

September 19, 2002

**Krogh & Leonard Report to Jim Luce, Chair, Washington Energy Facility Site
Evaluation Council Regarding EFSEC Standards Development**

I. Summary

This report contains the work of the Washington Energy Facility Site Evaluation Council (“EFSEC” or the “Council”) Standards Development Group. Anticipating a formal administrative rulemaking to adopt new thermal electricity generating facility standards, Council chair Jim Luce convened the group to facilitate the rulemaking process by both identifying subjects needing original or revised standards, and discussing and developing proposals for those standards. The Standards Development Group’s report consists of this narrative paper describing the group’s composition, process and summaries of proposed rules, the proposed rules, the Earl Report (see footnote 1, below) and all of the group’s meeting materials and minutes. The report is intended to assist the Council in its formal administrative rulemaking for new standards.

In general, the EFSEC Standards Development Group was an open one, composed of interested parties and stakeholders representing diverse interests. There was a high level of commitment to the standards development process and a general belief that it helped clarify and articulate different points of view. The group agreed that EFSEC would benefit by clearer substantive standards, making its process more efficient and predictable. There were divergent opinions about what EFSEC’s new standards ought to be, however, and all of the attached proposed standards but three contain multiple proposals for the substantive topics considered. All group members wish no

portion of the report or proposed standards to prevent any of them from making any argument or taking any position during EFSEC's formal rulemaking.

II. Introduction and Background

On April 20, 2001, in response to a request from Washington Governor Gary Locke, Charlie Earl, President of Everett Community College, published a report entitled, "Improving Washington Energy Facility Site Evaluation Council."¹ That report contained thirteen suggestions, including appointing a full-time chair to EFSEC. On September 17, 2001, Governor Locke appointed Jim Luce to that position.

Mr. Luce hired Bud Krogh and Stephany Watson of Krogh and Leonard to facilitate the EFSEC standards development process. On December 5, 2001, Mr. Luce first met with Mr. Krogh and Ms. Watson and also David Stewart-Smith, Administrator, Energy Resources Division, Oregon Office of Energy. Mr. Stewart-Smith was an important resource for the EFSEC Standards Development Group, providing insights into the Oregon energy facility siting process and contacts with members of the Oregon Office of Energy who answered questions and made presentations at group meetings.

One of Governor Locke's objectives for EFSEC is to develop clear, quantifiable standards for siting energy projects. In an October 25, 2001, memorandum to state agency directors, Governor Locke directed them to: "Work with key stakeholders in crafting quantifiable siting standards for power plant construction to help applicants and interveners better understand our expectations and attain full compliance with environmental laws and rules." In addition, in remarks before the Washington PUD Association on December 6, 2001, the Governor said, "I have asked Jim Luce, our new

¹ The report, referred to in this paper as the "Earl Report", is attached as Exhibit A.
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EFSEC chair, to develop clear and objective criteria for new [energy] facilities to avoid the uncertainty that has sometimes complicated permitting proceedings in the past.”

Mr. Luce asked Krogh and Leonard to run a stakeholder process to develop recommendations for new EFSEC standards. He suggested topics he thought the group should address and provided a preliminary contact list for populating the stakeholder group.

III. Process

The EFSEC Standards Development Group first met on December 13, 2001. It met eleven times, in half and three-quarter-day sessions. Meeting materials for each meeting—including meeting minutes, presentation materials and attendance lists--are attached as Exhibits B(1)–B(11). Each meeting had an average of thirty participants representing energy facility developers, environmental groups, state and local agencies, and business, public interest and labor organizations. Overall, 73 people attended the meetings, and 94 received all of the group’s e-mail distributions, which included all meeting materials and proposed standards drafts.

Two of the meetings contained extensive presentations relating to Oregon’s Energy Facility Siting Council (“EFSC”) standards. Margaret Kirkpatrick, a partner in the Stoel Rives law firm’s Portland office and EFSC practitioner, attended the group’s second meeting and gave an extensive presentation on Oregon’s siting process. She answered questions from the group and was available to assist throughout the process. Gail McEwen, Acting Land Resources Program Manager, Habitat Division and Tom Meehan, Environmental Specialist, Facility Siting, Oregon Department of Fish and

Wildlife attended one meeting and gave an extensive presentation on Oregon's habitat rules. Their presentation is included in Exhibit B(8).

After the first issue identification meeting on December 13, 2001, group members volunteered to make presentations on topics the group identified as needing standards. The presentations consisted of an explanation of the current law and practice regarding a particular topic, and often called on other states and jurisdictions for ideas for developing standards. The group discussed the issues raised in the presentations and made suggestions for proposed standards. Presenters then drafted proposals for discussion at subsequent meetings. The group often refined proposed standards throughout multiple meetings, and presenters returned to the group with as many as four drafts. Many proposed standards developed late in the process, often in response to other proposals, and did not receive as much discussion as others. The group agreed to include all proposals with the understanding that no particular proposal would receive more weight than any other.²

While the group reached complete consensus on only one proposed standard³, the collegial process enabled the participants to state their positions in an informal, problem-solving-oriented environment, engage in brainstorming, and ultimately understand and clarify their different positions and concerns. The group agreed that in those cases where it failed to find consensus, it would include all proffered alternative proposals in this

² Drafters' names generally do not appear on the proposed standards attached as Exhibits C(1) through C(12). While a careful meeting notes reader could identify a particular proposal's author, that identification process would reveal little. In some cases, to assist the group, presenters drafted proposed standards for discussion purposes only. Therefore, the fact that a particular presenter drafted a particular proposal should not be interpreted as that presenter's preferred alternative.

³ The group agreed upon the proposed mediation standard. There was no opposition to the proposed seismic standard, but little group discussion, so it is difficult to say whether the group reached consensus. While the report proposes only one noise standard, several group members did not endorse it.

report for the Council's information. Participants in the group also intend to actively participate in the Council's rulemaking process.

IV. Proposed Rules

What follows are descriptions of each alternative proposed standard. The proposed standards themselves are attached as Exhibits C(1) through C(12).

A. Air Quality

The EFSEC Standards Development Group proposes two air quality standards. The first (Exhibit C(1)(a)) creates a rebuttable presumption that when an energy facility site certificate applicant has complied with the state and federal air quality regulations set forth in WAC Chapter 463-39, the applicant has satisfied EFSEC's air quality standard. The presumption is rebutted when the Council reviews all of the relevant evidence before it and determines that the project poses probable⁴ significant adverse impacts to the environment or human health or both. If the Council makes such a determination, it may require additional emission controls and mitigation measures necessary to prevent probable significant adverse impacts and to protect the public interest pursuant to its authority under RCW Chapters 43.21C and 80.50 and WAC 197-11-660(1).

The alternative proposal (Exhibit C(1)(b)) makes the existing state and federal air quality regulations the applicable standard, rather than a rebuttable presumption.

B. Fish and Wildlife

There are two proposed fish and wildlife standards. Both proposals suggest changing the definition of "natural environment" that an energy facility site certificate applicant must describe in its application, replacing "animal life" with "wildlife", and

⁴ Some group participants preferred the removal of "probable" from the proposed standard.
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requiring applicants to describe the effect on instream flows from construction, operation and termination of the proposed project. The first proposed standard (Exhibit C(2)(a)) also proposes a definition of mitigation and a list of information that applicants should consider in developing acceptable fish and wildlife mitigation plans including mitigation monitoring and replacement ratios. The proposal exempts wetlands impacts, which the report proposes be governed by a separate standard.

The second proposed standard (Exhibit C(2)(b)), which some group participants considered too detailed, adds the requirement that the application describe the “natural environment” throughout all four seasons of the year. In addition to the goal of no net loss of habitat functions and value as also stated in the first alternative standard, this proposed standard states that EFSEC shall seek a net gain in productive capacity of habitat through restoration, enhancement and creation with a preference for restoration and enhancement. In addition, this proposal (1) encourages no net loss of habitat functions or values, using the Habitat Evaluation Procedure (HEP) or other method acceptable to EFSEC to measure net loss, (2) expresses a preference for on-site, in-kind mitigation (3) seeks avoidance of impact on any federally or state listed endangered or threatened species--with mitigation of such impacts required to occur within the habitat supporting the same Evolutionary Significant Unit--(4) requires preserving at-risk, high quality priority habitat as part of an acceptable mitigation plan, basing habitat mitigation measures on the best available science using proven mitigation techniques that proceed with project construction and (5) requires additional habitat value (above replacement value) in cases of delayed mitigation. The proposal provides that EFSEC, in consultation with the Washington Department of Fish and Wildlife, determines the significance of

impact and the amount of mitigation required and achieved based on the best available information, including the applicant's application. It provides that the cumulative impacts of projects shall be considered. The project proponent is responsible for all mitigation costs, which are detailed in the proposed rule, and the project owner, proponent, certificate holder or heir remains responsible for site restoration costs until all impacts on fish and wildlife end. The proposal allows EFSEC to require a variety of financial assurance tools to ensure the project proponent will fulfill mitigation conditions, including the requirement that the posted credit equal mitigation costs plus ten percent.

C. Greenhouse Gas Mitigation

There are four greenhouse gas mitigation proposals. The first (Exhibit C(3)(a)) proposes that all greenhouse gas emitters permanently mitigate all of their greenhouse gas emissions at actual market cost. The Washington State University Climate Center would be responsible for annually determining and publishing actual market cost. In lieu of immediate mitigation of all new emissions, both new and pre-existing emitters would be permitted to pay the Washington Climate and Rural Energy Development Center to buy the most cost-effective mitigation on their behalf according to annually increasing schedules that cost less for pre-existing emitters.

The second proposed greenhouse gas emissions standard (Exhibit C(3)(b)) states that natural gas power plants may not emit more than 0.458 pounds of carbon dioxide per kilowatt-hour, calculated on a thirty-year basis. There are three paths to meet the proposed rule's offset and mitigation requirements: (1) combined heat and power systems that produce at least 20% of their useful energy as electrical or mechanical power and at least 20% as thermal energy, so that eligible systems have an overall efficiency of

at least 60%; (2) direct credit for biomass (as defined in RCW 19.29A.090) use against carbon dioxide emissions; and (3) provision of a portfolio of qualified offset projects, as defined in the proposed rule, including energy efficiency measures, clean and efficient transportation measures, and renewable energy resources and sequestration programs, the last of which is limited to 20% of the applicant's total funds invested to offset carbon dioxide emissions. Applicants would be permitted to arrange their own offsets or pay a qualified organization to do so. Every five years, certificate holders must report on their hours of operation and carbon dioxide emissions to the Council. The Council will evaluate technology for reducing greenhouse gas emissions and its cost every two years to update energy facility carbon dioxide mitigation requirements.

The third proposed standard (Exhibit C(3)(c)) is essentially identical to that adopted by Oregon's Energy Facility Siting Council. It proposes standards for two categories of facilities: baseload gas plants and non-baseload plants. For both baseload gas plants and non-baseload plants, the net carbon dioxide emissions rate of the proposed facility cannot exceed 0.675 pounds of carbon dioxide per kilowatt hour. There are specific standards for both categories of facilities together with rules for direct and monetary path offsets. The Council is responsible, through a quasi-judicial, contested-case proceeding, for evaluating the applicant's offset proposal taking into account (1) the certainty that the projected offsets will be achieved, (2) the ability of the council to determine what reductions resulted from the projects, and (3) the extent to which the carbon dioxide reductions would have occurred in the absence of the offset project. If the applicant chooses the monetary path, it must pay \$0.85 per short ton of carbon dioxide. The Council may adjust the amount once every two years based on evidence of the cost

of carbon dioxide offsets. In addition, an applicant choosing the monetary path must pay ten percent of the first \$500,000 of offset funds and 4.286 percent of any offset funds over \$500,000. The proposed rule sets out qualifications for non-profit organizations to administer the monetary path.

The fourth proposal (Exhibit C(3)(d)) states that EFSEC shall not adopt any greenhouse gas mitigation requirement unless required to do so by state or federal legislation.

One commenter noted that the greenhouse gas mitigation rules should apply equally to all industries in Washington, not just to power plants.

D. Noise

The proposed noise standard (Exhibit C(4)) describes the noise level permitted from the operation of thermal power plants. When plants are located in areas covered by a local zoning ordinance or comprehensive plan, the rule proposes three possible environmental designations for noise abatement (“EDNAs”) based upon a plant’s property designation as residential, commercial or industrial under the local zoning ordinance or comprehensive plan. When plants are located in areas not covered by a local zoning ordinance or comprehensive plan, the rule describes the three possible EDNAs that would apply to the property based on its use and the existing types of structures and businesses present there. The proposed standard describes the maximum permissible operational noise from thermal power plants, based on the EDNA of the receiving property, the time of day and the length of time of the noise emission. The proposed standard identifies a number of exceptions to the maximum permissible limits, such as emergency vehicle and construction noises. EFSEC may grant variances from

the noise requirements when for technological or economic reasons, no viable control methods exist. The Council may enforce its noise rules only upon the complaint of a person who lives, owns property, or works on the property affected by the noise complained of, except when the affected property is a park, recreational area or wildlife sanctuary.

Although there is only one proposed noise standard, the group had a significant discussion in one of its meetings that is not captured in the proposed standard. In that meeting, the presenter argued that the current noise rules applicable to power plants are inadequate, significant and unwarranted variability exists among local noise standards and bothersome tones that nevertheless meet applicable decibel-level standards are still unregulated.

E. Seismicity

The proposed standard (Exhibit C(5)) states that the local building code is the standard for design and construction of an energy facility. If the Council has overwhelming evidence that the maximum probable and maximum credible seismic event is greater than that referenced in the local building code, the applicant must conduct a site-specific study to characterize possible ground motion or failure expected during the seismic event, and design and construct the facility to withstand it.

F. Socioeconomics

There are three proposals for a socioeconomic standard in energy facility siting. In the first (Exhibit C(6)(a)) the goal is to avoid, minimize or mitigate adverse project-related socio-economic impacts on the local community and promote positive project-related socio-economic impacts on the local community. Applicants are directed to work

with local government jurisdictions to meet the goal. Specifically, applicants and local governments are required to address significant short and long-term local population increases, housing supply and vacancy rates, inclusion of nearby minority and low-income populations in the permitting process, maximizing the use of local workers and businesses for construction, operation and maintenance of the project and disparities between project-related service demands and project-generated tax revenue on affected local jurisdictions.

The second proposed standard (Exhibit C(6)(b)) requires applicants to submit a detailed socioeconomic impact study to the Council including the impact of the proposed project on population, work forces, property values, housing, traffic, health and safety facilities and services, education facilities and services, local economy and environmental justice. The applicant is directed to work with affected local governments to determine socioeconomic impacts, and if they are negative, to mitigate them. If an applicant requests work from affected local governments beyond ordinary application processing, the applicant and affected local governments are directed to agree on an acceptable cost reimbursement plan before beginning the additional work.

The third socioeconomics proposal is to retain WAC 463-42-535 as the socioeconomics standard, without change.

G. Water Quality

There are two proposals, structured like the two air quality proposals. The first proposed standard (Exhibit C(7)(a)) creates a rebuttable presumption that for thermal power plants under the Council's jurisdiction that discharge wastewater subject to the National Pollution Discharge Elimination Program ("NPDES"), compliance with the

NPDES permitting program as adopted by the Council in WAC Chapter 463-38 satisfies the Council's standard. The presumption is rebutted when the Council reviews all of the relevant evidence before it and determines that the project poses significant⁵ adverse impacts to the environment or human health or both. If the Council makes such a determination, it may require additional effluent limitations or mitigation measures necessary to prevent significant adverse impacts to the environment and human health.

For wastewater discharged to publicly-owned treatment facilities, the Council's standard is deemed satisfied upon a demonstration that wastewater discharges will not interfere with the ability of the treatment facility to comply with the permits governing its operation.

For energy facilities that discharge wastewater to groundwater, compliance with WAC Chapter 173-200 creates a rebuttable presumption that the Council's standard has been satisfied. The presumption is rebutted when the Council reviews all of the relevant evidence before it and determines that the project poses significant⁶ adverse impacts to the environment or human health or both. If the Council makes such a determination, it may require additional effluent limitations or mitigation measures necessary to prevent significant adverse impacts to the environment and human health.

The alternative proposal (Exhibit C(7)(b)) makes the existing state and federal air quality regulations the applicable standard, rather than a rebuttable presumption.

H. Water Quantity

Both proposed standards (Exhibits C(8)(a) and (b)) set forth how site certificate applicants request and receive authorization to use water resources for energy facilities.

⁵ Some EFSEC Standards Development Group participants believe "probable" should be inserted before "significant."

⁶ See footnote 5, above.

The two proposals differ only in that the first proposed rule states that water is valuable and must be prudently managed and encourages site certificate applicants to conserve water during the construction and operation of their plants. The second proposal does not contain this policy language.

Applicants proposing to use water for an energy facility must specifically identify submitted water rights or other authorization to use water in the application. Applicants must (1) submit water rights or other water use authorizations that the proposed energy facility may use without changes, (2) submit water rights that may be changed to meet the points of withdrawal, place of use and purpose of use identified in the application, or (3) submit water rights from both categories sufficient to meet the proposed facility's needs.

If an applicant submits water rights that require changes, the applicant must provide EFSEC with a report of examination identifying the proposed water rights changes. EFSEC is responsible for determining whether to authorize water use incorporating the requested changes based on the substantive law applicable to a water rights change application. The site certificate applicant must provide EFSEC with a report of examination identifying the proposed water rights changes. The Washington Department of Ecology prepares the report of examination and the applicant pays the cost of its preparation. The applicant must notify the Department of Ecology at least six months before submitting its site certificate application that a report of examination is necessary and the department must respond to the applicant within five business days stating whether it can timely complete the report of examination; if not, the applicant may hire a consultant to prepare the report and the Department of Ecology may comment upon it.

EFSEC may condition the applicant's requested water use in the site certification agreement. Applicants must obtain *new* water rights from the Department of Ecology outside the site certificate application procedure.

I. Wetlands

There are three proposed wetlands standards. All three cover wetlands as designated in accordance with the *Washington State Wetland Identification and Delineation Manual*. The first proposal (C(9)(a)) contains a stated goal of avoiding impacts to wetlands in energy facility siting. However, if avoidance is not practicable, the applicant must minimize the impacts and mitigate them. The proposed rule contains compensatory mitigation requirements and they must be consistent with Washington Department of Ecology *Guidelines for Development: Freshwater Wetlands Mitigation Plans and Proposals*, 1994, as revised. The rule contains a preference for on-site and early mitigation. The proposed rule also includes standards for wetland buffers including buffer widths, width averaging, measurement, maintenance and permitted buffer uses including conservation and restoration activities, passive recreation and storm water management facilities. The rule proposes that EFSEC may determine appropriate buffer widths in accordance with a qualified professional biologist's recommendations and the best available science on a case-by-case basis to protect wetland functions and values based on site-specific characteristics.

The second proposed standard (Exhibit C(9)(b)) requires that wetlands be rated according to the Washington Department of Ecology's wetland rating system in the Washington State Wetland Rating System documents (Western Washington, *Ecology Publication #93-74*, Eastern Washington, *Ecology Publication #91-58*) as revised. The

rating assigned to a wetland determines the attendant buffers required. The proposed standard contains criteria for EFSEC to use in increasing and decreasing wetland buffer widths. Mitigation requirements are similar to those contained in the first alternative proposal, but specific mitigation ratios are required for each rated category of wetlands. Like the first alternative proposal, the proposed rule contains a preference for on-site and early mitigation. It allows credits from a Department of Ecology-approved wetland mitigation bank as compensation for unavoidable impacts to wetlands when specified criteria are met.

The third proposal (Exhibit C(9)(c)) states that compliance with applicable city or county wetlands protection regulations is prima facie evidence of satisfying the no net loss standard. The Council also has the authority to determine that the applicant has demonstrated no net loss even though the applicant has not satisfied all of the applicable city or county wetlands regulations.

J. Certificate Expiration

There are two proposed standards. Overall, the first (Exhibit C(10)(a)) states that if a site certificate holder does not begin construction within ten years of the date set forth in the site certificate, the site certificate expires. “Begin construction” means the start of construction of a unit's major components, excluding site preparation, upon a schedule and with the intention of completing construction within twenty-seven months after commencement. During the first five years after the “begin construction” date, at least six months and no more than nine months before the certificate holder begins construction, the certificate holder must identify to the Council any substantial changes-- or lack thereof--in environmental, legal and technological conditions relating to the site

certificate. During the second five years after the “begin construction” date, the certificate holder must certify to the Council that all of the representations in its application are the same. If they are not, the certificate holder must identify the changed conditions to the Council and propose changes to the site certification agreement to address the changed conditions. When construction begins during the second five years after the date set forth in the site certificate, the Council must affirmatively authorize the beginning of construction. If a site certificate holder begins construction within six months of the date set forth in the site certificate, no additional showing is necessary.

The second (Exhibit C(10)(b)) states that if the certificate holder does not commence operation within five years from the effective date of the Site Certification Agreement, the Site Certificate expires.

K. Need for Projects

There are three standards proposed for EFSEC to use when evaluating whether there is a need for a particular energy facility. The first (Exhibit C(11)(a)) refers to RCW 80.50.010, which articulates a state policy that requires EFSEC to recognize the pressing need for more energy facilities. The proposed standard states that applicants for site certificates are not required to make any showing to the Council regarding need for power.

The second proposal (Exhibit C(11)(b)) states that for an applicant to demonstrate need, proposed energy projects must be consistent with state energy policy. An applicant may show this consistency in one of three ways. First, an applicant may show need when the region has acquired a threshold of at least 60 percent of annual efficiency resources targeted for acquisition by the Northwest Power Planning Council in the Northwest

Conservation and Electric Power Plan. Second, an applicant may show need by demonstrating that at least 70% of a proposed project's output for at least 10 years will be sold to an entity that has conducted a Qualifying Integrated Resource Plan that considers efficiency resources to meet electricity demand. Third, an applicant may mitigate the need standard by investing in or paying for the acquisition of energy efficiency according to a proposed formula.

The third proposed standard (Exhibit C(11)(c)) refers to RCW 80.50.010 which directs the Council to balance demand for energy facilities with the broad interests of the public. The proposal states that applicants for site certificates must demonstrate that operating, under-construction and permitted resources in the region are insufficient to meet 115 percent of projected demands at critical water conditions over the ten years following the date of application. There are exceptions for public agencies if they are required to obtain citizen review and approval under RCW 80.52, and for applicants who can demonstrate that a proposed facility will provide a net benefit to consumers, as defined in the proposed standard.

L. Mediation, Stipulations and Settlement

This proposed standard (Exhibit C(12)) states the Council's preference for stipulations during administrative proceedings and settlement. The Council retains the power to reject stipulations and approve settlements. The Council supports any alternative dispute resolution mechanism to resolve disputes without full contested hearings or litigation. It may direct parties to meet or consult or to engage in a collaborative process. The collaborative process is defined as a Council-sanctioned negotiation in which interested persons work with each other and EFSEC staff to achieve

consensus. The proposed rule includes rules for all negotiations, unless otherwise agreed to by all participants.

V. Conclusion

The EFSEC Standards Development group believes that this report identifies the significant policy issues in and alternative viewpoints about new EFSEC standards. The group hopes the report is helpful to the Council in its rulemaking process and its members look forward to participating in the rulemaking.