

(UPDATED APPENDICES 12/19/00)

APPENDIX A

Budget Proviso

Law of 2000, 2nd Sp. Sess., Ch. 1, § 116(41), p. 1637:

(41) \$25,000 of the general fund--state appropriation for fiscal year 2001 is provided solely for the department of community, trade, and economic development to provide administrative and professional support, including the hiring of an independent facilitator, to a joint legislative task force charged with reviewing current energy siting statutes and reporting its recommendations to the legislature and the governor by December 1, 2000. The task force, which shall consist of eight voting legislative members and eight nonvoting members representing interested stakeholder groups, shall review and make recommendations regarding the following issues: (a) Jurisdiction and membership of the state siting authority; (b) its procedures; (c) the scope of preemption of proprietary and regulatory functions of local governments and other state agencies; (d) local government participation; (e) the standards and processes for determining the need for proposed projects; (f) the role of a counsel for the environment; (g) funding and related costs of participating in the state siting process; (h) monitoring and oversight of certified facilities; and (i) the siting of facilities on public lands.

APPENDIX B

Work Group Participants

Margaret Allen	Barbara Ritchie
Jim Arthur	Dave Robertson
Heather Ballash	Deb Ross
Mary Barrett	Gayle Rothrock
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Katy Chaney	Rose Spogen
Danielle Dixon	Collins Sprague
John Doyle	David Stewart-Smith
Jenene Fenton	Jim Thornton
Allen Fiksdal	Mike Tracy
Bill Frymire	Stu Trefrey
Jerry Henry	Tony Usibelli
Jim Hurson	Helmet Wallenfels
Daniel Jemelka	Dave Warren
Bill Jolly	Mark Woodward
Carol Jolly	
Bill Kiel	
John Klingele	
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Louis Lee	
Jaquelyn Lynch	
Patty McDonald	
Karen McGaffey	
David Mudd	
John Mudge	
Claudia Newman	
Arne Olsen	
Terry Oxley	

APPENDIX C

Three Lists from Work Group Meeting—September 27

At the work group meeting in Bellingham on September 27, work group members made three lists.

First List: For the first list, each person said what he or she thought was working now in the state siting process. The group did not discuss this list or agree on it. This is not a consensus list.

Second List: For the second list, each person said what he or she thought was critical for a review of the siting process to consider. For purposes of this list they set aside the December 1 deadline for reporting to the Legislature and Governor. This list is not a consensus list.

Third List: The group then looked over the list of issues that at least one person had said was critical and selected issues to start discussing in more detail. This list became the "starter issues." This is a consensus list in the sense that everyone agreed to start with these issues. There was no attempt to determine each person's level of interest in each issue or to determine whether all agreed that each issue was in fact an important issue. Various participants then agreed to write up drafts of options for most of the starter issues and the group decided to devote its October 11 agenda to these starter issues.

1. What, in your view, is working now? (This is not a consensus list.)

- Each project is getting a thorough review. We know what we are facing when the process is done.
- Monitoring is working well from the agency standpoint. Oversight is working well.
- The counsel for the environment is working relatively well, given available staff and funding.
- Eminent domain is working well. In other words, the task force doesn't need to address it.
- Local involvement in siting proceedings is working well, except for concerns about preemption of local public lands.
- EFSEC's new sequencing of SEPA and adjudication should be much improved.
- Requiring the applicant to fund major activities works well.
- The adjudicative process is functioning and we seem to be able to resolve some issues early so that they don't need to go through adjudication.

2. What, in your view, is it critical that a review of the siting process must address, leaving aside the time constraints of the current review? (This is not a consensus list.)

- Amend the purpose statement and legal standard for approval and make the siting process consistent with state energy policy.
- Lower the 250MW threshold
- Establish a CO2 standard for thermal generating plants.
- Make it easier and less expensive for state agencies to participate.
- Fix problems associated with the ex parte wall for state agencies and local governments in the adjudicative proceeding.
- Make non-hydro renewables eligible (mentioned wind and solar).

- Amend the statute so that it has a very clear intent and policy section.
- Fix problems with the public and adjudicative phases of the process so that it is clear how they are to be combined into one record. In other words, how do you combine the adjudicative process and public participation into one final record?
- Clarify preemption. Will the siting process preempt local law and state law with regard to both regulatory and proprietary powers? A big question is, to what extent are public lands preempted by EFSEC? The legislature needs to act on this.
- Membership: Should it governmental members or a citizen board?
- How should SEPA apply? Can we eliminate some of the duplication in applications and environmental impact statements?
- There needs to be adequate time and money for local governments to carry out their responsibilities, however they might be defined.
- Address the problems of determining consistency of EFSEC criteria and local ordinances. This is a problem especially when a local government classifies an energy facility as a conditional use.
- Reconcile the mission of EFSEC and public perception.
- Change state energy policy to make it more directive.
- Pre-site facilities as industrial facilities are being done now. Can we use GMA to pre-site?
- Make the EFSEC statute consistent with the GMA.
- Provide adequate financing for state agency staff time.
- Resolve questions about the governor's role and the adjudicative process.
- Have appropriate state agencies monitor and oversee certified facilities directly. Remove EFSEC from that loop.
- Get more certainty in the process.
- Make the siting process more efficient.
- Allow applicants to opt out of the state siting process if the project is located entirely in one local jurisdiction.
- Resolve more issues up front.
- Address funding issues.
- Clarify EFSEC's role regarding water rights.
- Address the thresholds for jurisdiction. Are they appropriate for the different kinds of facilities?
- Provide adequate funding for the counsel for the environment and for council members.
- Address issues of public participation.
- Address issues associated with the reliance on local government for siting some facilities. There are two concerns here: (1) Many local governments lack the technical expertise and money to review a proposal. (2) A local government may block a project that is important to the state.
- Develop a more staged approach: pre-siting, followed by an expedited process that enables parties to resolve issues up front, before adjudication.
- **What should we start on? (This was a consensus list of issues to start discussing.)**
- Preemption, both regulatory and proprietary
 - state: Chuck, Bill J, Claudia, Gary, David M, Patti McDonald
 - local: Claudia, David Grant, Patti, Dick Little
- The timing of the land use hearing -- RCW 80.50.090: Chuck

- GMA sequencing: Scott, Claudia, David G., Heather, Arne
- Define “land use plan and ordinances” in EFSEC statute: Claudia
- Membership (no assignments)
- SEPA linkage to the EFSEC process: sequence, duplication: Chuck
- Money for AG’s office, local governments, state agencies, EFSEC (no assignments)
- Monitoring and oversight: Bill K, David M, Allen, Dick L, Patti
- threshold limits
 - non-hydro renewables: Danielle
 - how to calculate the threshold for thermals (the current 250): Allen, Bill K
- state work with local governments to assist with pre-siting (Are energy facilities essential public facilities?): Collins, Barbara Brenner, Greg Aucutt, Claudia, Heather
- Amend intent statement: Claudia, Danielle
- Role of counsel for the environment and relationship to other public parties: Bill F, Mary B, Barbara, Jerry Henry, Danielle
- Resolve issues up front: negotiation, mediation, arbitration: Jim, Barbara
- Permit duration: Danielle, Gary, Allen
- Guidance for role of governor: Can parties discuss case with the governor? What is the standard for appeal?

APPENDIX D

White Paper on State Roles in Energy Facility Siting

Deborah Ross, EFSEC Chair

January 17, 2000

Introduction

This paper is designed as a brief introduction to major issues involving Washington state's involvement in siting energy facilities. The purpose of the paper is to assist legislators and other stakeholders in identifying key issues and, hopefully, starting to identify areas of consensus and disagreement.

This paper primarily addresses options for *state* level involvement in siting. To the extent energy facilities are, or may be, sited by local or federal authorities, this paper does not address procedural improvements that may be warranted to improve their processes.

The paper is structured as follows: Part one is a very brief background on why we are undertaking this review. Part two discusses the status quo, including a description of pros and cons. Part three contains illustrations for siting models that could represent procedural improvements over the status quo. Attachment A is a matrix developed by EFSEC staff showing how each key issue is addressed in Washington state and several other systems.

This paper attempts to be objective and factual. To the extent it expresses an opinion, the opinion reflects what we have heard from a wide number of stakeholders. However, the author accepts responsibility for any views expressed here.

Background

At the state level, responsibility for siting and monitoring large energy facilities rests with the Energy Facility Site Evaluation Council (EFSEC). In some instances, these responsibilities are preempted by federal entities or lie with local or other state agencies.

Over its 30 year history, EFSEC has from time to time undergone scrutiny and change. Changes to EFSEC's statute have been both minor (e.g., adding or dropping members from the Council), and major (e.g., adding new types of facilities to EFSEC's jurisdiction, making chair a citizen rather than full-time professional position). The last comprehensive review of EFSEC occurred in 1993 at the behest of the legislature. Lack of consensus among members of the legislative task force, combined with a general lack of public interest in energy siting at the time, resulted in a divided report. The committee did recommend a few minor changes, only one of which (compensation of chair) ultimately was enacted.

In mid-1998, EFSEC initiated its own scrutiny of possible changes that could improve the EFSEC process. This resulted in the formation of several task forces which were to report back to the Council with recommendations for improvements. As a result of this process, the Council has changed its policy regarding the sequencing of the environmental review and adjudicative phases of its proceedings. Further, the Council commissioned its chair to work with the governor's office and the legislature towards more comprehensive legislative reform.

Subsequently, partly as a result of experiences with the recently terminated Cross-Cascades pipeline proceeding, public interest in making improvements to siting processes has reemerged. The governor's Fuel Accident Prevention Team, formed after the Bellingham pipeline explosion, recommended the formation of a task force to study energy facility siting issues. The governor endorsed the recommendation and commissioned EFSEC to work with the legislature on forming and conducting the task force.

Issues

Issues that have received the most attention from EFSEC and stakeholders can be placed into these broad categories:

- Facilities regulated by state, local and federal authorities
- Membership of state siting entity
- Process (including public participation, sequencing, and governor's role)
- Local involvement
- SEPA responsibility
- Need/consistency
- Funding
- Monitoring and enforcement
- Eminent domain and public lands

This section briefly identifies and describes these issues. It also includes a brief discussion of some of the pros and cons of the state's current approach. Attachment A also contains a matrix that tabulates each issue, and various ways it has been addressed here and elsewhere.

Facilities regulated

The state has retained siting and monitoring jurisdiction, via EFSEC, only over large energy facilities, and even then its jurisdiction is limited. For example, EFSEC does not have jurisdiction over electrical transmission except to the extent it is connected with a new power plant; and it has jurisdiction only over thermal power plants, not hydropower or other renewables. It sites all large petroleum pipelines but only intrastate natural gas pipelines (interstate natural gas pipeline siting is preempted by the federal government); as well as large refineries and oil ports.

EFSEC's jurisdictional thresholds may be the highest of any state that has a state-level energy siting process.

Pro:

Having relatively high thresholds for state involvement ensures that only facilities that are of statewide significance have state-level review; all others receive local review where local impacts are better known.

Con:

Certain facilities with multijurisdictional significance, for example, transmission lines or short pipelines that cross county or city boundaries, are excluded from state coordination and review and may be very difficult to site at the local level. Further, having jurisdiction over only one type of electrical power plant could skew the siting of facilities either towards or away from

other types of plants. For example, the state energy policy embodied in RCW 43.21F.015 encourages the development of renewable resources, but these are often difficult to site at the local level.

Membership

The Council consists of a citizen chair, members chosen by the directors of nine state agencies, and, when an application is before the Council, representatives from the localities and port districts where the facility is proposed to be sited.

Pro:

The original purpose of having members be drawn from state and local agencies is to facilitate coordination among these agencies, as well as to draw on the expertise of their staffs.

Con:

These purposes are, in practice, thwarted because of the adjudicative nature of EFSEC proceedings. Agencies who have members on EFSEC typically intervene as parties in EFSEC proceedings. Ex parte rules then prohibit the members from communicating with the staff who are most expert in the issues before EFSEC, and, very often, with the agency directors.

Process

The state undertakes a five-part process in examining an application for a new energy facility:

- EFSEC is the responsible State Environmental Policy Act (SEPA) official and retains an independent consultant to prepare a Draft and Final Environmental Impact Statement.
- EFSEC examines the proposal for consistency with applicable local land use ordinances, development plans and comprehensive plans
- EFSEC undertakes a formal adjudication under the Administrative Procedures Act of all issues relating to the proposal, and is required during that process to balance the need for the plant with the public interest.
- EFSEC conducts certain air and water discharge permitting reviews as delegated by the U.S. Environmental Protection Agency
- Once these four phases are complete, EFSEC forwards a recommendation to the governor who then must decide within 60 days whether to accept the recommendation, reject it, or remand it for further review.

Pro:

The process is designed to streamline review of a proposed facility to maximize both environmental review and coordinate the state and local processes that would otherwise be distributed among a wide variety of local and state agencies. Further, the governor's ability to review the entire record injects a political litmus test, or "reality check," into the process.

Con:

Several features of the process create confusion and unwieldy results. These include the following:

- The SEPA process and the adjudicative process don't work well together. The SEPA process works best in an open environment with extensive negotiation, issue narrowing, and public involvement. The adjudicative process works under rules designed to limit evidence, control

participation, and place strict boundaries around communications. EFSEC has initiated a new process which it hopes will improve the coordination of these two phases but more improvements may be warranted.

- The Growth Management Act was enacted after the EFSEC statute and doesn't mesh well with the EFSEC process in that determination of consistency may be dependent upon local governments' first conducting an environmental review.
- The governor's role is unclear. If he/she is to be an independent actor, able to take comments from any interested person, this undermines the solemnity and finality of the EFSEC process. On the other hand, if his/her role is simply to act like an appellate judge, it is not clear what standards he should apply (particularly within the 60 day time period for acting). (All other models we examined have appeals taken directly to the court system.)

Local involvement

EFSEC review preempts local jurisdiction over the siting of these facilities. However, local interests are diversely represented in the EFSEC process. First, EFSEC must review the project for consistency with local ordinances, development plans, and comprehensive plans and hears from local authorities and citizenry in that process. Second, the locality has voting members on the Council during a review. Third, localities may intervene as parties in an EFSEC proceeding to protect their interests. Fourth, during the permitting, monitoring and enforcement processes EFSEC may consult with or contract with local authorities for permitting, monitoring and enforcement.

Pro:

Preemption is a universal feature of state siting statutes since the primary purpose of a state siting statute is to give the state the power to reconcile local with statewide interests for facilities that are deemed sufficiently important to have statewide review.

Con:

Local governments sometimes feel that their voices and concerns are not adequately heard or addressed – at least in comparison with the more typical local siting process. Funding is a major issue for local participation in the state process. As noted above, the inconsistency between the GMA process and the state siting process needs to be resolved.

SEPA

EFSEC is the responsible SEPA agency, retaining an independent consultant to produce draft and final EISs.

Pro:

This is in furtherance of the one-stop shopping approach of the siting statute and ensures that all matters of public interest are included in the environmental review.

Con:

As noted above, the SEPA process does not easily mesh with the adjudicative process. This creates not only administrative problems but also confuses participants who are more used to the give and take of the usual EIS development process. Further, other agencies, such as the

Department of Ecology, have more extensive expertise in developing draft and final environmental impact statements.

Need/consistency

The EFSEC statute contains a statement in its preamble that there is a “pressing need” for new energy facilities. However, the statute also says that EFSEC is required to balance demand against the public interest in protecting the environment. The state energy policy articulated in RCW 43.21F.015 was enacted since the EFSEC statute; its applicability to EFSEC’s deliberative process is not clear.

Pro:

The EFSEC mandate to recognize the importance of adequate affordable supplies of energy provides a rationale for having a state presence in siting large energy facilities. The “balance” language provides subjective guidance to EFSEC concerning its central function.

Con:

It has not always been easy, in EFSEC’s thirty year history, to reconcile the statute’s assertion of a “pressing” need for energy resources with periodic cycles of energy surplus. Furthermore, the term “need” means vastly different things to economists, engineers, and citizens. Recent cases have stressed EFSEC’s balancing responsibility as central to its decisions. EFSEC does not interpret the “pressing need” language as requiring any kind of thumb on the scale in favor of siting a facility. The three statutory expressions of policy (“pressing need,” “balance,” and the state energy policy) need to be reconciled and perhaps made more objective.

Funding

Applicants fund EFSEC’s processing of a siting application, and permittees fund ongoing monitoring and compliance. However, in absence of a voluntary agreement with applicants, funding for participation from intervenors and interested persons is borne by the intervenors themselves.

Pro:

Applicant/permittee funding ensures that EFSEC has adequate resources to process a case and monitor compliance. This is seen as a major benefit by the agencies who otherwise would have to fund compliance out of general fund sources.

Con:

Some may see applicant funding as giving the applicant leverage over an EFSEC decision. Further, having participants be required to fund their own participation can be extremely burdensome and can result in an imbalanced record before the Council.

Monitoring and enforcement

EFSEC has sole responsibility for monitoring and oversight of permitted sites. By statute, it must contract with the applicable state and local authorities to assist it in performing these functions.

Pro:

Continues the notion of one-stop shopping; ensures adequate funding for these activities (see above).

Con:

EFSEC staff only provides coordinating and contractual activities for site monitoring that might be performed by another agency just as well.

Eminent domain and public lands

Eminent domain statutes are independent of siting statutes. In the past, most applicants before EFSEC were public utilities with eminent domain powers. This is not longer the case. Therefore, an EFSEC finding that a proposed facility is in the public interest does not automatically entitle it to exercise eminent domain powers.

Pro:

The “public interest” standard for creating an eminent domain power could be different from that required for siting an energy facility.

Con:

The lack of a link between the siting process and eminent domain creates a disconnect in a couple of possible areas: first, public utilities have eminent domain powers and independent power producers do not. The latter, which are far more common developers of power plants, must therefore site facilities where they can acquire the land, and not where the project makes sense from an efficiency perspective. (This has not been an issue so far in Washington state, but has become a major issue in California.) Second, a difference of opinion has arisen with respect to EFSEC’s authority to require a state or local agency to cede lands for siting facilities, since some believe the eminent domain statutes are not clear on this point.

Illustrations of models for siting energy facilities

EFSEC has no position at this time on particular improvements or changes it would like to see. However, we concur with the apparent consensus that the current model is not working well. In order to assist decision makers in envisioning procedural improvements to the current model, we developed four alternative models that are each designed to represent a *procedural* improvement over the status quo.

This section briefly describes each model. They were developed as *examples only*. Their common feature is that they are all designed to improve the status quo with respect to transparency, internal consistency, consistency with existing statutes, and efficiency. However, each would reflect different philosophies about the function of government, public interest, and decision making processes. The four models developed here deliberately represent a very broad spectrum of possible levels of state involvement in siting.

The models developed here are *procedural and not institutional*. The functions described could be in theory performed by a number of state-level entities, including, but not limited to, a modified EFSEC, another existing state agency (e.g., Department of Ecology or Utilities and Transportation Commission, or a specialized body such as a new office of pipeline siting and

safety). In order to make this clear, we developed the term State Energy Siting Authority, or SESA, to refer to this functional entity.

Model 1: Local siting, State siting authority performs only funding & EIS coordination

Under this model, state involvement in siting energy facilities would essentially be abolished, except for coordinating funding and the EIS process. All siting would be done locally under applicable GMA/siting processes. The SESA would exist to coordinate funding and environmental review. The underlying philosophy of this model would be to concentrate control over siting at the local level while ensuring adequate funding and expertise for environmental review.

Facilities regulated: Same as current

Membership: Director of SESA (it would have to be determined whether a gubernatorial appointee, etc.)

Process: An applicant for an energy facility would jointly apply to SESA to initiate the EIS process and to the applicable local authority. The SESA would develop the EIS on behalf of the local authorities (and in cooperation where applicable with federal authorities) with funding by the applicant. The SESA would also assess fees for local review of the project.

Local involvement: Local authorities would have exclusive authority to site the facility.

SEPA: Would be done by SESA or Department of Ecology.

Need/consistency: None except as desired by local authorities.

Funding: Funding for EIS and for local siting would be provided by the applicant.

Monitoring and enforcement: By local authorities and state agencies as applicable.

Eminent domain and public lands. No change to current statute.

Model 2: Advisory body

Under this model, jurisdictional thresholds are kept the same but there is an “opt in” model for local authorities and developers. The balancing requirement is eliminated and the SESA becomes essentially a permitting coordinator and an advisor to existing authorities, rather than a regulator. Monitoring and compliance roles are eliminated. The underlying philosophy of this model is to minimize the state’s involvement except as coordinator of underlying state and local jurisdictional activities.

Facilities regulated: Same as currently for mandatory involvement of EFSEC except that very large transmission facilities (over 220 KV) are added, and all power facilities are included, not just thermal. If both local authorities and developers agree, power plants over 25 MW can opt for SESA review.

Membership: Based on current representative EFSEC model.

Process: The SESA acts as advisor to the governor and to state and local authorities concerning environmental impacts, other considerations such as need and consistency with state or regional goals, and coordination of agency involvement in EIS and permitting processes. There is no adjudicative proceeding, but the SESA may hold informal or formal hearings to take comments from the applicant and the public. The SESA’s final product is a report to applicable permitting entities concerning any issues applicable to the proceeding. Permitting entities are free to use whatever portions of the report they deem useful.

Local involvement: Siting is done at the local level in conformance with applicable state statutes. Local authorities can opt to have environmental work done by Ecology for power plants over 25

MW or medium sized linear facilities (e.g., pipelines over one mile or multijurisdictional impacts).

SEPA: Ecology is SEPA official, but works with other agencies as coordinated by SESA.

Need/consistency: *May* be considered by SESA as part of its report. *May* be considered by local authorities or Ecology as desired.

Funding: If SESA is involved, applicant pays cost of environmental review, monitoring and compliance. For optional facilities (e.g., power plants between 25 and 250 MW) where there is an “opt out”, SESA is not involved and there is no applicant funding at the state level.

Monitoring and enforcement: By applicable local and state authorities.

Eminent domain and public lands: No change. However, an applicant must show either eminent domain right or entitlement to the land in order to begin SESA process.

Model 3: Modified Oregon model

This model is loosely based on the Oregon statute. It is modified somewhat to reflect differences in underlying statutes. Under this model, the SESA has less of a role in environmental review and compliance. However, jurisdictional thresholds are lower. The model contains a more objective set of criteria that an applicant has to meet than under current statute. The decision making process is also based on a more traditional adjudicative model than the current EFSEC process. The underlying philosophy of this model is to objectify and streamline the siting process and to encourage siting of facilities where they make sense from an overall efficiency perspective, and to reflect views of the citizenry of the state.

Facilities regulated: For mandatory SESA involvement, same as current, except add transmission lines over 220 kV and add all power plants regardless of process. In addition, by agreement of *either* the developer or the local authority, SESA can take jurisdiction over linear facilities over one mile or crossing a jurisdictional boundary.

Membership: A seven member panel appointed by the Governor and confirmed by the legislature, with staggered terms.

Process: A pre-application process of public and agency review and input is designed to narrow the issues for adjudication. This process includes the development of a draft environmental impact statement (see below). Once issues are narrowed, the council proceeds to a formal adjudication phase and issues a final decision. The decision is appealable to the courts.

Local involvement. SESA determines whether the facility is consistent with local siting ordinances. If not, SESA must make a finding of overriding public interest in order to preempt local ordinances. Local authorities can request to have SESA take jurisdiction for intermediate sized facilities.

SEPA. SEPA review is done by the Department of Ecology, in consultation with SESA for coordination of other state agency interests.

Need/consistency. For power plants, developer can either show consistency with state or regional policy, or can meet a set of objective criteria which include compliance with stated greenhouse gas reduction strategies. For other facilities, applicant must show that facility will *either* reduce overall energy costs to the state *or* that the facility will produce environmental benefits.

Funding. Applicants fund SESA’s processing of the application, monitoring and compliance costs, and reasonable costs of public intervenors as determined by SESA. A means test is established for funding intervention of individuals or organizations.

Monitoring and enforcement. SESA assesses a fee to permittees for monitoring and enforcement, which are the responsibility of, and performed by, state and local agencies.
Eminent domain and public lands. No change.

Model 4. Increased state level siting authority and enforcement”

Under this model, the SESA has jurisdiction over a broader number of facilities. It must determine need for the facility or its consistency with state and regional objectives. Eminent domain is tied to the SESA process. It relies on an adjudicative model, which is appealable to the courts, and SESA retains compliance and monitoring responsibility. The underlying philosophy of this model is that the development of energy facilities consistent with state and regional goals is a top priority for the state and should be streamlined and facilitated by establishing a state presence in siting and encouraging consistent treatment of these facilities.
Facilities regulated. Same as current, except that at the developer’s or local authority’s option any power facility over 1 MW, and any energy facility covering more than one local jurisdiction, can be sited by SESA.

Membership: Seven members appointed by governor and confirmed by Senate, with staggered terms.

Process: A pre-application process of public and agency review and input is designed to narrow the issues for adjudication. This process includes the development of a draft environmental impact statement (see below). Once issues are narrowed, the SESA proceeds to a formal adjudication phase and issues a final decision. The decision is appealable to the courts.

Local involvement. SESA determines whether the facility is consistent with local siting ordinances. If not, SESA must make a finding of overriding public interest in order to preempt local ordinances. Local authorities or the developer can request to have SESA take jurisdiction for power plants over 25 MW.

SEPA. SEPA review is done by the Department of Ecology, in consultation with SESA for coordination of other state agency interests.

Need/consistency. SESA must find that the project will reduce energy costs to the state’s citizens and businesses, be consistent with state or regional energy policy, or be environmentally beneficial.

Funding. Applicant funds SESA process, monitoring and compliance, intervention of public agencies and local authorities, as well as a means based funding for citizens and organizations.

Monitoring and enforcement. By SESA as is done currently by EFSEC

Eminent domain and public lands. If an energy facility is sited by SESA, the developer has eminent domain powers on public and private lands. If not, not.

APPENDIX E

Comments and Materials Submitted by Work Group Participants

(All comments have been reformatted. Some comments have been changed to remove editorial suggestions that were incorporated in the final report.)

Charles R. Blumenfeld
Karen M. McGaffey

PERKINS COIE LLP

January 17, 2001

Introduction

During the past three months, we have participated in the meetings of the Joint Legislative Task Force and its Work Group, as well as taking part in the Energy Facility Siting Symposium sponsored jointly by the Energy Facility Site Evaluation Council (EFSEC) and the Joint Legislative Task Force. Our comments throughout this process have been based in large part upon our experience representing energy project developers in the EFSEC permitting process,¹ as well as in other state and local permitting processes governing energy facilities that do not fall within EFSEC's limited jurisdiction.

In general, we believe the November 20, 2000 Draft of the Work Group Report provides a good summary of the Work Group's discussion, and reflects the strong disagreement and broad diversity of opinions expressed during the Work Group's meetings. This memorandum provides a few specific comments regarding issues addressed in the Work Group Report.

Specific Comments

Section III. A. Jurisdiction – Issue That Arose During Work Group Discussion #3.c. The current jurisdictional limit of 250 megawatt is an objective and relatively clear rule concerning jurisdiction. Although the difference between a 249 megawatt facility and a 250 megawatt facility may be insignificant, it is important that the jurisdictional line be clear so that a project developer can easily determine which permitting agencies have jurisdiction regarding a particular project. As indicated in the draft Work Group Report, one participant suggested the use of alternative criteria for determining jurisdiction based on the level of impact associated with a particular project. It is important to note that this proposal acknowledged the importance of objective criteria, such as the number of acres of fill required or the quantity of regulated pollutants emitted.

¹ We have represented project developers in two Trans Mountain Pipe Line applications, the Satsop Combustion Turbine application, the Cross-Cascade Pipeline application, and the Sumas Energy 2 application.

Section III. C. State and Local Government Regulatory Preemption.

Section III. I. Siting Facilities on Publicly Owned Land. These two sections overlap considerably and it would be clearer to discuss as two related issues in the same section, particularly since the Issues discussion is duplicative.

In addition, the following Issues That Arose During Work Group Discussion in Section III. I. are problematic: **Issue #1.b.** – the description does not make it clear that currently the local governments and state agencies referenced have been given broad intervention. **Issue#1.c.** – this issue was not discussed in any detail at the work group and is dependent on what type of public property, what type of interest (i.e. franchise, easement, transfer of title) etc. The question, as posed, does not directly relate to preemption. It more logically fits as a part of the discussion in Issue #2.a.relatering to the negotiation process that will take place between the public agency and the certificate holder after certification. **Issue#2.b.** – this does not appear to be an issue related to preemption; rather it is an issue more property included in Section III.G.

Section III. E. Standards and Processes for Determining Need for Proposed Projects – Issue That Arose During Work Group Discussion #1. Some members of the Work Group recommended that the EFSEC statute be amended to reference the State Energy Policy and/or the State Energy Strategy. Although these recommendations have some intuitive appeal, they present a more complicated issue. A simple requirement that EFSEC decisions be "consistent" with the State Energy Policy and Strategy would be problematic in application for several reasons.

First, the State Energy Policy and State Energy Strategy concern issues that extend far beyond EFSEC's narrow jurisdiction. The Energy Policy, RCW 43.21F.015, focuses on the development of a diverse array of resources, emphasizing renewable resources, requiring energy resources to be developed consistently with state environmental policy, ensuring an adequate supply of energy, encouraging conservation, allocating energy during emergency shortage situations, and providing impartial and objective information concerning energy issues. The State Energy Strategy has a similarly broad scope. EFSEC, in contrast, has very limited authority. EFSEC cannot, for example, develop resources or mandate conservation, and it cannot provide funding or incentives to encourage conservation and renewable resources. EFSEC's authority is limited to issuing permits for a small subset of energy facilities in the state.

Second, amending the facility siting statute to require EFSEC to implement the State Energy Policy and/or Energy Strategy would be likely to create an obstacle to siting needed natural gas-fired generating facilities. In the past, some parties to EFSEC proceedings have relied upon the Energy Policy and Energy Strategy to argue that EFSEC should deny certification of new thermal facilities in favor of renewable power and conservation. Although this argument is impossible to reconcile with the current language of the facility siting statute, an amendment to the siting statute to require "consistency" with the State Energy Policy and/or Strategy might be misinterpreted as endorsing this view. At a time when the Northwest Power Planning Council has concluded that the region needs at least 3000 MW of new generating capacity -- and that conservation and renewables alone cannot meet this need -- the Legislature should not take any action that might be interpreted as discouraging the development of highly efficient natural gas-fired power plants.

Third, that State Energy Policy and State Energy Strategy are dated. The Policy was enacted in 1981 and amended in 1994. The Strategy was developed in 1994. The statutory Policy speaks in very general terms, and therefore, is less likely to become outdated, but it also incorporates the much more specific Strategy by reference. The power industry has changed dramatically in the past decade. The Legislature should not require EFSEC to apply the Policy or Strategy without first reevaluating them in light of current conditions.

Section III. F. The Role of a Counsel for the Environment – Issue that Arose During Work Group Discussion #1. The Draft Work Group Report presents a somewhat one-sided view about the Counsel for the Environment. The Work Group did not discuss this issue at length, and many of the participants in the Work Group had little or no experience with the EFSEC process and the role of the Counsel for the Environment in practice. In general, participants agreed that the Counsel for the Environment was helpful in providing citizens with information about the EFSEC process. The participants disagreed, however, about the extent to which the Counsel for the Environment represents all of the interests of the citizens in the adjudicatory process. In practice, the Counsel for the Environment has routinely opposed projects presented to EFSEC and has served more as a "devil's advocate" challenging all aspects of a proposed project and supporting the efforts of a project's opponents. When considering the workload and resources of the Counsel for the Environment, it is also important to keep in mind that numerous state agencies, which are also charged with protecting various aspects of the citizens' interests, also routinely participate in EFSEC proceedings.

Danielle Dixon

III. BUDGET PROVISIO TOPICS

A. JURISDICTION AND MEMBERSHIP OF THE STATE SITING AUTHORITY

Jurisdiction

Issues that Arose During Work Group Discussion:

1) Should the current threshold for thermal generating plants, now 250 megawatts, be changed?

Yes. The Legislature should lower the threshold for thermal generating facilities required to undergo the EFSEC siting process from 250 MW to 50 MW. When EFSEC's authorizing statute was established in the 1970's, hydropower was regulated by the Federal Energy Regulatory Commission (FERC) and coal and nuclear power were basically the only other sources of potential new electrical generation in Washington. For economic reasons, only facilities at least 250 MW in size would use coal or nuclear power. Thus, the original statute was intended to capture all significant new generating facilities in the state. Times have changed, and with the discovery of new supplies of natural gas and increased efficiencies achieved from natural gas combined cycle combustion turbine technologies, natural gas has become the marginal resource across the country and in Washington. In addition, renewable energy resources like wind have

gained popularity and ground since the 1970s. Finally, the trend nationally is away from large central station generators and towards smaller, distributed generation.

The current high siting threshold combined with a perception that the siting process is cumbersome and expensive have motivated developers to propose facilities that fall just below the 250 MW threshold in order to avoid the state siting process. The state siting process should be fair and efficient, and should address the significant energy generating facilities proposed in the state. Facilities smaller than 250 MW frequently have significant environmental impacts. A 248 MW facility may have greater impacts than a 265 MW facility because the developer manipulates the technology to lead to lower generating capacity, resulting in less efficiency. The state should be involved in assessing the broad array of proposals, not simply the largest ones, and should consider the cumulative impacts of siting multiple facilities throughout the state in addition to examining the implications of siting individual large facilities. Lowering the threshold and applying EFSEC rules more uniformly to new plants also will help level the playing field for energy facility developers in Washington.

Currently, Washington and Montana have the highest siting thresholds (both at 250 MW); other states range in sizes, with Oregon's threshold set at 25 MW; California's threshold set at 50 MW; and thresholds in some states set at 0 MW.

Note that this change in threshold level also should be accompanied by an examination of the criteria used for determining which facilities can undergo expedited processing. The statute currently allows for expedited processing upon finding that the proposed facility would not have significant impacts, and the types of impacts are specified. The Legislature may want to consider, or allow EFSEC to consider through rulemaking, whether any types of facilities automatically should be granted expedited processing.

3. Should the basis for determining what is subject to the siting process and what is not be reexamined?

Yes. The workgroup discussed five issues related to this question. Our comments follow for three of those areas.

a) *Establish "opt in" provisions for some facilities that are not now under EFSEC's jurisdiction.*

Currently, for stationary generating plants, only thermal power plants (coal, gas, nuclear) greater than 250 MW undergo the EFSEC process. We recommend also providing developers of non-hydro renewable facilities and any hydro facilities not under the jurisdiction of FERC with the ability to opt into an expedited EFSEC process.

Renewable energy facilities currently are not addressed in the state siting process. Under state statute (RCW 19.29A.010), renewable resources are defined as electricity generation facilities fueled by water; wind; solar energy; geothermal energy; landfill gas; or biomass energy based on solid organic fuels from wood, forest or field residues, or dedicated energy crops that do not include wood pieces that have been treated with chemical preservatives such as creosote,

pentachlorophenol, or copper-chrome-arsenic. Hydroelectric facilities on navigable waters are regulated through the Federal Energy Regulatory Commission (FERC). Other renewable facilities currently undergo local siting processes.

There are various reasons for enabling developers of renewable facilities to opt into the EFSEC process:

- 1) If a renewable facility such as a wind farm crosses multiple jurisdictions, the facility developer must apply for local permits in each of those jurisdictions. The EFSEC process provides an opportunity for a renewable developer to undergo a single siting decision.
- 2) Washington State's energy policy emphasizes investment in energy conservation and renewable energy resources. The state should play a role in expediting the siting of clean renewable energy facilities in keeping with that policy.
- 3) Improperly sited renewable facilities can have significant environmental impacts, which should be carefully weighed. At the same time, those impacts are limited and site specific.
- 4) Other states, like Oregon, include siting of renewable energy facilities in their statutory mandate.

On the flip side, without increasing the efficiency of the EFSEC process or establishing expedited processing for renewable energy resources, the cost of undergoing the state siting process may be prohibitive, especially for a small-scale renewable project that already has to compete in the market with other less expensive power producers.

d) Allow an applicant for a facility currently under state siting jurisdiction to "opt out" of the state process if the project is located entirely in one local jurisdiction.

We strongly believe that thermal generating facilities, because of their impact on the environment, public health, and resource supply, should not be provided with an opt out provision as some stakeholders have suggested. The workgroup agreed that there is a need for a state entity to oversee siting of energy facilities. Energy facilities are different from other industrial processes because we need sufficient reliable energy for health and safety reasons and energy is a non-storable commodity. Most thermal generating facilities are located in a single jurisdiction. The effect of this option would be to have a state siting entity that oversees only linear facilities like pipelines and those facilities that choose to undergo a state siting process. Essentially, a developer would determine if the local city/county was in favor of a proposed project and then decide whether the odds were better to move forward with local siting or state siting. Public participation and environmental considerations could get the short end of the stick. Further, the state would have a difficult time planning for energy shortages and addressing cumulative impacts. Finally, the environmental impacts of thermal plants extend far beyond the local siting area, but individual cities and counties may not take these larger impacts into consideration in the same way as a state siting entity.

e) Establish different review processes for different types of facilities.

We think this idea has merit. In Oregon, certain types of facilities are guaranteed expedited siting because they have minimal environmental impact. This proposal would make sense if the

threshold for examining proposed generating facilities is significantly lowered. By categorizing some types of facilities up front as being low impact, those facilities could come on line faster and a significant investment of resources on the part of EFSEC and the applicant in the permitting process could be avoided.

4. Should there be a time limit for the duration of a permit for certified but not yet constructed projects?

Yes. The Legislature should establish a build window for a permit to limit time between issuance of a site certification agreement and the last date that commercial operation of the facility can begin before the permit expires in part or in full. To ensure that a permitted facility not only is constructed within a reasonable specified time period but also begins operations, a formal build window is critical. A typical natural gas power plant can be constructed fully within 1.5-2 years. Currently, the waiting list for new turbines is about 3 years, although applicants can order turbines prior to obtaining a siting permit. A 4-year build window would be reasonable for the applicant and would provide EFSEC and the public with greater certainty about power plant development in Washington.

EFSEC's governing statute should be modified to require a permitted facility to begin commercial operation within four years of final approval of the site certification agreement. The applicant could apply for a permit extension at the end of that period upon a satisfactory showing that an extension is justified, provided the applicant demonstrates that no significant environmental or economic changes have occurred during the four year period that should be addressed in a new siting proceeding or revised SCA. In addition, similar to Oregon's practice, any new standards or rules applicable to energy facilities that come into effect during the period of the build window should automatically be added to the final SCA.

There are multiple reasons to mandate a four-year build window:

- a) Developers of four natural gas power plants (in Chehalis, Satsop, Creston & Longview), approved for siting by EFSEC between 1994-1997 with a total capacity of about 2200 MW, have not started constructing those facilities. Although EFSEC included a permit duration restriction within these site certification agreements, the duration (5 years + 5 years) is too long to offer any certainty about when or if those facilities will commence construction and operation.
- b) A power plant developer may be reluctant to begin construction on a permitted facility if there is a chance that multiple other developers will simultaneously start construction and operations, leading to a glut in the market.
- c) Washington State and the region cannot accurately determine the need for new electric generating facilities absent any certainty about permitted facilities actually commencing operations. We need certainty about whether a facility will be developed to meet energy needs.
- d) Without a reasonable, restricted build window for new power plants, EFSEC and other parties cannot predict with any degree of certainty the cumulative impacts associated with multiple facilities commencing operations during the same time period. Cumulative impacts include effects on the environment, health, natural gas availability and natural gas price.

- e) Local ordinances frequently require term limits for facility construction once a permit has been approved. This is a similar concept.
- f) State agency time and effort should be utilized for reviewing facilities that will be constructed if sited.

Membership

Issues that Arose During Work Group Discussions:

- 1) The ex parte rule

Please see comments under Procedures – Adjudication.

- 2) The cyclical nature of EFSEC's caseload causes problems for members and their agencies.

If the Legislature does not replace EFSEC's current agency membership with a governor-appointed board, we support making membership of four state agencies (Military, Health, Agriculture and Transportation) optional, for the reasons discussed in the work group report.

B. PROCEDURES

Adjudication

Issues that arose during work group discussions:

- 1) The ex parte rule limits communications between members and the state agency or local governments they represent.

As a result of the ex parte rule, agency representatives who sit on EFSEC are constrained from discussing the substance of an application with anyone who is not a formal party to the adjudicated process. Further, they are restricted from speaking with individual parties to the process unless all of the parties are present (e.g., during a hearing). Thus, if an agency intervenes in the formal adjudicated proceeding, the staff working on the intervention cannot communicate with the EFSEC member representing that agency. The same holds true for local officials who sit on EFSEC when a facility is proposed in their county or city. Those officials are unable to communicate with their constituents about the proposal because of ex parte rules.

There are multiple good reasons for maintaining ex parte restrictions. However, it also is critical to recognize that the intent of the original legislation was to enable the agencies to provide technical expertise to this process, but they are being hampered from doing that. A governor-appointed board of five members, similar to that in place in Oregon, may be the best long-term solution for EFSEC membership. Moving in that direction will require concomitant changes in funding and staff level.

The State Environmental Policy Act and the EFSEC Process

Issues That Arose During Work group Discussions:

- 1) How should SEPA apply to energy facility siting?

SEPA should apply to energy facility siting in the same way it applies to all projects. EFSEC's statute should not in any way undermine or eliminate the SEPA process, which emphasizes public participation.

C. STATE AND LOCAL GOVERNMENT REGULATORY PREEMPTION

Issues That Arose During Workgroup Discussions:

- 1) Will the siting process preempt local law and state law with regard to both regulatory and proprietary powers? A big question is, to what extent are public lands preempted by EFSEC?

The option of pre-empting local land-use plans and zoning ordinances needs to be preserved to enable a facility to be sited that is in the best interest of the public at large even if the immediate locality is not in favor of that facility. Nonetheless, the law needs to be amended to specifically recognize the Growth Management Act as one of the local plans for which consistency will be determined.

However, EFSEC and the Governor should NOT have the ability to pre-empt state environmental, public health and other laws and regulations to site an energy facility. State laws and regulations, created to protect the public interest and the environment, should be considered a floor below which no entity can go.

E. STANDARDS AND PROCESSES FOR DETERMINING NEED FOR PROPOSED PROJECTS

Issues That Arose During Workgroup Discussions:

- 1) Should there be a clear connection between the EFSEC statute and the state energy policy?

Yes. Reforms to EFSEC's authorizing statute, along with an updated Energy Strategy that includes specific strategies related to energy facility siting that take into account the current market and environment, would accomplish this goal. The State Energy Policy (RCW 43.21F.015) includes a provision for updating the State Energy Strategy, so that can occur without additional legislative direction.

The state's overarching energy policy, developed and formulated in statute after the EFSEC authorizing statute was created, should help guide decisions about siting of energy facilities. Currently, the EFSEC statute does not even reference the RCW containing the state energy policy. To ensure a clear connection between EFSEC's authorizing statute and the energy policy intended to guide the entire state, we recommend modifying the "Legislative finding -- policy --

intent” section in EFSEC’s statute (RCW 80.50.010) to reference the state energy policy (RCW 43.21F.015) and the state energy strategy, providing additional guidance for EFSEC members in reaching decisions about siting of new energy facilities.

2) Should there be an explicit carbon dioxide standard for thermal generating plants?

Yes. The Legislature should implement a numerical standard for all new thermal generating facilities not currently in operation requiring those facilities to reduce a specified amount of CO₂ emissions through direct investment or investment through an independent third party in a portfolio of mitigation and offset options (energy efficiency, renewables, carbon sequestration).

Generating electricity from fossil fuels releases carbon dioxide emissions, which are the largest contributor to global warming. The global scientific community has reached consensus that the global average temperature record is influenced by human-caused greenhouse gas emissions. The overwhelming majority of climate scientists are convinced that human-induced climate change is already measurable in weather around the world today. Greenhouse gases are the most likely explanation for observed warming in the Pacific Northwest. Scientists predict that global warming will impact the Pacific Northwest in the next 50 years by reducing snowpack, increasing precipitation in winter and decreasing precipitation in summer, all of these leading to adverse impacts on irrigated agriculture, forests and salmon.

Predominant scientific and economic opinion favors immediate efforts to deal with the problem. Over 1,500 senior scientists from around the world, including 102 Nobel Prize winners, have declared in their World Scientists' Call to Action that global warming is a real and serious threat. More than 2,000 economists have said that climate change poses significant economic, environmental and social risks.

CO₂ emissions are increasingly being addressed internationally and at the national, state and local levels. Multiple governments and businesses have pledged to reduce greenhouse gas emissions, many of them setting specific performance targets. Close to home, Canada has committed to meeting its Kyoto targets and is in the midst of developing its National and Provincial Plans to develop first phase measures to reduce climate changing emissions. British Columbia has launched a pilot program trading emissions credits for greenhouse gases. In 1997, the State of Oregon adopted in law a CO₂ standard for new fossil fuel facilities. In 1993, the City of Portland, OR became the first U.S. city to adopt a goal and strategy to reduce greenhouse gas emissions. In April, 2000, the City of Seattle passed a resolution to meet electric energy needs and growing demand with no net increase in greenhouse gas emissions. The state of New Jersey recently set a goal to reduce emissions to below 1990 levels by 2005.

EFSEC is mandated to represent the broad interests of Washington State and its citizens (RCW 80.50.010). EFSEC currently has the legal authority to require a thermal generating facility to mitigate and offset CO₂ emissions. In its recent decision to recommend that the proposed Chehalis generating facility be granted an amended site certificate, EFSEC included a requirement for the developer to offset CO₂ emissions to at least the level established in the Oregon standard. That recommendation sets a precedent for future permits for large natural gas power plants. Given that only thermal power plants at least 250 MW in size undergo EFSEC’s

siting process, developers may opt for slightly smaller facilities to avoid a CO₂ mitigation requirement. The Legislature can help ensure that developers do not game the system by: (1) lowering the threshold for EFSEC's review of proposed generating facilities from 250 MW to 50 MW, and/or (2) establishing a statewide CO₂ standard at least at the same level as Oregon's standard that applies to all natural gas generating facilities not currently operating in the state. A numerical standard, like that enacted in Oregon in 1997, applicable to all thermal generating facilities not currently operating, would create a level playing field for developers while protecting the environment.

Additional Issue that Arose During Workgroup Discussions (and in the first draft of the workgroup report) but Does Not Appear in the Final Report:

1) Amend statute intent and policy sections to ensure clarity

To ensure that the EFSEC statute is applicable in different time periods rather than tied to events happening when the law is being developed/modified, three time-sensitive words should be removed from the intent section of the statute. Removing these words in no way detracts from EFSEC's authority, but rather recognizes that our energy needs tend to follow boom and bust cycles. When the statute was passed in the 1970s, we were in the middle of an energy crisis. During much of the 1980s and early 90's, we were in an energy surplus. Now we are heading back towards a deficit.

These three words add nothing to the statute other than inaccurately implying that Washington always needs more energy, which tips the scales away from protecting the public interest and the environment.

We suggest the following simple changes to RCW 80.50.010 to address this issue:

... It is the policy of the state of Washington to recognize the ~~pressing~~ need for ~~increased~~ energy facilities, ...

... It is the intent to seek courses of action that will balance the ~~increasing~~ demands for energy facility location and operation ...

In addition, RCW 80.50.010 contains reference to providing "abundant" energy for Washington State. Ensuring that abundant energy is available implies a desire to build significantly more energy generating facilities than are needed, which has multiple ramifications, including more time spent by the state siting entity in permitting new projects. We would suggest the following modification to RCW 80.50.010 to address this issue:

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

... (3) To provide ~~abundant~~ sufficient energy at reasonable cost ...

Additional Issue that Was Not Discussed in Detail During Workgroup Meetings:

1) Clarify how the EFSEC process addresses cumulative impacts of new facilities

In the past several years, EFSEC has sited four natural gas power plants that have yet to be built, totaling more than 2000 MW capacity. Multiple additional facilities have been proposed in Washington as well; some will undergo the state siting process and others a local permitting process. The construction and operation of each of these facilities individually will adversely affect the environment and may lead to health impacts. The total impact of all of these facilities may be greater than the sum of the parts. Therefore, EFSEC should assess the cumulative environmental and consumer impacts that may result from multiple facilities undergoing construction and starting operations in Washington.

EFSEC has the legal authority to address cumulative impacts. Under WAC 463.47.020, EFSEC adopts by reference sections or subsections of WAC 197.11, which regulates the State Environmental Policy Act process. One of the subsections, WAC 197.11.792, states that agencies consider three types of impacts in determining the scope of environmental impact statements: direct, indirect and cumulative. EFSEC's authorizing statute does not direct the agency to directly address cumulative impacts in each siting process, however.

On the environmental front, a cumulative impact analysis would address among other issues the total contribution of CO₂ emissions to the state's current emissions production rate and the effect of those additional emissions on global climate change. From the consumer perspective, one impact may be how new natural gas generation affects the availability and cost of natural gas for other purposes in the state. If the operation of new natural gas facilities leads to a price increase for natural gas that affects all direct users, some larger customers that currently rely on natural gas may switch fuels to avoid rising prices. For example, large industrial customers, like paper mills, that use gas for process heat to operate industrial boilers may choose to burn residual fuel oil instead of natural gas. The result is increased environmental impacts.

Under RCW 80.50.010, EFSEC is charged with balancing the demand for energy facilities with the broad interests of the public, and preserving and protecting the quality of the environment. To accomplish these objectives, EFSEC must consider the cumulative impacts of new natural gas plants coming on line when determining whether to approve a requested permit.

Carol Jolly

EXECUTIVE POLICY OFFICE
P.O. BOX 43113
OLYMPIA, WA 98504-3113

November 27, 2000

Thank you for the opportunity to comment on the staff's description of the process and outcome of the last 3 months' effort to reevaluate how the state sites energy facilities. For the most part, I find the draft presents a clear description and review of the work group's efforts. I do wish to address three elements of the report. [Note: several paragraphs of editorial suggestions have been removed.]

The decision to structure the bulk of the report (Section III.) around the Budget Proviso topics leads to confusion in the discussion of preemption, since the two applicable portions are separate and unrelated. This is exacerbated because the first issue identified in Part C, entitled "regulatory preemption," addresses preemption of public lands. I would recommend explicitly linking these discussions in the text and/or making them both subsections of a single Preemption part.

I would also urge rewriting of the Background section on Publicly Owned Land Preemption, which currently makes it appear that this is an issue that solely affects state parks. In reality, this issue could affect a variety of state-owned lands including wildlife management areas and hatchery grounds, as well as DOT lands. The brief discussion offered reflects only EFSEC's view on the preemption issue; if the debate is to be cited at all, it would certainly seem only fair to reflect both sides' views. And the first issue listed is too narrow in citing only "parks and wilderness areas" as potentially precluded from energy facility siting.

Bill Kiel

RCW 80.50 Thermal Power Plant Definition

This is an interpretation of the current definition of thermal power plant in RCW 80.50.020(14)(a). This is for information only. No changes are proposed.

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

(a) Any stationary thermal power plant¹ with generating capacity of two hundred fifty thousand kilowatts or more², measured using maximum continuous electric generating capacity³, less minimum auxiliary load⁴, at average ambient

temperature and pressure⁵, and floating thermal power plants of fifty thousand kilowatts or more⁶, including associated facilities⁷;

Notes:

1) Stationary thermal power plant – A fixed position electric generating station that burns a fuel of any kind (e.g., coal, oil, diesel, natural gas, nuclear, etc.). It does not include fuel cells (chemical reaction), wind, geothermal, solar, etc.

2) Two hundred fifty thousand kilowatts – A measurement of the electrical output in kilowatts measured at the output terminals of the generator. This measurement is further defined to be based on the plant’s maximum continuous capacity rating less the plant auxiliary load at average atmospheric temperature and pressure for the site.

3) Maximum continuous electric generating capacity – The word continuous implies a maximum dependable type rating that the plant could actually achieve in continuous operation. Although most generators are capable of achieving outputs higher than this rating, they cannot sustain operation at this level on a continuous basis. For steam-electric plants, atmospheric conditions can strongly influence the performance of the plant cooling systems (cooling towers) that in turn affects the plant’s output (steam cycle efficiency). As a result, the electric industry uses a definition of the maximum dependable (continuous) capacity as the gross electrical output as measured at the output terminals of the turbine-generator during the most restrictive seasonal conditions. In the RCW 80.50 definition, the average ambient temperature conditions of the site are specified instead of the most restrictive seasonal conditions.

4) Less minimum auxiliary load – During normal operation most power plants use some of the electricity they generate to operate the station equipment. The term “less minimum auxiliary load” means that the plant rating is to be determined by subtracting the smallest (i.e., minimum) electric load necessary to run the plant equipment from the maximum continuous capacity rating. This results in a “net” electrical rating for the plant that is a measure of the electricity actually available to the grid.

5) Average ambient temperature and pressure – The outdoor temperature and pressure of the site can influence the output of a plant. For steam-electric plants, the outdoor temperature affects the steam cycle efficiency by changing the cooling water temperature coming from the cooling towers. For combustion turbine plants, the turbine output varies with the air density or the amount of oxygen that is available for combustion. This provision specifies that the plant output is to be measured using the (annual) average temperature and pressure for the site.

6) Floating thermal power plants of fifty thousand kilowatts or more – This term is interpreted to refer to any thermal power plants of 50,000 kilowatts or more that are constructed on a floating platform. This provision probably refers to an older concept of modular construction of power plants on floating platforms that could be moved where needed.

7) Associated facilities – The term “associated facilities” has a very specific meaning and is defined in RCW 80.50.020(6). It is limited to those electrical items that connect the plant to the grid. These facilities are to be included in the definition of an energy plant.

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

Robert Loch

ROBERT M. LOCH
2786 Birch Bay Lynden Road
Custer, WA 98240

July 28, 2000

Energy Facility Site Evaluation Council
925 Plum Street SE, Building 4
P.O. Box 43172
Olympia, WA 98504-3172

Re: Comments on Application No. 99-1, Sumas Energy 2

Summary

The DEIS should be stricken from the evidentiary record.

Comments and Argument

These are the comments of Robert M. Loch, who lives at 2786 Birch Bay Lynden Road, Custer, Washington, 98240.

I own that residence and a second property which is located at 2810 Birch Bay Lynden Road. These properties are adjacent to the indicated route of the two 115 Kv electric transmission lines which are identified in the DEIS as an alternative to the transmission of SE2's power output through Abbotsford to the Canadian power grid.

I filed extensive timely comments on the DEIS. I have received no response to my comments. I understand that a final EIS will be published, presumably taking in to account all of the comments to the Council including those I submitted.

Subsequently, I filed an application seeking intervenor status. The applicant objected, and the Council rejected my application in its Order No. 743.

I want to focus your attention on a troubling issue concerning the evidentiary record.

ALJ Nan Thomas has admitted into evidence the DEIS which was prepared by Jones & Stokes of Bellevue, Washington, bearing a date March 2000. The admission of the DEIS conflicts with your own orders and rules as well as the general rules of evidence.

To explain: your Order No. 743, which became final about May 20, 2000, decided that the alternative 115 Kv lines are not an issue in this case. Therefore, according to Order No. 743, no testimony relating to the alternative transmission lines will be admitted in this case. That's what it says.

The DEIS contains extensive text and conclusions relating to the two 115 Kv transmission lines. Miss Mary Barrett began examining witnesses on July 25th on the DEIS's analysis of the 115 Kv lines. This too is what Order No. 743 prohibits.

There is another problem. If a DEIS is a necessary item of record for this adjudicatory hearing, this DEIS will not meet the Council's standards. Page-by-page editing seems a minimal prerequisite.

Rules Relating to Siting Energy Facilities, Title 463, WAC 463-30-310, Rules of Evidence is on point. WAC 463-30-310 Rules of Evidence states,

“(3) When portions only of a document are to be relied upon, the offering party shall identify the pertinent excerpts and state the purpose for which such materials will be offered. Only the excerpts, in the form of copies, shall be received in the records.”

This rule is mandatory. The DEIS must be edited for the record.

There is still another problem which all by itself warrants the document's exclusion.

Irrelevant evidence should not be allowed into the record. Under RCW 34.05.452, the presiding officer is allowed to exclude evidence that is irrelevant.

The text relating to the 115 Kv lines does not tend to prove or disprove any disputed fact that is of consequence to the determination of this action. Thus, a great part of the DEIS is not relevant, and should be excluded. The ALJ has previously excluded evidence deemed not relevant, including large sections of Whatcom County Council member Connie Hoag's testimony.

The admission of the entire DEIS could result in a miscarriage of justice. Suppose the applicant ultimately is unable to transmit SE2 power into the Canadian grid, and then uses this case record to obtain a modified Site Certification Agreement.

This would be a miscarriage of justice in that rejected intervenors such as myself would have been deprived of any chance to test the "evidence" in the DEIS before any impartial trier of fact. Please don't take this lightly. This applicant has demonstrated a willingness to run double-reverse plays.

The DEIS also begs for exclusion as hearsay. The DEIS is a statement made by Jones & Stokes, i.e. someone other than a witness testifying at this hearing, and it is being offered to prove the truth of the matter stated therein. The rule of evidence excluding hearsay would seem to render the entire DEIS inadmissible, not just the verbiage relating to the 115 Kv "connected action."

RCW 34.05.452 allows admission of hearsay evidence, but only conditionally, namely,

“...if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs...”

Given the consequence of this project, reasonably prudent persons would not be accustomed to rely on such a report. ALJ Thomas’s confidence in the draft EIS is misplaced and premature. First, it is after all just a draft. A draft is a preliminary outline or plan. EFSEC went to some trouble to elicit comments on the DEIS, which could result in significant, even radical changes to the draft report. Many reasonable and prudent individuals gave harsh critical comments on the DEIS, pointing out a number of factual errors, and not just on minor issues. The DEIS should be excluded as hearsay.

Conclusion

Please strike the DEIS from the record of this adjudicatory proceeding because:

- 1) the DEIS is entirely hearsay,
- 2) in part, it is not relevant,
- 3) EFSEC’s Order No. 743 forecloses the admission of all DEIS text concerning the 115 Kv transmission lines,
- 4) Washington Administrative Code Rule 463-30-310 requires that the portions of a document to be relied upon be identified and copied separately for the record. This has not been done.

Respectfully submitted,
Robert M. Loch

RML/rab
Attachment (EFSEC Order No. 743)
cc: Honorable Connie Hoag
2633 Halverstock Road
Lynden, WA 98264
cc: Ms. Mary Barrett
Assistant Attorney General
P.O. Box 40100
Olympia, WA 98504-0100

Other Comments

B. Procedures

The State Environmental Policy Act and the EFSEC Process

The sequence used by the EFSEC for the EIS and the adjudicatory proceedings is illogical and unfair.

First, the authors of the draft EIS are not made available for cross examination before the Council at adjudicatory hearings. Second, the final EIS is not made available to the public nor to the intervenors until well after the adjudicatory proceedings are concluded and the record closed. It is entirely possible that misleading, erroneous, and contradictory information could be set forth in the final EIS, and relied upon by the Council in its recommendation to the Governor.

The EIS should be an integral part of EFSEC's adjudicatory record, and it should be tested by way of cross examination as is other evidence.

E. Standards and Processes for Determining a Need for Proposed Projects

The RCW chapter concerning EFSEC is completely out of date.

Perhaps, in 1970, there was a "pressing need for increased energy facilities" for the State of Washington.

Now, however, in year 2000, electric generation plant sponsors are exploiting this legislated presumption to obtain plant siting agreements from EFSEC, even while setting themselves up as "power merchants". None of their electric output over the life of the facilities may be consumed in this state. Therefore, the presumption is subject to misuse in the EFSEC process.

The RCW should be revised to withdraw from merchant power plant sponsors any presumption of need. Merchant power plants are nothing more than electricity factories. They are not available, as all such plants once were, to serve our state's public convenience and necessity.

Merchant power plants constructed here will eventually bring our area to EPA non-attainment status; in consequence, dedicated power generation sources will be excluded or made cost-prohibitive. The state's power consumers will be the economic losers.

If the state really has "pressing need for increased energy facilities", thirty years after that statutory finding, why aren't all of the several power plants heretofore sited by EFSEC operational or under construction? The clear answer is: The plants' sponsors are angling to serve the Western Region power market, not our state's market needs.

The legislature should be apprised of the logical disconnect between an unqualified statutory presumption of need for electric power, and the undisguised intent of market-oriented power producers to sell their electricity as a bulk commodity across state boundaries.

Paul Margaritis

RE: EFSEC legislative proposal (draft)

I appreciate your keeping me on your mailing list and giving me the opportunity to comment. I am responsible for Tractebel's development of the Chehalis Generation project in Chehalis Washington, a 520 MW facility. The Chehalis project has of course gone through the EFSEC process and so my comments are with that background.

I note that the committee recommendation is to leave the facility size threshold as it is today. I do not think this is advisable. The EFSEC process is very thorough and of course provides the public an opportunity to participate that otherwise would not occur. Most power generation projects today are built around modules of approximately 250 MW given this is where the size of one of the most popular modern gas turbines. By keeping the EFSEC jurisdictional size threshold at 250 MW, it enables developers to duck below the EFSEC process. Many developers will take advantage of this in view of the widely held opinion among developers that the EFSEC process takes more time and results in more mitigation than if a project goes directly to the respective agencies. This is detrimental to the citizens of Washington for several reasons:

- smaller plants are less fuel efficient, raising the cost of electricity
- less fuel efficient also means more air born emissions per kilowatt hour generated
- a 250 MW plant has in many respects the same impact on the community as say a 500 MW plant and the public should have an opportunity to have their questions addressed

I recommend that Washington adopt a size threshold of 75 or 100 MW, more in line with Oregon. This would also serve as a disincentive for developers to cross the state line to avoid EFSEC in Oregon by building in Washington.

Claudia Newman

I. INTRODUCTION

The tragic explosion of Olympic Pipe Line Company's oil pipeline in Bellingham last year occurred during the EFSEC adjudicatory proceedings on Olympic's application to construct the new Cross Cascade Pipeline across the state of Washington. The explosion, combined with numerous complaints from the public about the process before EFSEC with regard to the pipeline application, led to a consensus that ch. 80.50 RCW should be amended to answer these concerns.

As a result, the 2000 legislature created the Joint Task Force on Energy Facility Siting through a budget proviso for the Department of Community, Trade, and Economic Development. The proviso directed the task force to review several issues concerning the make up of EFSEC, the process, and the standard of approval for new facilities. A work group of stakeholders met in approximately twelve meetings (traveling to Olympia, Bellingham, and Seattle for full day meetings) to discuss the issues raised by the statute. This

paper presents, to some degree, explanation and recommendations on several issues raised over the course of the meetings.

Overall, when looking at how to amend the EFSEC statute, the most important policy factors that every legislator should consider and respect are protection of the public interest and the environment combined with the interest of meeting our energy needs. We should have a siting statute that is consistent with our state energy policy and, at the same time, pays more respect to the public in both its procedural and substantive requirements.

II. BUDGET PROVISIO TOPICS

A. Jurisdiction and Membership of the State Siting Authority

Jurisdiction

1. Should the current threshold for thermal generating plants, now 250 megawatts, be changed?

Answer: yes.

There are loop holes in the current statute that should be closed to the greatest extent practicable to make sure that energy facilities that will have significant impacts on the environment and our health do not evade state siting review.

For example, the statute currently states that EFSEC has jurisdiction over

- facilities capable of processing more than 25 thousand barrels per day of petroleum into refined products and
- Facilities which will have the capacity to receive more than an average of fifty thousand barrels per day of crude or refined petroleum which has been or will be transported over marine waters.

As a result, owners and operators of refineries have increased capacity over the years in a piecemeal fashion – always right under the numbers - to avoid EFSEC review. But the reality is that, in total, the refineries have increased their capacity quite significantly. So significant that it would be in the interest of the state to have the expansion go through a siting review process.

Also, EFSEC has jurisdiction over any stationary thermal power plant with generating capacity of 250 thousand kilowatts or more, measured as defined in the statute. This is outdated – Oregon’s siting council has jurisdiction over power plants with generating capacity of 25 thousand kilowatts, and California’s has jurisdiction over plants with capacity of 50 thousand kilowatts. With Washington’s law, numerous power plant operators are building new power plants with generating capacity of 249 thousand kilowatts to avoid EFSEC review. Nonetheless, these plants have enormous environmental impacts (probably more so because they are running less efficiently to get under the threshold).

The threshold for EFSEC’s jurisdiction should be lowered to include these facilities that currently do not receive meaningful review. We would support lowering the jurisdiction over refineries to 5 thousand

barrels per day within a period of two years, and lowering the jurisdiction over power plants to 25 thousand kilowatts.

2. Should the basis for determining what is subject to the siting process and what is not be reexamined?

The work group discussed many issues related to this question, but because others in the group have submitted written comments on most of these issues, our comments address only one.

One participant mentioned the idea of allowing an applicant for certain facilities that are within EFSEC jurisdiction to opt out of the EFSEC process altogether. We would strongly oppose any possible consideration of an “opt out” option for any facility that is stated to be within EFSEC jurisdiction. At the outset of the work group meetings, one of the very few points of consensus in the entire group was the need for a state decision making body that will oversee the siting of energy facilities. Including an “opt out” provision would undermine the very existence of this state decision-maker. It would make futile the entire discussion of which facilities should be within the jurisdiction of EFSEC and which should not be within that jurisdiction, because the final decision would ultimately be that of the applicant. If there were an opt out provision, the process would become one of forum shopping by the applicant for the path of least resistance. The path of least resistance is always that with the least attention paid to protection of the public interest and the environment. Because these energy facilities will have statewide impacts, they should be subject to statewide review without the option to “opt out” of the process.

Membership

3. The cyclical nature of EFSEC’s caseloads causes problems for members and their agencies

See recommendations set forth in the discussion under Procedures, Changing Components of EFSEC’s Structure – Some Implications.

B. Procedures

Overview of Siting Process

1. Should the governor be able to direct the council to reconsider an application when there is no draft certification agreement, in other words, when the recommendation is to reject the application?

Answer: no.

This is not allowed in the current statute – and for good reason. Past practice of EFSEC has been apparently based on a presumption that energy facilities will be approved, with conditions. EFSEC has, in all of its years, recommended denial of a proposal only once. In the rare situation where EFSEC finds that the evidence supports an outright denial, there must be some extremely significant and severe adverse impacts to the public interest. The Governor should not be given the option to overturn such a decision for political reasons, primarily because, in that

circumstance, the Governor's action could only be related to furthering narrow special interests over the interests of the public.

Adjudication

1. The ex parte rules limits communications between board members and the state agency or local governments they represent.

Answer: Change EFSEC to a citizen board or, in the alternative, employees of the state who otherwise work in energy policy. (or a combination of the two).

Changing EFSEC membership to a citizen board or that consisting of partially or wholly employees from an energy office would solve a number of the problems that were brought up during the work group meetings - specifically ex parte, lack of time by state employees, the lack of work when no projects are in the door. To eliminate the problem of the cyclical nature of the work load (i.e. no work if there are no applications in the door), the new EFSEC board should also be charged with the duty of working on other energy issues and tasks in addition to deciding on siting new facilities.

The State Environmental Policy Act and the EFSEC process

1. How should SEPA apply to energy facility siting?

Answer: The same way that it applies to all other state actions.

Despite that this task force was put together following one of the worst environmental and health disasters this state has seen in a long time (the Olympic pipeline explosion), there were rumblings by at least one applicant representative that imply weakening the SEPA requirements for siting energy facilities. We would not object to streamlining the process – but, too often, “streamlining the process” is doublespeak for eliminating regulatory requirements or attempts to undermine the policy and intent of the law. As long as the policy, intent, and substantive requirements of SEPA are met – we would not object to “streamlining.” The public has, time and time again, sharply criticized EFSEC’s SEPA process and the EIS’s of the past. An answer to that outcry that consists of an elimination of any SEPA requirement – procedural or substantive – would not be well received by the public.

The Growth Management Act and the EFSEC statute

1. Make the EFSEC statute consistent with the GMA

Currently, the EFSEC statute does not recognize the existence of the Growth Management Act. This comment deals with just one very narrow issue related to the GMA - which is very easy to solve and should not be controversial. The definition section of the statute would be amended as suggested below, along with ministerial changes throughout to coincide with those changes.

Technically, as the statute is written, an applicant can argue that, to determine land use consistency, the Council should look at the old comprehensive plan and the old zoning code of

each county and city that were adopted prior to the GMA’s enactment. This of course, does not make sense. As it stands, the EFSEC statute defines relevant terms as follows:

(15) “Land use plan” means a comprehensive plan or land use element thereof adopted by a unit of local government pursuant to chapters 35.63, 35A.63, or 36.70 RCW;

(16) “Zoning ordinance” means an ordinance of a unit of local government regulating the use of land and adopted pursuant to chapters 35.63, 35A.63 or 36.70 RCW or Article XI of the state Constitution.

RCW 80.50.020(15) and (16).

Throughout the ordinance, the references to land use focus on zoning ordinances and comprehensive plans with no recognition of the significant changes in local land use law caused by passage of the GMA.

The statute should be amended to explicitly include development regulations promulgated by local governments pursuant to the Growth Management Act. The entire statute will have to be reviewed so that each provision is consistent with the following change - (for example in 463-28-030(1) change “site” to “project,” and in other sections change the word “zoning ordinance” to “development regulation,” etc).

Suggested language:

(15) “Land use plan” means a comprehensive plan or land use element thereof adopted by a unit of local government pursuant to chapters 35.63, 35A.63, or 36.70, ~~or 36.70A~~ RCW;

(16) “Development regulation” ~~“Zoning ordinance”~~ means ~~an ordinance of a unit of local government~~ any controls placed on development or land use activities by a local government ~~regulating the use of land and~~ adopted pursuant to chapters 35.63, 35A.63, ~~or 36.70,~~ or 36.70A RCW or Article XI of the state Constitution.

C. Standards and Processes for Determining Need for Proposed Projects

Should there be a clear connection between the EFSEC statute and the state energy policy?

Answer: yes.

The policy statement and legislative findings of RCW 80.50.010 should be updated to reflect the state’s energy policy. The EFSEC statute currently contains legislative findings and policy statements that are out of date. It conflicts on its face with the more recently enacted law that declares the state’s energy policy, RCW 43.21F.015. Certainly, the statute that dictates the siting of state energy facilities must be consistent with the statute that expresses the state energy policy. But, as it is written, the EFSEC statute is not only inconsistent with the state energy policy statute, it undermines it.

The EFSEC statute was created during the 1970's oil crisis. At that time, the United States had been hit with the Arab Oil embargo and there was fear that much needed fossil fuels would run out. The technology that exists today for alternative sources of energy had not been developed yet (fuel cells, etc). Driven by that era's crisis mentality, an omnibus energy bill was enacted. The bill set up the State Energy Office and granted the Governor special emergency powers to declare a state of "energy supply alert." In that context, the language that is still standing in RCW 80.50.010 was written.

A lot has changed since 1976. The energy "crisis" as we knew it in the 1970's is over. Scientists now overwhelmingly agree that greenhouse gases produced mainly by the burning of fossil fuels are altering the atmosphere in ways that affect the earth's climate, and it is likely that they have contributed substantially to the observed warming over the last 50 years. Increased warming has shown up in retreating glaciers, thinning polar sea ice, retreating snow packs, warmer nights, and elsewhere. Scientists tell us that the temperatures will keep rising if emissions are not curtailed.

In 1994, Washington State adopted a law that expresses the state's energy policy. RCW 43.21F.015. In essence, the state policy is to support ongoing efforts to foster wise and efficient energy use and to promote energy self sufficiency through the use of indigenous and renewable energy resources, consistent with the promotion of reliable energy resources, the general welfare, and the protection of environmental quality. In direct contravention to the promotion of conserving energy, the EFSEC statute's policy section instead expresses a "pressing need" for "increased" and "abundant" energy sources in the state. The policy statement does not even mention the concept of promoting renewables.

We recommend that the following language replace RCW 80.50.010:

The legislature finds that energy demands in the state of Washington require a procedure for the selection and utilization of sites for energy facilities and the identification of a state position with respect to each proposed site. The legislature recognizes that the selection of sites will have a significant impact upon the welfare of the population, the location and growth of industry, and the use of natural resources of the state.

It is the policy of the state and intent of the legislature to promote energy conservation and the use of alternative energy supply sources. It is also the policy of the state and intent of the legislature to have a supply of energy that is sufficient to ensure the health and economic welfare of its citizens. The siting shall be carried out in a manner that furthers statewide environmental, public safety, and land use goals and reduces wasteful, uneconomical and unnecessary energy facilities in Washington State.

It is the intent of the legislature to seek courses of action that will balance demands for energy facility location and operation in conjunction with the broad interests of the public.

2. Should there be an explicit carbon dioxide standard for thermal generating plants?

Answer: yes.

The statute addressing the siting of new energy facilities must take into consideration the recent worldwide confirmation that global warming is, in fact, a certainty. The use of fossil fuels results in carbon dioxide emissions, which are the largest contributor to global warming. An overwhelming majority of climate scientists recently agreed that we are facing a very serious problem in our not so distant future related to our survival. If this legislature doesn't have the political will to require limitations of CO2 emissions from new facilities, then it will allow short term, shortsighted economic desires to undermine the very real need for change. While the pressure is on by special interests to ignore this issue, turning our heads now is very bad policy.

The legislature should lower the threshold for EFSEC's review of proposed generating facilities from 250 MW to 25 MW and establish a statewide CO2 standard at least at the same level as Oregon's standard that applies to all natural gas generating facilities not currently operating in the state.

G. Funding and Related Costs of Participating in the State Siting Process

1. Provide adequate funding for the Counsel for the Environment

Answer: yes.

There is no doubt that the Counsel for the Environment needs better funding. In the last proceeding, one assistant attorney general did the work of three attorneys. She needed, and should have had, another assistant attorney general working with her. EFSEC denies the right to intervene to citizens and environmental groups time and time again on the basis that the Counsel for the Environment will protect their interests. This is not well taken when the Counsel for the Environment is so overwhelmed and short staffed that he or she cannot do the complete job to the extent necessary to truly protect those interests.

Gayle Rothrock

I think the "contrasting" views on the matter of EFSEC pre-emption of the management and stewardship of state lands (proprietary issues) are serious and the differences should not be minimized. Nothing short of legal opinions from the attorney general and the courts will settle those differences of views.

The recommended statutory changes are the ones I recall seeing earlier. They are realistic and many would be immediately helpful to the work of the energy facility siting review process in Washington. There are likely to be 4 or 5 application filings in 2001, bringing on an unprecedented level of activity for EFSEC. This will throw several matters of process management, including timeliness, into sharp focus!

Rose Spogen

My name is Rose M. Spogen, (174 Yates Rd. Chehalis, WA., 360-748-4711). After attending the 2 day Symposium in September I have attended all but two of the Task Force Work Group sessions.

My interest in attending these work sessions lies in the fact that I am a concerned citizen that has participated in the process with the Energy Facility Site Evaluation Council (EFSEC) since December 1993. I am a member of The Critical Issues Council that had intervener status with a project that secured their Site Certification Agreement in 1997. In 1999 the applicant asked for an amendment, in fact today we will be leaving this meeting to attend an EFSEC meeting where action will be taken in this regard.

I will be following the format as was laid out in a Draft One Report (DOR11/8) dated 11/8/2000 and will address those issues for which I have concerns. I read that the task force took three months to review and make their recommendations for these 9 budget provisos and that the work groups were expected to complete their work by the first of December. My assessment after the Symposium was this will be a monumental task.

Quite possibly there are changes that would help the EFSEC process, BUT I add '**WITH CAUTION**'. From my view, the process NEEDS TO BE more COMPLETE, THOROUGH AND ALL ENCOMPASSING from the beginning. I was getting the sense that some members were wanting a more EXPEDIENT process. We should not give up thoroughness for expediency.

Having been through the process for a natural gas fired combustion turbine over the past 6 1/2 years, I can attest to the fact that it has neither been easy nor has it been the most fun thing I've ever done, but at least the way the process is at this time, with hard work, citizens, applicants, state and federal agencies all have an opportunity to get involved.

(A). JURISDICTION AND MEMBERSHIP ON PAGES 7 & 8. STRATEGY has to be the number one issue for me. By that I mean that unless the State of Washington has an overall energy strategy there is going to be a proliferation of combustion facilities that I fear will compromise our most precious water supplies, our natural gas supplies while polluting our skies.

Just by HAVING A STRATEGY as a goal, an overall plan answering such questions as; Do we want to devote gas and water to these facilities, while compromising our air? If so how much? What cumulative effects will there be? NOT ONLY REGIONALLY but also to a MORE LOCALIZED area as there are most likely other industries already in close proximity that could

be impacted. Are there alternative sites? What will be the second fuel source and will that require new roads or rail? What about adequate fire and police protection? The list goes on.

This strategy plan would NOT COME FROM nor be a part of EFSEC, this would be as a goal for the state. The Governor and legislators owe it to the citizens of this state to inform and let them decided if they want to be the energy capitol of the world. I favor our state, not speculators deciding if we want the burden of providing valuable resources to this so called 'need'. Don't let us find out later that we bought into another WHOOPS!

If there is a goal, a plan, a strategy, then the siting process will become a more expedient process. The Energy Division is updating their plan and should be given sufficient funds to complete this as soon as possible.

During the 2 day Symposium, we were reminded that there are 6 or 7 permitted facilities that could have been built but few have even started. We were admonished to be careful and certainly not panic into thinking that there was a 'NEED' for these facilities.

Issue 2: Kind and size of facilities; again in my 'common sense' world with a goal, a plan, a strategy a lot of these questions would fall into place. If you have an overall picture of how you want our state to function then you can't dismiss this overall DEGRADATION IF THE CUMULATIVE EFFECTS ARE NOT TAKEN INTO ACCOUNT.

Also under Issue 2. GAS PIPELINES IN CONNECTION WITH GAS FIRED COMBUSTION FACILITIES ARE A BIG CONCERN that are not addressed up front. I very much like the idea that in Oregon where they consider all transmission lines, water and gas pipelines as **RELATED AND SUPPORTIVE** issues simply because the facility can not run without them. And even if EFSEC does not have jurisdiction over them they are a dealt with up front.

With our current EFSEC process the gas pipeline is only mentioned in the application, and ***EFSEC chooses not to discuss it by saying it is a FERC matter.*** I cannot accept that because when all is said and done the applicant could have the plant completely built and citizens are still in the dark about where the gas pipeline route will finally be laid.

To be sure the applicant says 'this is where we think it will go' but there is no guarantee that they can't change their minds. There is absolutely no reason why these routes should not be determined before construction begins. It is a fact that in our case the gas line was proposed in the 1994 application, but since then new homes have been built in that area. This is not fair to the homeowner that may have not known of the proposed route. Who bears the responsibility, the realtor, the city, the county, WHO?? I know the applicant is always asking for certainty, but I ask where is it written that the certainty need always be with the applicant and not the citizen.

In addition, I am asking you to immediately draft legislation (if there isn't already) that either the applicant or the owners of the gas pipeline be put on notice that when their lines are installed near, through residential areas, parks, golf courses or any inhabited area, their lines **WILL** be made safer. That means they either are buried deeper, double cased, or made safer by other

means that needs approval from our state. I emphasize will, because the slip and slide language such as maybe, we could or it's possible is not acceptable.

You must find a way because with so many of these facilities are being built. They are going to impact peoples lives and the applicant must take responsibility up front. In our case I asked the applicant to do this and he said 'he could but it costs money'. I say if you want to come to this state you better have money, because the risks to the public for 22 jobs using 40 prime acres of land is totally out of balance.

I would also like to add that there was a lot of talk about the Olympic Pipeline and I do not discount those concerns for one minute. In fact it should only reinforce the concern for safety of all pipelines including those for combustion turbine facilities. However there was not any discussion at any of the meetings I attended for this type of line. In fact at one side conversation I was as much as told that those pipelines weren't an issue, no different than sewer lines. I beg to differ. A pipeline under pressure is a dangerous line anywhere and those who either own one or has exclusive use such as the applicant should be held responsible. (In the past few years this natural gas line has erupted twice, thankfully not in an inhabited area).

Issue 3: Duration/Permit/Construction Yes, I do believe there should be a duration. There becomes a point where the air and other permits must be renewed and they have limitations. Then there is a problem with who came first. Again I come back to having a plan, if you have deadlines there is more control of the cumulative effects that satisfies the strategy.

Membership: I think that the membership of the EFSEC is as it should be. There was a suggestion that the number be cut by four but I do not favor that. Not all members are able to attend meetings and/or important hearings and I think that if the numbers were cut that problem would not get better. Councils such as this one, making recommendations to the Governor, should have a fair number in attendance. Even though not all may have issues with each and every project there is too much work for even fewer people. Plus I found that very good questions and concerns have been raised by all who have served on the council. As I told the council there are times I do not agree but I think that they should be proud of the work they do, it is not an easy job.

A way should be found to increase the pay of the Chair and staff. If those serving on EFSEC from agencies cannot be paid for their extra work, then the agency should receive compensation. Certainly if there are more applicants, there should be more facilities built, and with all the taxes they say they are going to bring to our state, there should be some added revenue for those agencies. You could also *start by not giving the applicants any sales tax relief.*

At this time I do not favor the citizen membership such as Oregon EFSEC. I think that process would be very hard for citizens to participate. The size of the EFSEC staff and budget would have to increase two or three fold.

Procedures

Ex parte - I don't have a problem with ex parte as long as the applicant must live by the same rules as the public. And I believe the EFSEC agency representative should have full access to

her/his department right up until adjudicative hearings. After all, we want them to be as fully informed as possible in order to make a better decision for all concerned.

C: The scope of Preemption.....

D: Local Government Participation.....

E: Standards and Processes for determining need..... There could be established standards such as the Oregon plan. Something that I think that could be resolved immediately is language..... such as; ... ‘the beginning of construction’ was defined and interrupted three different ways in our case and the final determination was that the down payment of a turbine satisfied that definition without breaking the ground on which this facility would sit. Also, I had a problem that the applicant did not have to prove that they had spent 10% of the total cost of facility to satisfy beginning construction. (EPA)

F: Role of the Counsel for the Environment..... ABSOLUTELY NECESSARY and should be expanded. If we are going to have applicants say there is a ‘GREATER NEED’ for generating power and this state buys into that premise, then there is a NEED FOR THE GREATER PUBLIC INVOLVEMENT. There could be an ombudsman for the public through CFE office to help with the process.

G: Funding and Related Costs..... EFSEC and related agencies should receive greater funding. If this is going to be a priority for this state then find the money.

H. Monitoring and oversight.....ONE COMMENT.....Please do not leave it up to the applicant to do their own monitoring or oversight.

there should be open records, so if a city, county, state, fed. Gov. citizen, group, or whoever wants to see their records for water usage, air emissions, noise levels, oil deliveries, etc. they must abide. EFSEC could monitor or designate same **BUT the applicant pay for the services.**

Unless there is money for entities and agencies I doubt they will want much involvement with monitoring and oversight.

I. The Siting of facilities on public lands.....The only involvement with public lands I have had is during this discussion. But I heard something that I must address. It was said that siting a combustion facilities next to a public park where the noise would be a problem for those spending a night of two immediately got my attention because ...At the present time at least one of these facilities has been sited in a valley that is 2 miles wide, within 300 -400 ft of peoples homes, 1/4 of a mile from schools, retirement village, and medical center. Their gas pipelines proposes to go through a golf course and right along side peoples homes. They will be hearing this noise, breathing this emission not just for 2 or 3 days but 24 hrs a day, 365 days a year each and every day of their lives,

It's a prospective things for me, so with a strategy, a goal, a plan, these facilities could be sited where they have the least amount of impact for all concerned. I know that would not fit the applicant's strategy, to be under the transmission line, to run only a mile of pipe line but guess what folks, that's the price of doing business and if you can't afford to make your facility the very best it can possibly be, find another state.

Let me conclude by saying that during these work sessions the public has been portrayed as being totally against any siting of power generation and pipelines.

I speak for myself when I say that I think that is erroneous. It is my experience that most people if given the chance to be informed and included into the decision making process can and will try to understand and quite possibly contribute to any project. My personal thoughts are that there is a time and place for everything. I happen to believe that if WA State wants to pursue energy generation, we should be on the cutting edge of new technologies not on the tail end of the old.

Collins Sprague

INTRODUCTION TO COMMENTS ON THE DRAFT STATUS REPORT OF THE WORK GROUP

Since the statutes creating what is now the Energy Facility Site Evaluation Council were originally enacted in 1970, three significant circumstances have changed. A competitive wholesale electricity market mechanism was established, pursuant to the National Energy Policy Act of 1992, that permanently displaced the utility power “exchanges” that were typical thirty years ago. Incredible economic and population growth has occurred throughout Washington. And, electrical generation technologies have evolved beyond the sort of capital intensive, large central station power plants common in 1970. The implications of these changes cannot be emphasized enough to illustrate the importance of Washington’s energy facility siting process.

Changes in the Wholesale Electricity Market

Generation facilities were almost exclusively owned by utilities and federal agencies in 1970. Utilities wanted to own and dispatch generation to serve as much of their load as possible. The transmission grid operated by the Bonneville Power Administration (BPA) was largely built out by 1970 and enabled the transmission of electricity throughout the region. It enabled the output of the Centralia Steamplant, constructed by a consortium of utilities in the early 1970s, to be transported to its owning utilities. The most common power exchanges at this time occurred to coordinate the operation of hydroelectric facilities in the Columbia River Basin that were under diversified ownership.

Development of transmission interties between the Northwestern and Southwestern United States allowed Washington’s utilities to deploy their resources more efficiently, particularly after plans to develop vast amounts of thermal generation capacity was abandoned. Seasonal exchanges of surplus power with Southwestern utilities became normal operational practice. When utilities

exchanged power, they usually did so at incremental cost, not at a price determined by market signals or conditions. The National Energy Policy Act in 1992 changed all that. Utilities presently have the theoretical ability to purchase electricity from any utility and independent power producers. These sales take place through wholesale market mechanisms and with market participants (i.e., marketers) that did not exist in 1990, let alone in 1970.

The wholesale market has evolved recently to the point that supply and demand pricing has supplanted the conventional practice of power “exchanges”. As Washington, and especially the Central Puget Sound, becomes more dependent on imported power acquired through the wholesale market, the more susceptible utilities and their customers will be to supply and demand considerations; that is, high costs. Moreover, since capacity on the interties has been derated in recent years, power imports from places like California may become more constrained. Transmission congestion within our own state can make power delivery a challenge. An abundance of local supply will ensure stable and efficient pricing for the state’s consumers, and protect utility consumers from economic dislocation and uncertainty.

Some participants in the Work Group have suggested that the siting of gas-fired power plants should be discouraged through systemic changes to EFSEC’s statutes (Ch. 80.50 RCW). While the state might still be able to benefit from an abundant supply of electricity produced in places like California, Oregon, and Idaho, it would be confronted with supply reliability challenges. Greater reliance on power imports could make areas of the state more vulnerable to outages. EFSEC must not function to directly or indirectly harm the reliable operation of the transmission grid and the supply of low-cost power to the state’s consumers.

Growth within the Central Puget Sound Area

The U.S. Department of Energy has reported that, since 1990, the available capacity of electricity generation in the country has increased just 0.06%, while demand has grown by 17%. The situation in Washington parallels that of the nation. This point can be illustrated through a narrative about the Central Puget Sound region.

The population of King, Pierce, and Snohomish counties in 1970 was approximately 1.2 million less than it is at present. The economy of these counties has also expanded and diversified. The area has fewer milling and smelting operations (electricity intensive industries during the working day), but it now has more Boeing plants and an increasing number of computer dependent businesses. Computers and telecommunications switching gear require continuous cooling and high power quality; they also demand extremely reliable supply. Utilities have difficulty predicting how much and when energy intensive computer-based loads will arrive on their proverbial doorstep. Unlike manufacturing plants, “server farms” can be housed in existing buildings and become operational in a short period of time. Load forecasts can be rendered meaningless when a 100 MW server farm requests new electric service.

Like the Central Puget Sound, the state’s economy is very energy dependent and intolerant of high electricity cost. Electricity is fundamental to the manufacture of aircraft, the smelting of aluminum, the packing of agricultural goods for export, the growing of silicon wafers, the

crafting of wood products, and the refining of petroleum products. Virtually every region of the state contains an energy intensive industry.

Most of the power supplied to the Central Puget Sound area originates from other regions. For example, electricity is imported from the Centralia Steamplant in the south, from the Skagit River projects in the north, and the Federal Columbia River Power System and in the east. Supplies also derive from British Columbia, California, Oregon, Montana, Idaho, and other states throughout the Western System Coordinating Council's jurisdictional region. Seattle City Light's hydroelectric projects are largely located in Skagit, Whatcom, and Pend Orielle counties.

The Central Puget Sound area depends heavily on the viability of the transmission system. As population and electricity loads continue to grow as projected, this dependence will only increase. The best way to ensure a reliable supply to support the dynamic economy of the state is to site generation capacity as close to the larger load centers as possible and to promote effective conservation programs. Site banking can be valuable for future planning. More critical, though, is a siting process that is responsive to market changes. EFSEC must continue to perform its current statutory function – but in the most expeditious way possible.

The view that development of gas-fired generation plants in Washington will only result in the siting of merchant plants that dedicate their output to the California market oversimplifies the situation nearly to the point of misrepresentation. The output of merchant plants is traded and marketed through wholesale market mechanisms. That means that at any given time of a day, contracts for power from the plant could be sold to utilities (and marketers) throughout the region. It is unlikely the facility's total output would be exclusively provided to any single state or utility all the time. If sited in this state, generation facilities owned by independent power producers can bolster the reliability of the local transmission system, whether the power it places on the grid is sold "locally" or not.

The EFSEC process should not be instilled with a bias against power plants predicated on the form of its technology, the nature of ownership, or whether or not the facility will supply electricity to California. The state's utilities have been providing power to California for years. It's more efficient to be able to sell generation output whenever and wherever possible – the result is more cost-effective electricity production.

Improvements in Electrical Generation Technologies

Thirty years ago, the most prominent electrical generation technologies involved large, central station nuclear (i.e., WNP-2) or coal-fired (i.e., Centralia Steamplant) facilities. Building new power plants based on these technologies is no longer feasible for innumerable environmental and economic reasons. Nevertheless, the operational (base load) characteristics of these facilities are incredibly valuable: They can operate 24 hours a day, 7 days a week, and, theoretically, 365 days a year. But these facilities have poor cycling capability. That is, it takes a long time to start them "cold" before they are capable of generating electricity. They cannot come on line fast enough, for instance, to supply peak requirements. The latest combined cycle gas-fired generation technology, however, has the capability of functioning like a base load plant and a peaking plant. And it can do so very economically.

Combined cycle gas-fired generation facilities emit only a modicum of nitrogen and carbon dioxides compared to diesel, oil, and coal fueled power plants. They produce almost no particulate matter or sulfur dioxide emissions. The newest gas-fired combined cycle turbines are markedly more efficient and less polluting than prior generations of the technology. The newer technologies reduce fuel use by as much as 40% of the amount of fuel consumed by the older versions of technology (jet airplane turbine derivatives).

The capacity factor and cycling capabilities of combined cycle turbines are valuable for utility base load and peaking needs, as well as for transmission system load and frequency balance. A wind turbine, by comparison, has a low capacity factor; at any particular time it may only be able to achieve maximum output about 30% of the time. Wind turbines are a useful resource, but they are variable. They cannot operate without sufficient wind and they must be disengaged if wind speed is too high. A utility cannot start a wind generator when it requires peaking energy, it cannot “spin” the turbine constantly to meet potential reserve needs, and it can’t operate the turbine continuously to serve base load. Wind resources must be supplemented (“firmed”) by other generators, like a combined cycle turbine, for it to simulate a resource having greater capacity factor.

Gas-fired turbines are the most reliable, cost effective, and operationally compatible (with load requirements) technology available. Construction of one of these facilities can take less time than it takes to permit one of them under the EFSEC process today. With the emergence of the wholesale market as a supply and demand proposition, it is imperative for the state’s utilities and consumers that the siting process become more responsive to market considerations. A protracted siting process merely prolongs the amount of time that local utilities must subject themselves to the vagaries of purchasing more imported power through the wholesale market. It also increases project output cost.

COMMENTS ON REPORT: BUDGET PROVISIO TOPICS

Jurisdiction of the State Siting Authority

Renewable projects, such as wind farms and central station solar projects, should be allowed to “opt in” to the EFSEC process

The “opt in” concept goes to the heart of many issues that have raised with respect to the purpose and operation of EFSEC: Should it function as a permitting agency, where it essentially “stands in the shoes” of the state’s regulatory agencies (i.e., local government, Department of Ecology, etc.), or should it be transformed into an independent regulatory body? EFSEC should retain its present role as a permit consolidation agency.

Current law (RCW 80.50.020 (14)(a)) already provides specific detail as to how the generation capacity threshold should be calculated. If additional details are necessary, these might be identified through rule-making.

The notion of lowering the jurisdictional threshold and imposing a CO2 standard practically means reconstituting EFSEC as a regulatory body, one that may be incapable of effectively ensuring for a continuous and abundant supply of energy that mitigates wholesale market volatility and sustains low-cost electricity for Washington's residential, commercial, and industrial customers. It would likely lead to a more protracted, costly, and contentious process. Even the current process could be less time intensive. As Mr. Fiksdal noted at the October 30 meeting of the Work Group, even the option of utilizing the expedited process authorized under RCW 80.50.075, would be "hard to achieve". Before the responsibilities of EFSEC are expanded, the agency should be capable of processing applications in a more expeditious fashion.

Other Suggestions

It is not necessary to establish a policy for siting distributed energy facilities. By definition, if not function, they do not warrant siting intervention.

Applicants should have the option of "opting out" of the EFSEC process. The premise behind the creation of EFSEC is that it could consolidate various federal (delegated), state, and local permits, and issue a site certification agreement in less time and obstruction than multiple state and local agencies acting individually could. However, experience has demonstrated that in certain circumstances a power plant developer can receive permission to site a facility faster by interacting with each state and local agency separately. That comparison illustrates how much EFSEC has lost the capability to function in a manner intended by its enabling legislation. It also raises the question of whether or not EFSEC's role should be limited to siting linear, or multiple-jurisdictional, facilities. Getting a power plant through a siting process and into operation in timely fashion is critical. Time affects a developer's ability to secure capital and the overall cost of a project cost; a protracted process can effectively defeat a project.

Linkage of the state energy strategy or energy policies enumerated under RCW 43.21F.015 with the exercise of state siting authorities pursuant to Ch. 80.50 RCW sounds reasonable and noble on its face, but it would be extremely problematic and disruptive in practice.

The State Energy Strategy can be revised comparatively quickly. Perhaps the process could take less than a year. Changes to the Strategy could be pursued for political purposes; for example, to frustrate the introduction (siting) of a technology deemed threatening to the interests of certain parties. If successful, such an endeavor could be as effective as though the Strategy itself were law. However, an affected party would have no recourse under law to bring on appeal the process under which the Strategy was developed or file an action on the basis of its content. It would have the force of law without due process.

Furthermore, since the Strategy could at least not contravene state energy policy, as enumerated under RCW 43.21F.015, it is more likely than not that the Strategy would, in the proposed linkage, assume a form inimical to the interests, including those of the public, for development of generation resources to maintain an abundant, low-cost supply of electricity.

The energy policy under RCW 43.21F.015 presents the opposite problem. Where the Energy Strategy may be, within the limits of RCW 43.21F.015, too much of an ad hoc document, the “policy” is embodied in statute and inflexible. If this policy were to supplant that incorporated in RCW 80.50.010, the concepts in RCW 80.50.010 would be lost. RCW 80.50.010 acknowledges the importance of balancing the interests of ensuring for an abundance of reasonably priced power with those of the environment and the public. The “policy” under RCW 80.50.010 is more appropriate that balanced than the one articulated under RCW 43.21F.015. Since amending statute law is not a simple proposition, reliance on RCW 43.21F.015 for guidance on energy facility siting could needlessly hinder what might otherwise be appropriate energy development.

RCW 43.21F.015 does not recognize the operational and economic limitations of certain renewable resources that it “emphasizes” and “encourages”, nor does it contemplate the prospect that the expeditious siting of generation facilities with cycling capabilities (i.e., combustion turbines) might be necessary to respond to market conditions, such as the permanent loss of generation capacity, the unexpected building of a “server farm” in the state, or the persistence of wholesale electricity price volatility (in other words, the current situation).

Policy considerations, including concerns about “cumulative impacts” of energy facility siting, are most appropriately addressed through the decision of the Governor to approve or deny a site certification recommendation by EFSEC.

Monitoring and Oversight of Certified Facilities

Revising RCW 80.50.040 to allow EFSEC to delegate compliance monitoring to other appropriate state agencies would be appropriate.

Several site certification agreements (Chehalis, Cowlitz, Northwest Regional Power Facility, and Satsop Power Plant) already embody termination dates. EFSEC and project applicants obviously have the ability to negotiate and stipulate on such matters. No statutory limitation is necessary.

Membership

It may be appropriate to only seat representatives from the agencies that have statutory *permitting* jurisdiction over a proposed energy facility and those agencies that have a proprietary (affected land) interest in a particular proceeding. The statute may no longer need to specify representation at all. EFSEC membership might be composed of representatives from the Departments of Ecology, Fish and Wildlife, and Health, as well as local governments, when considering an application to site a power plant, for example. Membership might be considerably more broad for siting a pipeline that crosses state lands.

Procedures

Problems associated with the “ex parte wall” can be addressed in a number of ways. For example, a narrowly applied exemption from the Administrative Procedures Act (notably RCW 34.05.455) could be incorporated within Ch. 80.50 RCW for communications between agency representatives and their respective agency personnel. That “fix” would virtually restore the process to how it functioned at EFSEC’s inception. Otherwise, the ex parte “problem” is not an issue for agency representatives unless their employing agency petitions to intervene in the matter. Any exception to the ex parte rule that applies to parties to the action and/or to the public would defeat the value and integrity of the adjudicatory process.

The issue of whether or not a proposed energy facility is consistent with local land use plans or zoning ordinances seems to concern some parties, particularly with the prospect that EFSEC could ultimately elect, as it apparently never has in thirty years, to pre-empt such local enactments. By rule (WAC 463-28-030), EFSEC directs applicants to make “all reasonable efforts to resolve” non-compliance issues with affected local governments. That is an appropriate and rationale means for EFSEC to endeavor to obviate the need to exercise its pre-emptory powers. However, the processes of determining consistency and reconciling differences can be dilatory propositions that necessitate the expenditure of scarce resources of all involved parties.

Some consistency related conflicts could be avoided by “site-banking”. Certain cities should be required under the Growth Management Act (Ch. 36.70A RCW) and their pertinent enabling statutes (35A.63 and 35.22 RCW) to permit electrical generation and transmission facilities within existing industrial or manufacturing zones or districts where residential and retail uses are prohibited. (Several large cities already maintain such zoning ordinances.) Once a project developer begins to actively pursue siting a facility that has been “banked”, it would be required, as law would otherwise provide, to address all relevant conformance issues that might arise from development of the site. Similar accommodations could be made in the Growth Management Act with respect to county planning for certain renewable energy projects.

Scope of Preemptory Powers

The premise that ESFEC’s “role regarding water rights” need to be “clarified” may be flawed. From previous actions taken by EFSEC, it appears that precedent exists to prove the agency has the authority to issue water rights, irrespective of other state law. AGO #10, 1975, also seems to affirm that EFSEC enjoys this authority.

Local Government Participation

If local governments lack the authority to fully recover the cost of activities they undertake relative to assume the primary task of siting energy projects within their jurisdictions, that issue should be addressed in a manner acceptable to local governments and project developers.

Funding and Related Costs of Participating in the State Siting Process

It appears that EFSEC can address the issue of reimbursing agencies for the salary and benefits of agency personnel participating in adjudicatory hearings through rule-making.

Additional General Fund-State funding for agency staff activities (i.e., functions of the Counsel for the Environment) that are not reimbursed (indirectly) by an applicant would be appropriate.

Appendix F

Discussion Paper on Preemption and Public Land

Deb Ross presented this paper to the work group on November 9, 2000, for discussion purposes only; it is not a recommendation of EFSEC.

Proposed language to protect sensitive areas and clarify EFSEC's role regarding publicly owned land and title transfer

Deb Ross, with review and comments and additions by Larry Fairleigh and Claudia Newman

This language does not represent the official position of EFSEC, the State Parks and Recreation Commission, or Fuel Safe Washington

The following language is intended to establish and clarify the Council's and Governor's responsibility with respect to sensitive natural and cultural areas. The first provision establishes a higher standard for siting on culturally and environmentally sensitive lands; the second clarifies the right of land-owning agencies and localities to be heard in siting proceedings, and the third provision clarifies that certification does not operate to transfer title from either private or public landowners. The first provision is modeled on, and language borrowed from, the Oregon siting statute.

NEW SECTION

- 1) Except as set forth in section 3, no certification shall be issued for an energy facility that is fully or partially sited in an area designated for protection by the state, local or Federal government, including but not limited to parks, monuments, wilderness areas, wildlife refuges, scenic waterways, and critical areas designated in local growth management plans [check appropriate language for critical areas].
- 2) Except as set forth in section 3, to recommend the issuance of a certification, the Council must find that, taking into account mitigation, the design, construction and operation of a proposed facility located outside areas described in section 1 are not likely to result in significant adverse impact to them.
- 3) Notwithstanding sections 1 and 2, the Council may recommend the issuance of a site certificate for a transmission facility or new transmission line under the Council's jurisdiction to be located in a protected area identified in section 1, if
 - (a) other alternative routes or sites have been studied and determined by the council to have greater environmental impacts and the council determines that a public need has been shown, or,
 - (b) in the case of property owned by a state agency or political subdivision, the affected state agency or political subdivision agrees to the location of the facility.
- 4) For energy facilities to be located in a protected area identified in section 1 that is owned by a state agency or political subdivision, all reasonable direct and indirect costs incurred by a state agency or political subdivision in participating in the site evaluation process and transferring the property interest including, but not limited to, staff time, title processing, consultant fees, attorney fees, and litigation expenses, shall be borne by the applicant.

5) Within two years of the effective date of this section, the council shall promulgate rules to carry out its provisions.

Note: “Transmission facility” is defined elsewhere in EFSEC statute to refer to oil and natural gas pipelines

NEW SUBSECTION TO 80.50.110

(3) Before preempting state agencies and political subdivisions as to the location of facilities on land owned by those state agencies or political subdivisions, the Council shall give affected agencies and political subdivisions the opportunity to be heard. Such hearings shall be conducted as part of the adjudicative proceeding described in RCW 80.50.090(3)

Note: It has been suggested that having an early determination by the Council on issues arising from siting on public lands would assist parties in narrowing issues and avoiding litigation. If the language regarding an early determination on land use consistency is kept in statute, there could be added language regarding siting on public lands, or it could be added to this section. An early hearing could be at the option of the land owning agency or locality.

NEW LANGUAGE TO BE ADDED TO 80.50.120:

(4) Notwithstanding sections 1, 2, and 3, the issuance of a certification shall not be sufficient in and of itself to transfer any real estate [property?] interests held by public or private persons or entities. The certificate holder shall indemnify and hold harmless the property owner from all actions arising out of the transfer of the property interest.

(5) In the case of real estate owned by a state agency or political subdivision, the state agency or political subdivision with jurisdiction over the property shall establish the terms and conditions for transfer of the property interest in accordance with its laws and consistent with the terms of the site certification agreement.

Note: This language is intended to codify an attorney general’s opinion from 1975 that says that the site certification agreement does not transfer title, and to clarify that the facility developer must take responsibility for any impairment of preexisting property interests such as competing easements. The legislature *may* wish to take the opportunity to clarify whether, and under what conditions, EFSEC ought to be able to issue water rights.