

CHRISTINE O. GREGOIRE
Governor



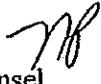
STATE OF WASHINGTON
OFFICE OF THE GOVERNOR

P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 753-6780 • www.governor.wa.gov

MEMORANDUM

October 5, 2011

TO: Governor Gregoire, Governor's Office Staff,
Executive Policy Office and Office of Financial Management

FROM: Narda Pierce 
General Counsel

SUBJECT: Office Protocol for Communications Related to
Energy Facility Site Evaluation Council (EFSEC) Matters

From time to time, we receive questions regarding communications with our office on projects addressed by the Energy Facility Site Evaluation Council (EFSEC). This memorandum describes the protocol that all employees of the offices of the Governor, Executive Policy, and Financial Management need to follow in relation to the Governor's decision-making role under the EFSEC statute, chapter 80.50 RCW.

1. What is EFSEC?

EFSEC is a statutory entity that makes recommendations to the Governor on the siting of energy facilities (e.g., power plants, alternative energy facilities such as wind power projects, pipelines, and transmission lines). When a siting application is submitted, EFSEC reviews the application and holds hearings on the proposed project to allow the applicant, project opponents, and other interested parties to present information to support their cases. EFSEC is required to report its recommendation to the Governor as to the approval or rejection of an application for certification, and any conditions the applicant should be required to meet for construction and operation of a project.

2. What is the Governor's role?

The Governor has the responsibility to make the final decision on approval or rejection of the application, and executes any Site Certification Agreement. A party may file a petition for judicial review of the final decision. The Governor's decision-making role under the EFSEC statute may be perceived as quasi-judicial. So, to ensure that the process is fair and that it looks fair to the public, we need to prevent communications between the Governor's staff and a party in an EFSEC matter. The

Governor bases her decisions in these matters on the extensive record that is developed in the EFSEC process, and does not seek further input. Also, a quasi-judicial officer generally may not communicate with one party to a proceeding without the other parties being present (other than communications regarding procedural aspects). Such communications could be viewed as inappropriate *ex parte* communications.¹ *Ex parte* communications occur when a quasi-judicial officer and one party² to a matter discuss it without the other side being present. *Ex parte* communications include both oral and written communications.

3. Can *ex parte* communications be cured?

Sending copies of written communications received from one of the parties to all other parties can sometimes cure *ex parte* communications. If oral communication with a party occurs, the communication must be detailed in a memorandum so it can be provided to other parties.

4. Why is this protocol important?

This protocol has been prepared because we may receive communications related to the EFSEC proposals that are referred to the Governor's Office for consideration. Proponents or opponents of the proposal have a right to have a court review the final decision, and either side could sue over the way the process is handled. Individuals who receive oral communications could be called as witnesses. As a result, your handling of communications according to this protocol should help minimize future problems.

5. What do I need to look out for?

Three general sources may seek to provide the Governor with written or oral communications:

- a. The parties to the formal proceedings and their representatives.

(Please contact the Governor's energy policy advisor if you have any questions about the parties and their representatives for a current project under consideration.)

- b. The general public and interest groups.
- c. Legislators and other public officials.

6. What are the rules that I must follow?

- a. Whenever possible, oral communications—particularly with parties or their representatives—should be avoided.
- b. The general rule is that *ex parte* communications from any party to the EFSEC proceeding must be shared with all parties.

¹ Latin for "by or for one party."

² What is a "party?" A party is a formal participant in the proceedings before EFSEC. For purposes of this protocol, "party" includes the lawyers, lobbyists, and others who speak on a party's behalf or at the party's direction.

- c. Communications from non-parties that contain factual information need to be provided to the Governor's energy policy advisor so the advisor can confer with the Governor's General Counsel to determine whether the communication contains a new material fact that should be made a matter of record. A new material fact is a fact that could be germane to the Governor's decision that is not already part of the EFSEC record.

7. What if a party to the EFSEC proceeding or another person initiates a communication?

AVOID ORAL COMMUNICATIONS WHENEVER POSSIBLE. Otherwise, you will have to write a memorandum summarizing the conversation. You may also be called to testify in court regarding the substance of the communication.

When someone brings up a pending EFSEC project, tell them that it is inappropriate for you to communicate on the subject and politely ask them to stop. Tell the person that if you do continue, you will have to write a memorandum and send it to everyone – and that you do not want that burden. Also, tell them that you could be called to testify in a lawsuit about the conversation. Ask the person to write his or her concerns down and mail them to the Governor's Office, and advise the person that such communications may be placed on the record.

If the person persists and you are unable to politely avoid the oral communication, promptly write a memorandum summarizing the conversation and send it to the Legal Affairs Coordinator for the Governor's General Counsel.

- If the conversation was with a party or its representative, the memorandum will be provided to EFSEC to be distributed to all parties.
- If the conversation was with a non-party public official, advocacy group, or member of the general public, the Governor's General Counsel will review the memorandum with the Governor's energy policy advisor to determine if it contains any new material facts. If it does, the memorandum will be distributed to all parties.

Written communications, including letters or emails, regarding an EFSEC project must be treated the same way as a memorandum summarizing a conversation.

Please let me know if you have any questions.