Feasibility Studies for Bioenergy Projects

PRESENTED BY

Julie Wilson-McNerney

Experience what we know about your industry and what it's like to be represented by Schwabe.

October 15, 2024

Agenda

- How can a lawyer help me?
- What's a feasibility study?
- What permits will I need?
- Water availability
- Things to consider when picking a location.

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Why hire a lawyer?

Lawyers can…

- Assist with permitting strategy
- Coordinate with local & state governments
- Public Records Act Requests
- Assess multiple sites or jurisdictions
  - What are the processes in each one?
  - Timelines?
  - Appeal pathways?
  - Any permitting pathway that's easier?
  - Likely project opponents?
  - Public comments?
- Assess risks associated with a particular property
  - Land use due diligence
  - Tribal issues
  - Contamination
  - Title and survey issues
  - Legal water availability
- Code changes? We can help draft legislation.

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Lawyers can also…

- Creating a legally defensible decision
  - Application review criteria
- Reducing litigation risk
  - Storytelling
  - Public comments
- Leveraging relationships

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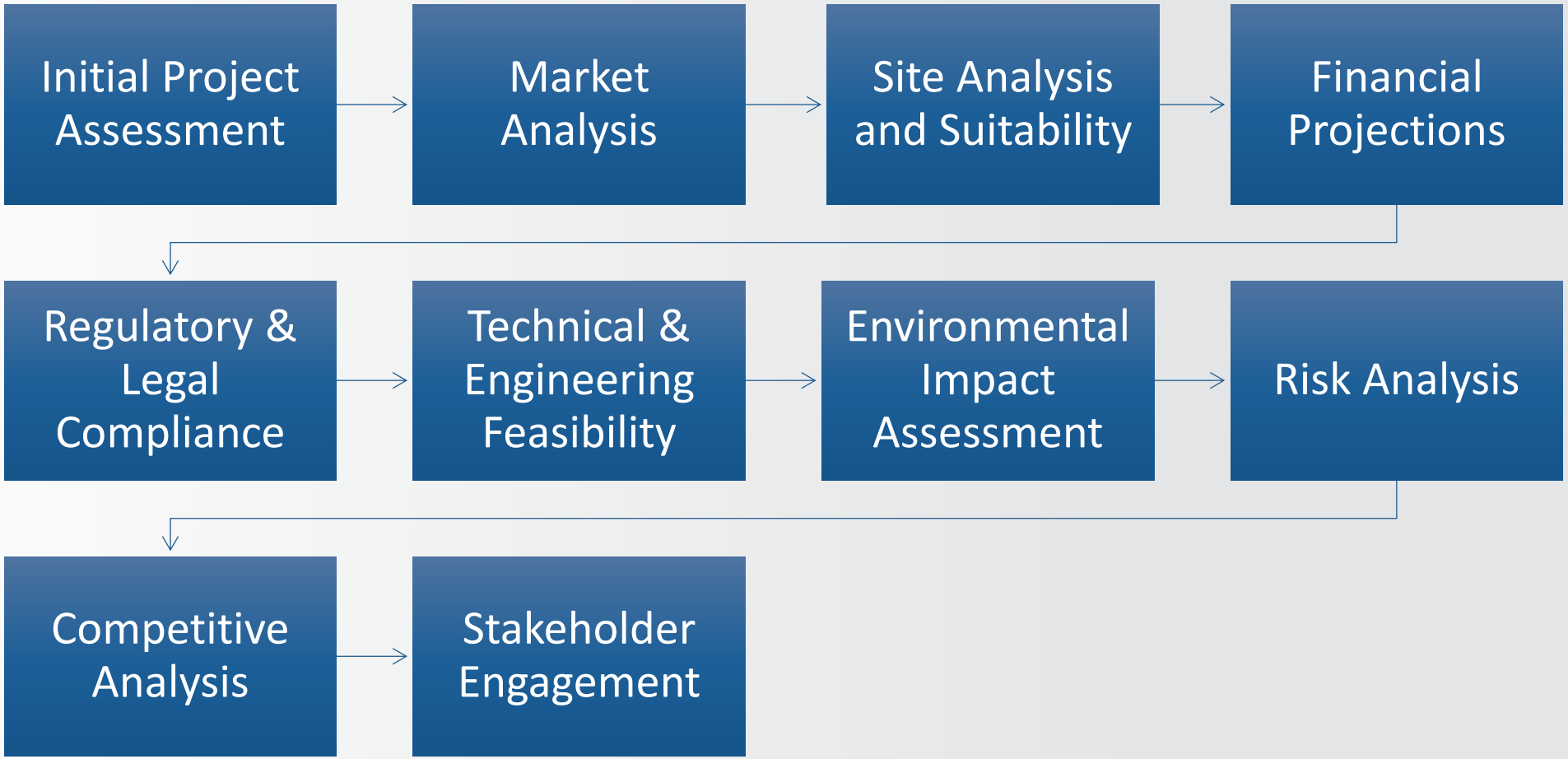
Site Feasibility Analysis

Site Feasibility Studies



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Initial Project Assessment

What are the project's requirements?

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- Required site area
- Location preferences
- Site coverage
- Security requirements
- Sustainability
- Neighborhood character / immediate surroundings
- Traffic and transportation
- Access
- Image and Visibility
- Local Planning Requirements and Initiatives
- Budget
- Schedule

Technical Factors

Site Location / Context

- Area map
- Local street map
- Topo map
- Master Plan Maps
- Potential Community Impacts
- Workforce

Physical Elements

- Hydrology
- Topography
- Physical Features
- Vegetation and Landscape
- Archaeological Features
- Environmental Hazards
- Threatened, Rare, or Endangered Species
- Conservation Plan and Regulations

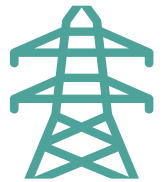
Zoning And Land Use Code

- Zone
- Setbacks
- Parking
- Permitted Uses

Subsurface

- Geotechnical Analysis
- Seismic Conditions

Utilities



- Power
- Sewer
- Water
- Waste management services

Transportation

- Public Streets
- Rail Access
- Shipping Port
- Truck Access

Federal Permits and Approvals

- **Clean Water Act Section 404 Permit**
  - Required for the discharge of dredge or fill materials into navigable waters of the United States
  - Individual
  - Nation-wide permit
- **NEPA**
  - Federal agency must analyze environmental impacts associated with its decision
- **Endangered Species Act Section 7/10 Consultations**
  - Federal agencies consult with the FWS and NMFS if actions they fund, authorize or carry out may affect species listed as “endangered” or “threatened.”

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Federal Permits and Approvals (cont.)

- Migratory Bird Treaty Act permit
- Bald and Golden Eagle Protection permit
- Floodplain assessment
- Authorizations needed for legal access / authority to use federal lands

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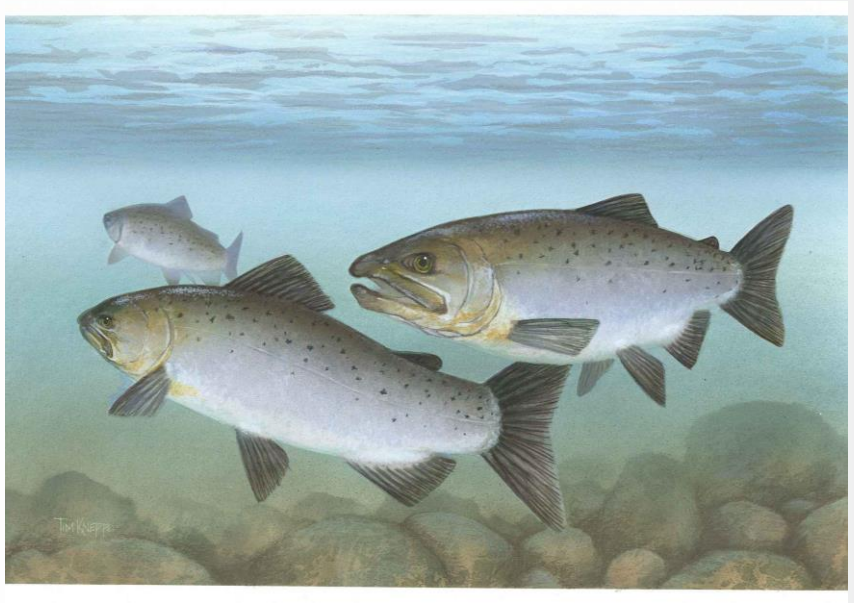
Tribal Treaty Rights



- Treaty fishing and hunting rights established in the Stevens Treaties of 1855.
- The Tribes' right to take fish is a property right, protected under the fifth amendment. *See, e.g., Menominee Tribe of Indians v. United States,* 391 U.S. 404, 411 n. 12 (1968)
- The treaty must be interpreted in the sense in which its words would have been understood by the Indians. *Fishing Vessel,* 443 U.S. at 676.
- The United States has a fiduciary duty and "moral obligations of the highest responsibility and trust" to protect the Indians' treaty rights. *Seminole Nation v. United States,* 316 U.S. 286, 297 (1942).
- Although the State may not qualify the right, it has authority under its police power to regulate the manner of fishing, the size of the take, the restriction of commercial fishing, and the like, *in the interest of conservation. Puyallup Tribe v. Washington Game Dept.,* 391 U.S. 392, 398 (1968)
- The right to take fish at all usual and accustomed fishing places has a "geographic" aspect and a "fair share" aspect. The Tribes' right to take a fair share of fish in common with other citizens does not displace their right of access to fishing places. *United States v. Oregon,* 718 F.2d 299, 304 & n. 6 (9th Cir. 1983).

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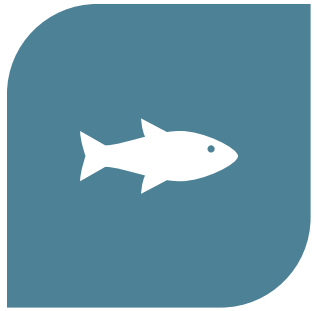
Project Opposition Based on Treaty Rights

TRIBES CLAIM THAT PROJECTS WILL IMPACT THEIR TRIBAL TREATY RIGHTS.

INCREASINGLY MADE ON MANY PROJECTS IN WASHINGTON

BROUGHT BEFORE FEDERAL, STATE, OR LOCAL PERMITTING ENTITIES, BUT NOT ALL DECISION-MAKERS HAVE THE AUTHORITY TO DECIDE TRIBAL TREATY RIGHTS ISSUES.



ISSUES RE: ACCESS, AVAILABILITY OF FISH, HARM TO FISH

State Permits and Approvals

- Air Permits
  - Construction
  - Operating
- NPDES Permit
  - Construction Stormwater
  - Operating Stormwater
- Solid Waste
- Hazardous Waste
- SEPA Review

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Local Permits and Approvals

- Rezone
- Overlay
- Boundary Line Adjustment
- Conditional Use Permit
- Variance
- Annexation
- Subdivision
- Binding Site Plan
- Utility connection fees

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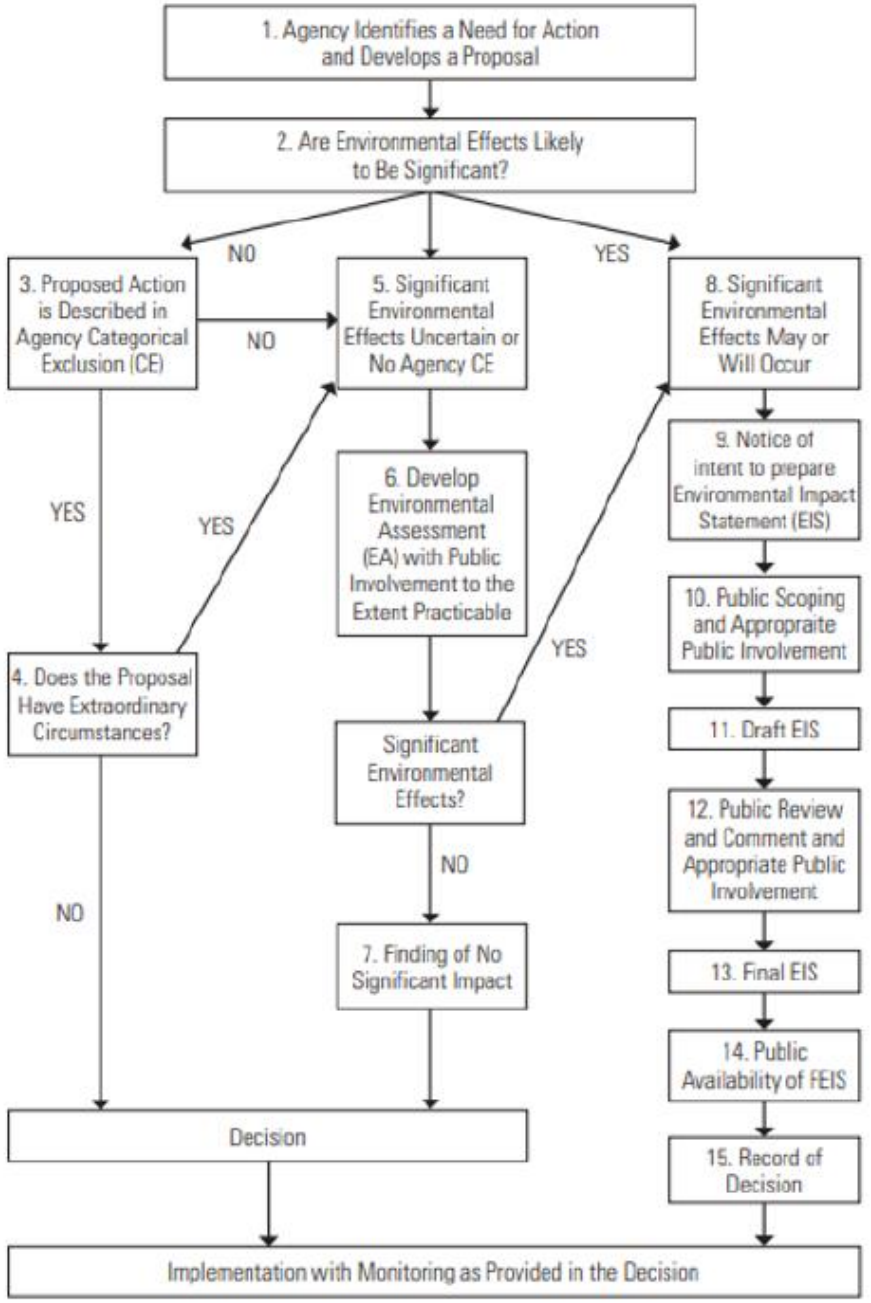
The NEPA Process

Source: CEQ, *A Citizen's Guide to NEPA: Having Your Voice Heard* (Jan. 2021)



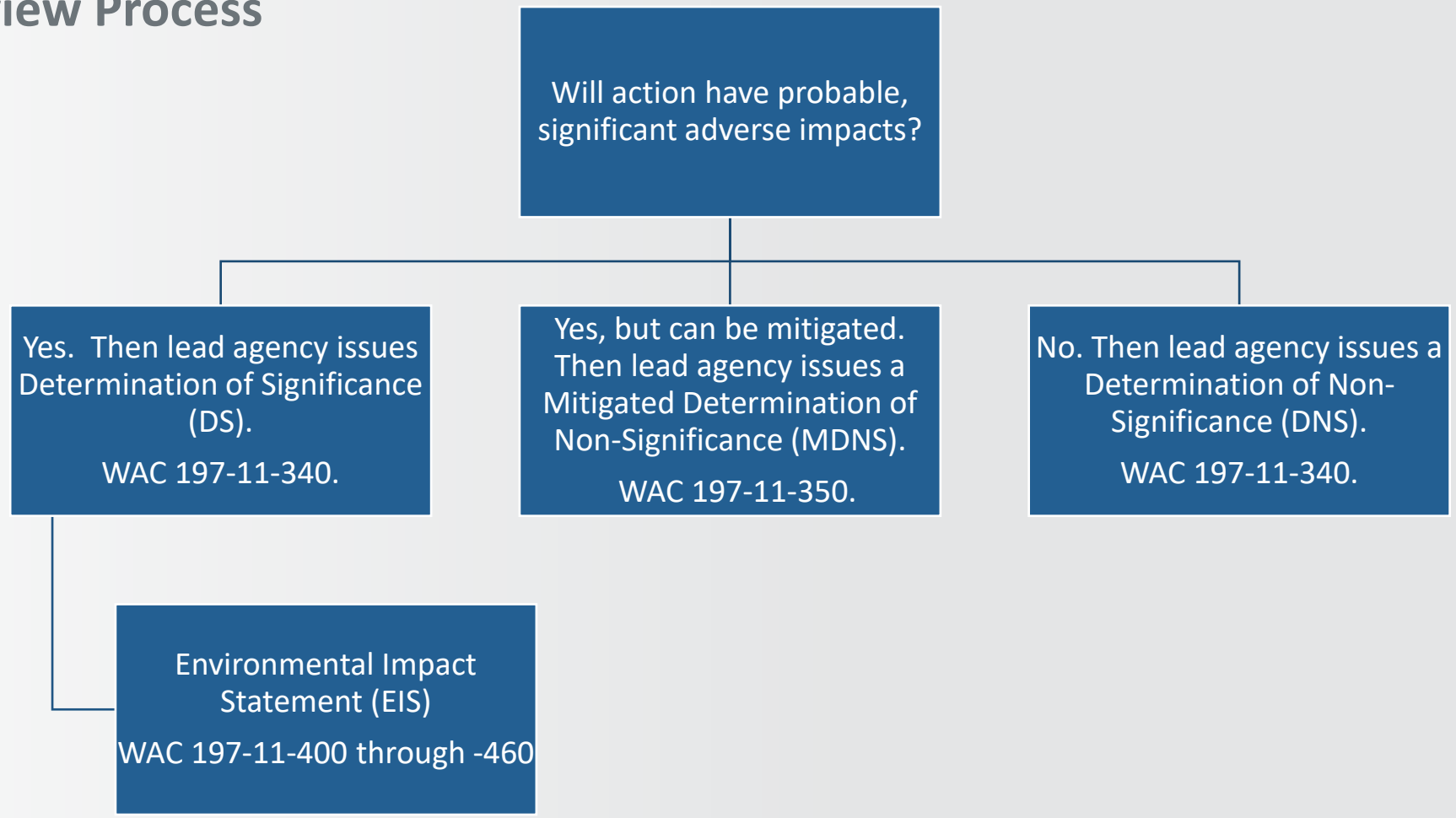
** Significant new circumstances or information relevant to environmental concerns or substantial changes in the proposed action that are relevant to environmental concerns may necessitate preparation of a supplemental EIS following either the draft or final EIS, or the Record of Decision. 40 CFR 1502.9(d).*

WA State Environmental Policy Act

- SEPA requires environmental review to be completed before a state or local agency may issue a discretionary permit or approval.
- This process begins with the applicant's submittal of a SEPA checklist and supporting technical studies.
- Lead agency reviews the applicant's checklist and the public's comments on the proposal and then decides whether the project will have probable significant, adverse effects.
- If so, an environmental impact statement will be required.
- If the impacts can be mitigated to a level below significance, the County will issue a Mitigated Determination of Nonsignificance ("MDNS").
- SEPA provides permitting agencies with supplemental substantive authority to condition or deny projects based upon identified environmental impacts. Conditions identified in an MDNS will be included as conditions of approval in the permits issued.

SEPA 101

Environmental Review Process



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3 Pathways for Clean Energy Permitting in WA

Ecology's Coordinated Clean Energy Permitting Process (new)

Energy Facility Siting Evaluation Council (EFSEC) Process

Local government-led environmental review and permitting

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Local Permitting Process

- City or County serves as SEPA lead agency
- Need to use approval processes mandated by local code
  - Staff approval
  - Hearing Examiner
  - City/County Council
- State permitting agencies rely on SEPA analysis performed by the municipality
- Must follow approval processes for state permits

Eligible Clean Energy Projects for EFSEC and Coordinated Permit Review

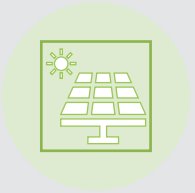
Renewable Natural Gas

Biofuels

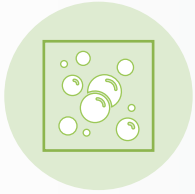
Biomass energy

Alternative jet fuel or sustainable aviation fuel

Wind



Solar



Green hydrogen

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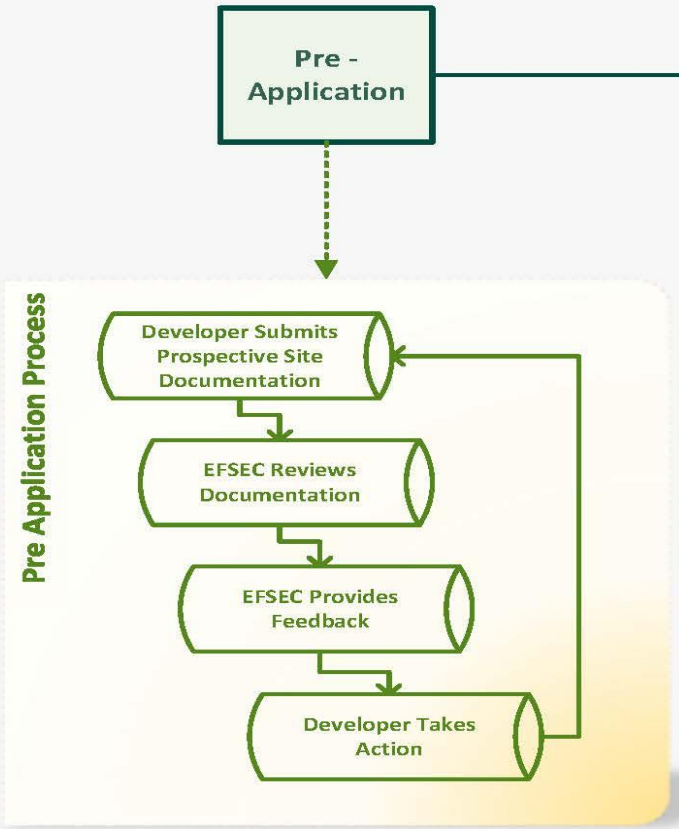
Coordinated Clean Energy Permit Process

- **Goal:** To ensure that the siting of new clean energy projects happens in an efficient, sustainable, and equitable manner.
- **Key Components**
  - **Streamlined Clean Energy Permitting Authority:** Establishes the Interagency Clean Energy Siting Council – co-chaired by the Departments of Ecology and Commerce – dedicated to consolidating the siting and permitting processes for clean energy projects.
  - **Expedited Environmental Review Process:** Amends SEPA to direct lead agencies to complete EISs for clean energy projects within 2 years.
  - **Clean Energy Projects of Statewide Significance:** In order to expedite the development of certain clean energy projects, the Department of Commerce is required to establish a new program for the designation of Clean Energy Projects of Statewide Significance (CEPSS).

EFSEC Pre-Application through Site Certification Process



Pre - Application → Application Submittal → Governor Decision

What is Pre-Application?

The Pre-Application phase enables an honest exchange of information and data early in the project planning process. Typically, this conversation is with EFSEC and a developer, but may include others. This ongoing conversation can help developers avoid unnecessary delays and expenditures. By identifying information gaps early in the planning process many potential issues can be addressed with minimal financial impact. However, if those issues are not identified until later, they may result in:

- Lengthy delays to conduct additional seasonally dependent studies.
- Extensive project re-design.
- High costs for remediations of problems that could have been avoidable.
- The need to switch or relocate the site.
- Project abandonment.

The goal of Pre-Application is to assist in avoiding negative outcomes by ensuring the right people with the right information are around the table early on. These Pre-Application discussions allow for collaboration to identify what issues need attention if a project has a better chance of success.

The initial conversation helps in identifying stakeholders and how to include their prospectives. On-going dialogues will help to pinpoint gaps - what additional data or research is needed, and what studies can be done to produce that data.

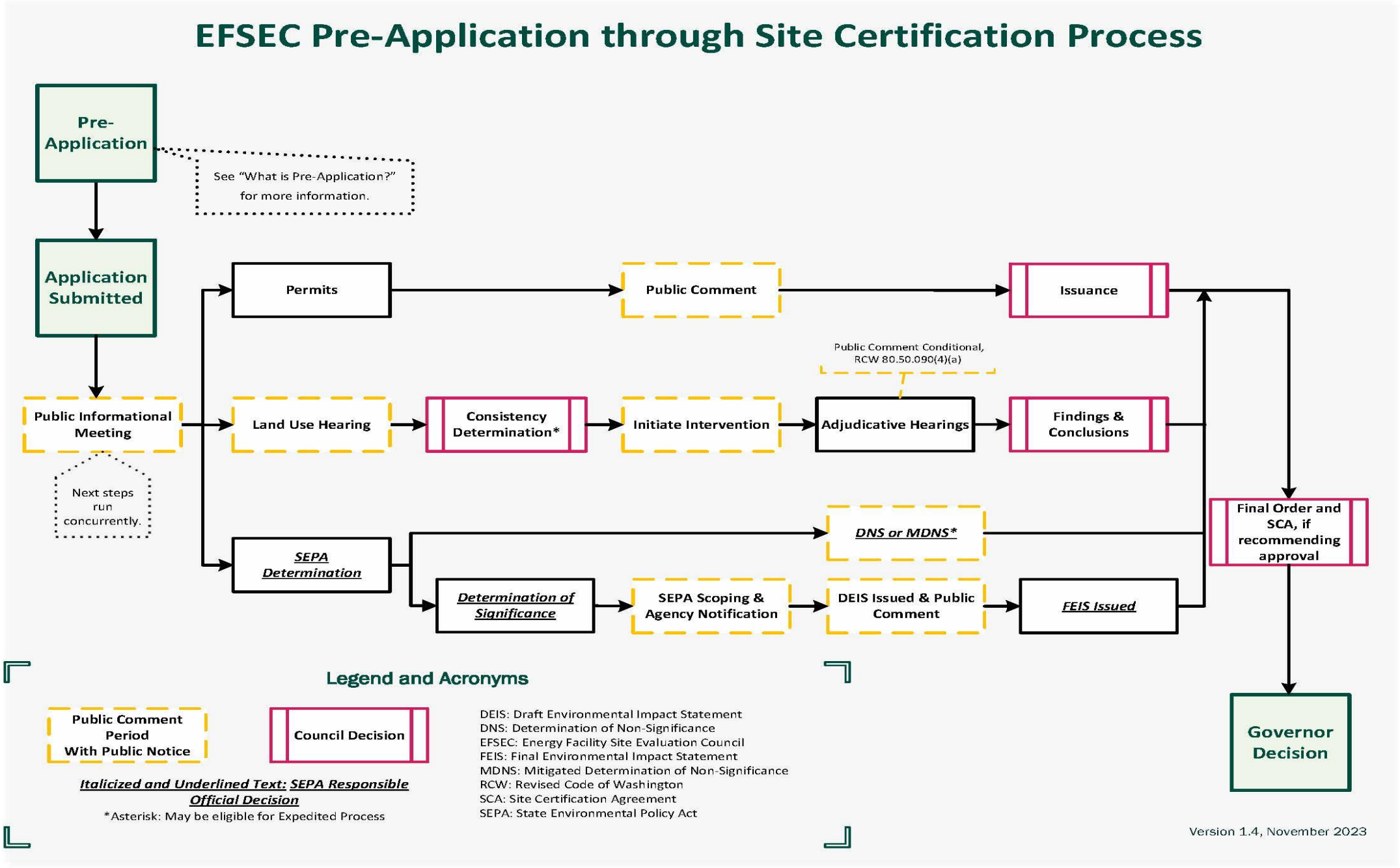
When the iterative pre-application process is done correctly it will lead to a more complete formal application that will be ready for regulatory review.

The Pre-Application Process Breakdown

Version 1.4, November 2023

Source: https://www.efsec.wa.gov/sites/default/files/public/images/20231130_FINAL_PreAppProcessv1.4.pdf

EFSEC Pre-Application through Site Certification Process



Source: https://www.efsec.wa.gov/sites/default/files/public/images/20231130_FINAL_PreAppProcessv1.4.pdf

Mandatory EFSEC Certification

- Thermal Electrical Generation
- Pipelines
- Electrical Transmission Lines
- Petroleum Refineries
- Petroleum Storage

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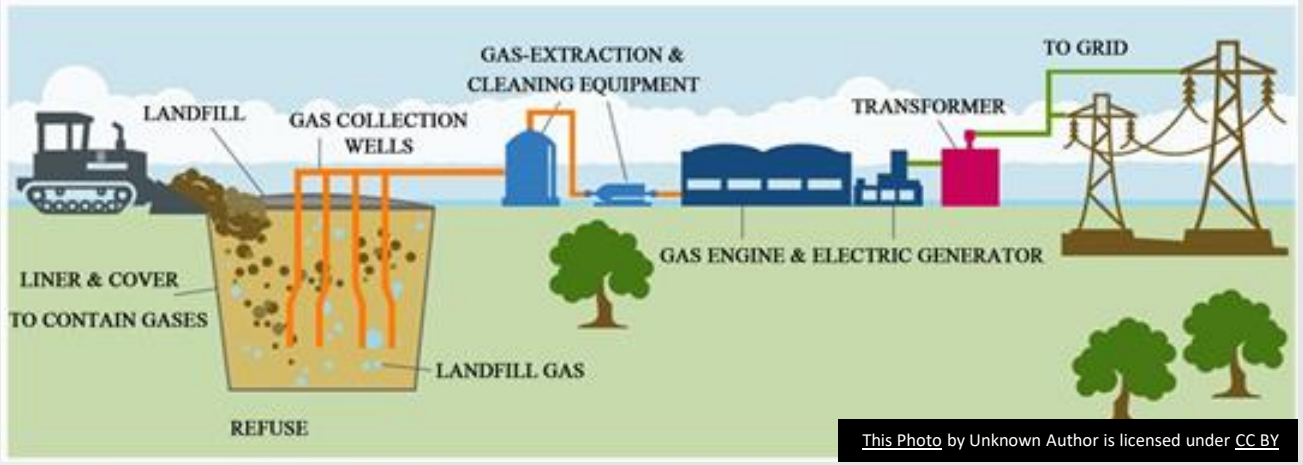
Optional EFSEC Process
Alternative Energy Electrical Generation

- Alternative Energy Electrical Generation
  - Biomass
  - Landfill Gas
  - Wind
  - Solar
  - Geothermal
  - Wave or tidal action



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COMPARISON OF OPTIONAL PATHWAYS FOR CLEAN ENERGY PROJECTS

Actions and Roles	Ecology's Coordinated Clean Energy Permit Process	Energy Facility Site Evaluation (EFSEC) Council Process	Local Government-Led SEPA and Permitting Process
Applies to new projects or facility modifications	Yes	Yes	Yes
Agency coordinating overall process	Ecology coordinates the environmental review and permitting work with participating state and local agencies	EFSEC coordinates the environmental review and permitting work with participating state and local agencies	No single agency lead
SEPA lead agency	Determined based on project and location	SEPA review is incorporated into the EFSEC process and the EFSEC Director is the responsible official	Determined based on project and location
Permitting	Each of the project's permits has a state or local agency with legal responsibility	EFSEC makes decisions and issues most state and local permits as part of the Site Certification Agreement	Each of the project's permits has a state or local agency with legal responsibility
Decision-maker(s)	• For each permit, the agency responsible makes the decision • All permits needed for a project must be approved	The EFSEC Council makes a recommendation to the governor, who makes the decision on a project	• For each permit, the agency responsible makes the decision • All permits needed for a project must be approved
Responsibility for Tribal engagement and consultation	Ecology is responsible for offering Tribal engagement and consultation for the coordinated permit process	EFSEC is responsible, in coordination with Department of Archaeological and Historic Preservation (DAHP)	• State agencies would offer Tribal consultation for environmental reviews as the SEPA lead agency and/or for their permits • Local governments can offer to engage with Tribes
Engagement with overburdened communities	Ecology verifies engagement has been done in timely manner and comments have been considered	EFSEC leads engagement	Each agency leads their own engagement process
Cost reimbursement required	Yes	Yes	May be required
Pre-application process	Yes	Yes (required for transmission lines)	Yes
Complete application required	Yes, it will be used for development of the work plan and to begin SEPA review	Yes, and if pre-application is done, the SEPA review can begin before the final application is submitted	Yes, it is used to begin SEPA review
Local ordinances	Local ordinances apply	EFSEC can preempt county and local ordinances	Local ordinances apply
Appeals	Permits each have their own requirements for appeals	Appeals are limited to the final decision and are not done for individual permits	Permits each have their own requirements for appeals

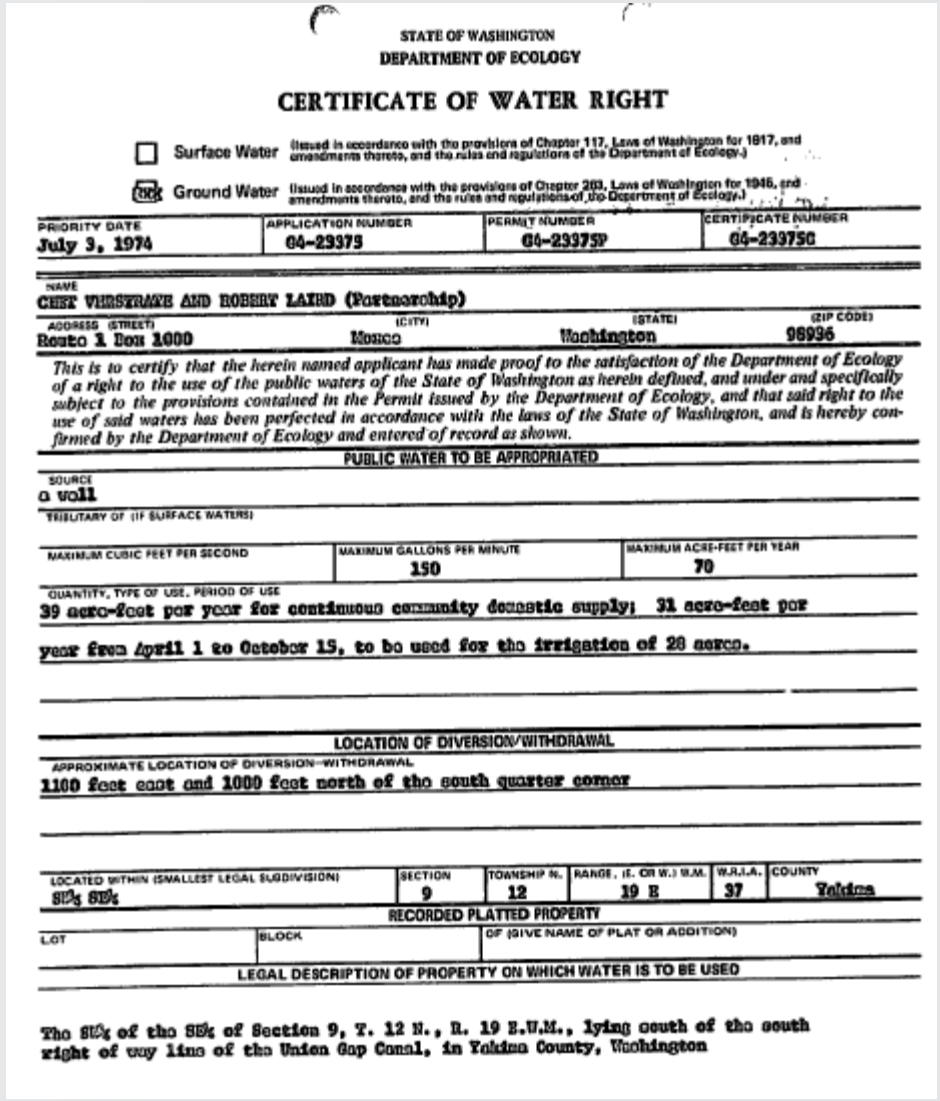
Source: https://apps.ecology.wa.gov/publications/documents/2406001.pdf

Water Availability

Evaluating Water Rights

Understanding The Process

- Types of water rights
  - Claims, permits, certificates, adjudicated rights
- Usufructuary rights
  - Owner of the water right acquires a right to put the water to beneficial use
  - Defined and limited by:
    - Quantity of use
    - Place of use
    - Time of use
    - Point of diversion
    - Place of use
    - Purpose of use
- Personal Property vs. Real Property



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

CERTIFICATE OF WATER RIGHT

☐ Surface Water (Issued in accordance with the provisions of Chapter 117, Laws of Washington for 1917, and amendments thereto, and the rules and regulations of the Department of Ecology.)

☒ Ground Water (Issued in accordance with the provisions of Chapter 263, Laws of Washington for 1945, and amendments thereto, and the rules and regulations of the Department of Ecology.)

PRIORITY DATE	APPLICATION NUMBER	PERMIT NUMBER	CERTIFICATE NUMBER
July 3, 1974	G4-29379	G4-29379P	G4-23375C

NAME
CHET VERSTRATE AND ROBERT LAIRD (Partnership)

ADDRESS (STREET)	(CITY)	(STATE)	(ZIP CODE)
Route 1 Box 1000	Moxee	Washington	98936

This is to certify that the herein named applicant has made proof to the satisfaction of the Department of Ecology of a right to the use of the public waters of the State of Washington as herein defined, and under and specifically subject to the provisions contained in the Permit issued by the Department of Ecology, and that said right to the use of said waters has been perfected in accordance with the laws of the State of Washington, and is hereby confirmed by the Department of Ecology and entered of record as shown.

PUBLIC WATER TO BE APPROPRIATED

SOURCE
a well

TRIBUTARY OF (IF SURFACE WATERS)

MAXIMUM CUBIC FEET PER SECOND	MAXIMUM GALLONS PER MINUTE	MAXIMUM ACRE-FEET PER YEAR
	150	70

QUANTITY, TYPE OF USE, PERIOD OF USE
39 acre-feet per year for continuous community domestic supply; 31 acre-feet per year from April 1 to October 15, to be used for the irrigation of 28 acres.

LOCATION OF DIVERSION/WITHDRAWAL

APPROXIMATE LOCATION OF DIVERSION—WITHDRAWAL
1100 feet east and 1000 feet north of the south quarter corner

LOCATED WITHIN (SMALLEST LEGAL SUBDIVISION)	SECTION	TOWNSHIP N.	RANGE (E. OR W.) W.M.	W.R.I.A.	COUNTY
S½ SE¼	9	12	19 E	37	Yakima

RECORDED PLATTED PROPERTY

LOT	BLOCK	OF (GIVE NAME OF PLAT OR ADDITION)

LEGAL DESCRIPTION OF PROPERTY ON WHICH WATER IS TO BE USED

The S½ of the SE¼ of Section 9, T. 12 N., R. 19 E.W.M., lying south of the south right of way line of the Union Gap Canal, in Yakima County, Washington

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Water Availability / Supply

What is the source of water for the project?

- Individual surface or groundwater right
- Irrigation district
- Private water company
- Municipal supplier
- Other third-party supplier
- Purchasing water on the open market

Is water physically available?

- Does the jurisdiction require proof to issue a building permit?
- Is the basin closed to additional allocation of water?
- Does the jurisdiction refuse to permit projects in particular places given water shortages?

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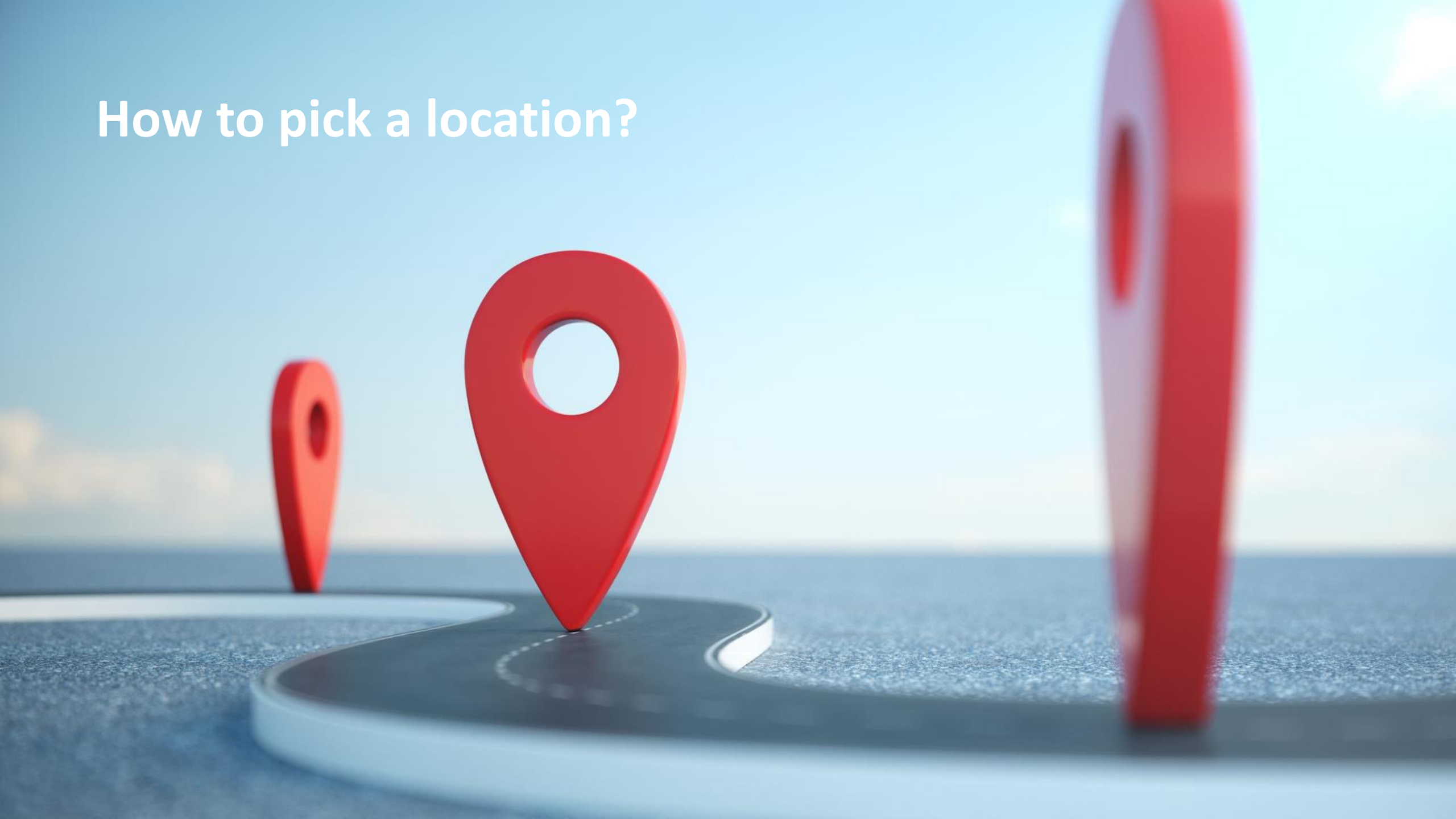
How to pick a location?

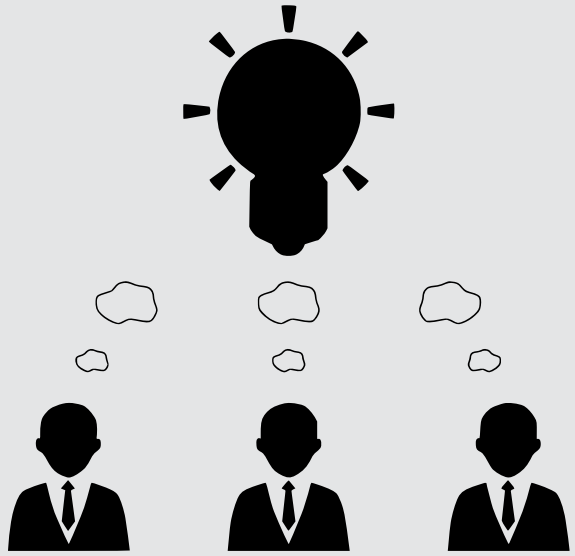


State and Local Incentives

- State
  - Reduced B&O (business & occupation) tax rate for manufacturing wood biomass fuel. RCW 82.04.260(1)(e).
    - Expires Jan. 1, 2029
  - Anaerobic digesters - property and leasehold excise tax exemption. RCW 84.36.635; RCW 82.29A.135.
    - Expires Dec. 31, 2024
  - Hog fuel sales & use tax exemption. RCW 82.08.956; RCW 82.12.956; RCW 82.32.605.
    - Expires June 30, 2034
  - Sales and use tax deferral program for clean energy investment projects. RCW 82.89.
    - Expires June 30, 2032
  - Sales and use tax exemption for anaerobic digesters and equipment used to process biogas from landfills and anaerobic digesters. RCW 82.08.900; RCW 82.12.900
    - Expires Jan 1, 2029.

How to choose between jurisdictions?

- How does the permit get approved?
  - Hearing Examiner
  - City / County Council - political process
  - Administrative approval
- SEPA lead agency
- Timing
- Local Politics
- Local opposition or support
- Incentives?
- Workforce
- Water?



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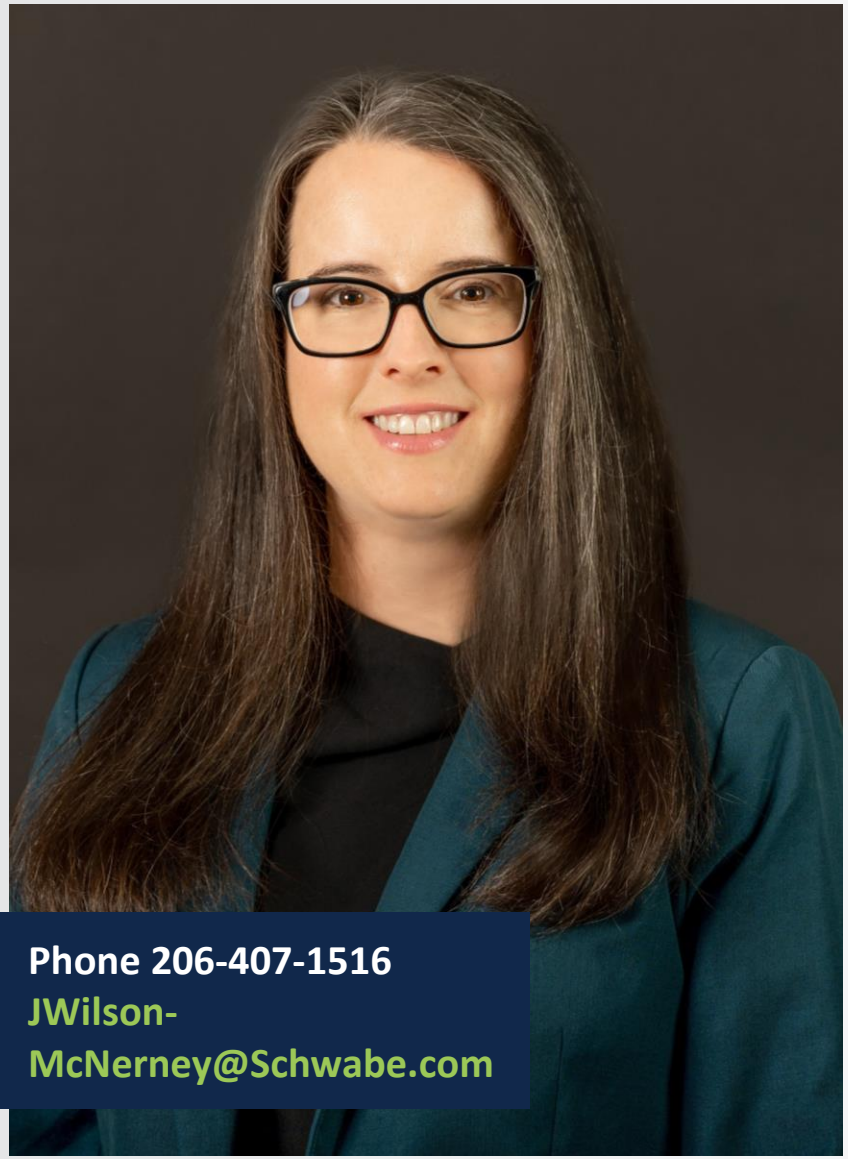

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