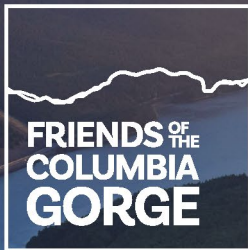


**Respondent No:** 5**Login:** Anonymous**Email:** n/a**Responded At:** Jun 22, 2025 23:15:22 pm**Last Seen:** Jun 22, 2025 23:15:22 pm**IP Address:** n/a

Q1. First & Last Name	Nathan Baker
Q2. Email address	nathan@gorgefriends.org
Q3. Are you part of an Agency or Organization?	Yes (please specify) Friends of the Columbia Gorge
Q4. Share any comment	Please see the attached comments of Friends of the Columbia Gorge.
Q5. Upload your document or picture (optional)	https://s3-us-west-1.amazonaws.com/ehq-production-us-california/77316d0059e31a8d0fe55a6fdf67b394ba57d0a3/original/1750659262/fd4eb5e9a148eab33a6a43e78780bcff_2025.06.22%20Friends_%20Comments%20on%20Delegating%20Certain%20Plan%20Approvals%20to%20the%20EFSEC%20Director.pdf?1750659262
Q6. Upload your document or picture (optional)	not answered
Q7. Upload your document or picture (optional)	not answered
Q8. Upload your document or picture (optional)	not answered



June 22, 2025

Energy Facility Site Evaluation Council

Submitted via EFSEC website at <https://comments.efsec.wa.gov/june-2025-delegating-plan-approvals-to-efsec-director-comments>

Re: Proposed Policy entitled “Delegating Certain Plan Approvals to the EFSEC Director” (Proposed Policy #16-01)

Dear Chair Beckett and Members of the Council:

Friends of the Columbia Gorge (“Friends”) submits the following comments in opposition to the proposed policy entitled “Delegating Certain Plan Approvals to the EFSEC Director” (Proposed Policy #16-01) (“Proposed Policy”). Friends is a nonprofit organization with approximately 4,000 members dedicated to protecting and enhancing the resources of the Columbia River Gorge, and with strong interests in responsible energy generation and the proper implementation of state law governing the approval, construction, and modification of large energy facilities in Washington.

Friends strongly opposes the Proposed Policy and urges the Council¹ to **not** adopt it. Among other problems, the Proposed Policy would unlawfully delegate certain of the Council’s powers and responsibilities to the EFSEC Director and would establish a precedent for similar unlawful delegations in the future. The Proposed Policy would also unlawfully exempt important agency decisions from public involvement and insulate them from public scrutiny by allowing the Director to make a multitude of decisions under the cover of darkness, with unfettered discretion whether to even involve the Council in the decision-making process, and with no required procedures for public participation. In addition, because the Proposed Policy would substantially conflict with and effectively change the Council’s Rules, it cannot be adopted without the Council first going through the required rulemaking procedures. Moreover, despite the fact that the Proposed Policy would result in sweeping changes to the Council’s Rules and procedures, EFSEC has failed to provide adequate notice of the proposed action and has provided only a six-day notice and comment period on the Proposed Policy, which is insufficient to inform and involve the public in the important regulatory questions presented by the Proposed Policy. For these and other reasons, the Council should reject the Proposed Policy.

¹ This letter uses the term “Council” to denote the Council, “Director” to denote the EFSEC Director (a.k.a. the EFSEC Manager), and “EFSEC” to refer to the agency as a whole.

1. EFSEC has failed to provide adequate notice of the proposed action.

EFSEC has failed to provide adequate notice of the proposed action. On June 16, 2026, EFSEC disseminated an email with the subject heading “EFSEC Upcoming Action Item: Delegating Plan Approvals to the EFSEC Director available for comment.” Nowhere in this email is the proposed action described. EFSEC also posted on its website at <https://www.efsec.wa.gov/council-information/council-meetings> an item under “Upcoming Action Items” entitled “Delegating Plan Approvals to the EFSEC Director,” which links to a document entitled “Delegating Certain Plan Approvals to the EFSEC Director” with the file number Policy #16-01 and a date of June 25, 2025, available at https://www.efsec.wa.gov/sites/default/files/181034/00027/202506_DelegationPlanApproval_update_Clean.pdf. And at some point thereafter, EFSEC posted the “[c]omplete” meeting packet for the Council’s June 25, 2025 meeting at https://www.efsec.wa.gov/sites/default/files/181034/00200/20250625_CompletePacket.pdf. The meeting packet includes a copy of the aforementioned document entitled “Delegating Certain Plan Approvals to the EFSEC Director” dated June 25, 2025.

Nowhere in any of these materials (not in EFSEC’s email, not on its website, not in the document dated June 25, 2025, and not in the meeting packet) is the proposed action described. The document entitled “Delegating Certain Plan Approvals to the EFSEC Director” is not even denoted or referenced anywhere as a draft or proposed policy.

After extensive research, Friends was able to determine that the document entitled “Delegating Certain Plan Approvals to the EFSEC Director” and numbered Policy #16-01 in fact contains (unidentified) proposed *revisions* to a policy previously adopted by the Council in 2016, which is available at the following link: https://www.efsec.wa.gov/sites/default/files/181034/00027/20160304_Delegationplanapproval.pdf. However, EFSEC has not provided any explanation to the public that the proposed action is to modify a 2016 policy. On the face of it, the document entitled “Delegating Certain Plan Approvals to the EFSEC Director” appears to be an entirely new policy.

Nor has EFSEC released a track-changes or redline version of the language that is proposed to be added to and/or deleted from the 2016 policy as part of the proposed action. EFSEC could easily have done this but instead chose to solely release a “clean” version of the policy as it would read in its entirety, as if the proposed changes were already adopted. In other words, it is impossible to discern on the face of the document what language would be new or changed, and indeed what language is *proposed*. The net result is that it is impossible for the reviewing public to discern within the four corners of the only publicly released document what proposal is being proposed.

Again, as it stands, it is impossible to discern what proposed action(s) are being contemplated here. This is very misleading to the interested public and thwarts meaningful public participation. EFSEC should not “hide the ball” regarding its proposed actions.

EFSEC should remedy these severe notice problems by preparing and publicly releasing a track-changes or redline version of the policy, showing which language is proposed for

addition to or deletion from the 2016 policy. In the alternative, if EFSEC is instead proposing to repeal the 2016 policy in its entirety and replace it with a new policy, EFSEC will need to explain such changes as the proposed action. Either way, EFSEC will need to remedy these problems and provide a new or extended comment period.

2. The six-day comment period on the Proposed Policy violates applicable law and the due process rights of interested persons, and (if the Policy is not rejected outright) should be extended by at least 60 days.

EFSEC has provided only a six-day notice and comment period on the Proposed Policy, even though adoption of the Proposed Policy would result in sweeping changes to the Council's Rules and procedures applicable to industrial-scale energy projects throughout the State of Washington. This woefully insufficient comment period violates applicable law and the due process rights of interested persons. In addition, by providing only a six-day comment period, EFSEC has deprived Friends of the opportunity to meaningfully inform Friends' members and supporters about the Proposed Policy and solicit their comments.

Moreover, three of the six days included in the six-day comment periods were weekend days (Saturday and Sunday, June 21 and 22, 2025) and one of the holidays was a federal and Washington state holiday (Juneteenth) (June 19, 2025). Thus, the six-day comment period provided by EFSEC was actually only three working days.

Apparently, EFSEC expected potentially interested persons and entities to immediately read the public notice, drop everything else they are working on, review the Proposed Policy, intuit or understand what the proposed action actually is (which is far from clear as discussed above), research the lawfulness and evaluate the policy implications of the proposed action, notify other potentially interested persons, and submit informed comments—all within six days (three business days). This is no way for a responsible state agency to do business.

EFSEC's actions and procedures here violate the Washington Open Public Meetings Act, which requires EFSEC to provide to the public a "reasonable" amount of time to review and submit written comments on proposed agency actions. RCW 42.30.240(1). Under the circumstances, a comment period consisting of only three business days on this Proposed Policy is **not** reasonable.

Moreover, consider the context of the Proposed Policy. EFSEC provided only six days (three business days) for comments on the Proposed Policy, even though adoption of the Proposed Policy would forever change the Council's Rules and procedures and, in turn, forever bar the public's ability to comment to the Council on countless site-specific project plans in the future.² This will exponentially compound the deprivations of any meaningful comment opportunity; the repercussions will reverberate for decades to come.

² The Proposed Policy effectively exempts numerous categories of proposed plans and applications from any public procedures by making them "subject to EFSEC Director approval" without prescribing any procedures for that review (other than giving the Director unfettered discretion whether to involve the Council in the decision-making process). (Proposed Policy at 2–3.)

Furthermore, Friends asks whether and why there is a perceived need for urgency here, such that EFSEC is short-changing the public on their rights to be meaningfully informed and fully participate in the Council's activities? EFSEC has not even attempted to justify its curtailment of public commenting rights, for example, by claiming any emergency necessitating immediate action. Instead, the agency is all but ignoring the public and attempting to take unlawful shortcuts in the law.

EFSEC is violating applicable law by providing only six days (three business days) for notice and comment on the Proposed Policy, and adoption of the Proposed Policy would further violate applicable law because the result would be to provide **no** notice and comment opportunities in the agency review of numerous project plans, which review would be unlawfully delegated to the EFSEC Director by the Proposed Policy. Among other authorities, providing only a single, six-day comment period for an unlawful policy that, if and when adopted, would bar any further public participation in the future, violates RCW 80.50.010(6), which specifies in pertinent part that EFSEC is required to "[e]ncourage meaningful public comment in energy facility decisions." Providing only a single six-day notice and comment period on a sweeping rule change that would have far-reaching implications for decades to come on numerous project plans, for numerous projects under the Council's jurisdiction, can hardly be said to encourage meaningful public comment. This egregiously short comment period thwarts the Legislature's intent and violates applicable law.

In order to achieve compliance with applicable law and as a matter of sound public policy, the Council should reopen and extend the comment period on the Proposed Policy by at least 60 days. A comment period of at least 60 days is warranted for matters like this involving important policy considerations that can affect all energy projects under Council jurisdiction for decades to come. Failure to enlarge the six-day comment period will violate applicable law and will violate the due process rights of persons interested in the Council's review of energy projects.

3. The Proposed Policy would unlawfully delegate to the EFSEC Director exclusive approval authority over numerous project plans and applications, and without providing any notice and comment opportunities to interested persons, all in violation of applicable law and stakeholders' due process rights.

The Proposed Policy would delegate to the EFSEC Director the exclusive approval authority over numerous project plans and applications in violation of applicable law. Furthermore, the Proposed Policy fails to provide or ensure any notice and comment opportunities to interested persons in the agency's decision-making processes. The proposed delegations would be unlawful and cannot be approved by the Council.

The Proposed Policy cites RCW 80.50.030(2)(b) as statutory authority:

The Legislature has recognized that some work of the Council will be performed by Council staff. RCW 80.50.030(2)(b).

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(Proposed Policy at 2.) But that statutory section was repealed by the Legislature in 2022. Laws of 2022, ch. 183, § 3.

Thus, the Proposed Policy cites no valid statutory authority. Although the now-repealed language at RCW 80.50.030(2)(b) never authorized the Council to delegate its decision-making (approval and denial) powers to the Director, assuming for the sake of argument that it did, that authority has now been repealed by the Legislature.

The same legislation that repealed RCW 80.50.030(2)(b) in 2022 also adopted RCW 80.50.360, which sets forth specific duties of the Council Chair and the Director. Laws of 2022, ch. 183, § 4. Although RCW 80.50.360 provides certain authority to the Director, that authority is limited to “overseeing the *operations* of the [C]ouncil” (which is different from the decision-making approval authority of the Council) and to carrying out certain duties “as delegated by the [C]hair,” including the Chair’s “status as appointing authority,” which means the Chair’s ability to make appointments and other personnel decisions. *See* House Bill Report, ESHB 1332 (2019), available at <https://lawfilesexternal.wa.gov/biennium/2019-20/Htm/Bill%20Reports/House/1332-S.E%20HBR%20APH%2019.htm> (referring to the EFSEC Chair’s “supervisory and appointing authority over EFSEC staff”) (emphasis added).³

Importantly, the Chair is not empowered to delegate to the Director the decision-making authority of the entire Council. Nor can the Council delegate such authority to the Chair, or to the Director. Instead, only certain authorities may be so delegated as authorized by the Legislature, such as the power to “authorize expenditures from the [EFSEC] account” that is “in the custody of the state treasurer, RCW 80.50.390, and to make offers to federally recognized tribes to “conduct government-to-government consultation to address issues of concern raised by such a tribe” pertaining to proposed energy facilities, RCW 80.50.060(8).

There is no language anywhere in the Energy Facility Site Locations Act (“EFSLA”) authorizing any broad delegation by the Council of its discretionary decision-making powers and authority to the Director or to EFSEC staff. For such a delegation to be lawful, it would need to have been authorized by the Legislature. *See, e.g., McNiece v. Washington State University*, 73 Wn. App. 801, 802–05, 871 P.2d 649 (1994) (construing RCW 28B.10.528 (1994), which provided that “[t]he governing boards of institutions of higher education shall have power, when exercised by resolution, to delegate to the president or his designee, of their respective university or college, any of the powers and duties vested in or imposed upon such governing board by law,” to mean that “the Legislature must have contemplated a wide delegation of those powers and duties”). But here, with no such broad delegation authority provided by the Legislature, there can be no such delegation.

In summary, nothing in EFSLA authorizes the Council to delegate its decision-making powers and authorities to the Director. To the contrary, Council staff, including the Director,

³ *See also McNiece v. Washington State University*, 73 Wn. App. 801, 871 P.2d 649 (1994) (evaluating whether state employee was “laid off by a person with ‘appointing authority.’”); *Matson v. City of Tacoma Civil Service Bd.*, 75 Wn. App. 370, 375–77, 880 P.2d 43 (1994) (evaluating whether an “appointing authority” was required to fill unoccupied employee positions and was empowered to cancel personnel requisitions).

may merely “review all information submitted,” “*recommend* resolutions to issues in dispute,” and “make *recommendations* to the [C]ouncil.” RCW 80.50.085 (emphasis added).

Indeed, the Council’s Rules also specify that the Director “*administers* the decisions of the [C]ouncil,” rather than making those decisions herself. WAC 463-10-010(6) (emphasis added). Except in very limited circumstances (such as SEPA threshold determinations), the EFSEC staff and Director are not approval authorities or decision makers. Rather, the staff play an advisory role in the Council’s decision-making process. The Proposed Policy would exceed the Council’s statutory authority by unlawfully delegating the Council’s decision-making powers and authority to the Director.

The Proposed Policy also cites and relies on the definition of “Council” in WAC 463-10-010. (Proposed Policy at 2.) That definition of “Council” is “the . . . [C]ouncil created pursuant to chapter 80.50 RCW and, where appropriate, to [*sic*] the staff of the [C]ouncil.” This definition is a far cry from an authorization of the delegation of the Council’s decision-making authority to any of the Council staff, including the Director—let alone such an authorization by the Legislature. This rule language simply requires that the Council Rules should be read, “where appropriate,” to refer to the Director or Council staff. For example, because the Director is authorized to process public records requests on behalf of the Council, WAC 463-06-070, references in the Rules to the “[C]ouncil” in the public records context may also, where appropriate, refer to the Director. This definition of “Council” does not, in and of itself, create any general or specific delegations of Council authority to the Director or other staff.

The Proposed Policy would unlawfully delegate to the Director the decision-making authority to approve or reject numerous types of plans and applications. (*See* Proposed Policy at 2–3.) Such a delegation would be in direct conflict with WAC 463-68-050, which requires a certificate holder to “provide the plans and specifications required by the site certification agreement *to the council for approval*” (emphasis added). This Council Rule expressly retains the Council’s decision-making authority with the Council, and certainly does not delegate (or even allow the delegation of) that authority to the Director. To delegate that authority to the Director would be in direct conflict with WAC 463-68-050.

The Proposed Policy would not only violate WAC 463-68-050 by unlawfully delegating to the Director the decision-making and approval authority for numerous types of project plans and applications, it would also give the Director unfettered discretion whether to involve the Council in the decision-making process by forwarding these plans and applications to the Council for potential Council approval rather than Director approval. The Council might, under the Proposed Policy, decide at that point to exercise its authority to “*approv[e]*”⁴ such plans. (Proposed Policy at 2.) But unless the Director chooses to forward a plan or application to the Council in the first place, the Council would never have the opportunity to exercise such authority: “For plans subject to EFSEC Director approval, *the Director shall consider whether* any individual plan should be forwarded to the Council for review and, at the Council’s discretion, Council approval.” (Proposed Policy at 2 (emphasis added).) This is the hallmark of

⁴ Curiously, there is no reference in the Proposed Policy to the Council *denying* or *rejecting* such plans. Instead, the Proposed Policy refers only to “Council *approval*.” (Proposed Policy at 2 (emphasis added).)

an arbitrary and capricious policy, because it leaves it completely to the whims of the Director which applications and plans should be forwarded in advance to the Council (prior to a Director decision), with no criteria, guidelines, or parameters for which types of applications and plans should be so forwarded.

The Proposed Policy is also unlawful because it would result in agency actions by the Director, without providing any procedures or participation (notice and comment) rights to the public. Decisions by the Director whether to approve plans and applications would constitute “agency actions” as defined by the Washington Administrative Procedure Act, because they would be “the implementation or enforcement of a statute and the “application of an agency rule or order.” RCW 34.05.010(3). Yet, despite purporting to authorize the Director to take agency actions, the Proposed Policy does not require any notice to interested persons of either the plans and applications themselves or of the Director’s decisions approving or rejecting them, nor does it provide any opportunities for interested persons to submit comments to EFSEC in advance of a Director decision. This violates the public’s rights to meaningful public participation in agency decision-making as well the due process rights of adjacent landowners and other stakeholders. Simply put, the Proposed Policy would allow the Director to make important decisions under cover of darkness, and the interested public may not even find out about these decisions until long after the fact.

The approaches taken in the Proposed Policy are inconsistent with the Washington Supreme Court’s holdings in *Friends of the Columbia Gorge, Inc. v. EFSEC*, 178 Wn. 2d 320, 310 P.3d 780 (2013). In that case, the court stated that any approval of an application for site certification “is the starting point of a longer process and more specific decisions are addressed throughout the process,” and also noted EFSEC’s “ongoing oversight of the project.” 178 Wn. 2d at 336. Given this “longer process” and the required “more specific [subsequent] decisions,” the court held that Friends “could not be ‘substantially prejudiced’ by claimed application shortcomings” in an initial application for site certification. *Id.* (quoting RCW 34.05.570(1)(d)). The court also held that most of the Council’s substantive Rules “apply to the [site certification agreement] and the later ongoing operation and construction of the facility” rather than the Council’s initial recommendation. *Id.* at 340.

Thus, the Washington Supreme Court held in *Friends v. EFSEC* that many of the Council’s substantive rules are “ongoing operation standards” that do not come into play until later, starting with the submission by a site certificate holder of plans and specifications to obtain approval for construction of the facility. *Id.* As a result, it was “not ripe” for Friends to challenge compliance with these standards at the time an application for site certification is approved. *Id.* at 343, 348 & n. 17.

Given this context of the Washington Supreme Court’s holding in *Friends v. EFSEC*, adoption of the Proposed Policy would result in the creation of an agency shell game, whereby interested persons would not be allowed to challenge compliance with many of the Council’s rules at the time a site certification is granted, and yet, under the Proposed Policy, interested persons would also not be allowed to participate in or influence—or even timely learn about, let alone challenge, subsequent agency decisions applying these same standards. The net result is

that the public would be completely shut out of EFSEC's decision making. The Council should not engage in such unlawful shell games by adopting the Proposed Policy.

4. Because the Proposed Policy is a disguised rule, the Council cannot adopt it without first engaging in rulemaking to revise and adopt Council Rules.

The Proposed Policy is self-labeled as a "policy." But it does not qualify as a "policy statement" pursuant to the Washington Administrative Procedure Act, which defines "policy statements" as "a written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to implementation of a statute or other provision of law, of a court decision, or of an agency order, including where appropriate the agency's current practice, procedure, or method of action based upon that approach," RCW 34.05.010(15), and which states that "[c]urrent . . . policy statements are advisory only," RCW 34.05.230(1).

The Proposed Policy admits that "[a]doption of this policy *formalizes the delegation* of [the Council's review and approval authorities] to the EFSEC Director and specifies the type of plans to which this delegated authority extends." (Proposed Policy at 2 (emphasis added).) The Policy would also functionally exempt a lengthy list of types of agency decisions (to be made by the Director) from having to go through any type of notice and comment or public participation procedures.

Furthermore, as discussed above, the Proposed Policy directly conflicts with WAC 463-68-050, which retains with the Council its review and approval authority over plans and specifications required by site certification agreements, and which does not authorize the delegation of such authority to the Director. The Proposed Policy does much more than articulate an advisory approach or practice. It effectively amends the Council's Rules by delegating the Council's decision-making authority to the Director for numerous types of plans and applications, and by in the process exempting these plans and applications from public participation and advance Council review. Although self-characterized as a "policy," it qualifies as a "rule," because it is an "agency directive . . . or regulation of general applicability . . . which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of . . . privileges conferred by law." RCW 34.05.010(16). The Proposed Policy lists numerous specific categories of types of decisions for which the Council completely delegates its decision-making powers and "formalizes [that] delegation" across the board for all such future decisions. (Proposed Policy at 2–3.) This proposed broad, sweeping, binding⁵ delegation governing the review of entire classes of applications and project plans is a "directive of general applicability," which makes it a rule rather than a policy statement. *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn. 2d 488, 495, 886 P.2d 147 (1994) (citing *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 647–48, 835 P.2d 1030 (1992)).

⁵ Compare with EFSEC's Policy #15-01, entitled "Enforcement Guidance," which states that "[t]his document . . . is *not intended to be binding* as a formally adopted rule" and specifies that "[t]he Council retains discretion to apply and adapt its enforcement efforts in individual cases." EFSEC Policy #15-01 at 1 (available at https://www.efsec.wa.gov/sites/default/files/181034/00027/20150818_EnforcementGuidelines.pdf).

When review of proposed plans and applications for projects are submitted to the Council for review, the public is guaranteed, at the very least, the opportunity to comment to the Council in advance of Council action. *See* RCW 42.30.240(1). In contrast, the Proposed Policy would alter that required practice by delegating the Council’s discretionary, decision-making authority to the Director, and thereby insulating the review and decision making for numerous types of plans and applications from *any* public process or public involvement. This conflicts with WAC 463-68-050 and is thus effectively “the amendment or repeal of a prior rule,” which is, itself, deemed to be a “rule.” RCW 34.05.010(16).

The Proposed Policy is a rule, and therefore cannot be adopted without going through agency rulemaking pursuant to the required rulemaking procedures of the Washington Administrative Procedures Act, including providing the public with statutorily prescribed notice and comment rights and opportunities. *See* RCW 34.05.310–.395. “These procedures allow members of the public to meaningfully participate in the development of agency policies that affect them.” *Nw. Pulp & Paper Ass’n v. Dep’t of Ecology*, 200 Wn.2d 666, 672, 520 P.3d 985 (2022). EFSEC has not followed these required procedures here. Unless and until EFSEC does so, it cannot adopt the Proposed Policy.

Even if the Proposed Policy did qualify as a policy statement rather than a rule, it should still be enacted via rule, per the guidance of the Washington Legislature. Unbeknownst to Friends until now, the Council apparently in 2016 enacted a policy similar to the Proposed Policy. EFSEC now apparently proposes to expand and modify that 2016 policy and retain all of this as a mere “policy,” rather than incorporate any part of the policy into the Council Rules. Yet the Legislature has specified that “[t]o better inform and involve the public, an agency is encouraged to convert long-standing interpretive and policy statements into rules.” RCW 34.05.230(1).

Pursuant to this guidance, if the Council wishes to formally delegate any of its decision-making and approval powers and authorities to the Director, and assuming for the sake of argument that the Council has statutory authority to do so, the Council should pursue such significant revisions of its procedures as rules rather than as policy statements. The public is entitled to rely on the Council’s Rules to specify whom at EFSEC has decision-making authority over which types of matters and what the applicable review and decision-making procedures are, without needing to be aware of obscure policy statements for such important matters. Adoption of the Proposed Policy as a “policy statement” rather than as a Council Rule would not only be unlawful, it would also be an imprudent and disfavored way to conduct agency review proceedings.

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5. Conclusion

For the reasons stated above, the Council should reject the Proposed Policy.

Sincerely,



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