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6 **BEFORE THE STATE OF WASHINGTON**
7 **ENERGY FACILITY SITE EVALUATION COUNCIL**

8 In the Matter of
9 Application No. 2003-01

10 SAGEBRUSH POWER PARTNERS, LLC
11 KITTITAS VALLEY WIND POWER
12 PROJECT

POST HEARING BRIEF OF
INTERVENOR LATHROP

13 I. INTRODUCTION

14 The Energy Facility Site Evaluation Council (“EFSEC”) does not have the legal ability to
15 certify Sagebrush Power Partners, LLC (“Applicant”) wind power site. Even if EFSEC had the
16 legal ability to certify the Applicant’s site, it should not do so because the Applicant failed to
17 meet its burden under EFSEC Rules governing site certification, including preemption.
18

19 II. DISCUSSION

20 2.1 Participation by the Department of Natural Resources and Community Trade and
21 Economic Development on EFSEC Violates the Laws on Conflict of Interest and Appearance of
22 Fairness.

23 2.1.1 Conflict of Interest and Appearance of Fairness.

24 The legislature established the make up of EFSEC in the 1970’s when no one
25 contemplated EFSEC would decide an application on state land and where the state receives

1 compensation. Chapter 80.50 provides no direction on the subject, and, more importantly,
2 provides no conflict of interest or appearance of fairness exceptions or waivers. RCW
3 80.50.030(3) indicates the Energy Site Evaluation Council shall consist of directors,
4 administrators, or their designees of certain enumerated departments, including the DNR and
5 CTED. However, it is impossible to reconcile their participation in this quasi-judicial decision
6 making process with well established law prohibiting representatives of the State of Washington
7 from engaging in conflicts of interest and violations of the Appearance of Fairness Doctrine.
8

9 The Appearance of Fairness Doctrine is a recognized doctrine in the State of Washington.
10 It requires quasi judicial hearings to be procedurally fair and be conducted by impartial decision
11 makers. *Raynes v. City of Leavenworth*, 118 Wn. 2d 237, 245, 821 P. 2d 1204 (1992). The
12 Appearance of Fairness Doctrine also requires public hearings and decisions not only be fair but
13 appear fair. See *Smith v. Skagit County*, 75 Wn.2d 715, 453 P.2d 832 (1969). The Appearance
14 Fairness Doctrine exists because it is important for public confidence in the system to have
15 hearings and proceedings which appear to be fairly conducted. *Chrobuck v. Snohomish County*,
16 78 Wn.2d 858, 870, 480 P.2d 489 (1971). As a result, the Appearance of Fairness Doctrine goes
17 beyond consideration of actual conflict of interest or bias by decision makers.
18

19 Generally three criteria should be examined in determining whether a hearing would
20 appear to be fair to a disinterested party. First, have there been exparte contacts between the
21 decision makers and a person either supporting or opposing the permit? Second, does the
22 decision maker have some sort of personal interest in the matter to be considered? Third, has the
23 decision maker prejudged an application before the matter has come before an appropriate body
24 for a public hearing? *Flech v. King County*, 16 Wn.App. 668, 558 P.2d 254 (1977). (See
25

1 generally Washington Real Property Deskbook Section 97.9 (1)). The Doctrine does not require
2 that actual bias or conflict of interest be shown.

3 The appearance of fairness doctrine should be applied to administrative tribunals acting
4 in a quasi-judicial capacity in two circumstances: (1) when an agency has employed procedures
5 that created the appearance of unfairness; and (2) when one or more acting members of the
6 decision-making bodies have apparent conflicts of interest creating an appearance of unfairness
7 or partiality. *Smith v. Skagit County*, 75 Wash.2d 715, 453 P.2d 832 (1969); *Buell v. Bremerton*,
8 80 Wash.2d 518, 495 P.2d 1358 (1972); *City of Hoquiam v. Public Employment Relations Com'n*
9 *of State of Wash.*, 97 Wn.2d 481, 646 P.2d 129 (1982). The test is “would a disinterested person,
10 having been apprised of the totality of a board member's personal interest in a matter being acted
11 upon, be reasonably justified in thinking that partiality may exist?” *Swift v. Island County*, 87
12 Wash.2d 348, 361, 552 P.2d 175 (1976). In Washington, a State agency as a whole is precluded,
13 as opposed to an individual within an agency, from engaging in conflicts of interest. See
14 *Guardianship Estate of Keffleler v. State of Washington, Department of Social and Health*
15 *Services*, 145 Wn.2d 1, 32 P.3rd 267 (2001).

18 2.1.2 The Department of Natural Resources.

19 A number of the proposed wind turbines will be located on land owned by the
20 Department of Natural Resources, a political division of the State of Washington (“DNR”). The
21 Applicant has paid the DNR \$28,261.88 and continues to pay DNR rent for its land. The land
22 leased to Applicant is held in trust by DNR for a variety of uses, including the common schools
23 of the State of Washington. Ch 79.01 RCW. The express goal of DNR is to manage State lands
24 so that they generate surplus funds that can be used elsewhere by the State.
25

1 DNR is a member of EFSEC. This constitutes a direct conflict of interest that should
2 preclude DNR, or any of its employees and/or designees, from participating in the decision on
3 the application in this matter. This conflict not only is an actual conflict of interest in that DNR
4 has a pecuniary interest in the outcome of the determination the Energy Site Evaluation Council
5 will make, but it also violates the Appearance of Fairness Doctrine.

6 DNR's participation violates the second prong of the Appearance of Fairness Doctrine,
7 discussed below, as it has a pecuniary interest in the application and will benefit financially if the
8 application is approved. DNR is unabashedly advocating for the approval of this project as a
9 land owner while at the same time sitting as a decision maker in a quasi-judicial proceeding with
10 the power to influence and vote to approve a project that will generate money for DNR. That is
11 not a process which appears fair, let alone is fair. DNR's participation violates the Appearance
12 of Fairness Doctrine.
13

14 2.1.3 The Department of Community Trade and Economic Development.

15 Likewise, the Department of Community Trade and Economic Development ("CTED")
16 is a statutory member of EFSEC. CTED has intervened to support the application and to ensure
17 that state energy policy, purportedly encouraging renewable energy resources, is followed.
18

19 With CTED as an intervenor as well as a decision maker, there is a conflict of interest as
20 CTED is publicly advocating for the approval of this application and was doing so prior to the
21 commencement of the public hearing process. In fact, during the course of this proceeding
22 CTED employees have used wind power lobbying groups' stationary and signed correspondence
23 to advance positions advocated by the wind power lobbying groups. CTED, as a voting member
24 of EFSEC, has prejudged this application. This violates the Appearance of Fairness Doctrine
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1 and should serve as a basis for the disqualification of CTED and its designated representative
2 from the Energy Facility Site Evaluation Council in this matter.

3 2.1.4 Conflicts and Appearance of Fairness Conclusion.

4 Because DNR and CTED have obvious conflicts of interest, each agency should not have
5 participated in this process as a member of the council and, in particular, should not have
6 participated in the adjudicative hearing. The conflict in CTED's case is particularly egregious.
7 CTED intervened in the proceeding and one of its employees publicly advocated for the
8 Applicant's project and testified while another of its employees is making the decision. The
9 adjudicative hearing is a quasi judicial proceeding. Because DNR and CTED representatives
10 participated in the adjudicative hearing while their participation violated the appearance of
11 fairness doctrine they have tainted the entire process. These proceedings have been hopelessly
12 and fatally flawed from the outset. No decision stemming from them should be or can be
13 considered by the Governor.
14
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16 2.2 EFSEC Has No Authority To Preempt Kittitas County's Decision To Deny This Project.

17 2.2.1 EFSEC Preemption Would Violate The Growth Management Act.

18 RCW 80.50.110 purports to grant EFSEC authority to preempt local comprehensive plans
19 and development regulations if such local land use controls are in conflict with Chapter 80.50
20 RCW. Specifically, RCW 80.50.110 states:

21 (1) If any provision of this chapter is in conflict with any other
22 provision, limitation, or restriction *which is now in effect* under any
23 other law of this state, or any rule or regulation promulgated
24 thereunder, this chapter shall govern and control and such other
25 law or rule or regulation promulgated thereunder shall be deemed
26 superseded for the purposes of this chapter.

1 (2) The state hereby preempts the regulation and certification of
2 the location, construction, and operational conditions of
3 certification of the energy facilities included under RCW
4 80.50.060 as now or hereafter amended. (emphasis added)

5 This statute was enacted in 1970 and later amended in 1975-76 2nd ex. s. c 108 § 37. The statute
6 was further amended by HB 2402 in 2006 which modified certain definitions in Chapter 80.50
7 RCW.

8 In 1990, the Washington State Legislature passed the Growth Management Act
9 (“GMA”), and Kittitas County opted into the GMA in December 1990, through Resolution 90-
10 138. The legislative findings included in the GMA (RCW 36.70A.010) state:

11 “The legislature finds that uncoordinated and unplanned growth,
12 together with a lack of common goals expressing the public's
13 interest in the conservation and the wise use of our lands, pose a
14 threat to the environment, sustainable economic development, and
15 the health, safety, and high quality of life enjoyed by residents of
16 this state. It is in the public interest that citizens, communities,
17 local governments, and the private sector cooperate and coordinate
18 with one another in comprehensive land use planning. Further, the
19 legislature finds that it is in the public interest that economic
20 development programs be shared with communities experiencing
21 insufficient economic growth.”

22 The Legislature intended all development to occur through coordinated planning efforts. In
23 2002, the Legislature passed Engrossed Substitute Senate Bill 6594 amending RCW 36.70A.103
24 to require all state agencies to comply with local comprehensive plans and development
25 regulations. RCW 36.70A.103 states:

26 State agencies shall comply with the local comprehensive plans and
development regulations and amendments thereto adopted pursuant
to this chapter except as otherwise provided in RCW 71.09.250 (1)
through (3), 71.09.342, and 72.09.333. (emphasis added)

The provisions of chapter 12, Laws of 2001 2nd sp. sess. do not
affect the state's authority to site any other essential public facility

1 under RCW 36.70A.200 in conformance with local comprehensive
2 plans and development regulations adopted pursuant to chapter
3 36.70A RCW. (emphasis added)

4 Through this same bill (ESSB 6594) the Legislature amended RCW 36.70A.200. The actual text
5 of section 2 of ESSB 6594 reads:

6 “ **Sec. 2.** RCW 36.70A.200 and 2001 2nd sp.s. c 12 s 205 are
7 each amended to read as follows:

8 (1) The comprehensive plan of each county and city that is
9 planning under RCW 36.70A.040 shall include a process for
10 identifying and siting essential public facilities. Essential public
11 facilities include those facilities that are typically difficult to site,
12 such as airports, state education facilities and state or regional
13 transportation facilities as defined in RCW 47.06.140, state and
14 local correctional facilities, solid waste handling facilities, and in-
15 patient facilities including substance abuse facilities, mental health
16 facilities, group homes, and secure community transition facilities
17 as defined in RCW 71.09.020.

18 (2) Each county and city planning under RCW 36.70A.040
19 shall, not later than (~~the deadline specified in RCW 36.70A.130~~)
20 September 1, 2002, establish a process, or amend its existing
21 process, for identifying and siting essential public facilities(~~(s)~~) and
22 adopt or amend its development regulations as necessary to
23 provide for the siting of secure community transition facilities
24 consistent with statutory requirements applicable to these facilities.

25 (3) Any city or county not planning under RCW 36.70A.040
26 shall, not later than (~~the deadline specified in RCW 36.70A.130~~)
September 1, 2002, establish a process for siting secure community
transition facilities and adopt or amend its development regulations
as necessary to provide for the siting of such facilities consistent
with statutory requirements applicable to these facilities.

(4) The office of financial management shall maintain a list of
those essential state public facilities that are required or likely to be
built within the next six years. The office of financial management
may at any time add facilities to the list.

(5) No local comprehensive plan or development regulation
may preclude the siting of essential public facilities.

(6) No person may bring a cause of action for civil damages
based on the good faith actions of any county or city to provide for
the siting of secure community transition facilities in accordance
with this section and with the requirements of chapter 12, Laws of
2001 2nd sp. sess. For purposes of this subsection, "person"

1 includes, but is not limited to, any individual, agency as defined in
2 RCW 42.17.020, corporation, partnership, association, and limited
3 liability entity.

4 (7) Counties or cities siting facilities pursuant to subsection
5 (2) or (3) of this section shall comply with section 7 of this act.

6 (8) The failure of a county or city to act by the deadlines
7 established in subsections (2) and (3) of this section is not:

8 (a) A condition that would disqualify the county or city for
9 grants, loans, or pledges under RCW 43.155.070 or 70.146.070;

10 (b) A consideration for grants or loans provided under RCW
11 43.17.250(2); or

12 (c) A basis for any petition under RCW 36.70A.280 or for any
13 private cause of action. “

14 Subsection 1 of this section was not amended. Essential public facilities include facilities
15 that are typically difficult to site and would also include power generating facilities. The section
16 makes no reference to Chapter 80.50 or to any overriding EFSEC jurisdiction for this type use.
17 Local government’s use of comprehensive plans or development regulations to preclude or
18 regulate the siting of essential public facilities, which would include power generating facilities,
19 and, more importantly, their authority over such facilities is not removed from the local
20 jurisdictions. EFSEC enjoys no exemption from GMA nor does it possess the present right to
21 overrule, let alone remove from or recommend preemption of, local jurisdiction decisions
22 concerning the siting of such facilities.

23 The Legislature never intended to allow EFSEC, or any other state agency, to preempt
24 local comprehensive plans or development regulations prepared under the GMA, and EFSEC’s
25 rules recognize that local regulations can be controlling. For example, WAC 463-47-120 states:

26 In determining whether a proposal is exempt from SEPA, the
council shall respect "critical area" designations made by local
governments under WAC 197-11-908.

1 If EFSEC is required to “respect” critical areas designations, one has to assume it is
2 prohibited from preempting any critical area regulations developed under the GMA. Further,
3 WAC 463-47-130 states:

4 In determining whether a proposal is exempt from SEPA, the
5 council shall inquire of the threshold levels adopted by
6 cities/counties under WAC 197-11-800(1).

7 Thus, EFSEC is required to consider the SEPA thresholds adopted by a local governmental
8 agency before determining whether a project is exempt from SEPA review. These examples
9 establish circumstances where EFSEC may not ignore local regulations.

10 The question is not a new one. In 1997, the question of whether EFSEC can preempt
11 GMA enacted comprehensive plans and development regulations was put before EFSEC as part
12 of the Olympic Pipeline application proceedings. EFSEC actually issued an order indicating
13 they would not rule on the issue. The following information was taken directly from Order No.
14 699, Application No. 96-1, Prehearing Order No. 1, related to the Olympic Pipeline application.
15

16 Counsel for the Environment (CFE) at the prehearing conference
17 repeated a concern raised during the land use hearing, asking that
18 the Council determine whether the provisions of the GMA “apply”.
19 The Council has earlier indicated in rejecting motions relating to
20 the land use hearing that the Council felt that it did not have
sufficient information or argument to make a determination on that
issue. The Council does not intend to enter an advisory opinion on
insufficient information or argument.

21 With the passage of the Growth Management Act, EFSEC’s ability to preempt local
22 comprehensive plans and development regulations became void. In other words, because the
23 GMA requires state agencies to comply with local comprehensive plans and development
24 regulations, Kittitas County has development regulations pertaining to wind power facilities,
25 and all State agencies, of which EFSEC is one, must conform to local land use regulations in

1 siting essential public facilities, EFSEC is barred from preempting the County's development
2 regulations.

3 2.2.2 HB 2402 Does Not Give EFSEC the Ability to Recommend Preemption of GMA
4 Adopted Development Regulations.

5 HB 2402 changed the definition of certain terms including changing the definition of
6 "land use plan" and "zoning ordinance" to include plans and ordinances adopted pursuant to Ch
7 36.70A RCW. However, HB 2402 does not apply because it became effective on June 7, 2006.
8 On that date EFSEC had already received and accepted the Applicant's application. The statute
9 only applies prospectively. Generally, a statutory amendment is like any other statute and
10 applies prospectively only. *In re Detention of Brooks*, 145 Wash.2d 275, 284, 36 P.3d 1034
11 (2001). In Washington when a statute is silent on whether it applies retroactively or
12 prospectively the presumption is that the statute applies prospectively only. *In re Personal*
13 *Restraint of Stewart*, 115 Wn.App. 319, 75 P.3d 521 (2003), *State v. Smith* 144 Wn.2d 665, 673,
14 30 P.3d 1245 (2001), as corrected; *Robin Miller Construction Co. Inc. v. Coltram*, 110 Wn.App.
15 883, 890 43 P.3d (2002). Indeed, a statutory amendment is presumed prospective in application.
16 *Smith*, 144 Wn. 2d at 673. The presumption against retroactive application of a statute or
17 amendment is an essential thread in the mantle of protection that the law affords the individual
18 citizen. This presumption is deeply rooted in our jurisprudence, and embodies a legal doctrine
19 centuries older than our Republic. *Smith*, 144 Wash.2d at 673, 30 P.3d 1245.

22 The strong presumption that an amendment is prospective can be overcome only if it is
23 shown that (1) the legislature intended the amendment to apply retroactively, (2) the amendment
24 is curative, or (3) the amendment is remedial. *Id*; see also, *McGee Guest Home, Inc. v. Dep't of*
25 *Social and Health Services*, 142 Wash.2d 316, 324, 12 P.3d 144 (2000); *State v. Cruz*, 139

1 Wash.2d 186, 191, 985 P.2d 384 (1999); *In re F.D. Processing, Inc.*, 119 Wash.2d 452, 460,
2 832 P.2d 1303 (1992). HB 2402 modified certain definitions contained within chapter 80.50
3 RCW. There is no indication the legislature intended the statute to apply retroactively as
4 opposed to prospectively. The amendment is not curative, nor remedial. Instead, the bill only
5 adds to the definitions used within a statute.

6
7 Second, Judge Torem, during Intervener Lathrop's cross examination of Mr. Wagoner,
8 specifically applied a prior version of WAC 463-42-362 to which the Applicant did not object.
9 In doing so Judge Torem referenced and indicated the applicant was vested to the statues and
10 Washington Administrative Code provisions ("Rules") in place when the application was filed.
11 (see generally Adjudicative Hearing Transcript pages 375-376.)

12
13 Third, HB 2402 did not make it "explicit" that EFSEC had the authority to Preempt GMA
14 based development regulations. HB 2402 did nothing to resolve the inherent conflict between
15 RCW 36.70A.200, RCW 36.70A.103 and RCW 80.50.110. In fact, HB 2402 only added to the
16 confused legislation framework. Even the Final Bill Report on HB 2402 provides "city land use
17 plans and zoning ordinances, as well as such county and regional plans and ordinances, must be
18 considered by the EFSEC in reviewing an application whether or not expedited processing is
19 used." (Appendix A).

20
21 2.3.3 *Lathrop v. EFSEC* Was Not a Confirmation by the Court of Appeals of EFSEC
22 and the Governor's Jurisdiction to Preempt Local Development Regulations Adopted Pursuant to
23 the GMA.

24 The sole issue in *Lathrop v. EFSEC* was whether the Kittitas County Superior Court
25 erred when it dismissed the Petition based on subject matter jurisdiction. *Lathrop v. EFSEC*, 130
26 *Wn.App.* 147, 150, 121 P.3d 774 (2005). The Applicant's citation to *Lathrop v. EFSEC* is

1 misplaced. The court of Appeals never addressed the ultimate issue of whether the EFSEC
2 statute allows EFSEC to recommend preemption of GMA Compliant Development Regulations
3 and allows the Governor to prevent GMA Compliant Development Regulations. Instead the
4 Court of Appeals merely held that jurisdiction to decide the issue was in Thurston County
5 Superior Court. *Id. at 148*. The case stands for no other propositions.

6
7 2.4 EFSEC Should Not Recommend, Nor Should the Governor Preempt Kittitas County
8 Development Regulations.

9
10 2.4.1 Background.

11 Reserving all objections to the Council’s power and authority to preempt local land use
12 ordinances and decisions, and assuming arguendo that such authority exists, whatever power the
13 Council has is controlled by, and must operate within, the legislative intent as expressed in RCW
14 80.50.010. The need for increased energy facilities is recognized, but key to the intent is “that
15 the location and operation of such facilities will produce minimal adverse effects on the
16 environment, ecology of the land and its wildlife...” *RCW 80.50.010*. This emphasis is repeated
17 in the second premise of that section where actions must also serve to “preserve and protect the
18 quality of the environment; to enhance the public’s opportunity to enjoy the esthetic and
19 recreational benefits of the air, water and land resources; ...and to pursue beneficial changes in
20 the environment.”

21 The Council has been given the power under RCW 80.50.040(1) to adopt rules under the
22 Administrative Procedures Act, and has adopted Chapter 463-28 WAC. It cannot be over-
23 emphasized that these are the Council’s rules and not those imposed on it by another agency. As
24 such, the Council must operate within those self-imposed constraints and require all persons
25 requesting the Council to exercise its authority to operate within those rules as well, and, of all

1 the rules controlling Council actions, probably none is more critical than those dealing with
2 preemption. The Council has previously determined that the Kittitas Valley Project is not in
3 compliance with Kittitas County land use codes, a determination which essentially divests the
4 Council of any authority to act until the Applicant has made its application compliant with
5 Kittitas County Codes and the decisions of its Board of Commissioners. If the Applicant fails to
6 resolve the non-compliance issues with the County, the Council's authority is reconstituted to
7 determine, first, if the Applicant has met its burdens under WAC 463-28-040 thereby authorizing
8 the Council to determine that substantial evidence exists to justify its preemption of the local
9 land use decision. In this case, substantial evidence is evidence in sufficient quantum to
10 persuade a fair-minded person of the truth of the declared premises. *In re Farina* 94 Wn. App
11 441, 972 P.2d 531 (1999). If and only if the Council can make that determination can it then
12 move on to the second element of the rule and make a decision upon whether or not the
13 Application should be recommended for approval or denial and upon what conditions, if any.
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16 WAC 463-28-040 provides as follows:

17 Should the applicant report that efforts to resolve noncompliance
18 issues with local authorities have not been successful, then, if
19 applicant elects to continue processing the application, the
20 applicant shall file a written request for state preemption as
21 authorized in WAC 463-28-020 within ninety days after
22 completion of the public hearing required by RCW 80.50.090, or
23 later if mutually agreed by the applicant and the council. The
24 request shall address the following:

25 (1) That the applicant has demonstrated a good faith effort
26 to resolve the noncompliance issues.

(2) That the applicant and the local authorities are unable to
reach an agreement which will resolve the issues.

1 (3) That alternate locations which are within the same
2 county and city have been reviewed and have been found
unacceptable.

3 (4) Interests of the state as delineated in RCW 80.50.010.

4 Thus, all four of the elements in WAC 463-28-040 are critical to the Kittitas Valley
5 application, and there must be substantial evidence that all four elements of this rule have been
6 established. In the case of the Kittitas Valley application, none have been met in other than
7 rudimentary fashion, let alone by substantial evidence. Accordingly, the Applicant has left the
8 Council no choice but to deny preemption and to follow that determination with the
9 recommendation to the Governor that the Kittitas Valley Application be rejected under WAC
10 463-28-080.
11

12 2.4.2 The Applicant Has Failed To Meet Its Burden to Prove it Made a Good Faith
13 Effort to Resolve the Inconsistency.

14 2.4.2.1 No Good Faith Effort By Applicant.

15 The first requirement of preemption is that the Applicant demonstrate a good faith effort
16 to resolve the non-compliance issues with Kittitas County. The Council will not be surprised
17 that the Applicant's brief attempts to paint a picture that it did everything humanly possible to
18 receive and respond to what it casts as vague and conflicting requests from the County under a
19 process that is hopelessly flawed. Yet the Applicant never legally challenged the Board of
20 County Commissioners decision to deny the application. If in fact the county process was
21 flawed or the county made a decision that was not legally defensible, as the applicant now
22 asserts, why didn't the Applicant file a challenge to the county action under RCW 36.70C.130?¹
23
24

25 ¹ 36.70C.130 provides, in part, as follows:

1 Likewise, the Council will not be surprised to learn from the briefs of Kittitas County and
2 the various opponents of the Project that the Applicant apparently cannot read or follow simple
3 instructions; is truculent and arrogant; and has, from the outset, had absolutely no interest in
4 finding any level of compromise with Kittitas County. The Applicant's total focus has been to
5 "go through the motions" with Kittitas County so that it can move on to the friendly forum in
6 perceives the EFSEC process to be.
7

8 However, as with most controversies, the facts likely rest someplace between these two
9 very different opinions.

10 The best and most accurate way for the Council to weigh the Applicant's good faith
11 efforts is through a full reading of the Verbatim Transcript of Proceedings of April 12 and 27,
12 May 3 and 31, and June 6, 2006 of the Kittitas County Board of County Commissioners
13 Meetings ("BOCC")². For it is not the arguments of the parties or their self-serving statements
14

15
16 (1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is
17 permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden
18 of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards
19 are:

20 (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a
21 prescribed process, unless the error was harmless;

22 (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is
23 due the construction of a law by a local jurisdiction with expertise;

24 (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole
25 record before the court;

26 (d) The land use decision is a clearly erroneous application of the law to the facts;

or
(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision;

(f) The land use decision violates the constitutional rights of the party seeking relief.

² The transcripts of all BOCC meetings referenced, except the April 12, 2006 meeting were attached to the Applicant's request for preemption. The transcripts of the April 12, 2006 meeting were submitted by Kittitas County (Exhibit 51-5 Supp). The citations in the following sections are to the BOCC transcript.

1 or conclusions that are determinative of the issue--it is the record, and it is the record that is the
2 best brief on the issue of good faith. It effectively defeats any and all claims the Applicant
3 makes that it attempted in good faith to comply with Kittitas County wind farm regulations and
4 the requests of the Commissioners made during the County hearing process.

5
6 2.4.2..1.1 The Hearing on April 12, 2006.

7 Although self-evident under the terms of County code, after reiterating that the Kittitas
8 County Wind Farm Overlay Process is site-specific, Commissioner Huston went on to point out
9 that the Applicant has chosen an area for the Kittitas Valley project that was already vested with
10 the Comprehensive Plan designation of "Rural" making it eligible for higher levels of residential
11 development as opposed to lower intensity uses. He then posed the question: was there adequate
12 justification of public benefit to find the project consistent with County goals and policies? (*see*
13 *Verbatim Transcript of Proceedings, April 12, 2006, Pages 7-11*) He pointed out that the
14 Commissioners previously stated that the Development Agreement executed by the County for
15 the Wild Horse Project was to be the template for the Kittitas Valley Project, recognizing, of
16 course, that the specifics for the KV Project would need to change because the site specific
17 circumstances and impacts of the two projects were quite different. But what did the Applicant
18 actually provide to the County? As of April 12, 2006, and after seven prior public hearings, the
19 Applicant had only managed a Development Agreement draft that had essentially nothing more
20 done to it than to change the names in the document from Wild Horse to Kittitas Valley. This
21 was obviously the case as it contained numerous provisions that related only to the Wild Horse
22 Project. (*see Verbatim Transcript of Proceedings, April 12, 2006, Pages 12-16*) The
23 Development Agreement is the "heart and soul of the mitigations of the impacts" and
24
25
26

1 Commissioner Huston found the current draft of the Development Agreement particularly
2 lacking in this regard. (*see* Verbatim Transcript of Proceedings, April 12, 2006, Page 17)

3 With regard to setbacks, Commissioner Huston pointed out the very clear distinctions
4 between the Wild Horse Project and the Kittitas Valley Project. The former presented questions
5 of impacting properties where no residences presently exist as compared to the KV Project where
6 many residences do exist within the impacted areas of the project. *Id.* at 25. Shadow flicker,
7 noise and lights were recognized impacts in the Development Agreement--even as proposed by
8 the Applicant. The only mitigation proposed to mitigate these impacts was distance, and the
9 Commissioners clearly felt 1000 feet was not adequate. *Id.* at 26-28 and 43. Not until the
10 Applicant got to EFSEC did it suggest it could use technology to shut turbines off during periods
11 when significant shadow flicker impacted residences. (Adjudicative Hearing Transcript of
12 Proceedings, page 782-786) A good faith approach would have been to make that mitigation
13 proposal at the county level.

14
15
16 It was also obvious at that as of April 12 the Commissioners had yet to be presented with
17 a Development Agreement draft that specified either the number, location, or size of the towers.
18 *Id.* at 41-45. Commissioner Bowen pointed out that, with the Rural Lands Comprehensive Plan
19 designation, the structure height limitations, and the underlying zoning districts, the tremendous
20 impact of turban towers anywhere approximating the size of those being proposed by the
21 Applicant led him, likewise, to the conclusion that establishing adequate setbacks were critical to
22 the approval of the Application.

23
24 Commissioner Bowen also noted that, while the Applicant had apparently reduced the
25 number of turbines over-all, many of the reductions took place in the center of the project as

1 | opposed to tower locations closer to the project boundaries. Thus, the reduction provided little in
2 | the way of mitigation. *Id.* at 47-48. He noted that the DEIS analyzed setbacks from 0.4 to 1.5
3 | miles but that the Development Agreement as proposed by the Applicant proposed no such
4 | distances in the way of mitigation or that the acknowledged impacts would be mitigated by the
5 | 1000 foot setback that was proposed by the Applicant. *Id.* at 48-51.

6 |
7 | At the conclusion of that hearing, the Commissioners requested the Applicant to bring
8 | them information on setbacks that would mitigate uncontroverted impacts and to revise the draft
9 | Development Agreement so that it actually addresses the specifics of the Kittitas Valley Project
10 | and the Commissioners' clearly expressed mitigation requirements. The Commissioners even
11 | determined to independently go to wind farm projects to see them during the day and night times
12 | so that they could better assess reasonable setbacks, and Mr. Peck, on behalf of the Applicant,
13 | was not only enthusiastic about the prospect of the Commissioners visiting existing wind power
14 | projects, but clearly expressed that they did not see any "deal killers" on the subject of set backs
15 | and that all parties were negotiating together in good faith. *Id.* at 53-57.

16 |
17 | Commissioner Huston could not have been more clear when he said: "I'm looking for the
18 | Applicant to actually present additional information to suggest a setback from their perspective,
19 | mitigates the impacts that they have agreed exist." *Id.* at 62. He continued "I think in terms of
20 | what I'm looking for, I think I've been fairly clear about what I'm dealing with is, frankly, the
21 | question of an identified probable significant adverse impact which I must mitigate.

22 |
23 | And just to be clear for the record, I'm not prepared to walk away from that as just an
24 | acceptable impact and one that's not – that we're not able to mitigate. I don't believe that's the
25 |

1 case. I need to mitigate that impact before I can determine that in fact this project's public
2 benefit outweighs the negative impact. So in a nutshell that's it." *Id.* at 64.

3 Finally, Commissioner Huston makes a very key statement that shows complete and
4 accurate comprehension of the very same issues presented to EFSEC: "I'm not prepared to
5 accept the global notions that power generation is a public benefit; I'll just accept that, that's
6 fine. But we're dealing with the question of this project generating power. Because as we've
7 already indicated with past decisions, there are other sites at which wind farms can be placed. ...
8

9 The question is in this site. Can the benefits that it will generate, can they be made to outweigh
10 the impacts that they cause? Question of mitigation." (emphasis added) *Id.* at 64-65.

11 Could the directions of the Commissioners to the Applicant at the conclusion of the April
12 meeting have been made more clear? Fix the Development Agreement so it actually
13 addresses the Kittitas Valley Project and have it provide data on setbacks that specifically
14 address adequate mitigation for shadow flicker, lights, noise and the imposition of very large
15 structures into an area already settled with residences.
16

17 2.4.2.1.2 The Hearing on April 27, 2006.

18 The hearing commenced with the Commissioners each relaying their independent site
19 visits to other wind farms, and County Staff stated for the record that the Applicant sent a letter
20 responding to some of the Commissioners issues raised at the April 12 hearing. (*see* Verbatim
21 Transcript of Proceedings, April 27, 2006, Pages 1-15) Staff also indicated that elements set
22 forth within the decision making matrix previously provided to the Applicant had not been
23 introduced and thus were not in the record. (*see* Verbatim Transcript of Proceedings, April 27,
24
25
26

1 2006, Pages 16-17) Counsel for the Applicant then made a presentation but did not present an
2 updated draft Development Agreement.

3 At this point Commissioner Huston stated the obvious: “The biggest concern that I have
4 is at this point is that I don’t have what I asked for, which was a current, updated draft of the
5 Development Agreement. I have a letter that certainly explains why I’m wrong on a couple of
6 points and – and tells me the things you probably would include in a new draft Development
7 Agreement, but that’s not exactly the same thing.” *Id.* at 25-26. The Commissioners’ request
8 was then restated: “I want a new, clean Development Agreement that representatives of Horizon
9 are prepared to stand in front of me and say, we will do everything, everything without exception
10 that is in this draft. Not promise that you’ll talk about doing some things in the future. Tell me
11 what you are prepared to do, should that Development Agreement be signed.” *Id.* at 28.
12 Commissioner Crankovich concurred, and they each restated their positions on the point. *Id.* at
13 29-31. The Applicant’s counsel indicated a continued willingness to work on Development
14 Agreement issues (*Id.* at 32-33) and the matter was continued yet again.
15
16

17 The direction of the Commissioners on April 27 was absolutely the same as that given on
18 April 12: fix the Development Agreement to deal specifically with the Kittitas Valley project and
19 provide data on setback distances that would adequately mitigate all of the acknowledged
20 impacts the project would have to the surrounding neighborhood.
21

22 2.4.2.1.3 The Hearing on May 3, 2006.

23 It is at this hearing that the tenor of the Applicant’s posture with the County decidedly
24 changed, and one leaves it to the Council to determine if the ultimatum the Applicant presented
25 was made in good faith under the circumstances then existing.
26

1 Commissioner Bowen opened by acknowledging receipt of a draft Development
2 Agreement dated May 1, 2006 and responded to prior correspondence from the Applicant to the
3 effect that they believed the County was unreasonably delaying the process and not acting in
4 good faith. (*see* Verbatim Transcript of Proceedings, May 3, 2006, Pages 5-6) A history of the
5 process was recited by Commissioner Bowen. *Id.* at 6-10. Each of the Commissioners then
6 discussed the evidence in the record and their individual wind farm site visits with regard to a
7 setback distance necessary and appropriate to mitigate all impacts of the KV Project.
8 Interestingly, the Commissioners independently arrived at approximately the same conclusion
9 based on their observations at other wind projects--that it would take 2000 feet to one-half mile
10 setbacks from neighboring properties to adequately mitigate all impacts on the KV Project site,
11 with something approximating 3000 feet from non-participating lands and residences being a
12 reasonable target. *Id.* at 10-15, 21-24, 26-29.

13
14
15 County Staff then provided its critique of the most recent draft Development Agreement
16 and reiterated its concern about new information being placed in the record by the Applicant. *Id.*
17 at 16-18, 31-45.

18 After a break, the Commissioners asked the Applicant to address the Commissioners'
19 questions and issues. It should be emphasized at this point that the May 1 draft Development
20 Agreement proposed to increase the setback from 1000 feet to 1350 feet but provided absolutely
21 no justification for either the increase or any specific setback distance with reference to any of
22 the enumerated impacts for which the Commissioners had specifically requested information.
23 Instead, Mr. Taylor, on behalf of the Applicant stated that it was the Applicant's position that the
24 record already adequately addressed all of the Commissioners' concerns and "as a representative
25

1 of the Applicant and on behalf of Applicant Power Partners and its parent company Horizon
2 Wind Energy, I must inform you that at the proposed setback of 2500 feet, as I – if I’ve
3 understood correctly the proposal from the Board, would, in our opinion, render this project
4 inviable.” [sic] *Id.* at 47. The Commissioners stated that the Applicant had provided no
5 information to substantiate that the project was economically viable with setbacks of 1350 feet
6 but not at any greater distance, let alone not viable at 2500 feet, and that the Applicant had not
7 directed the Commissioners to any part of the record to support any assertion on economic
8 viability. *Id.* at 47-50. Without elaboration, the Applicant’s counsel said the Applicant would not
9 go forward with 2500 foot setbacks and that the Commissioners should take whatever action they
10 choose. *Id.* at 49. This exchange then took place at pages 50-52.

12 COMMISSIONER HUSTON: I think it’s important to note for the record,
13 Mr. Chairman, that through this entire process we’ve had continuous notation in
14 terms of the items in the record. We now have an assertion by the proponent,
15 who’s essentially tossed their hands up and said, It’s not viable.

16 I guess at this point – frankly I’m a bit disappointed that after all this time
17 and effort and months of discussion, they’re not even prepared to offer into the
18 record – we’ve already discussed the need to throw this back open for comment.
19 They’re not even prepared to discuss in fact why it’s not viable, what constitutes
20 an economically viable project, or anything in the record to substantiate what has
21 been a last-minute assertion that apparently there is a magical number of towers
22 that makes a project viable.

23 I’m hearing nothing to support that assertion, nothing whatsoever, other
24 than I guess they don’t want to play anymore. And I think it’s important when
25 this record goes to EFSEC that after a great deal of deliberation, a great deal of
26 discussion, a great deal of effort on the part of a number of citizens, as well as
staff and the Board of County Commissioners of Kittitas County, we’re now at a
point where essentially the hands have gone up and I guess the discussion is over.

And frankly, I’m not absolutely sure why we can’t get a more definitive
statement from the Applicant, although I suspect I know why; it’ll play much
better in front of EFSEC.

If in fact this is your last and best effort, Applicant, come to the
microphone and tell me that the draft I have dated May 1, 2006, is the absolute
final and best offer of the Applicant, and then I guess I’ll base my decision on
that.

1 CHAIRMAN BOWEN: We should note for the record the Applicant
2 doesn't wish to reply to that statement.

3 COMMISSIONER HUSTON: Well, then, we'll note for the record that
4 they do not wish to indicate whether in fact this is their best offer; and I guess
5 we'll then have to make our decision in essentially a vacuum at this point. I
6 would note for the record the Applicant has chosen to no longer participate in the
7 process in a meaningful manner.

8 2.4.2.1.4 The Hearing on May 31, 2006.

9 In response to letters received from the Applicant, County Staff relayed to the
10 Commissioners the contents of those letters as well as meetings with the Applicant subsequent to
11 May 3. It was the understanding of Staff that the Applicant was going to take a look at the
12 record and the range of setbacks identified by the Commissioners to see if it would be willing to
13 discuss some scenario of either fixed or variable setbacks. (see Verbatim Transcript of
14 Proceedings, May 31, 2006, Pages 9-13, 13-21) The Applicant's counsel made a presentation
15 followed by an indication from the Commissioners of a willingness to consider a 2000 foot
16 setback from nonparticipating property boundaries so long as the setback from any residence was
17 2500 feet. *Id.* at 34, 36-38. The Applicant responded by indicating again that the setbacks
18 would make the project not economically viable. *Id.* at 41-42. Again, no data or substantiation
19 for the point at which the project would no longer be economically viable had yet been presented
20 by the Applicant.

21 At page 50, Chairman Bowen then asked counsel for the Applicant: "...do you have
22 information with you today that could help us to see if that's viable or not?" The answer
23 illuminates the absolute lack of any good faith on the part of the Applicant to even attempt
24 justification for its refusal to objectively shoulder its burden for providing data establishing that
25

1 the setbacks it was proposing (or was objecting to) were or were not adequate to mitigate known
2 impacts.

3 MR. TIM MCMAHON: I was afraid you were going to ask me that question. All
4 I can tell you is the information we provided you in the correspondence is that a
5 half-mile setback reduces the project in half and doesn't leave a sufficiently viable
6 project. That's the information I have back from my client. (Emphasis added)

7 No reference to the record. No economic data as to the number of turbines required to
8 make the project economically viable, and how, or if certain turbine locations are critical to that
9 viability. No substantive information about how adequate setbacks can or should be determined
10 for this project. These absences stand in stark contrast to the findings of the DEIS that
11 significant impacts would result from this project—impacts acknowledged by the Applicant to
12 require distances greater than 1350 feet.

13 Arguably, the Applicant was demonstrating a good faith effort right up until the time it
14 delivered its bombshell on May 3, 2006 to the effect that it no longer desired to discuss the issue
15 of setbacks beyond 1350 feet.

16 2.4.2.1.5 The Key Issue.

17 The key issue for the siting of any wind farm, including this one, is its proximity to and
18 impact on surrounding land. These are the elements which form the very basis of EFSEC's
19 existence. Yet for the boxes and boxes of material submitted by the Applicant for the record,
20 some of which may be interesting, but most of which is totally irrelevant to the key questions,
21 the Applicant totally fails to produce a shred of substantive and useful information for the
22 County (or EFSEC for that matter) that will help to establish objective standards for the setback
23 of tower locations from the project boundary. The Applicant did not even want to discuss with
24 the County a variance procedure that could allow for exceptions from the setback requirement
25
26

1 for particular tower locations. One would think that, at the very least, the Applicant would have
2 attempted to contrast this project with the Wild Horse requirements.

3 The DEIS identifies, and the Applicant agrees, that several significant environmental
4 impacts on neighboring properties will result from this project, and authorities from all quarters
5 are in agreement that distance is the primary, if not only, effective means of mitigating these
6 impacts. But, what did the Applicant provide to the County? It proposed 1000 foot setbacks
7 with no justification for that distance and then increased it to 1350 feet, again with no
8 substantiation. Was 1000 feet inadequate? Was 1350 adequate or just arbitrary? The claim the
9 Applicant made that any greater setback would make the project no longer economically viable
10 was likewise unsubstantiated, but this Council, just as the County, has absolutely no information
11 in the record on that point, either.
12

13 Instead, and what the Applicant offers in supposed verification of its good faith effort to
14 resolve this key issue with the County are 30 pages in its brief that attempt to obscure the facts
15 and focus the Council's attention on irrelevant points and authorities. One cannot read the
16 transcripts of the County proceedings and reach the conclusions of the Applicant about those
17 proceedings as stated on pages 30 through 38 of its brief. Of the seven points the Applicant
18 attempts to make about its good faith, six relate directly to the terms, operation and validity of
19 the County's land-use regulations and procedures. What the Applicant fails to do, however, is to
20 point to any authority or jurisdiction of this Council under Chapter 80.50 RCW to interpret, let
21 alone rule on such issues. *See* RCW 80.50.040.
22

23
24 The Applicant provides no guidance to the Council as to what constitutes a "good faith
25 effort." Established case law uses the term with some frequency but does not draw a clear,
26

1 general definition. But, that is not to say that a good faith effort is simply in the eye of the
2 beholder. A good faith effort is a question of fact established through the record. *State v.*
3 *Whittaker* 133 Wn.App. 199, 135 P.3d 923 (2006). "'Good faith' is defined as: Honesty of
4 intention, and freedom from knowledge of circumstances which ought to put the holder upon
5 inquiry...an honest intention to abstain from taking any unconscientious advantage of another,
6 even through technicalities of law, together with an absence of all information, notice or benefit
7 or belief of facts which would render transaction unconscientious.' Black's Law Dictionary 822
8 (Rev. 4th ed. 1968). Good faith is also defined as "honesty in fact." RCW 62A.1-201(19).
9

10 "There have been numerous efforts to define the term 'good faith.'
11 See, e.g., RCW 62A.1--201(19); *Klein v. Rossi*, 251 F.Supp. 1
12 (D.N.Y.1966); *Smith v. Whitman*, 39 N.J. 397, 189 A.2d 15 (1963);
13 *Gafco, Inc. v. H.D.S. Mercantile Corp.*, 47 Misc.2d 661, 263
14 N.Y.S.2d 109 (1965); 1 G. Glenn, *Fraudulent Conveyances and*
15 *Preferences* s 295 (1940). These efforts, if viewed as a whole, seem
16 to attribute three factors or indicia to good faith: (1) An honest
17 belief in the propriety of the activities in question; (2) no intent to
18 take unconscionable advantage of others; and (3) no intent to, or
19 knowledge of the fact that the activities in question will, hinder,
20 delay, or defraud others. Moreover, whether or not there has been
21 good faith is to be determined by looking to the intent behind or the
22 effect of a transaction, rather than to its form."

18 *Tacoma Ass'n of Credit Men v. Lester*, 72 Wn.2d 453, 458, 433 P.2d 901, (1967)

19 The courts of Washington have adopted an approach to good faith that includes both an
20 objective and subjective elements.
21

22 "Percival first argues that good faith under RCW 70.96A.120(7)
23 requires something in addition to the actor's subjective intent. We
24 agree.

25 Although the term good faith is not defined in the Uniform
26 Alcoholism and Intoxication Treatment Act, we conclude that it
should be defined to include both a subjective and an objective
element. In *Wood v. Strickland*, 420 U.S. 308, 321-22, 95 S.Ct.
992, 1000-1001, 43 L.Ed.2d 214 (1975), the court stated as to the

1 good faith defense in civil rights actions commenced under 42
2 U.S.C. s 1983:

3 'The disagreement between the Court of Appeals and the
4 District Court over the immunity standard in this case has
5 been put in terms of an "objective" versus a "subjective" test
6 of good faith. As we see it, the appropriate standard
7 necessarily contains elements of both Therefore, ... we
8 hold that a (state official) is not immune from liability for
9 damages under s 1983 if he knew or reasonably should have
10 known that the action he took within his sphere of official
11 responsibility would violate the constitutional rights of the
12 (person) affected, or if he took the action with the malicious
13 intention to cause a deprivation of constitutional rights ...'

14 See Hearn v. Rhay, 68 F.R.D. 574 (E.D.Wash.1975). See
15 generally Friedman, The Good Faith Defense in
16 Constitutional Litigation, 5 Hofstra L. Rev. 501 (1977)."

17 *Percival v. Bruun*, 28 Wn. App. 291, 293, 622 P.2d 413 (1981)

18 Although it deals with the State's obligation to produce a witness at trial, *State v. Smith*
19 148 Wn.2d 122, 59 P.3d 74 (2002) also provides some elements that generally apply to
20 establishing a good faith effort. One need not perform a futile act but "if there is a possibility,
21 albeit remote, that affirmative measures might produce the [objective result], the obligation of
22 good faith *may* demand their effectuation." *State v. Ryan* 103 Wn.2d 165, 172 691 P.2d 197
23 (1984).

24 The Applicant has the burden of establishing its good faith efforts, and it is not
25 accomplished when the Applicant unilaterally elects to terminate discussions with the County,
26 especially under the circumstances presented here. It can only be presumed from the Applicant's
actions that any information it would have produced about the setback distances necessary to
adequately mitigate the height and scale of the towers and their associated shadow flicker, noise
and lights, would also establish setbacks that would make the project uneconomic, at least in the

1 opinion of the Applicant. What this really says is that the Applicant has not made the effort to
2 obtain a large enough project area so that it could mitigate all of its impacts onsite. To accept the
3 Applicant's flat statement that the project would no longer be economic would have to be based
4 upon faith because there certainly is no substantive evidence in the record to support the
5 assertion.

6
7 The Applicant could not and did not make its case with the County, and, as
8 Commissioner Huston opined, it now comes to this Council in hopes of not only being relieved
9 of the obligation to come forward with credible, objective information that at least attempts to
10 counter the setback observations of the Commissioners, but also from the obligation to accept
11 setbacks as necessary to fully mitigate onsite the acknowledged impacts of this project. And, the
12 30 pages of Applicants brief cannot obscure its failure to produce a record of good faith.

13 2.4.2.2 Failure to Reach Agreement.

14
15 The second element the Applicant must establish under WAC 463-28-040 is that it and the
16 County have been unable to reach an agreement to resolve the outstanding issues. Again, the
17 primary issue is one of setbacks, and the record is clear that it was the Applicant, not the County,
18 that declared an impasse. But there is another issue that was and is central to reaching
19 agreement—the substantive terms of the application must be fixed and certain and remain so.

20
21 The transcript of the exchanges between the County and the Applicant on the setback
22 issue speaks for themselves. Incredibly and at the bottom of page 60 of its brief, the Applicant
23 complains of an empty record concerning the establishment of setbacks. From the outset, the
24 County made clear to this Applicant that, consistent with this Applicant's processing of the Wild
25 Horse project, each application must rise or fall on the specifics of the site. It was not the

1 County's burden to justify any particular setback distance and it repeatedly asked for this
2 information from the Applicant. It was never provided, and the Commissioners, having
3 independently arrived at a setback range they felt would be necessary to deal with the impacts of
4 this project, continued to hold open the option of discussing different distances or even a
5 variance process if the Applicant would come forward to justify those considerations. The
6 Applicant elected not to and cannot now complain of the state of the record.
7

8 Under WAC 463-28-040(2) the point is not, as the Applicant asserts in pages 60-70 of its
9 brief, a lack of understanding on the part of the County as to esthetic impacts and proposed
10 mitigation. Rather, the question is whether the County and the Applicant have failed to reach an
11 agreement on the issues. By its very definition, agreement requires mutuality, and the failure to
12 reach agreement requires fixed and final positions of the parties that cannot be reconciled. The
13 County was open to further discussions and invited the continuance of an open dialogue and it
14 was the Applicant that refused to continue to look for an answer.
15

16 In addition and from the time it first filed with the County right up to the time it
17 submitted its brief in this matter, the Applicant has been constantly modifying the scope of the
18 project, the location and number of turbines, and the terms and conditions to which it agrees to
19 be bound. The October 30, 2006 letter of Mr. McMahan which transmits the Applicant's brief to
20 EFSEC contains nearly five pages of mitigation detail and other points with which the Applicant
21 is now apparently willing to agree.
22

23 In spite of repeated requests from the Commissioners, the County was never even given a
24 draft development agreement that the Applicant said it would sign. Mr. Lathrop, in his testimony
25

1 to EFSEC, doubted that anyone involved could state what is actually being applied for and under
2 what terms and conditions. Even the Applicant did not take up the challenge.

3 The record was closed at the County, yet the Applicant kept on with new information that
4 it had failed to timely introduce. County staff called out this fact, and the Commissioners, while
5 observing that it might well be necessary to reopen the record due to the extent and content of
6 what the Applicant was providing, nevertheless continued to invite the Applicant to cure the
7 defects in its presentation and supply substantive data on not only setbacks and project
8 economics, but also on all of the other details it was proposing for the development agreement as
9 required under County code.
10

11 The record is closed at EFSEC, yet the Applicant failed to ever present a complete and
12 accurate package of everything it intends or to which it is willing to be bound, let alone anything
13 remotely resembling what it was proposing to the County. One can fairly ask: Exactly what was,
14 at the end, the complete proposal to the County?
15

16 This quasi-judicial proceeding must be decided on the record and not ex parte and ex
17 hearing communications and proposals. The cure to the defects is for the Applicant to reopen the
18 record at the County and then, if necessary, at EFSEC. But, to proceed without doing so will
19 mean that the Applicant cannot establish a failure to reach agreement.
20

21 2.4.2.3 Alternate Locations.

22 The Applicant must establish that alternate locations within the County have been reviewed
23 and found unacceptable. WAC 463-28-040(3) The record of this Application and that of the
24 Wild Horse project previously before this Council clearly establish the existence of vast areas in
25 Kittitas County suitable for wind farm development which also possesses a high probability of
26

1 being consistent with local land use regulations. Commissioner Huston stated as much. (*see*
2 Verbatim Transcript of Proceedings, April 12, 2006, Page 65) Notably, the Wild Horse project
3 itself, done by this very Applicant, has room for expansion, and this Applicant acknowledged but
4 pleaded ignorance of the Invenergy project proposed on land immediately south of Wild Horse.
5 There are alternative locations for this type of facility in Kittitas County.

6
7 It is disingenuous for the Applicant to argue that there are no alternative sites in Kittitas
8 County for wind power projects, and the issue of preemption must fail on this element alone.

9 2.4.2.4 The Interests of the State.

10 WAC 463-24-040(4) directs compliance with this element to RCW 80.50.010 which
11 provides in part:

12 “...It is the intent to seek courses of action that will balance the increasing
13 demands for energy facility location and operation in conjunction with the broad
14 interests of the public. Such action will be based on these premises:

15 (1) To assure Washington state citizens that, where applicable, operational
16 safeguards are at least as stringent as the criteria established by the federal
17 government and are technically sufficient for their welfare and protection.

18 (2) To preserve and protect the quality of the environment; to enhance the
19 public's opportunity to enjoy the esthetic and recreational benefits of the air, water
20 and land resources; to promote air cleanliness; and to pursue beneficial changes
21 in the environment.

22 (3) To provide abundant energy at reasonable cost.

23 (4) To avoid costs of complete site restoration and demolition of improvements
24 and infrastructure at unfinished nuclear energy sites, and to use unfinished nuclear
25 energy facilities for public uses, including economic development, under the
26 regulatory and management control of local governments and port districts.

(5) To avoid costly duplication in the siting process and ensure that decisions are
made timely and without unnecessary delay.”

1 The Applicant established no shortage of electrical power generation in this State for the
2 foreseeable future, is not a utility or other provider of electrical power, has no contract for either
3 the development of this project or the sale of whatever electricity it may generate, has proposed a
4 project that does not comply with element (2) above, and can only support the location of this
5 project by stating that this is the only land it has managed to lease as competitors have,
6 apparently, taken up other suitable land in the county for wind farms.
7

8 There is no demonstrated interest of the State in approving this project as there appear to
9 be more than enough such projects proposed for Kittitas County to serve future power needs. To
10 do otherwise would be tantamount to saying that whatever wind power site an applicant has
11 under contract is sufficient to deem its approval to be in the best interests of the State, regardless
12 of other available lands, projects or market forces.
13

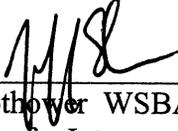
14 The fact the project cannot be made economically viable from the Applicant's
15 prospective while the acknowledged and known impacts on citizens residing within and adjacent
16 to the project boundaries cannot be adequately mitigated is perhaps the best indicator that the site
17 is not appropriate.

18 III. CONCLUSION

19 Because i) the DNR and CTED have conflicts of interest, ii) EFSEC has no jurisdiction to
20 preempt Kittitas County development regulations, and iii) even if EFSEC had jurisdiction, the
21 Applicant has failed to prove by a preponderance of the evidence the necessary elements of
22
23
24
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1 preemption, EFSEC should recommend to the Governor that the application for site certification
2 filed by the applicant be denied.

3 Respectfully submitted this 13th day of November, 2006.

4 

5 _____
6 Jeff Slothower WSBA No. 14526
7 Attorney for Intervenor F. Steven Lathrop

8 F:\Slothower\Zilka\Sagebrush\closing brief 11-13-2006

APPENDIX A

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HB 2402 - 2005-06

Providing for expedited processing of energy facilities and alternative energy resources.

History of Bill

as of Sunday, November 5, 2006 5:09 PM

Sponsors: Representatives Morris, Hudgins, B. Sullivan

2006 REGULAR SESSION

- Dec 30 Prefiled for introduction.
- Jan 9 First reading, referred to Technology, Energy & Communications. (View Original Bill)
- Jan 10 Public hearing in committee.
- Jan 12 Executive session in committee.
TEC - Executive action taken by committee.
TEC - Majority; 1st substitute bill be substituted, do pass. (View 1st Substitute)
- Jan 17 Passed to Rules Committee for second reading.
- Jan 18 Placed on second reading by Rules Committee.
- Feb 7 **1st substitute bill substituted.** (View 1st Substitute)
Rules suspended. Placed on Third Reading.
Third reading, passed; yeas, 93; nays, 3; absent, 0; excused, 2. (View Roll Calls)

IN THE SENATE

- Feb 9 First reading, referred to Water, Energy & Environment.
- Feb 15 Public hearing in committee.
- Feb 16 Executive session in committee.
- Feb 17 WEE - Majority; do pass.
Passed to Rules Committee for second reading.
- Mar 2 Placed on second reading by Rules Committee.
- Mar 3 Floor amendment(s) adopted.
Rules suspended. Placed on Third Reading.
Third reading, passed; yeas, 45; nays, 0; absent, 0; excused, 4. (View Roll Calls)

IN THE HOUSE

- Mar 6 House concurred in Senate amendments.
Passed final passage; yeas, 97; nays, 0; absent, 0; excused, 1. (View Roll Calls)
Speaker signed.

IN THE SENATE

President signed.

OTHER THAN LEGISLATIVE ACTION

- Mar 8 Delivered to Governor. (View Bill as Passed Legislature)
- Mar 24 Governor signed.
Chapter 205, 2006 Laws. (View Session Law)
Effective date 6/7/2006.

FINAL BILL REPORT

SHB 2402

C 205 L 06

Synopsis as Enacted

Brief Description: Providing for expedited processing of energy facilities and alternative energy resources.

Sponsors: By House Committee on Technology, Energy & Communications (originally sponsored by Representatives Morris, Hudgins and B. Sullivan).

House Committee on Technology, Energy & Communications
Senate Committee on Water, Energy & Environment

Background:

Energy Facility Site Evaluation Council

The Energy Facility Site Evaluation Council (EFSEC) was created in 1970 to provide one-stop licensing for large energy projects. The EFSEC's membership includes mandatory representation from five state agencies and discretionary representation from four additional state agencies. The EFSEC's membership may include representatives from the particular city, county, or port district where potential projects may be located. "In reviewing facility siting applications, the EFSEC must determine whether or not a proposed site is consistent and in compliance with county or regional land use plans or zoning ordinances."

The EFSEC's jurisdiction includes the siting of large intrastate natural gas and petroleum pipelines, electric power plants above 350 megawatts, new oil refineries, large expansions of existing facilities, and underground natural gas storage fields. For electric power plants, the EFSEC's jurisdiction extends to those associated facilities that include new transmission lines that operate in excess of 200 kilovolts and are necessary to connect the plant to the Northwest power grid.

Alternative Energy Resource Facilities

Developers of energy facilities that exclusively use alternative energy resources, regardless of the size of the facility's generation capacity, may choose to use the EFSEC process to site the facility. "Alternative energy resources" include wind, solar, geothermal, landfill gas, wave or tidal, untreated wood, and field residues.

Expedited Processing

A siting application may be expeditiously processed if the following criteria are not significant enough to warrant the EFSEC's full review: (1) the environmental impact of the proposed energy facility; (2) the area potentially affected; (3) the cost and magnitude of the proposed energy facility; and (4) the degree to which the proposed energy facility represents a change in use of the proposed site. The expedited process does not apply to alternative energy

resource facilities. Under the EFSEC process, the applicant is required to pay the costs of the EFSEC in processing an application.

Summary:

Expanding Expedited Processing to Alternative Energy Resource Facilities

All alternative energy resource facility may apply for expedited processing of its siting application.

Modifying Expedited Processing

The EFSEC may grant an applicant expedited processing of any siting application for certification upon finding that (1) the environmental impact of the proposed energy facility is not significant or will be mitigated to a nonsignificant level under the State Environmental Policy Act, and (2) the project is found to be consistent and in compliance with city, county or regional land use plans or zoning ordinances. Once the applicant has been awarded expedited processing the EFSEC is not required to commission an independent study to further measure the consequences of the proposed energy facility or alternative energy resource facility on the environment.

Municipal Land Use Plans and Ordinances

City land use plans and zoning ordinances, as well as such county and regional plans and ordinances, must be considered by the EFSEC in reviewing an application, whether or not expedited processing is used.

Votes on Final Passage:

House	93	3	
Senate	45	0	(Senate amended)
House	97	0	(House concurred)

Effective: June 7, 2006

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 2402

Chapter 205, Laws of 2006

59th Legislature
2006 Regular Session

**ENERGY FACILITY SITE EVALUATION COUNCIL--EXPEDITED PROCESSING OF
APPLICATIONS**

EFFECTIVE DATE: 6/7/06

Passed by the House March 6, 2006
Yeas 97 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate March 3, 2006
Yeas 45 Nays 0

BRAD OWEN

President of the Senate

Approved March 24, 2006.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Richard Nafziger, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 2402** as passed by the House of Representatives and the Senate on the dates hereon set forth.

RICHARD NAFZIGER

Chief Clerk

FILED

March 24, 2006 - 2:16 p.m.

**Secretary of State
State of Washington**

SUBSTITUTE HOUSE BILL 2402

AS AMENDED BY THE SENATE

Passed Legislature - 2006 Regular Session

State of Washington 59th Legislature 2006 Regular Session

By House Committee on Technology, Energy & Communications
(originally sponsored by Representatives Morris, Hudgins and B.
Sullivan)

READ FIRST TIME 01/17/06.

1 AN ACT Relating to expedited processing of energy facilities and
2 alternative energy resources under the energy facility site evaluation
3 council; and amending RCW 80.50.020, 80.50.075, and 80.50.090.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 80.50.020 and 2001 c 214 s 3 are each amended to read
6 as follows:

7 The definitions in this section apply throughout this chapter
8 unless the context clearly requires otherwise.

9 (1) "Applicant" means any person who makes application for a site
10 certification pursuant to the provisions of this chapter.

11 (2) "Application" means any request for approval of a particular
12 site or sites filed in accordance with the procedures established
13 pursuant to this chapter, unless the context otherwise requires.

14 (3) "Person" means an individual, partnership, joint venture,
15 private or public corporation, association, firm, public service
16 company, political subdivision, municipal corporation, government
17 agency, public utility district, or any other entity, public or
18 private, however organized.

1 (4) "Site" means any proposed or approved location of an energy
2 facility.

3 (5) "Certification" means a binding agreement between an applicant
4 and the state which shall embody compliance to the siting guidelines,
5 in effect as of the date of certification, which have been adopted
6 pursuant to RCW 80.50.040 as now or hereafter amended as conditions to
7 be met prior to or concurrent with the construction or operation of any
8 energy facility.

9 (6) "Associated facilities" means storage, transmission, handling,
10 or other related and supporting facilities connecting an energy plant
11 with the existing energy supply, processing, or distribution system,
12 including, but not limited to, communications, controls, mobilizing or
13 maintenance equipment, instrumentation, and other types of ancillary
14 transmission equipment, off-line storage or venting required for
15 efficient operation or safety of the transmission system and overhead,
16 and surface or subsurface lines of physical access for the inspection,
17 maintenance, and safe operations of the transmission facility and new
18 transmission lines constructed to operate at nominal voltages in excess
19 of 200,000 volts to connect a thermal power plant to the northwest
20 power grid: PROVIDED, That common carrier railroads or motor vehicles
21 shall not be included.

22 (7) "Transmission facility" means any of the following together
23 with their associated facilities:

24 (a) Crude or refined petroleum or liquid petroleum product
25 transmission pipeline of the following dimensions: A pipeline larger
26 than six inches minimum inside diameter between valves for the
27 transmission of these products with a total length of at least fifteen
28 miles;

29 (b) Natural gas, synthetic fuel gas, or liquified petroleum gas
30 transmission pipeline of the following dimensions: A pipeline larger
31 than fourteen inches minimum inside diameter between valves, for the
32 transmission of these products, with a total length of at least fifteen
33 miles for the purpose of delivering gas to a distribution facility,
34 except an interstate natural gas pipeline regulated by the United
35 States federal power commission.

36 (8) "Independent consultants" means those persons who have no
37 financial interest in the applicant's proposals and who are retained by

1 the council to evaluate the applicant's proposals, supporting studies,
2 or to conduct additional studies.

3 (9) "Thermal power plant" means, for the purpose of certification,
4 any electrical generating facility using any fuel, including nuclear
5 materials, for distribution of electricity by electric utilities.

6 (10) "Energy facility" means an energy plant or transmission
7 facilities: PROVIDED, That the following are excluded from the
8 provisions of this chapter:

9 (a) Facilities for the extraction, conversion, transmission or
10 storage of water, other than water specifically consumed or discharged
11 by energy production or conversion for energy purposes; and

12 (b) Facilities operated by and for the armed services for military
13 purposes or by other federal authority for the national defense.

14 (11) "Council" means the energy facility site evaluation council
15 created by RCW 80.50.030.

16 (12) "Counsel for the environment" means an assistant attorney
17 general or a special assistant attorney general who shall represent the
18 public in accordance with RCW 80.50.080.

19 (13) "Construction" means on-site improvements, excluding
20 exploratory work, which cost in excess of two hundred fifty thousand
21 dollars.

22 (14) "Energy plant" means the following facilities together with
23 their associated facilities:

24 (a) Any stationary thermal power plant with generating capacity of
25 three hundred fifty thousand kilowatts or more, measured using maximum
26 continuous electric generating capacity, less minimum auxiliary load,
27 at average ambient temperature and pressure, and floating thermal power
28 plants of one hundred thousand kilowatts or more, including associated
29 facilities. For the purposes of this subsection, "floating thermal
30 power plants" means a thermal power plant that is suspended on the
31 surface of water by means of a barge, vessel, or other floating
32 platform;

33 (b) Facilities which will have the capacity to receive liquified
34 natural gas in the equivalent of more than one hundred million standard
35 cubic feet of natural gas per day, which has been transported over
36 marine waters;

37 (c) Facilities which will have the capacity to receive more than an
38 average of fifty thousand barrels per day of crude or refined petroleum

1 or liquified petroleum gas which has been or will be transported over
2 marine waters, except that the provisions of this chapter shall not
3 apply to storage facilities unless occasioned by such new facility
4 construction;

5 (d) Any underground reservoir for receipt and storage of natural
6 gas as defined in RCW 80.40.010 capable of delivering an average of
7 more than one hundred million standard cubic feet of natural gas per
8 day; and

9 (e) Facilities capable of processing more than twenty-five thousand
10 barrels per day of petroleum into refined products.

11 (15) "Land use plan" means a comprehensive plan or land use element
12 thereof adopted by a unit of local government pursuant to chapter((s))
13 35.63, 35A.63, ((e~~r~~)) 36.70, or 36.70A RCW.

14 (16) "Zoning ordinance" means an ordinance of a unit of local
15 government regulating the use of land and adopted pursuant to
16 chapter((s)) 35.63, 35A.63, ((e~~r~~)) 36.70, or 36.70A RCW or Article XI
17 of the state Constitution.

18 (17) "Alternative energy resource" means: (a) Wind; (b) solar
19 energy; (c) geothermal energy; (d) landfill gas; (e) wave or tidal
20 action; or (f) biomass energy based on solid organic fuels from wood,
21 forest, or field residues, or dedicated energy crops that do not
22 include wood pieces that have been treated with chemical preservatives
23 such as creosote, pentachlorophenol, or copper-chrome-arsenic.

24 **Sec. 2.** RCW 80.50.075 and 1989 c 175 s 172 are each amended to
25 read as follows:

26 (1) Any person ((~~required to file~~)) filing an application for
27 certification of an energy facility or an alternative energy resource
28 facility pursuant to this chapter may apply to the council for an
29 expedited processing of such an application. The application for
30 expedited processing shall be submitted to the council in such form and
31 manner and accompanied by such information as may be prescribed by
32 council rule. The council may grant an applicant expedited processing
33 of an application for certification upon finding that((~~-~~

34 ~~(a))~~ the environmental impact of the proposed energy facility((~~-~~

35 ~~(b) The area potentially affected;~~

36 ~~(c) The cost and magnitude of the proposed energy facility; and~~

1 ~~(d) The degree to which the proposed energy facility represents a~~
2 ~~change in use of the proposed site~~
3 ~~are)) is not significant ((enough to warrant a full review of the~~
4 ~~application for certification under the provisions of this chapter)) or~~
5 ~~will be mitigated to a nonsignificant level under RCW 43.21C.031 and~~
6 ~~the project is found under RCW 80.50.090(2) to be consistent and in~~
7 ~~compliance with city, county, or regional land use plans or zoning~~
8 ~~ordinances.~~

9 (2) Upon granting an applicant expedited processing of an
10 application for certification, the council shall not be required to:

11 (a) Commission an independent study to further measure the
12 consequences of the proposed energy facility or alternative energy
13 resource facility on the environment, notwithstanding the other
14 provisions of RCW 80.50.071; nor

15 (b) Hold an adjudicative proceeding under chapter 34.05 RCW, the
16 administrative procedure act, on the application.

17 (3) The council shall adopt rules governing the expedited
18 processing of an application for certification pursuant to this
19 section.

20 **Sec. 3.** RCW 80.50.090 and 2001 c 214 s 7 are each amended to read
21 as follows:

22 (1) The council shall conduct an informational public hearing in
23 the county of the proposed site as soon as practicable but not later
24 than sixty days after receipt of an application for site certification:
25 PROVIDED, That the place of such public hearing shall be as close as
26 practical to the proposed site.

27 (2) Subsequent to the informational public hearing, the council
28 shall conduct a public hearing to determine whether or not the proposed
29 site is consistent and in compliance with city, county, or regional
30 land use plans or zoning ordinances. If it is determined that the
31 proposed site does conform with existing land use plans or zoning
32 ordinances in effect as of the date of the application, the city,
33 county, or regional planning authority shall not thereafter change such
34 land use plans or zoning ordinances so as to affect the proposed site.

35 (3) Prior to the issuance of a council recommendation to the
36 governor under RCW 80.50.100 a public hearing, conducted as an
37 adjudicative proceeding under chapter 34.05 RCW, the administrative

1 procedure act, shall be held. At such public hearing any person shall
2 be entitled to be heard in support of or in opposition to the
3 application for certification.

4 (4) Additional public hearings shall be held as deemed appropriate
5 by the council in the exercise of its functions under this chapter.

Passed by the House March 6, 2006.

Passed by the Senate March 3, 2006.

Approved by the Governor March 24, 2006.

Filed in Office of Secretary of State March 24, 2006.

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6 **BEFORE THE STATE OF WASHINGTON**
ENERGY FACILITY SITE EVALUATION COUNCIL

7 In the Matter of
8 Application No. 2003-01

CERTIFICATE OF SERVICE

9 SAGEBRUSH POWER PARTNERS, LLC,
10 KITTITAS VALLEY WIND POWER
11 PROJECT

12 I certify that I have this day served the following documents:

- 13 1. Post Hearing Brief of Intervenor F. Steven Lathrop
14 2. Certificate of Service

15 upon all parties in this proceeding by authorized method of service pursuant to WAC 468-309-
16 120(2)(a) as noted below:

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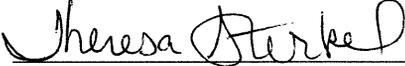
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22 I certify, or declare, under penalty of perjury under the laws of the State of Washington
23 that the foregoing is true and correct.

24 Signed at Ellensburg, Washington this 13th day of November, 2006.

25 

26 Theresa Sterkel, legal assistant to
Jeff Slothower – WSBA #14526
Attorney for Intervenor F. Steven Lathrop