "despite international scientific consensus that worldwide emissions must be reduced significantly below current levels to avert catastrophic climate change . . . ." RCW 80.80.005(1)(b). In order for Washington to do its part in addressing the problem, the Legislature acknowledged a need to "assess the trend of greenhouse gases emissions statewide over the next several decades, and to take sufficient actions so that Washington meets its responsibility to contribute to the global actions needed to reduce the impacts and the pace of global warming . . . ." RCW 80.80.005(1)(f). It is against this policy backdrop that the Legislature set its technology-forcing standards for new fossil-fuel fired power plants within Washington State, including sequestration mandates.

Energy Northwest disregards the plain terms and policy of the statute by arguing that the law is ambiguous, especially as to timing of the law's mandates. For example, Energy Northwest argues "[t]he statute does not expressly address the timing of Energy Northwest's determination [that sequestration is infeasible]. It is both appropriate and realistic to make that determination now." EN Opening Br. at 14. This is flatly wrong. The statute unambiguously states that this determination is to be made only after Energy Northwest makes a good faith attempt to implement its sequestration plan following final site certification approval. RCW 80.80.040(13).

Furthermore, a determination of infeasibility must be supported by documentation of the steps taken to implement the plan and proof of the technological and economic barriers to implementation. *Id.* Energy Northwest has taken no steps to implement sequestration so it cannot possibly comply with the statute's requirements. Additionally, Energy Northwest has not even attempted to document its determination of infeasibility at this premature juncture. Instead, Energy Northwest repeats its oft-cited refrain that technology for sequestration is not yet feasible and sequestration will not become commercially feasible until some time in the future. However, commercial feasibility is not the test under RCW 80.80.040. As for technological infeasibility, all of the other parties have submitted filings that demonstrate that

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sequestration *is* technologically feasible today and *is* occurring in the United States and around the world right now. *See* State's Opening Br., Storman Decl. and exhibit; NWEC Opening Br., Peridas Decl. and exhibits; Riverkeepers Opening Br., exhibits.

Energy Northwest's lament about the infeasibility of sequestration is simply an attempt to avoid meeting the legislative mandates. Energy Northwest asks, "[w]hen it is already obvious that sequestration is not feasible, why should Energy Northwest spend time and money, and perhaps cause environmental impacts, in advance of a formal determination [of infeasibility]?" EN Opening Br. at 14. It is possible to eliminate the first clause of this question because the other parties have shown that sequestration is feasible. Therefore, we are left with the remaining question that seems to be at the heart of Energy Northwest's concerns: Why should Energy Northwest spend time and money on developing a sequestration plan? The answer is simple: because the Legislature has determined that energy facilities must internalize the costs of harmful GHG emissions and has designated sequestration as a preferred approach to achieving the state's emissions reductions goals. *See* RCW 80.80.005(4)(b) ("It is vital to ensure all electric utilities internalize the significant and underrecognized cost of emissions and to reduce Washington consumers' exposure to costs associated with future regulation of these emissions . . . ."

Energy Northwest also argues that the legislative intent of RCW 80.80.040(13) is to allow Energy Northwest to proceed with permitting, regardless of whether Energy Northwest develops a bona fide sequestration plan. EN Opening Br. at 16. This argument is wrong. The Legislature did grant special consideration to PMEC by authorizing the purchase of offsets if implementation of a sequestration plan fails. However, the Legislature also required PMEC to submit a plan that contains all of the elements of RCW 80.80.040(11), which Energy Northwest admits it has not done. EN Opening Br. at 9 (Energy Northwest argues it is impossible to provide full and sufficient technical documentation as required by the law). If

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the Legislature had intended to allow PMEC to bypass sequestration altogether, it would have said so explicitly.

Evidence submitted demonstrates that there are measures Energy Northwest could implement right now (or could have started months ago) in order to develop a bona fide sequestration plan. For example, it could start the process of site characterization and development of a detailed site map. Stormon Decl. ¶ 6; Peridas Decl. ¶ 12; McCling Prefiled Testimony at 7. Energy Northwest could also develop a monitoring plan to prevent releases of CO2 to the atmosphere or contamination of groundwater. Stormon Decl. ¶ 7; Peridas Decl. ¶ 14. Although no one can state with certainty that Energy Northwest will be able to implement its plan within five years of operation, it is undoubtedly true that Energy Northwest can provide a plan with much more detail at this juncture. Energy Northwest's GGRP falls far short of what is required by the plain language and policy of RCW 80.80.

2. The GGRP does not constitute an adaptive management approach to sequestration.

As a general matter, "adaptive management" is an environmental approach that sets a clearly identified outcome but allows a regulated party some flexibility in determining how to reach that outcome. *See, for example*, Department of the Interior, *Department Manual, Environmental Quality Programs, National Environmental Policy Act of 1969,* 516 DM 4.16 (2004), cited in EN's Opening Brief at 5, n.3; *see also Natural Resources Defense Council v. Kempthorne*, 506 F. Supp. 2d 322, 356 (E.D. Cal. 2007) (rejecting an adaptive management approach that lacks quantified objectives and never requires any action to be taken). Adaptive management presumes a continuing regulatory presence to ensure that a party reaches milestones set forth in the adaptive management plan and that corrective actions are implemented for missed milestones. Adaptive management also incorporates regular monitoring and reporting to measure progress towards the required outcome.

In Washington, adaptive management approaches are used in various environmental contexts where a particular outcome is required but scientific uncertainty requires a flexible

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approach to achieving that outcome. For example, Ecology has used an adaptive management approach when issuing Section 401 certifications under the Clean Water Act which require "reasonable assurance" that a federally licensed project will comply with state water quality standards. 33 U.S.C. § 1341. When issuing a Section 401 certification to the Port of Seattle for construction of a third runway, Ecology fashioned an adaptive management approach because Ecology was not completely certain at the outset that the project would comply with water quality standards. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 606, 90 P.3d 659 (2004). In upholding this approach, the Supreme Court accepted the reasoning of the Pollution Control Hearings Board (PCHB) that adaptive management could be relied upon if requirements are set forth with specificity and future corrective actions and the required outcome are reasonably certain to occur. *Id.* at 605. The PCHB also held that specific enforceable requirements must be contained in the Section 401 certification if monitoring reveals that water quality standards are not being met. Adaptive management cannot be used to defer or delay compliance with the standards.[2] *Id.*

Adaptive management is also used in the context of stormwater regulation. RCW 90.48.555(8) requires construction and industrial general stormwater permits issued by Ecology to include adaptive management mechanisms for the purpose of achieving permit compliance. One aspect of this requirement is that permits must contain measurable benchmarks against which compliance is measured, and that the permittee must implement mandatory response strategies when the permittee runs the risk of violating the permit. *Id.; see also Associated General Contractors of Washington v. Dep't of Ecology,* PCHB Nos. 05-157, 05-158, 05-159, Findings of Fact, Conclusions of Law, and Order at 40-46 (June 4,

[2] The Section 401 certification at issue required the Port to monitor effectiveness of wetland mitigation for fifteen years, surface and groundwater for eight years, and fill criteria and low flow mitigation in perpetuity. If monitoring revealed a violation of water quality standards, the Port was required to implement contingency plans to bring the project back into compliance. *Port of Seattle*, 151 Wn.2d at 605.

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2007), *appeal pending in Thurston County Superior Court.*[3] An adaptive management approach that does not achieve the goal of permit compliance through an implementation schedule and regulatory enforcement or corrective actions likely would not constitute a valid adaptive management approach. *Puget Soundkeeper Alliance v. Dep't of Ecology*, PCHB Nos. 05-150, 05-151, 06-034, and 06-040, Findings of Fact, Conclusions of Law, and Order at 60-63 (invalidating portions of Ecology's Boatyard General Permit, in part because benchmark exceedances did not trigger a response timetable, implementation schedule, or specific enforcement actions by Ecology, nor was there any clear requirement that the permittees actually achieve the benchmarks).

Other applications of adaptive management in Washington include development of critical areas ordinances by local governments (WAC 365-195-920) and promulgation of forest practices rules that enhance salmon recovery (WAC 222-08-160(2); WAC 222-12-045). Like adaptive management in the Section 401 and stormwater contexts, both of these programs identify a set outcome (protection of critical areas and achievement of resource objectives) through a flexible approach that contains measurable targets.

Throughout its opening brief, Energy Northwest creatively calls its GGRP an "adaptive management" approach. EN Opening Br. at 5, 9-10, 16, 17, 18, 24, 25. In contrast, Energy Northwest uses the phrase "adaptive management" only once in the GGRP itself, and then only to refer to reporting provisions contained at the tail end of its plan. GGRP at 13, referring to "adaptive management provisions set forth in Section VI." Thus, the notion of the

[3] In the *Associated General Contractors* case, the PCHB upheld the adaptive management approach contained in the Construction Stormwater General Permit. The permit requires permittees to adhere to a tiered approach in order to achieve compliance with the permit's turbidity benchmark. At the first tier, the permittee is required to implement best management practices (BMPs) at the site. If the BMPs are ineffective, the second tier requires the permittee to revise its stormwater pollution prevention plan (SWPPP), implement and maintain source control and treatment BMPs, log BMP implementation and maintenance, to notify Ecology, and sample discharges daily until certain levels are achieved or the discharge stops. *Associated General Contractors* at 44-45. The permittee has an ongoing responsibility until the permittee achieves the required outcome (i.e., compliance with the permit's benchmark). *Id.* at 45.

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GGRP as an adaptive management approach seems to have been concocted as a means to get around the plain language requirements of RCW 80.80.040.

At any rate, the GGRP does not constitute an adaptive management approach to carbon sequestration. In order to constitute adaptive management, the Plan would need to first identify a clear outcome (i.e., commencement of sequestration within five years of plant operation as required by RCW 80.80.040(11)(b)). The Plan would then need to establish an implementation schedule and sequence of measurable milestones including a mechanism for regulatory action should Energy Northwest fail to meet the milestones.[4] The approach would also need to contain monitoring and reporting requirements with actual dates attached to them. In order to incorporate all of these elements with sufficient specificity, Energy Northwest would have to first complete the initial phases of site characterization and develop a detailed site map. The flexibility in the adaptive management approach relates to how Energy Northwest achieves the ultimate outcome of sequestration. It does not allow Energy Northwest to charge full steam ahead without a set outcome, clear timeline, or enforceable benchmarks to measure compliance.

The GGRP does not identify a clear outcome. Rather, it states that sequestration is not feasible, but may become feasible by 2020 at the earliest. GGRP at 13-14. Energy Northwest then prematurely proclaims that it will purchase GHG reductions, but provides no detail on how the amount of reductions will be calculated and how Energy Northwest will obtain the mandatory amount. GGRP at 21-22. As for continual monitoring, Energy Northwest proposes to submit a report sometime "prior to plant operation" that contains information such as "updated evaluation of the technological and economic feasibility of geological sequestration and other permanent sequestration" and "proposals for sequestration and mitigation projects necessary to comply with RCW 80.70 for the first five years following

[4] This is similar to the requirement that a sequestration plan contain provisions for penalties for failure to implement the plan on schedule. RCW 80.80.040(11)(d).

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plant operation." GGRP at 23. The GGRP is an attempt to delay compliance with the requirements of RCW 80.80. This is not an appropriate use of adaptive management. *Port of Seattle*, 151 Wn.2d at 605.

As all parties have noted, the GGRP is just a plan to submit a plan at some unspecified future date. It certainly does not meet the rigorous requirements of adaptive management. The GGRP should be rejected and the adjudication stayed until Energy Northwest makes an honest attempt to develop a plan.

3. Energy Northwest misconstrues the interplay between Chapters 80.70 and 80.80 RCW

Energy Northwest argues that PMEC's compliance with RCW 80.80 constitutes compliance with RCW 80.70. EN Opening Br. at 11-12. As noted in the State Parties' Opening Brief, this creates an absurd result by giving a competitive advantage to a dirtier plant. State's Opening Br. at 24. Statutes must be interpreted to avoid absurd results. *See, for example, State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987). Furthermore, statutes on the same subject matter should be read in harmony so that effect is given to both statutes. *See, for example, In re Piercy*, 101 Wn.2d 490, 492, 681 P.2d 223 (1984). If the statutes are interpreted as urged by Energy Northwest, RCW 80.70 would be rendered meaningless because it would have no effect.

Energy Northwest argues that the Legislature's use of the words "in unison" as opposed to the word "complement" is significant. EN Opening Br. at 11. This is incorrect as earlier drafts of a bill are given little weight by reviewing tribunals:

> Successive drafts of a statute are not stages in its development. They are separate things of which we can only say that they followed each other in a definite sequence, and that one was not the other. But that fact gives us little information about the final form, since we never really know why one gave way to any other. There were doubtless many reasons, some of them likely enough to be personal, arbitrary, and capricious-the fondness of the draftsman for a special locution, his repugnance to another, a misconception of the associations of some word, a chance combination, and often enough a mere inadvertence. That is not to say that some conclusions, principally negative ones, can not be drawn from the legislative history of a statute. But in the

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> end, all that we know is that the final form displaced the others, and that fact is not disputed.

Hama Hama Co. v. Shoreline Hrgs. Bd., 85 Wn.2d 441, 449-50, 536 P.2d 157 (1975).

In contrast to the little weight given to successive drafts of a bill, courts grant substantial weight to an agency's interpretation of a statute that the agency administers. *Pub. Util. Dist. 1 of Pend Oreille Cy. v. Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). Along with EFSEC, Ecology is charged with promulgating rules to implement and enforce the law's greenhouse gas performance standard. RCW 80.80.040(10). At this stage in the rulemaking, Ecology has interpreted the phrase "in unison" as requiring a facility to separately meet the requirements of each statute, first by meeting the performance standard, then by mitigating 20 percent of total CO2 emissions. *See* Declaration of Laura Watson, Ex. A. This interpretation is consistent with statutory intent and deserves deference. Energy Northwest's alternative interpretation should be rejected.

4. The GGRP does not meet the requirements of RCW 80.80.040(11).

Energy Northwest's brief addresses how it believes its Plan meets the requirements of RCW 80.80.040(11). EN Opening Br. at 13-18. For reasons set forth in their opening brief, the State Parties disagree with Energy Northwest on the sufficiency of each of these elements with the exception of penalties.[5] The State Parties do not repeat those arguments here, but instead refer the Council members to pages 9-19 of the State's Opening Brief. The State Parties also refer to similar arguments made in the opening briefs filed by the interveners. NWEC Opening Br. at 6-24; Columbia Riverkeepers Opening Br. at 9-25. The GGRP is not sufficient and the adjudication should not continue until Energy Northwest submits a sufficient plan.

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[5] The chart contained on page 8 of Energy Northwest's brief is particularly illustrative of the lack of detail contained in its Plan. As the chart shows, only one paragraph apiece in the Plan is dedicated to several of the elements (including monitoring, financial assurance, penalties, and public notice and comment). Only two pages are dedicated to the purchase of emissions reductions. Approximately nine pages are dedicated to the sequestration provisions themselves.

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B. Timing of GGRP Support

The preceding section analyzes why Energy Northwest must submit a bona fide carbon sequestration plan containing all of the mandatory elements identified in RCW 80.80 prior to proceeding with the adjudication in this matter. This section addresses Energy Northwest's ability to obtain a stay of the adjudication until their application is complete.

1. The Council should find the application incomplete and stay the adjudication.

The Legislature delegated the general threshold for applications for site certification to EFSEC by stating that applications "shall be supported by such information and technical studies as the council may require." RCW 80.50.060(6). The Council requires that applications shall provide information in such detail to enable the Council to complete its review. WAC 463-60-010. Further, the application is required to identify "all information known to the applicant which has a bearing on site certification." WAC 463-60-065. Applications for site certification "shall be complete and shall reflect the best available current information and intentions of the applicant." WAC 463-60-116(1).

With the enactment of RCW 80.80 after it filed its application for PMEC, Energy Northwest became obligated to amend its application by filing a carbon sequestration plan. Applicants can amend applications as a matter of right at least 30 days prior to the adjudicative proceeding or only for good cause shown after the start of the adjudication. WAC 463-60-116(2), (4). Energy Northwest submitted its GGRP to address carbon mitigation, but it does not contain the necessary elements of a bona fide carbon sequestration plan.[6]

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

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[6] *See* Section II.A.1.b. of the State Parties' Opening Brief for a more detailed discussion on how the GGRP does not contain the mandatory elements of a carbon sequestration plan.

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2. The Council and Applicant can agree to delay the adjudication.

Contrary to Energy Northwest's assertions, the Council's regulatory authority allows delay of the PMEC adjudication for any reason—including supplementing its application with a bona fide carbon sequestration plan as mandated by RCW 80.80. As discussed earlier, the applicant may submit a legally sufficient carbon sequestration plan after the adjudication is commenced if good cause is shown. WAC 463-60-116(4). The one year deadline to complete the application review process and make a recommendation to the Governor can be extended upon agreement of the Council and the applicant. WAC 463-64-020. Energy Northwest has already taken advantage of this opportunity when it requested an extension on August 29, 2007, of the EFSEC process for a "reasonable time." Two other recent examples resulting in application review running longer than twelve months are the Kittitas Valley Wind Power Project and Dessert Claim Wind Power Project.

It is in the best interest of Energy Northwest to request such an extension so it can submit a bona fide carbon sequestration plan that can be reviewed by EFSEC and Ecology. If Energy Northwest refuses to request an extension, the Council has no option but to find that Energy Northwest has not satisfied the mandate of RCW 80.80.

Energy Northwest also argues that the adjudication should proceed because its plan may be modified in response to commitments and stipulations which occur during the adjudication. *See* EN Opening Br. at 20-21. However, there is no reasonable basis to believe that Energy Northwest will be able to submit a bona fide carbon sequestration plan subject to public, Ecology, and EFSEC scrutiny during the current adjudication. Moreover, even if Energy Northwest could, such a late submittal of a precedent setting plan would not allow for meaningful review and comment by the parties or the Council and it may run afoul of the mandate that the Council consider the adequacy of the plan as part of the adjudicative process. RCW 80.80.040(12)(b).

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C. Conditional Approval

1. Energy Northwest's position that EFSEC may condition a draft site certification agreement on subsequent approval of a carbon sequestration plan is legally flawed.

Energy Northwest maintains that future compliance with its obligation to submit a carbon sequestration plan under RCW 80.80 is similar to conditions routinely imposed by EFSEC in other site certification agreements. EN Opening Br. at 23. But this argument is contrary to the express language in RCW 80.80.040(13), which provides that Energy Northwest "is required to include all of the requirements of subsection (11) of this section in its carbon sequestration plan submitted as part of the [EFSEC] process." Subsection (11) specifies the elements that must be included in the plan. As discussed in Section II.A.4. above, Energy Northwest's Plan falls far short of meeting these requirements. At most, Energy Northwest has indicated it may submit a carbon sequestration plan sometime in the future. However, EFSEC has a duty to consider the merits of the Plan during the adjudicative process and must make specific findings regarding its adequacy in its recommendation to the Governor. RCW 80.80.040(12)(b).

Had Energy Northwest submitted a viable plan that could be evaluated by Ecology and EFSEC, it would be reasonable to conclude that EFSEC could recommend approval of a site certification agreement that included specific conditions regarding plan implementation. Instead, Energy Northwest maintains that EFSEC can ignore the intent of the Legislature as expressed in RCW 80.80 and allow Energy Northwest to submit a plan sometime before the facility is allowed to become operational.

Energy Northwest argues that EFSEC typically includes conditions in its site certification agreements to ensure compliance with other laws, citing a condition that required submission of a stormwater pollution prevention plan in the Site Certification Agreement between the State of Washington and BP West Coast Products, LLC as an example. EN Opening Br. at 23. However, the requirements of a stormwater pollution prevention plan are

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well known and Ecology has published a 106 page guidance manual that describes in detail the essential elements of a plan. *See* http://www.ecy.wa.gov/pubs/0410030.pdf.

There is a significant and fundamental difference between a condition that requires compliance with express and clearly defined NPDES permitting requirements, such as a stormwater pollution and prevention plan, and this case, where Energy Northwest is legally obligated to submit a carbon sequestration plan at the inception of EFSEC's adjudicative process. In this case, Ecology must determine whether the plan will provide safe, reliable, and permanent protection against the GHGs entering the atmosphere and EFSEC must contract with Ecology for review of the plan consistent with Ecology's conditions. RCW 80.80.040(12). Evaluation of the plan by both Ecology and EFSEC must precede EFSEC's recommendation to the Governor. Energy Northwest's conditional approval approach skips these statutorily-mandated steps.

EFSEC cannot waive the express legislative mandate to make findings regarding the adequacy of the sequestration plan in its recommendation to the Governor. Energy Northwest's characterization of the carbon sequestration plan as one of any number of conditions that may be satisfied subsequent to site certification must be rejected as contrary to the express provisions of RCW 80.80.

2. Energy Northwest agrees with the State Parties and the Intervenors that consideration of Energy Northwest's compliance with RCW 80.80 is not premature.

Energy Northwest agrees with the State Parties and Intervenors that consideration of its compliance with RCW 80.80 is not premature, arguing that financing for the project and construction costs require certainty that realistically cannot be put off until the future. EN Opening Br. at 24. This argument undercuts and is directly contrary to Energy Northwest's argument in the previous section of its brief that EFSEC may condition future operations on subsequent submission of a sequestration plan. EN Opening Br. at 23. Indeed, Energy Northwest's admitted need for certainty before it begins construction and/or is able to secure

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financing argues in favor of the other parties' position that Energy Northwest must submit a viable sequestration plan now, before construction begins.

Although Energy Northwest admits it is not financially sound to leave compliance with RCW 80.80 for the future, it maintains that rather than doing so it has proposed a "GHG Plan that sets parameters for PMEC's compliance with chapter 80.80 RCW" and that it has "honored the Legislature's preference for sequestration by keeping that possibility open for the future." EN Opening Br. at 25. Merely keeping the "possibility" open for future sequestration is not what the Legislature intended when it enacted RCW 80.80.040(13) with Energy Northwest in mind. In fact, Energy Northwest has no intention of sequestering GHGs at the PMEC plant in the near future because it has concluded already that sequestration is not technologically and economically feasible. Instead of presenting a sequestration plan for EFSEC's consideration, Energy Northwest has stated it intends to fulfill its obligations under RCW 80.80 by purchasing verifiable GHG emissions reductions and asks EFSEC to sanction its proposal.

Although the State Parties agree that consideration of Energy Northwest's compliance with RCW 80.80 is not premature, they disagree with Energy Northwest's proposed result. EFSEC should reject Energy Northwest's argument that it is sufficient to propose a plan that leaves open the possibility of future compliance and require that Energy Northwest submit a viable plan before EFSEC makes its recommendation to the Governor.

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III. CONCLUSION

For the reasons stated above and in the State Parties' and Interveners' opening briefs, the Council should reject the GGRP and stay proceedings until Energy Northwest develops a bona fide sequestration plan.

DATED this 8th day of November, 2007.

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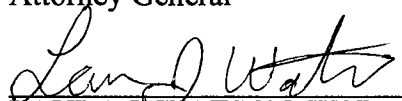

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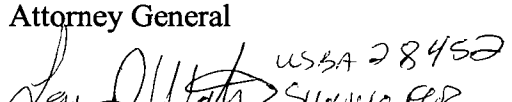

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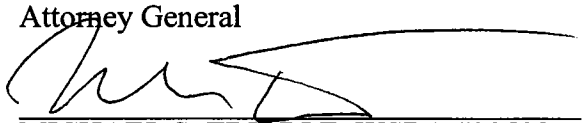

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