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Building a Better Process: Improving Washington State's "Energy Facility Site Evaluation Council" Review Procedures to Better Encourage Public Participation

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BUILDING A BETTER PROCESS: IMPROVING WASHINGTON STATE'S "ENERGY FACILITY SITE EVALUATION COUNCIL" REVIEW PROCEDURES TO BETTER ENCOURAGE PUBLIC PARTICIPATION

*Gregory L. Porter**

ABSTRACT: Washington State's Energy Facility Site Evaluation Council (EFSEC) is responsible for siting the state's energy facilities. The current process can frustrate robust public participation. One reason is that applicants must submit a single, comprehensive, application and these submissions have grown to enormous size and complexity. Local groups struggle with responding to these complex applications in time. Additionally, the council uses quasi-judicial adjudication where the applicant is represented by professional counsel, but local groups may lack the financial support to retain comparable counsel.

Washington should learn from how New York overhauled its energy facility siting process in 2011. New York's Board on Electric Generation Siting and the Environment (BEGSE) uses a pre-application that identifies key issues and initiates dialogue between the affected parties. Each application then receives a neutral facilitator who mediates disputes between parties during the process. Subsequently, BEGSE provides funds to interested local groups, ensuring they can fully participate in the adjudication. By adopting these procedures for the EFSEC, Washington would improve local and public participation.

I.	INTRODUCTION.....	91
II.	EFSEC AND ITS PROBLEMS FACILITATING MEANINGFUL PUBLIC PARTICIPATION.....	95
	A. The EFSEC's Existing Framework.....	96
	B. Adjudication under EFSEC and Washington's APA.....	99
	C. EFSEC's Struggles Facilitating Meaningful Public Participation	100
II.	NEW YORK'S SITING BOARD AND ITS PROCEDURES FOR PUBLIC PARTICIPATION.	103
	A. BEGSE's Pre-Application Facilitates Robust Public Participation	104
	B. BEGSE Supports Public Participation by Providing Public Funds.....	107
	C. BEGSE's "Presiding Examiner" Who Manages the Application Procedure.....	108
III.	IMPROVING THE EFSEC WITH LESSONS FROM NEW YORK.....	109
	A. Crafting a Pre-Application for EFSEC Using the BEGSE's Model	110
	B. Providing Public Funds for EFSEC's Process As	

Examined in the BEGSE's Procedure.....	112
C. Creating a Presiding Examiner for EFSEC	
Applications From the BEGSE's Example	113
IV. CONCLUSION	113

I. INTRODUCTION

There are two things people want from their energy providers: reliable power but minimal pollution. Considering America's appetite for electricity, second highest in the world,¹ generating all the power needed can make managing the pollution very difficult. In fact, thirty-two percent of all U.S. carbon dioxide emissions are from power plants.² These facilities also emit other pollutants—including sulfur oxides, nitrogen oxides, and even mercury³—that cause acute local harm.⁴

Due to the pollution that they generate, energy facilities frequently face challenges to their proposed location, their siting, when they apply for government permits. This resistance is especially stiff against nuclear plants,⁵ but even renewable

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1. The United States' estimated electricity consumption in 2014 was 4.103 trillion kilowatt per hour. *The World Factbook: United States*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last updated Jan. 12, 2017).

2. The EPA has calculated that thirty-two percent of the nation's carbon dioxide is evolved during electricity generation. See *Learn About Carbon Pollution from Power Plants*, ENVIRONMENTAL PROTECTION AGENCY, https://19january2017snapshot.epa.gov/cleanpowerplan/learn-about-carbon-pollution-power-plants_.html (last visited May 27, 2017) (linking to a snapshot of the article from January 19, 2017 because the original article has been pulled). Carbon dioxide is one of the most important pollutants because of its connection to anthropomorphic climate change, and it is regulated by the EPA under the "Clean Air Act" because of this danger it represents. See *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 40 C.F.R. § 1, 66496 (2009).

3. *Non-CO₂ Pollution from Coal*, CLEAN AIR TASK FORCE, <http://www.catf.us/fossil/problems/nonco2/> (last visited Dec. 30, 2016).

4. These acute pollutants cause severe public harm. For example, pollution from coal power kills an estimated 13,000 Americans every year. Conrad Schneider & Jonathan Banks, *The Toll from Coal: An Updated Assessment of Death and Disease from America's Dirtiest Energy Source*, CLEAN AIR TASK FORCE 9–10 (Sept. 2010), http://www.catf.us/resources/publications/files/The_Toll_from_Coal.pdf.

5. Almost no new nuclear power is being developed; the plant analyzed had been

and green energy facilities can face grueling siting challenges. In one notorious example, an eleven-turbine wind farm off the coast of Scotland has been fought for half a decade, with the litigation reaching all the way to the UK Supreme Court.⁶ Solar power also faces challenges in the courts⁷ and through the political process.⁸ Ultimately, every type of energy production, clean or dirty, can ignite local and national disputes over its siting.

States need a system for managing the inevitable power plant siting challenges. Washington manages them through a comprehensive state-wide system, the Energy Facility Siting Evaluation Council (EFSEC). Established in 1970 by the Thermal Power Plant Siting Act,⁹ the Council's purpose is to address the "pressing need for increased energy facilities, and

waiting 43 years for approval. Christopher Groskopf, *The United States' Newest Nuclear Power Plant Has Taken 43 Years to Build*, QUARTZ (May 11, 2016), <http://qz.com/681753/the-united-states-newest-nuclear-power-plant-has-taken-43-years-to-build/>.

6. Alexis Flynn, *Trump Loses Battle to Stop Wind Farm Near his Scottish Golf Resort*, WALL ST. J., Dec. 16, 2015, <http://www.wsj.com/articles/trump-loses-battle-to-stop-wind-farm-near-his-scottish-golf-resort-1450275439>.

7. *See, e.g.,* Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior, 755 F. Supp. 2d 1104 (S.D. Cal. 2010) (challenging the approval of a solar facility proposed for the California Desert Conservation Area, arguing they were not adequately consulted as required by the National Historic Preservation Act. The court granted a preliminary injunction, blocking the construction of the facility); California Unions for Reliable Energy v. U.S. Dep't of the Interior, No. CV 10-9932-GW(SSx), 2011 WL 7505030 (C.D. Cal. Nov. 9, 2011) (holding that plaintiffs lacked standing because their allegation that a thermal solar plant would threaten their water supply and damage a nearby scenic river was too speculative).

8. *E.g.,* Nevada significantly reduced how much the utility will pay solar customers for net metering and levied an ongoing fee to anyone who installs solar. These changes have made net metering far less lucrative, and now almost no new residential solar is being installed in the state. Net metering is when a household solar array sends excess power to the utility grid, which the utility agrees to buy. This means the solar generator is often paid by the utility at the end of the month. Diane Cardwell & Julie Creswell, *SolarCity and Other Rooftop Providers Face a Cloudier Future*, N.Y. TIMES, Feb. 10, 2016, <http://www.nytimes.com/2016/02/11/business/energy-environment/rooftop-solar-providers-face-a-cloudier-future.html>. In fact, the changes were controversial enough that the Nevada legislature is now on the precipice of reestablishing net metering as permanent state law. Sean Whaley, *Senate panel OKs Bill Aimed at Restoring Nevada's Rooftop Solar Industry*, LAS VEGAS REV. J., June 2, 2017, <https://www.reviewjournal.com/news/2017-legislature/senate-panel-oks-bill-aimed-at-restoring-nevadas-rooftop-solar-industry/>.

9. Thermal Power Plant Siting Act, WASH. REV. CODE §§ 80.50.010-80.50.010.900 (1970); *About the Energy Facilities Site Evaluation Council*, EFSEC, <http://www.efsec.wa.gov/council.shtml> (last visited Jan. 4, 2016) (using the council's name in the original act, the "Thermal Power Plant Site Evaluation Council").

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."¹⁰ Large-scale energy facility siting in Washington goes through the EFSEC's process, making the council a one-stop shop for companies, public interest groups, and other government agencies.¹¹

As of this writing, the EFSEC is currently reviewing an application for the largest oil-by-rail terminal in the country.¹² The terminal is named the Tesoro Savage Vancouver Energy Terminal (on later reference, the Terminal),¹³ and it would process up to 360,000 barrels of oil per day.¹⁴ Its oil would arrive primarily by railway along the Columbia River Gorge and then be shipped by oil tankers to refineries along the Pacific Rim.¹⁵ The Terminal represents a significant economic opportunity for Washington,¹⁶ but it would perpetuate fossil fuel dependence and its pollution could endanger local residents.¹⁷ Debate over the Terminal has brought the EFSEC into the greater political discourse, which provides an opportunity to examine the council's siting process.

While the EFSEC uses largely the same siting process as when it was first conceived in 1970,¹⁸ the reality of power

10. WASH. REV. CODE § 80.50.010 (2016).

11. William H. Rodgers, Jr., *Siting Power Plants in Washington State*, 47 (1971) (discussing the "Thermal Power Plant Site Evaluation Council"); Interview with Bill Lynch, Chairman, Energy Facility Siting Evaluation Council, in Tacoma, Wash. (Jan. 15, 2016).

12. Dameon Pesanti, *EFSEC Hearings End in Vancouver Amid Protests*, THE COLUMBIAN, July 29, 2016, <http://www.columbian.com/news/2016/jul/29/efsec-hearings-end-in-vancouver-amid-protests/>.

13. Tesoro Savage, *Application for Site Certification Agreement No. 2013-01*, EFSEC (Aug. 29, 2013) [hereinafter *The Terminal Application*], <http://www.efsec.wa.gov/Tesoro%20Savage/Application/EFSEC%202013-01%20Volume%20I/EFSEC%202013-01%20-%20Compiled%20PDF%20Volume%20I.pdf>.

14. *Id.* at 3.

15. *Id.*

16. *Id.*

17. Mark Johnson et al., *Governor Inslee Can Stop Proposal to Build Nation's Largest Oil-by-Rail Terminal*, THE SEATTLE TIMES, Nov. 29, 2015, <http://www.seattletimes.com/opinion/gov-inslee-can-stop-proposal-to-build-nations-largest-oil-by-rail-terminal/>.

18. *Compare* Rodgers, *supra* n. 11, with WASH. REV. CODE §§ 80.50.010–80.50.010.900 (2016).

generation has changed significantly. For starters, it was designed before renewable energy sources were market viable; now the cost of solar¹⁹ and wind²⁰ are down to a fraction of their price only twenty years ago. Washington's energy needs will continue to change as its population increases and technology advances, so the EFSEC as designed in the 1970s will only grow more antiquated.

The EFSEC's current process struggles with facilitating robust public participation. It is not that there is no public participation—participation can be substantial.²¹ Rather, the current framework makes public participation unwieldy. Most notably, it requires that applicant submit their materials in one big application, often hundreds of pages long,²² and applications this long can be very difficult for local and public groups to fully understand before adjudication begins.²³ Additionally, while the

19. Galen Barbose & Naim Darghouth, *Tracking the Sun IX: The Installed Price of Residential and Non-Residential Photovoltaic Systems in the United States*, LAWRENCE BERKELEY NAT'L LAB. 14–16 (2016), https://emp.lbl.gov/sites/all/files/tracking_the_sun_ix_briefing.pdf.

20. *Wind of Change*, THE ECONOMIST, Dec. 4, 2008, <http://www.economist.com/node/12673331>.

21. See, e.g., Phuong Le, *Oil Battle Unfolds in Pacific Northwest*, U.S. NEWS & WORLD REPORT, June 25, 2016, <http://www.usnews.com/news/us/articles/2016-06-25/major-battle-over-oil-terminal-unfolds-in-pacific-northwest> (demonstrating the significant interest in the Terminal demonstrates how EFSEC applications garner significant public participation).

22. The Terminal Application, *supra* n. 13 (serving as an example for application length, with Volume 1 (of two) alone being over 800 pages); WASH. REV. CODE § 80.50.071 (2016) (describing the one big application that EFSEC requires).

23. See generally Cynthia R. Farina & CeRI, *Rulemaking 2.0: Understanding What Better Public Participation Means, And Doing What It Take to Get It*, AMERICAN BAR ASS'N 9–11 (Mar. 1, 2013), http://www.americanbar.org/content/dam/aba/events/administrative_law/2013/04/administrative_lawandregulatorypracticeinstitute/Rulemaking.authcheckdam.pdf (using a case study to see if public participation and document length correlate and finding longer applications meant lower public participation). Farina and CeRI were analyzing administrative rulemaking, which has differences compared to administrative adjudication like the EFSEC's hearings. See Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 371–76 (1972). Gellhorn argues that agencies should facilitate public participation in adjudications when the nature of the dispute has a broad impact, whether the public is interested in the issue (especially if it would be unfair to exclude them), the public's interest is not adequately represented by the parties already present, the public representative are capable representatives, and that intervention would not disrupt the proceedings. *Id.* at 376–83. The EFSEC's hearings meet these requirements: power plants significantly affect a broad group of interests, the public and local communities are especially interested, and the EFSEC proceedings rely on the public participating themselves to represent their interests meaning the agency will not be disrupted. Therefore, the same reasons to encourage

applicants are usually represented by legal counsel, local groups may not be able to afford those services.²⁴ These issues and others frustrate public engagement.

Other states have also struggled with optimizing public participation in energy facility siting, including New York. New York overhauled its siting process in 2011.²⁵ The EFSEC could learn from New York's updated method to better execute the EFSEC's statutory mandate to provide an efficient process that encourages public participation, protects the environment, and ensures abundant energy for Washington.²⁶

First, this article will scrutinize the EFSEC's current method and its problems with promoting public participation. Second, it will examine the positive changes from New York's siting procedure revamp. Third, this article will recommend that the positive changes in the new process used by New York's Board on Electric Generation Siting and the Environment (BEGSE) should be slotted into the EFSEC's statutes to help ensure it has the highest quality public participation.

II. EFSEC AND ITS PROBLEMS FACILITATING MEANINGFUL PUBLIC PARTICIPATION

The main purpose of the EFSEC is to balance the need for abundant power against the harms from generating electricity, namely pollution that includes greenhouse gases.²⁷ Striking this balance should include engagement with the public, whose communities will house any new energy facilities. This engagement must come during the EFSEC's review because once Washington's governor gives final approval, that decision overrides any contrary local ordinance with legally binding and preclusive effect.²⁸ With this power and influence, the council

public participation in administrative rulemaking as explained by Farina and CeRI translate to the EFSEC's adjudications.

24. Dameon Pesanti, *EFSEC Gives Opponents of Oil Terminal More Time*, THE COLUMBIAN, Sep. 4, 2016, <http://www.columbian.com/news/2016/sep/04/efsec-gives-opponents-of-oil-terminal-more-time/> (observing that, for the Terminal, local groups ran out of funds for procuring hearing transcripts and other adjudicative documents and subsequently requested more time to get the needed funds for acquiring that evidence).

25. Power New York Act of 2011, N.Y. COMP. CODES R. & REGS. 16 § 1000.5 (2011).

26. WASH. REV. CODE § 80.50.010(5) (2016).

27. See *id.* § 80.50.010; Rodgers, *supra* n. 11.

28. Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council, 197 P.3d 1153, 1167–68, 165 Wash. 2d 275 (2008); WASH. REV. CODE §

must be responsible for vetting local and public concerns.

This section first analyzes the EFSEC's current framework—animated primarily by their namesake statutes—and Washington's Administrative Procedure Act (APA), which provides the rules for its adjudicative hearings. Then, it scrutinizes how this process, as currently constructed, struggles with stimulating strong public participation.

A. *The EFSEC's Existing Framework*

The EFSEC is a state agency under the direct supervision of the governor.²⁹ Its animating goals are to ensure procedural safeguards are at least as strong as the comparable federal protections, preserve and protect the quality of the environment, and provide abundant energy at a reasonable price, in part by reducing administrative costs if there were duplicate siting procedures.³⁰ To balance these competing goals, the EFSEC has developed an intricate administrative framework. The council is led by the chairperson—who is appointed by the governor with the advice and consent of the state senate—and the council has representatives from other state agencies and from locales where new facilities have been proposed.³¹

For a company to build a new energy facility in Washington, it must submit a detailed application to the EFSEC.³² The applicant must describe its plan to construct the facility, provide its schematics, and prepare reports on the facility's environmental and economic effects.³³ These environmental reports must include any necessary auxiliary permits, and they

80.50.120 (2016) (stating that the governor makes the final decision, based on the EFSEC's recommendation, that has legal binding effect).

29. *Id.* § 80.50.030(2)(a).

30. *Id.* § 80.50.010.

31. *Id.* § 80.50.030(2)(a), (3)(a) (stating that the chair is only removable for cause and executes all documents, contracts, and other material for the council). The other council members are five permanent representatives from the Departments of Ecology, Fish & Wildlife, Commerce, Natural Resources, and the Utilities & Transportation Commission; another four positions are filled at the EFSEC'S discretion including representatives from the Departments of Agriculture, Transportation, Health and Military; and finally, local representatives from places where new power plants have been proposed. *Id.*

32. *Id.* § 80.50.071; *Siting/Review Process*, EFSEC, <http://www.efsec.wa.gov/cert.shtml> (last visited Jan. 4, 2016).

33. WASH. REV. CODE § 80.50.071(5)(a) (2016).

must propose mitigation measures for any predicted environmental harm.³⁴ In total, they are comparable to Environmental Impact Statements under federal law.³⁵

When the EFSEC receives an application, Washington's attorney general appoints an assistant attorney general as the "counsel for the environment" who represents the public interest in protecting the environment.³⁶ The EFSEC then conducts three hearings. First, they hold an "informational hearing," which must be done within sixty days of receipt of the application.³⁷ They next hold a "conflict of law" hearing that examines whether the facility complies with local, county, and regional ordinances.³⁸ Should the proposed facility conflict with local ordinances, the EFSEC can override those ordinances in approving the application.³⁹

The final mandatory hearing before the EFSEC is a formal adjudicative proceeding under Washington's APA.⁴⁰ At this proceeding, "any person shall be entitled to be heard in support of, or in opposition to the application" within the framework of formal adjudication.⁴¹ These hearings have rules of discovery, evidence, and testimony modeled after the judicial process, and include an opportunity for public comment.⁴² There is a framework for "brief adjudicative proceedings" within the APA, but this framework is only available when there is a specific statutory exception, or when there is no need for significant public input.⁴³ Final hearings before the EFSEC are always

34. *Id.* § 80.50.071.

35. See National Environmental Policy Act § 102(C), 42 U.S.C. § 4332(C) (2012).

36. WASH. REV. CODE § 80.50.080.

37. *Id.* § 80.50.90(1).

38. *Id.* § 80.50.90(2).

39. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 197 P.3d 1153, 1158, 165 Wash. 2d 275 (Wash. 2008). If there is a conflict between local ordinance and the application, first the proceedings are stayed and the applicant determines if they can comply, but if compliance is not possible, then the EFSEC can preempt the local ordinance. *Id.*; WASH. REV. CODE § 80.50.110 (2016).

40. WASH. REV. CODE § 80.50.090(3).

41. *Id.*

42. Washington Administrative Procedure Act, WASH. REV. CODE §§ 34.05.413–34.05.476; WASH. REV. CODE § 80.50.100.

43. WASH. REV. CODE § 34.05.482 ("An agency may use brief adjudicative proceedings if: a) The use of those proceedings in the circumstances does not violate any provision of law; b) The protection of the public interest does not require the agency to give notice and an opportunity to participate to persons other than the parties; c) The matter is entirely within one or more categories for which the agency by rule has adopted this

formal adjudications.⁴⁴

If the application is approved after the third hearing, the EFSEC submits its recommendation to Washington's governor.⁴⁵ Then the governor has three options: accept the application as provided, reject the application, or send it back to the EFSEC for reconsideration of certain aspects of the proposal.⁴⁶ If the governor approves the application, that counts as an adjudicative proceeding under Washington's APA.⁴⁷

The governor's decision can be appealed to the Thurston County Superior Court.⁴⁸ The Superior Court can either review the decision itself or certify the appeal directly to the Washington State Supreme Court if it finds the appeal satisfies specific statutory questions.⁴⁹ Judicial review through this mechanism grants the court appellate jurisdiction.⁵⁰ Although such an appeal makes the Supreme Court the only true court to review the application, this still meets the state's requirement that parties be guaranteed a judicial appeal; the administrative hearing counts as an initial adjudication.⁵¹

There exists a pre-application procedure in the present statutes, but it only applies to proposals for a new power transmission line.⁵² These pre-applications must examine whether the proposed powerlines affect other land use obligations,⁵³ and any potentially contentious issues are

section and R.C.W. §§ 34.05.485 through 34.05.494; and d) The issue and interests involved in the controversy do not warrant use of the procedures of R.C.W. §§ 34.05.413 through 34.05.479.”)

44. *Id.* § 80.50.90(3).

45. *Id.* § 80.50.100.

46. *Id.*

47. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 197 P.3d 1153, 1167–68, 165 Wash. 2d 275 (Wash. 2008).

48. WASH. REV. CODE § 80.50.140 (2016).

49. *Id.* § 80.50.140 (stating the criteria necessary for Supreme Court review are: a) review can be made on the administrative record, b) fundamental and urgent interests affecting the public interest and development of energy facilities are involved which require prompt determination, c) review by the supreme court would be sought regardless of a lower court decision, and d) the record is complete).

50. *Residents Opposed to Kittitas Turbines*, 197 P.3d at 1163–64.

51. WASH. REV. CODE § 34.05.510; see *Residents Opposed to Kittitas Turbines*, 197 P.3d at 1163–64.

52. WASH. REV. CODE § 80.50.330.

53. *Id.* (specifying that the EFSEC examines if the powerlines affect existing land use plans and zoning ordinances, if they comply with relevant land development regulations, and whether contiguous jurisdictions have undertaken good faith efforts to

addressed before the process advances any further. Section III proposes that the EFSEC adopt a universal pre-application, so this statutory section could be used as a template for any expansion.⁵⁴

B. Adjudication under EFSEC and Washington's APA

Public participation is critical to administrative rulemaking in Washington. Washington's APA stated purpose is to "provide greater public and legislative access to administrative decision making."⁵⁵ Because the EFSEC conducts its hearings using Washington's APA, that act's express purpose directs its deliberations. It also aligns with the general understanding that public participation is beneficial to administrative rulemaking.⁵⁶ The EFSEC also promotes public participation through its own statute, stating that its procedures are designed "to assure Washington State citizens that, where applicable, operational safeguards . . . are technically sufficient for their welfare and protection."⁵⁷

Formal hearings under Washington's APA are quasi-judicial. For example, the parties can choose to represent themselves, have duly authorized representatives, or retain professional counsel.⁵⁸ Additionally, parties may present evidence, conduct cross-examination, and submit rebuttals.⁵⁹ The hearings must abide by Washington's Rules of Evidence,⁶⁰ but there are exceptions such as an allowance for hearsay if it is "the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs."⁶¹

reach agreements on the transmission corridor's location).

54. *See infra* Part III.

55. WASH. REV. CODE § 34.05.001 (2016).

56. *See* Roger Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J., 525, 531–33 (1972) (drawing a distinction between situations where public participation is beneficial, like rulemaking, and potentially detrimental like criminal trials).

57. WASH. REV. CODE § 80.50.010(1).

58. *Id.* § 34.05.428.

59. *Id.* § 34.05.449(2) (explaining that the specific features of any hearing can be shaped by the pre-hearing order or a limited grant of intervention).

60. *Id.* § 34.05.452(2).

61. *Id.* § 34.05.452(1) (2016). However, evidence may still be excluded on constitutional or statutory grounds, on the basis of evidentiary privilege recognized in the courts of this state, or if it is irrelevant, immaterial, or unduly repetitious. *Id.*

Once this evidence is taken, the agency has the power to make legally-binding findings of fact.⁶² The statute mandates that these findings:

[S]hall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial.⁶³

The EFSEC's findings of fact take on a special importance because any subsequent court reviews are restricted to the agency's findings of fact.⁶⁴

C. *EFSEC's Struggles Facilitating Meaningful Public Participation*

Although the EFSEC's animating statutes proclaim the importance of public participation, parts of the framework impede that goal. One major issue is that applicants are required to submit a single, comprehensive application, which can overwhelm local groups that are not prepared for such complex documents.⁶⁵ In general, Public participation negatively correlates with the length and sophistication of administrative applications: longer applications have less participation and the public comments received have lower substantive value.⁶⁶ Applications to the EFSEC are hundreds of pages long; just Volume One of the Terminal Application is over

62. WASH. REV. CODE § 34.05.461(3).

63. *Id.* § 34.05.461(4).

64. *Id.* § 34.05.558.

65. See, e.g. Cynthia Farina et al., *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 GEO. WASH. L. REV. 1358, 1367–79 (2015) (analyzing how technocratic language can suppress participation by otherwise interested parties); Richard J. Pierce, Jr., *The Administrative Conference and Empirical Research*, GEO. WASH. L. REV., 1564, 1567–69 (2015).

66. See Farina, *supra* note 23, at 22–24. Farina uses a case study evaluating administrative rules based on their "information load," a combination of the document's length and complexity. *Id.* at 22. As the information load increased, the number of public comments decreased *and* the comments received were conclusory statements of opinion, failing to engage with the agency's basis of facts, data, or substantive analysis. *Id.* at 7, 23. Farina found these conclusory comments to be as detrimental to the process as no comments at all. *Id.* at 7.

800 pages.⁶⁷ Such incredible length might be suppressing public participation.⁶⁸ Additionally, administrative applications are highly sophisticated—requiring reading at the late college to graduate school level to fully understand—while public participation experts recommend materials no more advanced than the 8th grade reading-level.⁶⁹ EFSEC does not solicit public comments until after the primary application has been completed.⁷⁰ Finally, having only one application, with one commenting window, disincentivizes the back-and-forth dialogue that could foster compromise.⁷¹ Together, these features of EFSEC's application reduce the level of public participation in reviewing energy facility siting applications.

The second problem with public participation comes from the high cost of engaging with the EFSEC's formal adjudication process.⁷² Many local and public groups may wish to participate, but cannot afford the legal counsel needed for formal adjudication.⁷³ Having proceedings with prohibitive costs goes against the EFSEC's expressed purpose of providing robust procedural safeguards for Washington's citizens.⁷⁴ Additionally, Washington's APA proclaims that administrative proceedings in the state are supposed to facilitate *greater* public involvement.⁷⁵ An administrative framework as complex as energy facility siting can only achieve significant public

67. The Terminal Application, *supra* note 13.

68. See Farina, *supra* note 23 at 45–46 (discussing, in an administrative rulemaking context, how application length must be managed: "To be accessible . . . information about the agency's proposal must be radically simpler and shorter. . . . the information must be presented in ways that enable participants to fairly quickly (i) grasp the topics covered by the rule and (ii) locate content on which they wish to comment.").

69. Farina, *supra* note 23 at 47–48.

70. Interview with Bill Lynch, Chairman, Energy Facility Siting Evaluation Council, in Tacoma, Wash. (Jan. 15, 2016).

71. See Cary Coglianese et al., *Transparency and Public Participation in the Rulemaking Process: Presidential Transition Task Force Report*, U. PA. L. SCH., 17–18 (2008) (discussing interactive commenting periods, where there are multiple sessions of commenting rather than one deadline; however they discuss the value in having more interactive processes generally).

72. See generally Pesanti, *supra* note 24 (demonstrating this issue using the EFSEC review of the Tesoro Savage Terminal. The local participants were so strained financially that they could not afford transcripts of the administrative documents when they were first published. Instead, they had to wait for their general release).

73. Cramton, *supra* note 56 at 538–41.

74. WASH. REV. CODE. § 80.50.010(1) (2016).

75. *Id.* § 34.05.001 (2016).

participation if the economic barriers for local groups are mitigated or removed.⁷⁶

Currently, the EFSEC already has measures that promote the public interest. The EFSEC appoints a "counsel for the environment" for each application.⁷⁷ However, this role is too specific to fully represent the public interest. In some cases, the public favors economic development over environmental protection.⁷⁸ In other cases, renewable energy sites are opposed—despite their contribution to clean energy—because they tarnish the community's views or clash with an aesthetic value.⁷⁹ Local interests are case-specific, so more flexible support through a general fund can better adapt to the needs of each case. Without any flexible support, the EFSEC does not completely ensure that public and local interests are fully represented during its proceedings.

If the EFSEC wants to revamp its procedure to better protect the public interest, one of the best examples is New York's overhaul of its own siting process. New York restructured its siting process in 2011, seeking an improved balance between environmental protection and new energy development.⁸⁰ This

76. Cramton, *supra* note 56 at 529–30.

77. WASH. REV. CODE § 80.50.080. See also *supra* Section 1.A.

78. *E.g.*, PUB. SERV. COMM'N OF WIS., *Environmental Impacts of Power Plants*, 17–18 (Jan. 4, 2017) <https://psc.wi.gov/thelibrary/publications/electric/electric15.pdf>; See also Darren K. Carlson, *Public Priorities: Environment vs. Economic Growth*, GALLUP (Apr. 12, 2005), <http://www.gallup.com/poll/15820/public-priorities-environment-vs-economic-growth.aspx>. Gallup has polled the question "should we protect the environment at the risk of economic decline, or favor economic development even if the environment suffers?" for over 20 years. Favoring economic development polled between nineteen percent to forty-four percent from 1984–2005. When it is not polled as an either or, but just as a question of what's most important to people, economic development trends even stronger.

79. Wind faces especially strong resistance due to its visual impact on the countryside. This resistance entrenches itself if turbines are approved and installed without significant public participation. Vikki Leitch, *Securing Planning Permission for Onshore Wind Farms: The Imperativeness of Public Participation*, 12 ENVTL. L. REV. 182, 184–85 (2010) ("[T]hose who are uncertain of their position towards wind turbines can be pushed negatively into an opposing stance if their views are not elicited during the process.").

80. Danielle Sugarman, *The Power New York Act of 2011 Reauthorizes and Modernizes Article X of the Public Service Law*, COLUMBIA LAW SCHOOL SABIN CENTER FOR CLIMATE CHANGE LAW: CLIMATE LAW BLOG (June 28, 2011), <http://blogs.law.columbia.edu/climatechange/2011/06/28/the-power-new-york-act-of-2011-reauthorizes-and-modernizes-article-x-of-the-public-service-law/>; Danielle E. Mettler-LaFeir, *New York State Power Plant Siting Bill Renewed*, BARCLAY DAMON (June 29, 2011), <http://barclaydamon.com/alerts/New-York-State-Power-Plant-Siting->

new process has strong protections for the public interest, including a three-stage application process and general funds for public and local interest groups.⁸¹

II. NEW YORK'S SITING BOARD AND ITS PROCEDURES FOR PUBLIC PARTICIPATION

Before 2011, New York sited facilities under the State Environmental Quality Review Act.⁸² This process was so onerous and costly that there was little new energy development in the state while it was in force.⁸³ In 2011, New York renovated the process through the Power New York Act of 2011, establishing the Board on Electrical Generation Siting and the Environment (BEGSE).⁸⁴

The BEGSE has promulgated rules to "establish procedures for applications for certificates and other matters affecting the construction or operation of major electric generating facilities."⁸⁵ Like the EFSEC, the BEGSE consolidates siting power in a one-stop shop, state-level agency whose siting decisions preempt local ordinances.⁸⁶ The Power New York Act was supported by both energy developers and environmentalists. For developers, it brought smaller energy facilities under the statewide umbrella, allowing facilities to abide by a uniform set of regulations instead of site-specific local regulations.⁸⁷ Environmentalists generally supported the Act's

Bill-Renewed-06-29-2011.

81. See N.Y. COMP. CODES R. & REGS. 16 § 1000.5 (2012).

82. Mettler-LaFeir, *supra* note 80 (noting that this was actually an interim process because New York's Article X, used for siting facilities, had expired in 2003, so the update in 2011 that includes the BEGSE was an update to the original Article X).

83. *Id.*; see also Eric Garofano, *Losing Power: Siting Power Plants in New York State*, 4 ALB. L. REV. 728 (2011) (describing the state of power plant siting in New York before the Power New York Act).

84. Assemb. Res. A08510, 2011-12 Reg. Sess. (N.Y. 2011).

85. N.Y. COMP. CODES R. & REGS. 16 § 1000.1 (2012).

86. Adam Blair, *Understanding Article X of the Power NY Act of 2011*, COMMUNITY AND REGIONAL DEVELOPMENT INSTITUTE, CORNELL UNIVERSITY (Sept. 2011), <https://cardi.cals.cornell.edu/sites/cardi.cals.cornell.edu/files/shared/documents/Community-Energy/Understanding-Article-X.pdf>.

87. Patricia E. Salkin, *The Executive and the Environment: A Look at the Last Five Governors in New York*, PACE ENVTL. L. REV. 706, 753-55 (2014) (explaining that the "Power New York Act" applies to any energy facility with a generating capacity of 25 megawatts, or if 25 megawatts or more is added to an existing facility). Under the sunset Article X, that threshold was 80 megawatts, so far fewer states would be covered, and

passage because it encouraged public participation and allowed smaller facilities, generally wind and solar, to participate in the same procedures as larger plants.⁸⁸

Both the EFSEC and BEGSE consolidate state energy siting, and their decisions preempt conflicting local law. The BEGSE's power to preempt local law generated controversy during its approval, because it clashes with New York's Municipal Home Rule.⁸⁹ The Board addresses that controversy by both restraining its use of preemption to "unreasonably burdensome" regulations, and ensuring that there is adequate public participation in its siting.⁹⁰

Three of the BEGSE's provisions for promoting public participation should be considered by the EFSEC to resolve its own struggles with public participation. First, the BEGSE uses a three-step pre-application process consisting of the "Public Involvement Plan," which provides notice and summary of the coming pre-application; a pre-application, called the "Preliminary Scoping Statement;" and then a final, complete application.⁹¹ Second, the BEGSE provides funding for local groups to ensure those groups can meaningfully participate. Third, BEGSE assigns a "presiding examiner" to each application to help the parties reach compromises throughout an application's review.

A. *BEGSE's Pre-Application Facilitates Robust Public Participation*

To secure the BEGSE's approval, applicants must first

those covered would have to be larger. *Id.*

88. Sugarman, *supra* n. 80.

89. Peter Manning, *Article 10-A Revised Process for Siting of Major Electric Generating Facilities in New York State*, OTSEGO COUNTY CONSERVATION ASSOCIATION, 3-5 (May 2013), <http://occainfo.org/wp-content/uploads/2015/01/Article10DiscussionPaper.pdf>; Jaegun Lee, *JCC Article X Forum Thursday Draws a Crowd of 100 Concerned Citizens*, WATERTOWN DAILY TIMES, (Mar. 9, 2012 4:30 AM), <http://www.watertowndailytimes.com/article/20120309/NEWS03/703099837/-1/news1203> (demonstrating an example of local concern over the new Article X's preemptive power, especially concerned with the loss of "Home Rule").

90. Manning, *supra* note 89 at 2-5. The EFSEC also limits its use of preemption because it first tries to reconcile the application and local ordinance. *Id.*

91. N.Y. COMP. CODES R. & REGS. 16 § 1000.4(c) (2012) (public involvement plan); N.Y. PUB. SERV. LAW § 163(1) (McKinney 2011) (the preliminary scoping statement); N.Y. PUB. SERV. LAW § 164(1) (2011) (the final application).

"consult with the public, affected agencies, and other stakeholders."⁹² Consulting with the public requires that applicants provide a Public Involvement Plan "to all persons residing in each municipality in which any portion of the facility is proposed to be located."⁹³ This plan serves as the first step in the pre-application process as it is the first official document provided by the applicant to the public.

At least 150 days after the public involvement plan's submission, the applicant submits their Preliminary Scoping Statement, which summarizes all the reasonably available information about the applicant's facility.⁹⁴ The statement must also identify all the relevant state and federal permits, certifications, and other authorizations necessary to operate their proposed power facility.⁹⁵ Further, the statement must describe all other laws that are applicable during the facility's construction and operation.⁹⁶ Finally, it must provide characteristics about the applicant, including any relevant property interests in the facility site and a completed environmental impact statement.⁹⁷

This series of submissions by the applicant develops

92. N.Y. COMP. CODES R. & REGS. 16 § 1000.5(b) (2012).

93. *Id.* § 1000.4(c) (requiring that the plan include 1) consultation with the affected agencies and other stakeholders, 2) pre-application activities to encourage stakeholders to participate at the earliest opportunity, 3) public education activities about Ar. 10, availability of funds, and this specific application, 4) establishing website for public information, 5) notifications, and 6) activities to encourage participation by stakeholders in the certification and compliance process).

94. *Id.* § 1000.5(l); *Id.* § 1000.5(d) (requiring that the applicant also provide notice of the incoming preliminary scoping statement three days before it is published, including a summary of its key features).

95. *Id.* § 1000.5(l).

96. N.Y. PUB. SERV. LAW § 163(1) (2011); N.Y. COMP. CODES R. & REGS. 16 § 1000.5(l) (2012). The same Preliminary Scoping Statement is described by the New York statute, § 163, and the agency regulation, § 1000.5. However, the agency regulation is more detailed, especially in its requirements for what environmental information must be provided.

97. N.Y. PUB. SERV. LAW § 163(1) (McKinney 2011). In total, the preliminary scoping statement examines: 1) a description of the proposed facility and its environmental setting; 2) the potential environmental and health impacts resulting from the construction and operation of the facility; 3) proposed studies evaluating the potential environmental and health impacts; 4) proposed measures to minimize these impacts; 5) discussion of any petroleum use, even as back-up fuel; 6) reasonable alternatives to the facility; 7) identification of all other state and federal permits, certifications, or other authorizations needed for construction, operation or maintenance of the facility; and 8) other information as required. *Id.*

information about the proposed facility gradually. Each document in the series grows in detail, but at every stage public education and engagement are prioritized.⁹⁸ What gets flagged in the preliminary statement aligns with what must be addressed in the final application.⁹⁹ This evolving process means there should be no surprises for any interested party.

New York also uses the series of pre-applications to facilitate a dynamic debate process. Many administrative commentators are accustomed to submitting lengthy comments right before a deadline, and are usually not familiar with dynamic commenting processes.¹⁰⁰ However, if there are multiple phases, then the public, the applicant, and the Board can exchange information and develop a workable solution over time.¹⁰¹ Extended engagement from the public means contentious issues can be resolved before the applicant sinks more resources into a larger, more complex application. Also, people with different levels of expertise can submit their feedback at different stages of the accumulating applications.¹⁰² For example, a layperson worried about the overall health risks can comment after receiving notice, while a team of analytical chemists could provide a recommendation for discharge rates of specific pollutants during the full application's evaluation.

A major concern in organizing government processes,

98. See Sugarman, *supra* note 80.

99. Compare N.Y. PUB. SERV. LAW § 163(1), with N.Y. PUB. SERV. LAW § 164(1) (final applications must provide: 1) a description of the site and facility to be built; 2) an evaluation of the expected environmental, health, and safety implications of the facility; 3) the facility's pollution control systems; 4) for petroleum-fueled plants, including back-up power, analysis of fuel storage and supply; 5) a safety plan during the construction and operation of the facility; 6) an evaluation of the significant and adverse disproportionate environmental impacts of the facility, if any (in accordance with rules to be promulgated by DEC for the analysis of environmental justice issues); 7) an analysis of air quality within a half-mile of the proposed facility; and 8) a comprehensive demographic, economic, and physical description of the community in which the facility is to be located" and other required content).

100. Farina, *supra* note 23, at 14.

101. See Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J., 433, 498–99 (2004) (advocating for an administrative process where the public is involved over multiple phases, arguing "[t]he agency can articulate its priorities early and therefore channel citizens' investment of time and effort into participating in ways that are useful for public policymaking. Or the public can push back and help the agency to rethink its agenda.").

102. *Id.* at 499 ("The desired outcome at this stage can be characterized as obtaining helpful and meaningful ideas from diverse audiences. These include scientific and subject-matter experts, affected stakeholders, and interested but inexpert citizens.").

administrative or otherwise, is upholding overall fairness.¹⁰³ This comes from principles of due process: people must be given the opportunity to participate in the rulemaking that binds them, or the processes can become arbitrary.¹⁰⁴ While drawing out the process may affect its efficiency, it helps ensure that all involved parties abide its result and recognize its legitimacy.

B. BEGSE Supports Public Participation by Providing Public Funds

The BEGSE further ensures robust public participation by providing general funds to concerned public parties.¹⁰⁵ These funds can help prevent local and public groups from being "priced out" of administrative proceedings.¹⁰⁶ When local groups can fully participate, then all the dimensions of the public interest can be represented. These funds are provided by the applicant as a separate charge from their application fee.¹⁰⁷

Asking the applicant to pay additional fees may seem controversial, especially if the fee is used to support adverse parties. However, "involvement of the community can allow the smooth progression of an application through the planning process if concerns and objections are addressed earlier in the process."¹⁰⁸ This means a higher fee to fund public participation becomes worth the cost if it helps legitimize the site's approval in the public's view.¹⁰⁹ An ounce of proactive goodwill could avoid a pound of future disputes.

An impediment to approving energy projects is entrenched local resistance.¹¹⁰ These disputes often arise *because* the public feels excluded from the process, which can be mended by a more inclusive process.¹¹¹ The public will more readily respect the

103. Paul Daly, *Administrative Law: A Values Based Approach*, U. OF CAMBRIDGE, 10–13 (June 28, 2014).

104. See *Atlantis Dev. Corp. v. United States*, 379 F.2d 818 (5th Cir. 1967).

105. See N.Y. COMP. CODES R. & REGS. 16 § 1000.10 (2012).

106. See *Id.* § 1000.5(d)(4); Cramton, *supra* note 56 at 538–41.

107. N.Y. COMP. CODES R. & REGS. 16 § 1000.10 (2012).

108. Leitch, *supra* note 79, at 183.

109. *Id.*

110. See JOHN S. DRYZEK, *THE POLITICS OF THE EARTH: ENVIRONMENTAL DISCOURSES* 7–8 (2d ed. 2005) (discussing the growth of environmental opposition to resource harvesting and energy production from local and multi-national groups).

111. Leitch, *supra* note 79.

decision if it is included in the decision. Including the public requires that the financial barriers be mitigated. By providing funds for local groups to participate, the applicant can start fostering positive relations with the community.

C. BEGSE's "Presiding Examiner" Who Manages the Application Procedure

Once a preliminary scoping statement is received, New York's Department of Public Service (DPS) appoints a "presiding examiner" to manage the application.¹¹² The presiding examiner is tasked with mediating any issues that arise between the parties.¹¹³ Specifically, the examiner persuades the parties to agree on the methodology for any scientific studies to be performed.¹¹⁴ Additionally, they determine the amount of funds needed for public participation, and ensure that those funds are received by local groups.¹¹⁵

Building an energy facility is a complex process. For example, the BEGSE's application requires analysis of the proposed site, assessment of health and safety concerns, a proposal for pollution control, and analysis on the economic and demographic ramifications of constructing a facility.¹¹⁶ Washington's EFSEC has similar requirements.¹¹⁷ Throughout the process, an applicant must advocate for its facility while the other parties scrutinize it for potential adverse effects. An applicant needs numerous detailed scientific studies, but establishing mutually acceptable parameters for these studies can be even more contentious than their outcomes.¹¹⁸

112. N.Y. COMP. CODES R. & REGS. 16 § 1000.5(h) (2012). DPS may also assign additional examiners to assist the principal examiner in all of their duties. *Id.*

113. *Id.* § 1000.5(i).

114. *Id.* The presiding examiner also arranges for the notice and summary of the preliminary scoping agreement to be provided in languages other than English, if a significant amount of the population impacted by the site speaks those languages. *Id.*

115. *Id.* § 1000.5(j).

116. Sugarman, *supra* note 80; N.Y. PUB. SERV. LAW § 163(1) (McKinney 2011) (outlining the requirements for BEGSE's Preliminary Scoping Statement).

117. WASH. REV. CODE § 80.50.071 (2016).

118. See Allan Mazur, *Scientific Disputes Over Policy*, in SCIENTIFIC CONTROVERSIES: CASE STUDIES IN THE RESOLUTION AND CLOSURE OF DISPUTES IN SCIENCE AND TECHNOLOGY 267–69 (H. Tristram Engelhardt, Jr. & Arthur L. Caplan ed., 1989) ("[W]e must not forget that we are dealing first with a political controversy that just happens to have scientific elements . . . even if the factual dispute were settled, the policy dispute would be likely to persist.").

If the EFSEC reviews applications, then another party should mediate with the parties to resolve these scientific disputes. Both the EFSEC and BEGSE have procedures for assigning expert consultants (from outside of the parties) to review the proposed site.¹¹⁹ In Washington, this expert conducts an independent analysis, but does not mediate between the parties.¹²⁰ However in New York, all BEGSE applications receive an examiner as a matter of course.¹²¹ The examiner mediates between the parties and develops consensus on methodology for the needed studies.¹²² This means any disputes over how a study should be performed are resolved before the study is done.¹²³ First, efficiency is boosted because groups know that their study's parameters are agreed to beforehand. Second, having a neutral party facilitate the studies helps ensure that both sides ultimately recognize the legitimacy of the studies once they are completed.

These three features from New York—a pre-application, general funds for ensuring public participation, and assigning a presiding examiner—encourage robust public participation in energy facility siting. Having that participation is critical when energy facility siting is done through a statewide system that has the power to preempt contrary local decisions. Any, or all, of these features of New York's process could slot into Washington's EFSEC process.

III. IMPROVING THE EFSEC WITH LESSONS FROM NEW YORK

The EFSEC is charged with ensuring that new energy facilities are safe, provide abundant energy, and have the lowest environmental impact possible. While these factors are difficult to balance already, the EFSEC must also review applications efficiently.¹²⁴ These competing statutory goals can be better

119. WASH. REV. CODE § 80.50.071(b) ("The council may commission its own independent consultant study to measure the consequences of the proposed energy facility on the environment or any matter that it deems essential to an adequate appraisal of the site."); N.Y. COMP. CODES R. & REGS. 16 § 1000.5(h) (2011) (requiring the use of independent experts rather than making the choice discretionary).

120. Rodgers, *supra* note 11 at 26–30.

121. N.Y.C.R.R. 16 § 1000.5(h) (2012).

122. *Id.* § 1000.5(i).

123. *See id.*

124. *See* WASH. REV. CODE § 80.50.010 (2016).

realized by adopting improvements from New York's overhauled siting process. First, the EFSEC should establish a mandatory pre-application, so that the materials for review accumulate more gradually. Second, public funds should be provided to support local and public participation. Third, the EFSEC should appoint an official comparable to the BEGSE's "presiding examiner." This official would do more than the EFSEC's current independent counsel; they would mediate between the parties and make agreements about the scope and methodology of the necessary scientific studies.

A. Crafting a Pre-Application for EFSEC Using the BEGSE's Model

The EFSEC could create a pre-application either by expanding their existing pre-application for transmission lines to all projects or by creating a new pre-application. To expand the existing pre-application, the Washington Legislature could work from Revised Code of Washington § 80.50.330 (R.C.W.). The legislature should expand the pre-application's requirements because right now the pre-application only analyzes how the project affects other land use obligations.¹²⁵ An expanded pre-application should interface with the final application's requirements in R.C.W. § 80.50.071 so that the key features of the final application are first described in the pre-application.¹²⁶ Alternatively, a brand new pre-application provision could be added, with its requirements also built to match the main issues from the final application report.¹²⁷ By having the issues align between the different application stages, debate over those issues can evolve throughout the process.

The BEGSE uses a three-step pre-application: first the public involvement plan, then a preliminary scoping agreement, and finally the full application.¹²⁸ The EFSEC does not need to follow this exact framework, but a three-stage framework does strike a calculated balance between developing the application over time and maintaining efficiency. Another solution would be to implement a two-stage review process: a pre-application and a

125. *Id.* § 80.50.330.

126. WASH. ADMIN. CODE §§ 463-60-125, 463-60-535 (2015).

127. *Id.* (identifying the main features of the current final application). New York's pre-applications are one example of a legislature's determination of the "key" features from the final application. N.Y. PUB. SERV. LAW § 163(1) (McKinney 2011).

128. *See* N.Y. COMP. CODES R. & REGS. 16 § 1000.5 (2012).

final application. If a two-stage application were to be selected, then Washington's pre-application should combine features from both of New York's first two stages.

New York's public involvement plan and the preliminary scoping statement serve different pre-application purposes. The public involvement plan is about notice, educating the public about how to participate, and stimulating public participation.¹²⁹ Then the preliminary scoping statement provides details about the facility's energy production, its possible environmental impact, and includes potential alternatives.¹³⁰ To illustrate how these two documents differ, the public involvement plan for the Baron Winds Project (under review in New York as of this writing) details how the applicant has planned a series of public meetings and town halls, created pamphlets, and created a website for its project.¹³¹ In its preliminary scoping statement, the applicant describes aspects of the application ranging from its land use impacts, its emissions controls and cost, to potential alternatives.¹³² It is these two pre-applications together, one for reaching out to the public and another to summarize the key features of the application, that achieve New York's level of public participation.

A potential downside to adding or expanding the pre-application is the risk of ossification. Administrative proceedings, especially rulemaking, are often criticized as being "ossified," which means the procedure is too cumbersome.¹³³ Adding more procedure does risk ossification, but that risk can be balanced against the benefits of improving public participation. New York's three-stage accumulative application even helps streamline the adjudication: there may be more stages, but the back-and-forth can encourage compromises.¹³⁴ However, if Washington is especially worried about ossification,

129. *Id.* § 1000.4.

130. *Id.* § 1000.5(d).

131. EVERPOWER, INC., ENVTL. DESIGN & RES., LANDSCAPE ARCHITECTURE, ENGINEERING & ENVTL. SERVS., D.P.C., PUBLIC INVOLVEMENT PLAN FOR THE BARON WINDS PROJECT 11–16 (Feb. 2015).

132. EVERPOWER, INC., ENVTL. DESIGN & RES., LANDSCAPE ARCHITECTURE, ENGINEERING & ENVTL. SERVS., D.P.C., PRELIMINARY SCOPING STATEMENT FOR THE BARON WINDS PROJECT, 39–50 (Aug. 2016).

133. Richard J. Pierce, Jr., *Rulemaking Ossification is Real: A Response to Testing the Ossification Thesis*, 80 GEO WASH. L. REV. 1493, 1493–95 (2012).

134. See discussion *supra* Section II.A.

then the two-step process recommended in the paragraph above—where New York's public involvement plan and preliminary scoping statement are combined—balances on the side of simpler procedure. No matter how Washington strikes the balance, a pre-application to help public participation is worth some extra procedure.

B. Providing Public Funds for EFSEC's Process as Exemplified in the BEGSE's Procedure

There are a few ways that the EFSEC could support local and public interest parties. It could expand the role of the "counsel for the environment" to represent the public interest more generally,¹³⁵ it could provide general purpose funds for public groups, or it could strive for both. The first choice, however, may make the role self-conflicting because economic and environmental interests may clash.¹³⁶ The EFSEC could alternatively make new counsel positions for all the different sides of the public interest, like an economic counsel, a tourism counsel, and so forth. However, this solution could spiral out of control, with an army of counselors for all kinds of issues. Eventually, the process could become unbearably bloated.

New York does not assign counselors for specific purposes but instead just supplies funds to public groups to represent their interests as they choose.¹³⁷ The EFSEC could adopt this method and have a fund for supporting local and public interest groups. These funds could be secured from the applicant or from the council's budget. The EFSEC already commissions an independent consultant to examine the site,¹³⁸ and this allocation could be restructured as a fund to support the public interest more generally. By creating a flexible pool of funds, the EFSEC can manage each application according to its needs, whether by assigning an independent examiner, a counsel for

135. WASH. REV. CODE § 80.50.080 (2016).

136. The U.N. attempts to reconcile economic growth with environmental protection through "sustainable development," but some experts argue that they are fundamentally opposed, incapable of reconciliation. *Compare* G.A. Res. 70/1, ¶ 59 (Sep. 5, 2015), with William E. Rees, *Economic Development and Environmental Protection: An Ecological Economic Perspective*, 86 ENVTL. MONITORING AND ASSESSMENT 29, 36–37 (2003) ("Since the economy is a dissipative structure and a dependent sub-system of the ecosphere, the former is, in effect, thermodynamically positioned to consume the latter from within.").

137. N.Y. COMP. CODES R. & REGS. 16 § 1000.5(d)(4) (2012).

138. WASH. REV. CODE § 80.50.071(1)(b).

the environment, or just helping local groups secure their own counsel.

*C. Creating a Presiding Examiner for EFSEC Applications
From the BEGSE's Example*

Under the current framework, the EFSEC is required to both review the application and mediate disputes between the parties. These roles are split by the BEGSE: the board reviews the applications while a separate examiner serves as the mediator. The EFSEC should similarly decouple these roles by creating a new position modeled after the BEGSE's presiding examiner or, alternatively, expand the roles of the counselors it already provides, such as the counsel for the environment and the independent examiner.¹³⁹ If the EFSEC chose to expand the existing roles, the independent examiner is better positioned to assume those responsibilities. The independent examiner is already meant to be a neutral party, while the counsel for the environment represents the public's specific interest in the environment.¹⁴⁰ In the end, any method to create a neutral mediating body would benefit the parties and the process.

IV. CONCLUSION

Washington's EFSEC is meant to adequately represent the public interest, but its current framework falls short. With the procedure in the public eye, thanks to the application for the Terminal, now is a chance to improve the process and better promote public participation. To find ideas for making these improvements, the EFSEC can look to New York State's overhaul of their own siting procedures.

There are three specific features of New York's new system that would serve Washington well. First, add a mandatory pre-application stage for all types of applications, not just for powerlines. This could imitate the BEGSE's three-stage process, or it could be a new framework. Second, the EFSEC should better support local and public interests of all kinds, which would require more than just a counsel for the environment. The best way to cover the breadth of different public interests would be to create a general fund for public engagement. Third, the

139. *Id.* § 80.50.020 (creating the counsel for the environment and the independent examiner).

140. *Id.* § 80.50.080.

EFSEC should decouple its role as mediator and its role as reviewer, and instead have a neutral mediator assigned to each application. This mediator should be charged with obtaining consensus on the scientific studies that each application needs. With these changes, Washington can have a better engaged public that is more receptive to executive decisions about siting power plants.