

1 an application, EFSEC retains an independent consultant to evaluate the consequences of the
2 proposed energy facility upon the environment. RCW 80.50.071. EFSEC then must conduct an
3 adjudicative hearing on the proposal at which “any person shall be entitled to be heard in support
4 of or in opposition to the application for certification.” RCW 80.50.090(3).

5 At the conclusion of the adjudicative hearing EFSEC must report to the Governor its
6 recommendation as to the approval or rejection of the application for certification. If the
7 recommendation is for approval, then EFSEC is to submit a draft certification agreement with its
8 report to the Governor. The Governor may then either: (1) approve the application and execute
9 the draft certification agreement; (2) reject the application; or (3) direct EFSEC to reconsider
10 aspects of the draft certification agreement either on the record or by reopening the adjudicative
11 proceeding for the purpose of receiving additional evidence. The Governor’s decision either to
12 approve or deny the application is final for the purposes of appeal. *See*, RCW 80.50.100. The
13 process is governed by legislative policies which include preservation and protection of the
14 quality of the environment. RCW 80.50.010(2).

15 SEPA (the State Environmental Policy Act; chapter 43.21C RCW) clearly applies to this
16 process. *See, e.g.*, RCW 80.50.180. There is no statutory provision, however, which expressly
17 delineates when or how the draft and final environmental impact statements required by SEPA
18 are to be integrated into this licensing process. Instead, SEPA provides general statements of
19 policy. Like other state agencies, the Council has adopted its own rules to implement the SEPA
20 process. (Chapter 463-47 WAC).

21 RCW 43.21C.030(2)(c) requires that an EIS be included with any recommendation or
22 report on proposals for major actions significantly affecting the quality of the environment. This
23 clearly means that the FEIS must accompany the recommendation by EFSEC to the Governor.
24 Intervenor ROKT’s motion raises the question of whether the FEIS must be prepared earlier,
25 before the adjudicative hearing?

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2 The SEPA Rules (chapter 197-11 WAC) require:

3 “The SEPA process shall be integrated with agency activities at the earliest
4 possible time to ensure that planning and decisions reflect environmental values,
5 to avoid delays later in the process, and to seek to resolve potential problems.”
6 (WAC 197-11-055(1); emphasis added.)

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8 “The lead agency shall prepare its threshold determination and environmental
9 impact statement (EIS) at the earliest possible point in the planning and decision-
10 making process, when the principal features of a proposal and its environmental
11 impacts can be reasonably identified.” (WAC 197-11-055(2))

12
13 “Appropriate consideration of environmental information shall be completed
14 before an agency commits to a particular course of action” (WAC 197-11-
15 055(2)(c).)

16
17 RCW 80.50.010(5) directs that it is the policy of the state of Washington “to avoid costly
18 duplication in the siting process and ensure that decisions are made timely and without
19 unnecessary delay.”

20 The adjudicative hearing process required by the legislation is clearly important.
21 Historically, for complex proposals, adjudicative hearings have lasted for weeks or months, have
22 included testimony from dozens of witnesses, and included hundreds of exhibits. Most of this
23 information focuses upon the environmental aspects of the proposal. ROKT argues that the law
24 requires that all of this information be left out of the FEIS, because, in its view, the FEIS must be
25 finished prior to the hearing. Any new information from the hearing must be either ignored in

1 the SEPA process, or a supplement to the FEIS must be prepared, which will guarantee an
2 unnecessary delay in the process. (It is unclear whether under ROKT's view a new hearing must
3 follow any supplement to the FEIS, but their logic certainly suggests it; if so, this could lead to
4 even further delay.) ROKT's proposed approach could also lead to parties attempting to
5 challenge the validity of an EIS during the adjudicative proceeding, which is not contemplated
6 under either RCW 80.50.090 or the EFSEC regulations.

7 The EFSEC adjudicative hearing provides the best opportunity to identify and consider
8 the environmental impacts of an energy facility. EFSEC's approach ensures that evidence at the
9 hearing will be available for the FEIS, while ROKT's proposed approach does not.

10 EFSEC's determination to hold an adjudicative hearing on an application does not
11 prejudice the application, nor does it constitute the agency's commitment to a particular course of
12 action. EFSEC has the ability to deny an application after a hearing, and it has done so in the
13 past. Further, an application may be withdrawn after an adjudicative hearing is commenced. In
14 short, the decision to hold the hearing is procedural, and does not prejudice the application.

15 Agencies may identify the times at which environmental review shall be conducted either
16 in their procedures or on a case-by-case basis. WAC 197-11-055(2)(b). In our case, EFSEC has
17 done a combination of both. As part of its SEPA procedures, EFSEC has adopted a rule, which
18 states that the adjudicative hearing shall be concluded prior to preparation of the FEIS. WAC
19 463-47-060(3). EFSEC has required that the DEIS be completed prior to commencement of the
20 adjudicative hearing. This allows for comments upon the DEIS to become part of the hearing
21 process while still ensuring that evidence submitted at the hearing will also be available for the
22 FEIS. This approach provides the maximum possible opportunity for integrating the SEPA
23 process into the decisionmaking process related to issuance of the site certification. The hearing
24 allows the Council to fully address environmental issues raised in the adjudicative hearing. This
25 is because the Council can change the DEIS as a direct outcome of the testimony and evidence

1 presented during the adjudicative hearing process. This would not be the case if the FEIS were
2 issued prior to the hearing, with no opportunity for the Council to change the DEIS as a result
3 environmental issues raised during the hearing process.

4 EFSEC's SEPA determinations must be accorded substantial weight. RCW 43.21C.090.
5 ROKT bears the burden of demonstrating the invalidity of WAC 463-47-060(3), and also must
6 show that it has been substantially prejudiced by the action complained of. RCW 34.05.570(1).
7 There is no showing that ROKT will be substantially harmed by EFSEC's determination to
8 prepare the DEIS before the adjudicative hearing and the FEIS after the hearing is completed.

9 III. CONCLUSION

10 Integration of SEPA's requirements with those of the EFSEC process is complex.
11 However, EFSEC's determinations to prepare the DEIS prior to the adjudicative hearing and the
12 FEIS after the hearing best meets the requirements of both SEPA and chapter 80.50 RCW. The
13 public's ability to comment early in the process is secured, while the environmental testimony
14 and comments upon the DEIS presented at the adjudicative hearing will be available for the
15 FEIS. This process provides the maximum assurance that the decisionmaking process will be
16 integrated with SEPA review, and that the EFSEC decision will be fully informed by the EIS.
17 The FEIS will be prepared prior to the Council's decision and will accompany the
18 recommendation to the Governor. The Governor, not the Council, makes the final decision.

19 EFSEC's determination to prepare the DEIS prior to the adjudicative hearing in order to
20 allow comment and testimony on the DEIS during the hearing will only be effective if the
21 contents of the DEIS are complete within a reasonable time prior to the hearing. EFSEC is in the
22 process of preparing an analysis of alternative sites. All parties should be entitled to submit
23 evidence with respect to EFSEC's analysis. To allow this, the Applicant suggests that the parties
24 be allowed to submit further prefiled testimony and exhibits limited only to EFSEC's alternative
25 site analysis. The Applicant suggests simultaneous submittal of prefiled testimony and exhibits

APPLICANT'S RESPONSE TO ROKT's MOTION
FOR STAY

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1 on the alternative site analysis on September 3, 2004. No new motions should be permitted. The
2 hearing should be rescheduled to begin no later than the end of September to early October.

3 With this change, the Applicant contends that EFSEC's SEPA process is fully compliant
4 with SEPA, with chapter 80.50 RCW, and with the Administrative Procedure Act. ROKT has
5 failed to demonstrate otherwise, and with the timing modification suggested above, the ROKT
6 motion should be denied.

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8 DATED this 6th day of August, 2004.

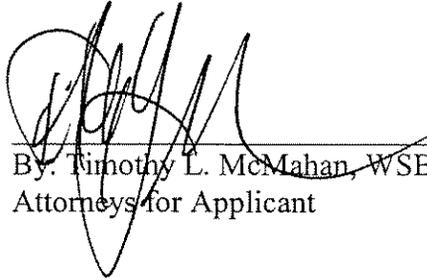
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