AGENDA
WASHINGTON EFSEC STANDARDS DEVELOPMENT GROUP
Thursday, June 27, 2002
9:00 a.m. – 1:30 p.m.
St. John's Episcopal Church, 114 20th Avenue SE, Olympia, WA 98501
Phone (360) 352-8527

1. Welcome and introductions

2. Review minutes from last meeting and gather contact information

3. Presentations

   A. Need: Discussion led by Mark Anderson (by conference call)

   B. Socio-economics: Revised draft proposed rule for standard – Brian Carpenter

   C. General Mediation Process: Proposal for mediation of EFSEC disputes – Liz Thomas

   D. Water Quantity: Revised draft proposed rule for standard – Chuck Lean

   E. "Deviation from Standards" Work Group: Draft proposed rule for standard – Stephany Watson

4. Report on wetlands – Chuck Blumenfeld

5. Next meeting and organization of remaining work

June 27, 2002
EFSEC Standards Development Group
Meeting Minutes
Olympia, Washington

Welcome and Introductions

Bud Krogh welcomed those in attendance. Meeting participants introduced themselves. There were no additions or corrections to the June 14, 2002, meeting minutes. Chuck Lean volunteered to present first since the need and build window discussions would be delayed until 10 a.m. for the purpose of including Mark Anderson by telephone.

Water Quantity

Mr. Lean presented his latest revisions to an outline for a proposed water quantity standard. There were three changes to the draft presented on June 14. First, Mr. Lean withdrew the naming of SEPA and EFSEC chapter 80.50 as the substantive law from which EFSEC's determination of water use authorizations would be based. Specifically, this was withdrawn from section D of the June 14 draft, "Water Rights Which Require Changes" (which is section E of the present draft), part (2). The final phrase, "as well as chapters 80.50 and 43.21C RCW," was removed.

Second, Mr. Lean changed specific elements of timing surrounding the report of examination that were discussed at the June 14 meeting. Instead of an applicant providing EFSEC with a report of examination within 90 days of submitting an application, the draft now requires in section E, part (3) (a), that an applicant provide EFSEC with a report of examination at the same time as the applicant submits an application. In section E, part (3) (c), Mr. Lean added that "[a]t least six months prior to submitting an application, the applicant shall notify Ecology of its intent to submit an application." Also, "[w]ithin five working days, Ecology shall notify the applicant in writing whether it will be able to complete a report of examination for inclusion in the application." If Ecology is unable to prepare a report of examination, the report may be prepared by a consultant.

Karen McGaffey said she felt section A, "Policy," did not really fit with the standard and questioned if it should be removed. She felt it was sufficiently vague and broad for people to begin making claims that are not warranted. For example, she said that with this policy statement someone could claim that because dry cooling exists, the use of certain technologies must accompany new facilities.

Carol Jolly offered an alternative. She proposed the group retain the policy statement, but without the last sentence. Ms. McGaffey and others were supportive of this. Brian Carpenter and Danielle Dixon did not agree with this alternative; they felt the last sentence should be included in the policy section. Mr. Carpenter said the policy section did not require the use of dry cooling. He said the section was intended to get applicants thinking about conserving, and he felt there was nothing wrong with encouraging water conservation. Ms. Dixon said she felt the dry cooling issue would still be handled on a case-by-case basis and this section would not open the door too far, which was Ms. McGaffey's concern.

Rusty Fallis offered a technical suggestion in regard to the last sentence of the policy section. If the sentence were to be kept, he asked if the phrase "EFSEC should encourage" could be changed to "applicants are encouraged." He said he was unsure what legal duty might be placed on EFSEC by stating that "EFSEC should encourage . . . water conservation measures for all energy facilities under its jurisdiction." Mr. Carpenter, Ms. Dixon, and others present approved of this change.

Mr. Krogh observed that the only disagreement was on whether or not the last sentence should be kept. He said Mr. Carpenter's and Ms. Dixon's comments would be included in the final report.

The third change to the draft presented June 14 was the insertion of section II, part (C), "Water Use Authorization." Mr. Lean said he inserted this for the purpose of making possible the reuse of storm water at an energy facility site.

Mr. Lean offered to put the current water outline into rule form. Stephany Watson said she would first work with Mr. Fallis on creating a template for a generic format of all proposed rules. Mr. Lean agreed to wait for the template before writing the rule.

Socio-economics

Mr. Carpenter presented a revised socio-economics proposed standard. The first proposed standard was presented on April 25, 2002, and discussed again on June 14. Mr. Carpenter explained that he intended for the first section to be viewed as the actual proposed standard. He said the second section was a guide for applicants on how to implement a standard. In section 2, part (A), "Procedure," he tried to make it clear that section 2 was not to be interpreted as "the only way" mitigation could be carried out. He said applicants should not feel they had to do exactly what was suggested in section 2; it was just a framework and was intended to get discussion flowing.

Regarding environmental justice, Mr. Carpenter said he limited environmental justice concerns to education. He said it was too hard to put measurements on environmental justice impacts. Ms. Jolly asked the purpose for including the phrase, "and where the nitrate and sulfate deposition is greatest," at the end of part (D), "Environmental Justice," (a). She felt it was limiting to list nitrate and sulfate deposition as possible factors affecting low-income or minority areas and not list other viable factors. Ms. Dixon suggested the phrase be replaced with another phrase, "where environmental impacts from the plant are the greatest." Mr. Carpenter said he included specifically nitrate and sulfate deposition because they were the causes of greatest concern in the past.

In parts (D) (a) and (D) (b) of environmental justice, Ms. McGaffey commented that it seemed odd for the applicant to be the one who is required to make extra efforts when the purpose should be to get EFSEC involved with minorities. Also, in part (D) (a) specifically, Ms. McGaffey felt the naming of the "immediate vicinity" of a facility as "1 mile" was inappropriate. She suggested the group let such process issues remain vague and handle specifics on a case-by-case basis.

Mr. Lean questioned the applicability of section 2, part (B), "Population." Mr. Lean pointed out that, according to the way it is presently written, if a town of 30 people increased to 40 over a period of ten years following the first year of a facility's construction, town residents or workers would have to be forced out of town (because a population increase of greater than 30% is considered major and would require mitigation, which demands a decrease in population). Ms. Jolly added that the removal of residents or workers from small towns would work contrary to the

idea of helping their economies. To remedy such a problem, Mr. Lean suggested expanding the definitions of "major impact" and "mitigation" to include more than just numbers. Mr. Carpenter agreed that this was not what he had intended. He said he would rethink this as well as section 2, part (C) (v).

Chuck Blumenfeld said he was not convinced there was a need for more than what is currently provided for in state regulations on socio-economics. He felt Mr. Carpenter's draft provided information that needed to be considered, but it did not actually set standards.

Paul Parker, from the Association for Washington Counties, said he felt Mr. Carpenter did a good job of researching and constructing section 2. However, he also said most, but not all, county officials would agree that it should not be included. In addition, it was reported that Commissioner Hinkle, from Kittitas County, urged that impacts be mitigated, regardless of the socio-economic status of the area.

Rick Lovely said he appreciated the amount of work Mr. Carpenter put into the draft. However, he felt such a standard would end up affecting smaller plants not under EFSEC's jurisdiction. He said politics would basically cover these issues and he did not see a need for a standard.

Ramona Monroe said she supported Mr. Blumenfeld's idea that existing regulations are sufficient and there is no need to submit a proposed standard on socio-economics to EFSEC.

Victoria Lincoln and Ms. McGaffey said they would work on a socio-economics standard different from Mr. Carpenter's for the next meeting. Mr. Krogh confirmed that Mr. Carpenter would revise his draft for the next meeting and Ms. Watson would convert it to rule form.

Need Test / Build Window

Liz Thomas said the "need test / build window" work group did not reach consensus on whether or not EFSEC should adopt a standard for assessing need for power or a build window. The last presentation on these issues took place February 28, 2002. A "Background Paper on Energy Policy" was distributed at that meeting.

Three draft papers, each detailing a different perspective on the idea of having a need test and build window, were distributed: (Alternative A) Ms. Thomas, (Alternative B) Ms. Dixon, and (Alternative C) Mr. Anderson. Ms. Thomas said the papers were reasonably self-explanatory. Alternative A said there should not be a need test or build window regulation. Alternative B said EFSEC should adopt a need standard as well as a build window requirement by regulation. It proposed a build window of four years. Alternative C said EFSEC had the authority to look at need through its own adjudicative processes, so it opted to leave things the way they were without a need standard. It supported having a build window and suggested four to six years as a possible time frame.

Mr. Anderson explained via telephone conference that, while his position in Alternative C was to take no action for a need standard, his (and OTED's) concern regarding need for a project involved the acquisition of efficiency resources. Essentially, OTED felt that "if there are substantial cost-effective efficiency resources available in the region, generation should not be built in its place, ergo there is no need for the project." Mr. Anderson acknowledged that this was an oversimplification of the issue, but said it was still the main idea. The goal of the example standard in Alternative C was to guard against the siting of generating facilities so long as other "large, cost-effective efficiency resources" were being acquired.

In regard to need for a project at a particular location, Mr. Anderson said there were many factors to consider in siting a facility near or away from load centers. Therefore, Alternative C did not address this issue.

Ms. McGaffey said these position papers were helpful because they did a good job spelling out all three perspectives. However, she felt agreement could not be reached on a need test or build window in this process.

Ms. Watson commented that the build windows proposed by Mr. Anderson and Ms. Dixon ranged from four to six years. She asked Ms. Thomas if there was a possibility for consensus on the issue. Ms. Thomas said she would not be comfortable setting a time frame. She said the economy is such that it is impossible to forecast with certainty the right amount of time to build an energy facility. She reasoned that a "one size fits all" build window would cause some facilities not to get built when they are needed and others to be built when they are not needed. She saw a build window as potentially problematic without an upside.

Ms. Jolly argued there was an upside because a build window forces applicants to come back to EFSEC and show that conditions (for which decisions are made to approve a plant) remain the same. She saw value in requiring parties to report back to EFSEC on a regular basis, such as every five years.

Ms. Dixon said she wanted more than a check-in after five years, however. She said that if new regulations are set and conditions such as housing change within five years, these changes must be accounted for.

Mr. Lufkin said he thought a build window was a good idea. However, it must include more than a check-in every five years. There must be a real opportunity for interested parties to really assess things.

Mr. Blumenfeld said he favored a large build window with checks along the way. He said the central issue was financing. The value of having an EFSEC certificate, he said, was that a party could then go out and get financing.

Ms. McGaffey said EFSEC's current approach involves more than a check-in. A party goes back to EFSEC and sees if there are new issues or laws requiring changes. She was concerned that the current five-year review process could be turned into a system of applying all over again. Her view was that the current approach works well.

Mr. Krogh asked the group if there was a possibility for creating something between the ideas of a check-in and starting the process all over again. Ms. Thomas mentioned that the text from Chehalis Power's Site Certification Agreement might be something that could be put into regulation. It set a 10-year build window and required Chehalis Power to identify before EFSEC environmental, economic, technological, and other changes after five years. Mr. Krogh asked Ms. Thomas to send a copy of the Chehalis text to Ms. Watson and use it as a basis from which to form a build window regulation. Ms. Dixon and others will review it.

Ms. Thomas suggested the three authors leave the door open for proposed revisions on the issue of a need test and put the papers in rule form. Ms. Watson reminded the group that Mr. Fallis and she would create a common template for the format of all proposed rules, and then others could draft the rules for the next meeting. After the papers are reviewed in rule form, they will be circulated and people can sign the paper they support.

General Mediation Process

Ms. Thomas said she and Mr. Lufkin ran out of time while working together for this meeting. They will draft something together that should work for everyone by the next meeting.

Mr. Krogh asked if the mediation would be mandatory. After some discussion, it was agreed that EFSEC would encourage mediation, but it would not be mandatory.

Wetlands Report

Mr. Blumenfeld reported that he spoke with wetlands consultants and they raised some very serious concerns about parts of the group's working proposal. Most importantly, they were not happy with the idea of using an EFSEC statewide standard as a model. Mr. Blumenfeld said his workgroup was rethinking things and at least a different approach could be suggested at the next meeting.

Standards Deviation Group

Ms. Watson said the standards deviation group renamed itself the "Effect of Standards" group because the group's focus is really on the results that will come about after new standards are adopted.

Ms. Watson presented her group's draft proposal. She said it stated that neither EFSEC nor an applicant may engage in an independent balancing process once an applicant establishes compliance with WAC Chapter 463-14. The reason for this, the workgroup believes, is that WAC 463-14 incorporates the seeking of "courses of action that will balance the increasing demands for energy facility location" with public interests, as called for in RCW 80.50.010.

Ms. Dixon said she strongly disagreed with the proposal. She thought the final question of balance should be left with the Council. She said the balancing was sometimes the final determinant in whether a project was sited or not. She felt there were some things standards did not cover and sometimes standards worked against each other. For these reasons, she felt it was necessary to have a cumulative review of the project after individual standards had been assessed.

Ms. Thomas commented that the group was working to create certainty and predictability. She asked how predictability would be enhanced if EFSEC was allowed to overturn things at the end through a balancing process. She added that in Oregon there is no balancing process at the end; applicants can be sure that there will be no additional issues surfacing at the end.

Mr. Lufkin said he felt it was important to have a balancing process at the end. Having EFSEC look at the pros and cons of the project after the standards have been assessed individually was important to him.

As a point of clarification, Mr. Fallis asked Mr. Lufkin if he was saying that even if environmental impacts were mitigated, it still could be possible for EFSEC to disapprove a project. Mr. Luce added that in the Governor's directive to develop clear, quantifiable standards, it was implicit that if an applicant meets those standards the project is approved. He asked Mr. Lufkin if he was saying that EFSEC could disapprove a project, based on the Council's findings in the end balancing process, even though it met the standards. Mr. Lufkin said he believed, based on statute, this was the Council's charge.

Mr. Blumenfeld said he had difficulty understanding how the Council could make a decision that the project was adequately mitigated, but then turn down the project. He said it seemed that somewhere along the way the Council would discover whether or not there was a major problem with the project.

Mr. Lufkin said his concern was that current standards were not set up extremely well and standards under proposal were not yet fully developed. He said he did not feel comfortable that standards would handle environmental issues sufficiently at this point. He also felt there were problems with the DEIS (Draft Environmental Impact Statement).

After further discussion, Mr. Fallis asked the group for feedback on an idea. The idea was for EFSEC to determine no sooner than the issuance of the DEIS whether there were unmitigated significant adverse environmental impacts notwithstanding compliance with applicable standards. If the Council concluded there were such impacts, there would be an opportunity for a hearing. Because chapter 80.50 RCW implies that the purpose of a hearing is to explore significant adverse environmental impacts, perhaps there would be no reason to have a hearing if there were no unmitigated impacts, and this would make the process quicker.

Ms. Jolly said she felt the combination of SEPA statute and new EFSEC standards would accomplish the balancing that was needed as well as address the certainty the Governor was seeking.

Ms. McGaffey noted that at some point there must be a decision on whether or not someone's environmental issue is important enough to hold a hearing on it. Mr. Fallis asked if the person with the environmental issue should be required to petition to intervene, submitting a brief to the Council on the reasons for which there should be a hearing. Ms. McGaffey said that was one approach: placing the burden on the applicant to file a motion to intervene.

After further discussion, it was agreed that Mr. Lean would draft a rule on these issues after Mr. Fallis developed a rule template.

Next Meeting and Organization of Remaining Work

The next meeting will take place Friday, July 12, 2002, at St. John's Episcopal Church, 114 20th Avenue SE, Olympia, Washington 98501. This is the final date for proposed rules to be presented. Ms. Dixon commented that the Northwest Energy Coalition hired a consultant and was receiving feedback for a CO2 proposal. She will present a proposed rule on CO2 July 12.

The final report will be drafted after July 12. The following meeting (which is also the final meeting) will take place Thursday, August 8, 2002. At this meeting the final report will be reviewed. Most likely the meeting will be held at St. Placid's Priory in Lacey or again at St. John's Episcopal Church.

June 27, 2002
EFSEC Standards Development Group Meeting Attendance

Ramona Monroe	rlmonroe@stoel.com
Tony Ifie	tonyifie@aol.com
Mike Lufkin	michael@atg.wa.gov
Danielle Dixon	danielle@nwenergy.org
Paul Parker	pparker@wacounties.org
Rusty Fallis	rustyf@atg.wa.gov
Carol Jolly	carol.jolly@ofm.wa.gov
Kathryn Crum	kathrync@qwest.net
Brian Carpenter	piercebctc@earthlink.net
Allen Fiksdal	allenf@ep.cted.wa.gov
Victoria Lincoln	victorial@awcnet.org
Dick Fryhling	dickf@cted.wa.gov
Jenene Fenton	fentojmf@dfw.wa.gov
Mike Mills	mikem@ep.cted.wa.gov
Charles Carelli	ccar461@ecy.wa.gov
Donna Ewing	suedonoly@aol.com
Tim Boyd	thetsbgroup@attbi.com
Dave Arbaugh	dcarbaugh@att.net
Rick Lovely	rlovely@ghpud.org
Chuck Lean	lean@attbi.com
Karen McGaffey	kmcgaffey@perkinscoie.com
Chuck Blumenfeld	cblumenfeld@perkinscoie.com
Justin Long	justin443long@hotmail.com
Stephany Watson	swatson@sagelake.net
Bud Krogh	ekrogh@serv.net
Jim Luce	luceconsulting@attbi.com
	jiml@ep.cted.wa.gov
Mark Anderson* (via teleconference)	marka@ep.cted.wa.gov

WATER RIGHTS POINTS FOR CONSIDERATION

Draft June 27, 2002

I. EFSEC Water Resources Policy and Purpose

A. Policy. Water is a finite and valuable natural resource and its prudent management is necessary to promote the health and welfare of all citizens. It shall be EFSEC's policy to promote the use of the state's water resources in a manner that maximizes the net benefits to the natural environment and the state's need for energy facilities. Consistent with this policy EFSEC should encourage, to the extent practicable, water conservation measures for all energy facilities under its jurisdiction.

B. Purpose. The purpose of this rule is to set forth how applicant's proposing to use water resources for an energy facility may request and receive authorization for their intended use.

II. Procedures for water use authorization

A. **Submission of Water Rights.** Applicants proposing to use water for an energy facility must either (1) submit water right(s) or other water use authorizations suitable for use by the proposed energy facility without change, (2) submit water right(s) which are approvable to be changed to meet the point(s) of withdrawal, place of use and purpose of use identified in the application, or (3) submit water rights from both categories sufficient to meet the needs of the proposed facility. Submitted water rights or other authorizations to use water must be specifically identified in the application. In no event will EFSEC authorize the use of a larger quantity of water than authorized by the water rights or water use authorizations submitted by the applicant and identified in the application.

B. **Beneficial Use Requirement.** Water rights submitted by the applicant and identified in the application shall have been beneficially used and not subject to relinquishment for nonuse.

C. **Water Use Authorizations.** The term "water use authorization," as used herein, is any right to use water for a proposed power plant which is not based directly upon a water right permit or certificate issued by the State. It is anticipated that such an authorization will usually consist of a contractual right to use water supplied by a municipal corporation or other water purveyor, but it can consist of any lawful right to use water for an energy facility.

D. **Water Rights Suitable for Use Without Change.** An applicant may identify in the application water right(s) or water use authorizations sufficient to meet the requirements of the proposed energy facility without the necessity of any change to a water right permit or certificate issued by the State. In such event, EFSEC shall determine whether the applicant holds, or will hold, sufficient legal authority to water in a quantity sufficient to meet the requirements of the proposed energy facility.

E**. Water Rights Which Require Changes.**

(1) If the applicant submits water right(s) that require changes to: **(a)** the point(s) of withdrawal and/or diversion; **(b)** the place of use; and/or **(c)** the purpose and time of use, in order to make the water right(s) suitable for use by the proposed energy facility, then EFSEC shall determine whether to authorize water use incorporating the requested change(s).

(2) EFSEC's determination shall be based on the substantive law applicable to a water rights change application, including but not limited to chapters 43.21A, 90.03, 90.14, 90.44, and 90.54 RCW, together with implementing regulations and judicial decisions, but not including requirements for priority processing of applications.

(3) (a) As part of its application, the applicant must provide EFSEC with a report of examination, identifying the water rights changes to be made, the quantities of water (both in gallons per minute and acre feet per year) which are eligible to be changed, together with any limitations on the use, including time of year; the report of examination shall also include comments by the Department of Fish and Wildlife with respect to the proposed changes. **(b)** The report of examination shall normally be prepared by Ecology and submitted to EFSEC. Ecology's cost for preparation of the report shall be borne by the applicant. **(c)** At least six months prior to submitting an application, the applicant shall notify Ecology of its intent to submit an application and the water rights changes which will be necessary. Within five working days, Ecology shall notify the applicant in writing whether it will be able to complete a report of examination for inclusion in the application. If Ecology's response is affirmative, the applicant and Ecology shall work together to develop a schedule and exchange information preparatory to completing the report of examination. Ecology's preparation of a report of examination shall not make Ecology a sponsor of the proposal or preclude Ecology from taking a position with regard to the proposed energy facility. In the event that Ecology notifies the applicant that it will be unable to prepare a report of examination for submittal with the application, then the report of examination may be prepared by a consultant retained by the applicant. If the report of examination is prepared by a consultant, Ecology may provide EFSEC with any comments related to the requested changes that it deems appropriate.

(4) If EFSEC authorizes the applicant's requested water use in the site certification agreement, it may specify the terms and conditions of water use. EFSEC will not change the water rights submitted by the applicant. Rather, those water rights will be identified in the site certification agreement and form the basis for the water use authorized by EFSEC. No other use shall be made of those water rights during the life of the site certification agreement.

F. **Options for Applicant.** Nothing in this section shall prevent an applicant from seeking to obtain new water rights from Ecology, or from applying to change a water right to either Ecology or a Water Conservancy Board, but any such application shall be separate and distinct from an application for site certification.

Draft proposed rule for socio-economics standard for energy facilities

by Brian Carpenter

Section 1:

A. Statement of Intent

The Council's goal is to avoid, minimize or mitigate adverse project-related socio-economic impacts on the local community and promote positive project-related socio-economic impacts on the local community.

B. The following areas of impact are considered "socio-economic impacts" for purposes of this section.

i. Impacts on the local population;
ii. Impacts on the local housing supply and vacancy rate;
iii. Environmental justice;
iv. Impacts on local government services, both in terms of revenues and demands;
v. Impacts on the local workforce and economy;

C. Standard:

The applicant will work with local government jurisdictions to avoid, minimize or mitigate any negative project-related socioeconomic impacts and to promote any positive project-related socioeconomic impacts.

i. In the area of population, the applicant and local governments will address, if necessary, the impacts of significant short term or long term increases in local population due to the project.
ii. In the area of housing, the applicant and local governments will address, if necessary, the impacts on the local housing supply and vacancy rate. Particular emphasis should be given to the possible need for short term housing or if the local housing supply and/or vacancy rate is very low.
iii. In the area of environmental justice, the applicant and local jurisdictions will seek out, identify and take extra measures to include nearby minority and/or low income populations in the permitting process.
iv. In the area of local economy and workforce, the applicant and local jurisdictions will seek out ways of maximizing the use of local workers, local contractors and local suppliers for construction and operation of the facility.
v. In the area of local government services, the affected jurisdictions and the applicant will address any disparities between project-related service demands on the affected jurisdiction and project-generated tax revenue to the affected jurisdiction.

Section 2

A. Procedure: This section exists to offer guidance to applicants and affected local jurisdictions in meeting the standard set forth in Section 1. Nothing in this section is intended to restrict, limit or require the applicant or the affected local jurisdiction to pursue any one path of mitigation. Rather, it is intended to provide a framework within which discussion can occur and creative solutions may be reached.

B. Applicants shall, in cooperation with the affected local jurisdictions, estimate the impacts of the proposed facility in the areas listed in Section 1(B)(i-v). For each area of impact:

i. If the facility is found to have a minor impact, no further action is necessary;
ii. If the facility is found to have a moderate impact, the impact shall be avoided or mitigation is required to reduce that impact to a minor level;
iii. If the facility is found to have a major impact, the impact shall be avoided or mitigation is required to reduce that impact to a minor level;

Applicants shall estimate the impacts of 1(B)(i) first.

B. Population
i. Most recent census data plus any more relevant and recent information shall be reviewed to determine the local population. In-migration caused by the facility shall be estimated and compared to the existing population and expected background population trends.
ii. If the facility shall cause population to increase by 0-10% over ten years beginning with the first year of construction of the facility, the impact shall be found to be minor;
iii. If the facility shall cause population to increase by 11-30% over ten years beginning with the first year of construction of the facility, the impact shall be found to be moderate;
iv. If the facility shall cause population to increase by greater than 30% over ten years beginning with the first year of construction of the facility, the impact shall be found to be major;

C. Housing
i. The existing housing vacancy rate and the existing housing supply, both quantity and quality, shall be determined for the local vicinity of the facility.
ii. Population in-migration caused by the facility, both during construction and operation, shall be compared to the existing housing vacancy rate and supply to determine impacts on local housing
iii. If the existing vacancy rate is between zero and five percent and the number of vacant units is less than or equal to the predicted inmigration caused by the facility, the facility will be found to have a major impact upon housing.

a. If the existing vacancy rate is between zero and five percent and the number of vacant units is greater than the predicted inmigration caused by the facility, the facility will be found to have a moderate impact upon housing.

iv. If the existing vacancy rate is between six and eleven percent and the number of vacant units is less than or equal to the predicted inmigration caused by the facility, the facility will be found to have a moderate impact upon housing

a. If the existing vacancy rate is between six and eleven percent and the number of vacant units is greater than the predicted inmigration caused by the facility, the facility will be found to have a minor impact upon housing.

v. If the existing vacancy rate is greater than twelve percent and the number of vacant units is less than or equal to the predicted inmigration caused by the facility, the facility will be found to have a moderate impact upon housing

a. If the existing vacancy rate is greater than twelve percent and the number of vacant units is greater than the predicted inmigration caused by the facility, the facility will be found to have a minor impact upon housing.

D. Environmental Justice

a. The applicant shall determine if there exists a majority low-income neighborhood and/or a majority minority neighborhood in the immediate vicinity (1 mile) of the project and where the nitrate and sulfate deposition is greatest.

b. If such neighborhoods are found, the applicant shall make extra efforts to include these neighborhoods in the application/permitting process. Efforts may include, but are not limited to:

i. Providing material about the project in appropriate languages

ii. Providing language translation services for public meetings

iii. Advertising of meetings in non-traditional publications or on non-traditional radio/television stations

iv. Extra meetings targeted at the affected low-income and/or minority communities

E. Government Services

i. Applicants shall estimate the impact of the proposed facility on all government services in the vicinity of the project area. Government services shall include, but are not limited to: school districts, cities, counties, emergency services, sewer districts, water districts, irrigation districts, other special purpose districts, the state and others.

ii. Applicants shall consult with local government service providers as part of the application process to determine the impacts on services, the potential need for mitigation and the project-generated revenues that will flow to the service provider.

ii. In all cases, projected revenues from the facility to a particular service provider shall be compared with projected costs to the same service provider

c. If the difference between the two is negative, then the project is found to have a negative impact on the service provider and mitigation is required.

d. If the difference between the two is equal or greater, then the project is found to have a positive impact on the service provider and no mitigation is required.

ii. Mitigation may be done in a variety of ways, including but not limited to the following:

a. "Shortfall payments" by the project owner until such a time that the revenue generated by the facility is equal to or greater than the cost to the service provider for services related to the facility.

b. Service providers may create separate accounts for the facility in question. Services provided to the facility may be charged to the account and revenue generated from the facility may be charged to the account. Any negative balance will be made up in the form of a shortfall payment by the facility owner/operator.

c. A mediation system may be set up between the facility owner/operator and the service provider to settle disputes between the two parties over whether or not an expense or revenue is related to the facility.

d. Equipment purchases, training, staff resources and other services paid for by the project owner and utilized by the service provider.

F. Local Economy and Workforce

i. Construction and operational staffing levels shall be determined for the facility.

ii. Construction and operational payrolls shall be determined for the facility.

iii. Construction and operational expenditures for goods and services shall be determined for the facility.

iv. The applicant shall estimate the percentage of employees under 2(e)(i) that will be hired locally. (within 100 mile radius)

v. The applicant shall estimate the percentage of expenses incurred under 2(e)(ii-iii) that will be expended locally. (within 100 mi radius)

vi. The applicant shall provide the percentages derived from 2(e)(iv) and 2(e)(v) above as part of the application for site certification.

vi. Impacts shall be determined as follows:

a. If less than or equal to twenty percent of the total construction and operational workforce is non-local, then the impact shall be considered minor

b. If between twenty-one and thirty-nine percent of the total construction and operational workforce is non-local, then the impact shall be considered moderate.

c. If greater than forty percent of the total construction and operational workforce is non-local, then the impact shall be considered major.

d. If less than or equal to twenty percent of the total construction and operational spending is non-local, then the impact shall be considered minor

e. If between twenty-one and thirty-nine percent of the total construction and operational spending is non-local, then the impact shall be considered moderate.
f. If greater than forty percent of the total construction and operational spending is non-local, then the impact shall be considered major.

vii. Mitigation for impacts considered moderate or major in 2(e)(vi) shall be required and shall include some or all, but are not limited to the following:
a. Good faith efforts to work with local employment security offices, state-approved apprenticeship training programs, community based organizations, welfare to work programs, union halls and other employment and training programs in the area to promote the hiring of local residents for construction and operation of the facility.
b. Good faith efforts to work with local chambers of commerce to identify potential local suppliers of goods and services
c. Good faith efforts to work with local economic development and business development organizations to maximize local spending

EFSEC STANDARDS COMMITTEE

DRAFT WHITE PAPERS ON NEED TEST AND BUILD WINDOW[1]

These papers follow up on the discussion at the Committee meeting of February 28, 2002, regarding whether or not EFSEC should adopt a regulation relating to need for power, and the somewhat related question of what provision, if any, should be made for a "build window". For background, see the minutes of the February 28 meeting and the "Background Paper on Energy Policy" distributed at that meeting.

There were fundamental disagreements as to policy issues relating to any need standard or build test. The subgroup was not able to reach consensus as to whether any rule should be adopted, or what any such rule should say. Attached for reference are the various positions of group members. Because the scope of the Committee's work is limited to generating facilities, the scope of the position papers is likewise limited.

[ATTACH PAPERS BELOW; ALTERNATIVE A FOLLOWS.]

[1] Prepared by Liz Thomas, Preston Gates & Ellis LLP. The views expressed here are my individual views, and are not expressed on behalf of any client or the firm.

Alternative A on Need Test/Build Window
For Generating Facilities

QUESTION 1: SHOULD EFSEC ADOPT A NEED TEST BY REGULATION?

It is doubtful that EFSEC's statute calls for or even authorizes a determination of need for generating facilities.

EFSEC should not adopt a regulatory need test because a) other agencies (BPA, Northwest Power Planning Council or NWPPC, WUTC, PUDs, etc.) are charged with determining need for power; b) EFSEC's adoption of a regulation would subject facilities over 350 MW to a requirement that is not imposed on smaller facilities; c) adoption of a need test would be contrary to federal energy policy; and d) adoption of a need test would encourage smaller projects which are not subject to EFSEC's rigorous environmental review. Establishing a need standard would not contribute to analysis of environmental impacts, as these are fully covered by other EFSEC criteria and SEPA requirements.

QUESTION 2: IF A NEED TEST WERE ADOPTED, WHAT REGULATORY CRITERIA WOULD BE APPLIED?

Questions that would have to be resolved if a need test were adopted include:

- Within what geographic area should need be determined? The area must be larger than Washington State in order to recognize the interdependent and seasonal nature of electric supply. At a minimum, the area would have to include the entire region covered by the NWPPC's regional plan. To fully recognize the benefits of seasonal exchange, it might be appropriate to consider the entire Western Interconnection.

- What proof would be required to demonstrate need? One approach would be to consider whether existing resources are sufficient to meet 115% percent of projected demands over the next ten years. This approach would recognize the importance of maintaining sufficient reserves, and a planning horizon consistent with the time required to plan, permit and construct a project.

QUESTION 3: IF A NEED TEST WERE ADOPTED, SHOULD IT APPLY EQUALLY TO ALL PROJECT DEVELOPERS?

The market will determine need for power. If a developer, whether IOU, Public Power or IPP does not have long term use for or long term contracts selling the output of a generation facility as well as long term contracts or proven ability to contract for fuel supplies it probably will not be able to obtain funding for the project unless it is self funded. Without these, a lending agency would probably not seriously consider the proposal.

Moreover, any need test could involve a multi-tiered structure, with investor-owned utilities subjected to the most stringent test; public power subjected to a lesser test; and independent power

developers ("IPPs") to the least stringent test. This tiered approach would recognize that IPPs do not rely on ratepayer funds for design or construction, so (a) there is no ratepayer impact associated with such development costs (unless the project is built and power sold to a utility); and (b) IPPs face hurdles in obtaining financing that function as a need test. Tiering could be achieved by looking at longer planning periods, larger geographic areas, and/or higher demand thresholds.

QUESTION 4: SHOULD EFSEC ADOPT A BUILD WINDOW STANDARD BY REGULATION?

For some projects, EFSEC has established a limited shelf life for site certification, *e.g.,* the applicant must report back in five years and the site certificate expires if construction is not begun within ten years.

EFSEC should not establish this type of requirement by regulation. First, some SCA elements have inherent build windows, including the PSD and NPDES permits. Second, the time until both commencement of construction and commencement of commercial operation will vary substantially from one project to another, depending on technology, financing, and commercial arrangements (e.g., option projects). Finally, build windows might force premature construction.

Subgroup members who endorse this Alternative A:

Name: _____ Organization: _____

Name: _____ Organization: _____

Name: _____ Organization: _____

Name: _____ Organization: _____

Name: _____ Organization: _____

Name: _____ Organization: _____

K:\99980\40000\ET\ET__O21JD 10/2/02 10:46 AM

Alternative B on Need Test/Build Window[2]

QUESTION 1: SHOULD EFSEC ADOPT A NEED TEST BY REGULATION?

Yes, EFSEC should adopt a need standard applicable to stationary power facilities to ensure Washington State is considering net benefits for consumers in siting power plants as well as the potential ramifications stemming from overbuilding of generation facilities. A need standard relates to regional and state policy promoting least cost resources, which considers economic and environmental costs and benefits.

In her January 17, 2000 White Paper on State Roles in Energy Facility Siting, former EFSEC Chair Deb Ross noted the following with regard to need and the related concept of 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.
>
> 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.
>
> 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.* [Italics added for emphasis]

Recent EFSEC Orders have further defined and bolstered the need and consistency concept. Order 754 (p. 13) interprets the need and consistency concept "to require a balancing of the state's need for energy at a reasonable cost with the imperative to minimize adverse impacts to the environment." Further, "The Council considers need and consistency to be a single concept that is not just a demonstration of the need to produce power based on current supply and demand. The need and consistency issue poses a broader question of whether an energy facility at a particular site will produce a net benefit after balancing the availability and costs of energy to consumers and the impact to the environment." (Order 754, p. 13)

> In considering the need and consistency issue and deciding if there is a net benefit for consumers in the siting of a power plant, the Council will consider the policy

[2] Prepared by Danielle Dixon, NW Energy Coalition.

considerations expressed in RCW 43.21F.015(1) – (4), which are consistent with the intent expressed in RCW 80.50.010.
Specifically, EFSEC will consider:

1. Whether, and to what extent, the energy and capacity from the proposed facility will benefit consumers;
2. Whether the Applicant has offered commitments to increase the diversity of resources, including but not limited to:
   _Demonstration that the proposed facility itself is consistent with goals of diversity or preferred resource acquisition strategies, or
   _If the facility is not consistent with these goals, a commitment to procure additional resources such as energy conservation or renewable sources of energy; and
3. Whether, and to what extent, the proposed generating facility will mitigate environmental impacts consistent with the environmental policies and requirements articulated in state land use and environmental statutes and other relevant statutory criteria in individual cases. (Order 754 re: SE2, p. 14)

To fulfill its responsibilities in balancing the costs and benefits of a proposed facility, EFSEC should continue to incorporate the need and consistency concept in its deliberations. To provide certainty to applicants and other interests, EFSEC should adopt a specific need standard through rulemaking. Providing more certainty with regard to this and other issues could result in a more efficient permitting process that developers will favor, thus obviating the concern that a developer might choose to build a smaller than 350 MW facility to avoid EFSEC.

QUESTION 2: WHAT REGULATORY CRITERIA COULD BE APPLIED?

The Council has employed a number of tests to determine need and consistency, including:

> (1) a showing that a certain percentage of capacity is under firm contract entered into prior to construction; (2) consistency with integrated resource planning principles by having a certain percentage of capacity sold to purchasers who have adopted an integrated resource plan or otherwise conducted an integrated resource planning process, including the opportunity for public participation; (3) a showing of consistency with regional or statewide energy plans or strategies for acquisition of new energy resources; or (4) consistency with and reliance upon regional forecasts of energy needs. (Order 754, p. 13)

With regard to the geographic area in which need should be determined, EFSEC should look to the Pacific Northwest region as defined within the 1980 Northwest Power Act. There is one associated caveat, i.e., the region must be considered as a whole. For example, Boise's need for a new power plant does not provide sufficient justification for siting a power plant in Western Washington. Alternatively, a demonstration that the region as a whole generally is facing an energy (not capacity) deficit would be an appropriate indicator of need.

With regard to proof that would be required to demonstrate need, as outlined in another white paper on this topic, one approach would be to consider whether operating, under construction, and permitted supply and demand-side resources are sufficient to meet 115% percent of projected demands at critical water over the next ten years from the date of application. This approach

would recognize the importance of maintaining sufficient reserves, and a planning horizon consistent with the time required to plan, permit and construct a project. The Northwest Power Planning Council tracks and assesses demand and supply side resources for the region, and would be an appropriate entity from which to acquire this information.

QUESTION 3: IF THERE IS A NEED TEST SHOULD IT APPLY EQUALLY TO ALL PROJECT DEVELOPERS?

Essentially three categories of potential developers exist: consumer-owned utilities (COU), regulated investor-owned utilities (IOU), and independent power producers (IPP). The third category includes unregulated subsidiaries of IOUs with power development and marketing functions.

In applying a need standard, EFSEC should consider costs/benefits of a facility to ratepayers if the developer is a COU or regulated IOU, and costs/benefits to the general public if the developer is an IPP.

We propose the following with respect to application of a need standard:
1) A public agency (as defined in RCW 80.52.030) required to undergo EFSEC siting for a proposed stationary power plant is exempt from the EFSEC need standard if and only if that agency must obtain citizen review and approval for that project under RCW 80.52.
2) All other developers of proposed stationary power plants must demonstrate they have met EFSEC's need standard.

In proposing the above, we recognize several issues:
1) Public agencies currently are required to conduct an independent cost-effectiveness test and obtain a positive vote of the people in their service territory in order to move forward with issuing bonds to finance power plants greater than 350 MW (per the 1981 Don't Bankrupt Washington Initiative, as modified by the 2002 Legislature). Although not specifically a need standard, this provides some helpful checks and balances that can obviate the requirement for a need standard via EFSEC. Plus, this study and vote must take place long before construction can begin.
2) The regulated IOUs, by contrast, have no up front obligation to demonstrate need. Ultimately, the Utilities and Transportation Commission will determine the prudence of a resource acquisition, but that generally occurs long after the resource is up and running and relates to how much cost recovery the utility will be granted. It's important to keep in mind that power from an IOU-developed facility may be sold to a broader set of entities than simply the ratepayers within that IOUs service territory.
3) The unregulated IOUs are IPPs. An IPP's ability to secure financing depends on many factors, including existing capital structure, ability to access gas and transmission, connections, experience, etc. Generally, financial issues like capital structure are not considered by EFSEC in issuing a permit. Similarly, a strict demonstration of need for power in the Pacific Northwest likely is not required by potential financers, but is an issue of concern within the State to ensure we don't overbuild. Facilities developed by IPPs can result in both ratepayer and general public impacts, and therefore need must be a component of EFSEC's decision making.

QUESTION 4: SHOULD EFSEC ADOPT A BUILD WINDOW STANDARD BY REGULATION?

A build window is the time between the period of 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.

EFSEC should establish this type of requirement by regulation. We propose a build window of four years. First, Washington State and the region cannot accurately determine the need for new electric generating facilities absent certainty about permitted facilities actually commencing operations. Second, 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.

EFSEC orders for Chehalis and Sumas included 10-year build windows; EFSEC's Order on Cowlitz included a 5-year build window.

June 20, 2002

MEMORANDUM

To: EFSEC Standards Process Participants
From: Mark Anderson, OTED
Subject: Addressing the issues of "Need," and "Build Window"

Summary

The issue of need for a project is not the only energy policy issue that arises in facility siting, and issues change with the type of facility. However, by limiting our focus to Thermal Generation only, we have developed a standard that addresses our major concerns and provides certainty to stakeholders.

Our major concern, in addition to greenhouse gases (the topic of a separate standard), is the acquisition of efficiency resources in Washington and the region. The Northwest Power Planning Council has concluded that market forces alone will not capture all cost-effective conservation, and has estimated that at least 1500 average MW of efficiency resources are available in the region at a cost of 2.5 cents per kWh or less (see attached graphs), an amount equivalent to 1800 MW of baseload generation at an 83% capacity factor. . Our standard is structured so that "need" is assumed if the region is acquiring reasonable levels of efficiency resources. If the region is not acquiring those resources, "need" is also assumed if the output of the project is being acquired consistent with an integrated resource plan. Otherwise, the applicant must mitigate for the under-acquisition of efficiency resources and lack of a plan.

OTED supports the concept of setting a reasonable build window, perhaps 4-6 years, for the purposes of improving certainty in energy planning. However, this issue is less important than that of siting generation when efficiency should be acquired.

Background

The issue of "need" in facility siting is often discussed as if there is a single issue, narrowly defined. In reality, there are a number of issues and they are of more or less concern depending on the type of facility.

Three of these issues can be defined as different types of need.

a. Need for power (or product) refers to sufficiency of supply to meet demand. It is met by increasing supply or reducing demand.

b. Need for a particular type of facility refers to the means by which energy supply is met or distributed. Alternatives for electricity production include thermal generating

resources like natural gas, oil, coal and uranium, and renewable resources like hydropower, solar radiation and wind. Alternatives for petroleum transport may include pipelines, barges, and trucks.

c. Need for a facility at a specific site raises the issue of whether there are better places to site the same facility, e.g. in closer proximity to associated facilities and demand. Alternative pipeline routes come under this definition.

Generally, when OTED uses the phrase "…need and consistency with state energy policy…," it refers to all these energy issues, and others, like greenhouse gas emissions. Some of these issues are very important. OTED clearly wants EFSEC to retain its ability to consider alternatives to petroleum pipeline transport, i.e. need for the pipeline. Because of the number of potential energy issues, impacted differently by different types of facilities, OTED's preferred position is to maintain the status quo - not to address the issue in rule, but to have EFSEC continue to consider each application on a case-by-case basis. That position is not preferred by all participants in the standards process, and admittedly, it does not achieve improved certainty as sought by the Council. By limiting the issue to thermal generating plants, and limiting the number of issues addressed by the standard, OTED has developed a standard it can support.

State Energy Policy

For various reasons, the legislature has established explicit policy direction for energy production and use. For example:

> "The legislature finds and declares that it is the continuing purpose of state government, consistent with other essential considerations of state policy, to foster wise and efficient energy use and to promote energy self-sufficiency through the use of indigenous and renewable energy sources…" (From RCW 43.21F.010 Legislative finding and declaration),
>
> and,
>
> "It is the policy of the state of Washington that:
> (1) The development of a diverse array of energy resources with emphasis on renewable energy resources shall be encouraged…
> (4) Energy conservation and elimination of wasteful and uneconomic uses of energy and materials shall be encouraged, and this conservation should include, but is not limited to, resource recovery and materials recycling….
> (7) The state energy strategy shall provide primary guidance for implementation of the state's energy policy…." (From RCW 43.21F.015 State Policy).

State law also makes OTED the official state agency responsible for coordinating implementation of the State Energy Strategy (RCW 43.21F.045(2)(g)). The current State Energy Strategy calls the assessment of need for a project one of the key points that should be looked at in facility siting. In addition, the strategy recognizes conservation and improved efficiency as the top priority resources for Washington to acquire. The state initiated review of the State Energy Strategy on

June 21, 2002. While it is too soon to say what the details of the strategy will be, they will undoubtedly remain consistent with statutory support for efficiency and renewable resources.

Regarding Need for the Project

Historically, this aspect of need is the one most often addressed in energy facility siting. It is also the one that most clearly relates to state energy policy, i.e. the more efficiency is acquired, the less generation is required. Therefore if there are substantial cost-effective efficiency resources available in the region, generation should not be built in its place, ergo there is no need for the project. This is an oversimplification of complex markets, but the general concept is valid.

The goal of the standard is not to perfectly regulate the acquisition of efficiency resources and generating resources. Rather, the goal is to ensure that the worst-case scenario does not occur, i.e. that we do not regularly site generating facilities while large, cost-effective efficiency resources go unacquired. This can be achieved one of two ways; by tracking regional efficiency acquisition targeted by the Northwest Power Planning Council (NWPPC) and setting a reasonable threshold, or by ensuring that the output of the project is acquired by utilities or companies that have quality integrated resource plans. If neither measure is met, the standard would allow applicants to mitigate the underachievement or lack of a plan and obtain a site certificate.

Regarding Need for a Particular Type of Facility

While OTED would like to see a standard for renewable resources similar to that for efficiency, the time does not seem right. Having an integrated resource plan would suffice for that standard too, but there are as yet no explicit targets for renewable resource acquisition set by the NWPPC. That is likely to change, and is being discussed as part of the development of the 5th NW Power Plan. If such targets are set, OTED will consider proposing a renewable resource standard to EFSEC.

Regarding Need for a Project at a Particular Location

While clearly a siting issue, there are many factors other than energy issues that come into play when considering a specific location for thermal generating plants. While it is generally better for the electricity system as a whole to site generating facilities near load, there are other reasons for siting such facilities away from load centers. Therefore the standard does not address this issue.

Regarding Greenhouse Gases

OTED supports establishing a separate greenhouse gas mitigation standard, but would allow efficiency mitigation (on an per ton reduction basis) to count towards greenhouse gas mitigation.

The Standard

This is meant to be an example of the kind of standard that could be written. Numbers and percentages are relatively arbitrary and meant for discussion. Text is not sacrosanct.

WAC 463-XX-XXX Standards - Consistency with State Energy Policy. Energy projects must be consistent with state energy policy. The applicant must demonstrate consistency by meeting the following standards, or mitigate if the standards are not met.

(1) Thermal Generating Projects:

(a) The standard is met, if the region has acquired a threshold of at least 60 percent of annual efficiency resources targeted for acquisition by the Northwest Power Planning Council in the Northwest Conservation and Electric Power Plan. By January 1 of each year, the Council (EFSEC) shall adopt a threshold calculation that shall apply to all applications made during the year.

(b) If the threshold calculation indicates that the region has not acquired the necessary efficiency resources to meet the standard, the standard is met if the project is being developed, or at least 70 percent of the output of the project is being purchased for at least ten years, by an entity that has a qualifying integrated resource plan, and the project is of the type and scope recommended by the plan for imminent acquisition.

(c) If neither (a) nor (b) are met, mitigation shall be required in the following manner:

(i) The applicant may invest in or pay towards the acquisition of efficiency resources according to the following formula: Project Estimated Average Annual Generation in kWh x 2.5 percent x $0.025.

(d) Mitigation for the acquisition of efficiency resources can be applied to mitigation for greenhouse gases.

Example:

- ?? Project Estimated Average Annual Generation in kWh equals: Capacity in MW (600) x Availability at 80% (.80) x 1000 (change to kilowatts) x 8760 (change to kWh) = 4,204,800,000 kWh.
- ?? 2.5 percent (0.025) is the percentage of project generation that will be acquired as efficiency.
- ?? $0.025/kWh is the cost at which the NWPPC estimates 1500 MW of regional efficiency resources are available.
- ?? 4,204,800,000 x .025 x .025 = $2,628,000.00

The standard may require some definitions, for example:

Qualifying Integrated Resource Plan – Utilities Commission or Utility Board approved public process or equivalent public process.

PRELIMINARY DRAFT OF JUNE 26, 2002
See drafting notes in footnotes[3]
Rules of the Energy Facility Site Evaluation Council
Relating to Alternative Dispute Resolution

WAC 463-*-005 Alternate dispute resolution.** The council supports parties' efforts to resolve disputes without the need for litigation when doing so is lawful and consistent with the public interest. Alternate dispute resolution (ADR) includes any mechanism to resolve disagreement without full contested hearings or litigation.[4]

(1) The council will not delegate to parties the power to make final decisions, but will retain the authority to approve any proposed settlement or agreement.

(2) Parties to a dispute or disagreement on a matter that is under the council's jurisdiction[5] may agree to negotiate with any other parties at any time without council oversight. The council may direct parties to meet or consult under WAC 463-***-006(1) and may establish a collaborative process under WAC 463-***-007. The council encourages parties to use and experiment with other forms of ADR subject to the council's approval.

(3) The council may direct parties to a proceeding[6] to enter negotiations aimed at resolving issues in the proceeding.

(4) In any negotiation, the following apply unless all participants agree otherwise:

(a) The parties, as their first joint act will consider the council's guidelines for negotiations, set out in a policy statement adopted pursuant to RCW 34.05.230,[7] and determine the ground rules governing the negotiation;

(b) No statement, admission, or offer of settlement shall be admissible in evidence in any formal hearing before the council without the consent of the participants or unless necessary to address the process of the negotiations;[8]

(c) Parties may agree that information be treated as confidential to the extent provided in a council protective order;[9] and

---

[3] These draft rules are patterned on the WUTC's rules. WUTC commissioners, Staff and AAGs should be consulted regarding their views of the strengths and weaknesses of their current rules.

[4] As presently drafted, these rules would apply to all EFSEC proceedings, not just those involving the siting of thermal power projects.

[5] In this subsection, "parties" may not have to be "parties to a proceeding" and accordingly, this subsection could be used prior to the initiation of adjudicative proceedings.

[6] This section, which authorizes the council to "order" negotiations, requires that parties be "parties *to a proceeding.*" Until a party has become a party to a particular proceeding, the council may lack jurisdiction over that party sufficient to require the party to participate in negotiations. Thus it may be impossible for the council to mandate ADR for anyone other than the Applicant until the council has taken interventions in a proceeding.

[7] Review WUTC's guidelines. Consider whether EFSEC should also adopt guidelines, or whether to delete this reference to guidelines.

[8] Although *parties* could further agree that statements would not be admissible in litigation or otherwise disclosed, such a requirement may not be appropriate for inclusion in a WAC because it might exceed EFSEC's jurisdiction.

[9] The WUTC has a standard form of protective order that it uses for of evidence that parties wish to keep confidential because, for example, it is highly sensitive from a commercial standpoint. If EFSEC uses protective orders, this reference could be kept. Otherwise, the words following "confidential" in this subsection should be deleted.

(d) Participants should advise each other, any mediator or facilitator, and the council, if the negotiation is sanctioned by the council, if the negotiation is without substantial prospects of resolving the issue or issues under negotiation.

WAC 463-*-006 Settlement conference; settlements.** The council favors the voluntary settlement of disputes within its jurisdiction. It will approve settlements when doing so is lawful and when the result is appropriate and consistent with the public interest in light of all the information available to the council.[10]

(1) In support of a voluntary settlement of any dispute within the council's jurisdiction, the council may invite or direct the parties to confer among themselves or with a designated person. Settlement conferences shall be informal and without prejudice to the rights of the parties. Any resulting settlement or stipulation shall be stated on the record of the conference or submitted to the council in writing and is subject to approval by the council.

(2) Settlements. A settlement is an agreement among two or more parties to a proceeding to resolve one or more issues.

(a) The council may exercise discretion whether to accept a proposed settlement for its review. If the council accepts a settlement for review in an adjudication, the council will schedule a time at a hearing session for parties to present the settlement and for the council members to inquire about it, unless the council believes such a session to be unnecessary for it to exercise informed judgment upon the proposal.

(b) Partial settlement. An agreement of all parties on some issues may be presented as a partial settlement for council review, and remaining matters may be litigated.

(c) Multiparty settlement. An agreement of some, but not all, parties on one or more issues may be offered as their position in the proceeding, with the evidentiary proof that they believe appropriate to support it, for council review. Nonsettling parties may offer evidence and argument in opposition.

(d) Parties shall advise the council when they have reached a partial or multiparty settlement and may suggest preferred procedural alternatives for review of the settlement. The council will determine the appropriate procedure.

WAC 463-*-007 Collaboratives.[11]** (1) A collaborative is a negotiation sanctioned by the council in which interested persons work with each other and representatives of council staff to achieve consensus on one or more issues assigned to or identified by the collaborative participants. Membership in the collaborative must reflect the interests reasonably expected to be substantially affected by the result of the collaborative.

(2) When beginning a collaborative, participants must address procedural guidelines for negotiations that the council has set out in a policy statement.[12] Communication between the council and the collaborative participants may be made through the council secretary. Changes in the orientation or membership of the collaborative, the issues it will address, or similar matters,

[10] The WUTC's statutory mission is to regulate in the public interest. Consider whether this sentence should be revised so that it is keyed to chapter 80.50 RCW.

[11] These rules relating to collaboratives could be used in the pre-intervention phase of a proceeding, although there would be a risk that parties later seeking intervention would assert that their interests were not adequately represented by the participants in the collaborative.

[12] Review WUTC guidelines and consider whether EFSEC should adopt guidelines or whether this portion of the ruled should be deleted.

may be made with council knowledge and consent by letter from the secretary or by other means with the agreement of collaborative participants and the council.

WAC 463-*-010 Stipulation as to facts.** A stipulation is an agreement among parties as to one or more operative facts in a proceeding. The council encourages parties to enter stipulations of fact. The parties to any proceeding or investigation before the council may agree upon the facts or any portion of the facts involved in the controversy. The parties to a stipulation may file it in writing or enter it orally into the record. This stipulation, if accepted by the council, shall be binding upon the parties. The parties may present the stipulation as evidence at the hearing. The council may reject the stipulation or require proof of the stipulated facts, despite the parties' agreement to the stipulation.

K:\99980\40000\ET\ET__O21LG 10/2/02 10:46 AM

Effect of Standards Proposal June 20, 2002

The Council acknowledges the following language from RCW 80.50.010, stating the energy policy of the state of Washington: "The legislature finds that the present and predicted growth in energy demands in the state of Washington requires the development of 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 the natural resources of the state.

It is the policy of the state of Washington to recognize the pressing need for increased energy facilities, and to ensure through available and reasonable methods, that the location and operation of such facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.

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

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

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

(3) To provide abundant energy at reasonable cost.

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

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

In formulating WAC Chapter 463-14, the Council has been mindful of the objectives of RCW 80.50.010. The Council has specifically incorporated the objective of balancing the increasing demands for energy facility location and operation with the broad interests of the public into the body of WAC Chapter 463-14. Since such balance is incorporated into WAC Chapter 463-14, an applicant who demonstrates compliance with the rules, standards and procedures set forth in WAC

463-14 will not be required to demonstrate any further "balance" of interests and the Council will not engage in a separate balancing analysis for EFSEC applications.