

Concise Explanatory Statement
(RCW 34.05.325.6a)

Of

WAC 463, Energy Facility Site Evaluation Council
Operational Rules



Washington State
Energy Facility
Site Evaluation Council

October 2007

Executive Summary

The Energy Facility Site Evaluation Council (EFSEC or Council) began the process of revising the state's energy facility siting rules in 2000. In 2004 EFSEC adopted a comprehensive set of rules developed over several years that set construction and operational standards for energy facilities (WAC 463-62). Also adopted were a number of administrative corrections and updates, as well as a partial reorganization of the Chapters within Title 463 WAC.

During the period of 2004 through 2006 EFSEC continued to review its procedural rules. Also during this time EFSEC conducted two application reviews and found that some of its procedural rules were not unnecessarily adding benefit to its application review process, and that certain aspects of its rules may contribute additional burden to the process increasing the time and cost of an application review.

The Washington State Energy Facility Site Evaluation Council enabling legislation is Chapter 80.50 RCW. The legislation authorizing the council is unique to state government in that it grants sole responsibility for siting certain energy facilities to the Council. This includes the provision that EFSEC preempts the authorities of both state and local entities when it comes to siting energy facilities under its jurisdiction. Within Chapter 80.50 RCW the Council is granted authority to address environmental and ecological and related impacts resulting from siting energy facilities.

During the latter part of 2006 and into 2007, EFSEC discussed the need and intent of this rulemaking during its monthly public meetings. The rules discussion was also captured in the EFSEC minutes that are distributed monthly to a large mail list as well as posted on EFSEC's web site: www.efsec.wa.gov.

All of the editing and redrafting of existing rules were done by council members, staff of the council and the assistant attorney general assigned to the council and publicly discussed as mentioned above.

The Council's goal was to streamline EFSEC's siting process and to ensure the intent of Chapter 80.50 RCW was reflected by its rules.

Changes to Chapter 463-28 WAC State Preemption would expedite the siting of energy facilities where a project is found to be inconsistent with local land use plans and zoning ordinances. This would be accomplished by eliminating the requirement for an applicant to seek local government change land use plans or zoning ordinances prior to an adjudicative hearing.

Changes to Chapter 463-47 WAC SEPA Rules would streamline and reduce costs of siting energy facilities by: 1) providing EFSEC the option of having SEPA documents

prepared by EFSEC, an independent consultants, or the applicant; 2) giving EFSEC the option of preparing a Final Environmental Impact Statement before or after an adjudicative hearing; and 3) changing the immediate responsibility for SEPA activities from the Council to the Council's Responsible Official.

Changes to Chapter 463-66 WAC Amending, Transferring, or Terminating a Site Certification Agreement were considered. Change to WAC 463-66-040 that added Chapter 463-72 WAC Site Restoration to the items to be considered in an amendment review. Changes to WAC 463-66-070 and 080 were considered but not carried forward.

A CR 101 was filed in June 2006. The first draft of proposed rule revisions were prepared and discussed at an EFSEC meeting in November 2006. In January 2007 the draft rules they were placed on the EFSEC web site and sent to stakeholders for comment.

On April 13, 2007 EFSEC filed Form CR 102 Proposed Rulemaking with the Code Reviser Office with the June 12, 2007 hearing in Olympia, and the June 13, 2007 hearing in Yakima. A notice of proposed rulemaking was sent to EFSEC's rulemaking mail list and extensive list of those who follow EFSEC issues. A deadline of 5:00 p.m. on July 13, 2007 was set for all comments.

The council held a public comment hearing during its June 12, 2007 monthly meeting and held a second public hearing on June 13, 2007 in Yakima. Neither public hearing resulted in any comments to the proposed rule changes. Sixteen written comments were received by the June 13, 2007 deadline. The Council also considered seven additional comments that were received after the June 13, 2007 deadline.

Based on the comments and Council review changes to the proposed rules were made except for eliminating changes to WAC 463-66-070 and repeal of WAC 463-66-080. Changes to these two sections were not adopted.

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Authority to Adopt Rules

The Washington State Energy Facility Site Evaluation Council (EFSEC or Council) is authorized in Chapter 80.50 RCW¹. RCW 80.50.040 (4) gives the council the power to “To prescribe the form, content, and necessary supporting documentation for site certification...” and “To adopt, promulgate, amend, or rescind suitable rules and regulations, pursuant to chapter 34.05 RCW, to carry out the provisions of this chapter, and the policies and practices of the council in connection therewith.”

RCW 80.50 was originally enacted in the 1970’s (1970 ex.s. c 45 § 2) and has been amended several times over the years including amendments in 2004, 2001, 1995, 1977 and 1975-76.² The council as it exists today is the result of legislation and the operating rules and regulations it established during this period.

EFSEC is granted authority to address environmental and ecological impacts resulting from siting energy facilities from two separate legislative authorities. These are RCW 80.50.040 Energy facility site evaluation council – Powers enumerated and RCW 43.21C The State Environmental Policy Act.

RCW 34.05.328 requires state agencies adopting “significant legislative rules” to prepare what is known as a Concise Explanatory Statement. This is intended to provide a clear understanding of rules proposed for adoption by providing sufficient documentation as to the extent of the rules revisions so as to “persuade a reasonable person that the determinations are justified.”³ Although EFSEC is not one of the agencies required by RCW 34.05.328(5) to go through this process to document its rule revisions, it determined that the extent of the changes being considered warranted preparing this document.

The legislation authorizing EFSEC is unique to state government in that it grants sole responsibility for siting certain energy facilities to the council. This includes the provision that EFSEC legislation preempts the authorities of both state and local entities when it comes to siting energy facilities under its jurisdiction.⁴ EFSEC enabling legislation states clearly the purpose of the council and its powers and responsibilities.

RCW 80.50.010 Legislative finding--Policy--Intent. The legislature finds that the present and predicted growth in energy demands in the state of Washington requires the development of a procedure for the selection and utilization of sites for energy facilities and the identification of a state position with respect to each proposed site. The legislature recognizes that the selection of sites will have a significant impact upon the welfare of the population, the location and growth of industry and the use of the natural resources of the state.

¹ RCW, Revised Code of Washington

² 2004 c 224 § 7; 2001 c 214 § 3; 1995 c 69 § 1; 1977 ex.s. c 371 § 2; 1975-'76 2nd ex.s. c 108 § 30.

³ RCW 34.05.328(2)

⁴ RCW 80.50.110

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

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

- (1) To assure Washington state citizens that, where applicable, operational safeguards are at least as stringent as the criteria established by the federal government and are technically sufficient for their welfare and protection.
- (2) To preserve and protect the quality of the environment; to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment.
- (3) To provide abundant energy at reasonable cost.
- (4) To avoid costs of complete site restoration and demolition of improvements and infrastructure at unfinished nuclear energy sites, and to use unfinished nuclear energy facilities for public uses, including economic development, under the regulatory and management control of local governments and port districts.
- (5) To avoid costly duplication in the siting process and ensure that decisions are made in a timely fashion and without unnecessary delay. [2001 c 214 § 1; 1996 c 4 § 1; 1975-76 2nd ex.s. c 108 § 29; 1970 ex.s. c 45 § 1.]

The full extent of EFSEC authority to adopt rules is described in:

80.50.040 Energy facility site evaluation council--Powers enumerated.

The council shall have the following powers:

- (1) To adopt, promulgate, amend, or rescind suitable rules and regulations, pursuant to chapter 34.05 RCW, to carry out the provisions of this chapter, and the policies and practices of the council in connection therewith;
- (2) To develop and apply environmental and ecological guidelines in relation to the type, design, location, construction, and operational conditions of certification of energy facilities subject to this chapter;
- (3) To establish rules of practice for the conduct of public hearings pursuant to the provisions of the Administrative Procedure Act, as found in chapter 34.05 RCW;
- (4) To prescribe the form, content, and necessary supporting documentation for site certification;
- (5) To receive applications for energy facility locations and to investigate the sufficiency thereof;
- (6) To make and contract, when applicable, for independent studies of sites proposed by the applicant;
- (7) To conduct hearings on the proposed location of the energy facilities;
- (8) To prepare written reports to the governor which shall include: (a) a statement indicating whether the application is in compliance with the council's guidelines, (b)

- criteria specific to the site and transmission line routing, (c) a council recommendation as to the disposition of the application, and (d) a draft certification agreement when the council recommends approval of the application;
- (9) To prescribe the means for monitoring of the effects arising from the construction and the operation of energy facilities to assure continued compliance with terms of certification and/or permits issued by the council pursuant to chapter 90.48 RCW or subsection (12) of this section: PROVIDED, that any on-site inspection required by the council shall be performed by other state agencies pursuant to interagency agreement: PROVIDED FURTHER, that the council may retain authority for determining compliance relative to monitoring;
 - (10) To integrate its site evaluation activity with activities of federal agencies having jurisdiction in such matters to avoid unnecessary duplication;
 - (11) To present state concerns and interests to other states, regional organizations and the federal government on the location, construction, and operation of any energy facility which may affect the environment, health, or safety of the citizens of the state of Washington;
 - (12) To issue permits in compliance with applicable provisions of the federally approved state implementation plan adopted in accordance with the Federal Clean Air Act, as now existing or hereafter amended, for the new construction, reconstruction or enlargement or operation of energy facilities: PROVIDED, that such permits shall become effective only if the governor approves an application for certification and executes a certification agreement pursuant to this chapter: AND PROVIDED FURTHER, that all such permits be conditioned upon compliance with all provisions of the federally approved state implementation plan which apply to energy facilities covered within the provisions of this chapter; and
 - (13) To serve as an interagency coordinating body for energy-related issues.

The legislative intent established in RCW 80.50.010 and the fact that the legislature, throughout RCW 80.50 and specifically in RCW 80.50.040, used the broadest possible terms to describe the powers and duties conveyed to EFSEC is the basis of the rule-making authority granted to EFSEC. As one example, the broad language used in RCW 80.50.040(2) indicates that it is not the legislature's intent to enumerate every possible environmental concern that it believes EFSEC should address in the siting process. Professor William Rogers,⁵ writing in response to a position of the Association of Washington Business, writes: "To ensure that the sweeping language and pronouncements of RCW 80.50.010 would not be lost in the practical application of the statute, the legislature specifically enumerated EFSEC's power to develop and apply environmental and ecological guidelines in relation to the type, design, location, construction and operational conditions of certification of energy facilities subject to this chapter." (RCW 80.50.040(2)). This statement by the legislature constitutes an express granting of authority empowering the council to address any and all environmental and ecological concerns related to energy facilities."

To fulfill its mandate, EFSEC is required to establish an array of procedural and operational rules to carry out legislative intent, in particular the charge to"

⁵ Professor William Rogers Jr., Stimson Bullitt Professor of Environmental Law, University of Washington. "Setting the Standard: the legal case for CO2 regulation in Washington."

- balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public⁶;
- adopt, promulgate, amend, or rescind suitable rules and regulations, pursuant to chapter 34.05 RCW, to carry out the provisions of this chapter, and the policies and practices of the council⁷;
- develop and apply environmental and ecological guidelines in relation to the type, design, location, construction, and operational conditions of certification of energy facilities.⁸

All of these dictate the need for EFSEC to promulgate and from time to time update or propose new rules for the purpose of implementing the provisions of Chapter 80.50 RCW.

In addition it is required that all actions of the council must comply with the provisions of RCW 43.21C, the State Environmental Policy Act (SEPA). SEPA is set forth as an independent additional means of evaluation of potential environmental and ecological impacts resulting from siting energy facilities. The SEPA process is established to examine and assess impacts resulting from an action and determine necessary mitigation or other conditions that must be met in order to authorize activities that do not result in adverse impacts on the environment. EFSEC has the authority under SEPA to condition and require appropriate mitigation in its recommendation to approve an energy facility.

The rules under which EFSEC currently operates and the results of this rule review process are in direct response to the requirements of Chapter 80.50 RCW. These include establishing:

- (1) Agency operational and public record-handling rules per RCW 80.50.040(1) “To adopt, promulgate, amend, or rescind suitable rules and regulations, pursuant to chapter 34.05 RCW, to carry out the provisions of this chapter, and the policies and practices of the council...”;
- (2) Terms and conditions for operating energy facilities and establishing performance standards and mitigation requirements per RCW 80.50.040(2) “To develop and apply environmental and ecological guidelines in relation to the type, design, location, construction, and operational conditions of certification of energy facilities...”;
- (3) Requirements for public meetings per RCW 80.50.040(3) “To establish rules of practice for the conduct of public hearings pursuant to the provisions of the Administrative Procedure Act, as found in Chapter 34.05 RCW...”;
- (4) Guidelines for Applications for Site Certification per RCW 80.50.040(4), “To prescribe the form, content, and necessary supporting documentation for site certification...”;
- (5) Review of applications for completeness and if necessary, hiring consultants to conduct necessary studies and report on proposals to site energy facilities per RCW 80.50.040(5-6), “To receive applications for energy facility locations and to investigate the sufficiency thereof and to make and contract, when applicable, for independent studies of sites proposed by the applicant...”;

⁶ RCW 80.50.010.

⁷ RCW 80.50.040(1).

⁸ RCW 80.50.040(2).

- (6) Process and procedures for conducting adjudicative hearings on proposed energy facilities per RCW 80.50.040(7), “To conduct hearings on the proposed location of the energy facilities...”;
- (7) Preparation of recommendations to approve or deny site certification for approval by the governor per RCW 80.50.040(8), “To prepare written reports to the governor...”;
- (8) Conducting compliance monitoring and determining compliance per RCW 80.50.040(9), “To prescribe the means for monitoring of the effects arising from the construction and the operation of energy facilities to assure continued compliance with terms of certification and/or permits issued by the council...”;
- (9) Rules consistent with and comparable to the requirements of other state and federal agencies per RCW 80.50.040(10), “To integrate its site evaluation activity with activities of federal agencies having jurisdiction in such matters to avoid unnecessary duplication”;
- (10) Coordination with and consideration of concerns over siting of energy facilities with state and interstate organizations per RCW 80.50.040(11), “To present state concerns and interests to other states, regional organizations, and the federal government on the location, construction, and operation of any energy facility which may affect the environment, health, or safety of the citizens of the state of Washington; and
- (11) Maintain rules pertaining to the issuance of permits required under the Federal Clean Air Act and National Pollution Discharge Elimination System per RCW 80.50.040(12), “To issue permits in compliance with applicable provisions of the federally approved state implementation plan adopted in accordance with the Federal Clean Air Act and Clean Water Act.”

Goals and Objectives of Rulemaking

The council is directed to provide a balance between increasing demands for energy, location of energy facilities, impacts on the environment and the broad interests of the public by providing and clear, definitive and understandable processes, procedures and requirements when siting new, expanding, or changing existing energy facilities. Many of the rules in place today were crafted in an era when nuclear energy development was emerging and are not completely appropriate for today’s energy environment. It has been the intent of the council over the past several years to update its operational and energy-facility siting rules to provide clear and understandable energy-facility siting requirements while providing applicants and members of the public a higher degree of certainty in the project review and approval process and maintaining a clear balance between the need to site energy facilities and to protect public health and the environment. EFSEC’s goal is to put in place mechanisms that add certainty to the siting process while achieving the required balance. The nature of the EFSEC enabling legislation provides authority to adopt the necessary rules to carry out this mandate.

The proposed rule revisions to the council operating rules will maintain the necessary balance between the need for energy and protection of public health and safety and the environment. At the same time, the proposed changes to procedures will streamline the application process and provide greater certainty to applicants.

It is the belief of the council that these goals can be achieved by the adoption of revisions to procedural rules regarding preemption, implementation of the State Environmental Policy Act, and changes to site certification agreements at this time.

Basis for Developing Rule – Why Are We Doing This

The Energy Facility Site Evaluation Council as it exists today was created in 1970. While the statute (Chapter 80.50 RCW) and various sections of the Administrative Procedure Act (RCW 34.05) have been amended, the council continues to find through time where existing rules may be changed to streamline and expedite its siting and compliance monitoring without impacting its ability to carry out the intent of Chapter 80.50 RCW. The EFSEC rules received an extensive overhaul and revisions in 1977 and 2004.

In June 2006 EFSEC filed with the Code Reviser Office Form CR 101 a Preproposal Statement of Inquiry. The subjects under consideration for this notice included “but not necessarily be limited to: 1) expedited processing, 2) timing of environmental review and land use determinations, 3) preemption, 4) carbon dioxide mitigation, 5) amendments and termination of site certification agreements, 6) potential site studies, 7) use of consultants, and 8) fees and allocation of costs”. This rulemaking is consistent with the June 2006 CR 101.

Since 2004 EFSEC has also reviewed new applications for site certification and several changes to site certification agreements have demonstrated that further changes to its rules are necessary. The application reviews and amendments to site certification agreements have brought to the forefront issues with the rules for preemption, SEPA, and amending site certification agreements.

Until recently the existing rules have worked well and while the existing rules provide the guidance necessary to complete facility siting, the rules regarding the procedure in the event a project is found inconsistent with local land use regulations has been found by the Council to delay its review and may be in conflict with the intent of its statute that clearly states the state is the sole siting authority.

In reviewing Executive Order No. 06-02 on Regulatory Improvement issued by Governor Gregoire in February 2006, and recent experience with application reviews, EFSEC has looked at its processes and procedures in implementing SEPA. Through discussions with applicants and stakeholders the Council has determined that providing additional options in how and when it prepares environmental documents while still meeting the requirements of the State Environmental Policy Act could save time and money for those involved with application reviews. In addition the options proposed by this rulemaking to SEPA may enable a better understanding by the public of what potential environmental impacts may occur so they are better informed and can make a better choice of whether to become an intervener in an adjudicative proceeding.

EFSEC have had several recent requests to amend site certification agreements. With these recent requests for amendments, amendments to site certification agreements have not been an

uncommon occurrence over the past 10 to 15 years. Current rules require a Governor's approval of an amendment if there is significant environmental impact due to the proposed amendment. Proposed changes to WAC 463-66-070 and the repeal of WAC 463-66-070 were considered but the Council determined these should not be adopted.

The extent of the rules revisions that the council considered were the result of; 1) direction from Governor Gregoire; 2) experience based on findings in recent applications reviews, and 3) the continued Council review of its administrative process changes, both large and small.

Council Action To Prepare Final Draft Of Proposed Rules

Throughout the rulemaking process, members of the council were very involved with setting the tone for the process. Council member's attended all of the meetings where rule changes were discussed and worked with staff, to prepare the proposed rules revisions.

After the issuance of the June 2006 CR 101, EFSEC began developing proposed language for Chapters 28, 47, and 66 WAC. The first drafts of the proposed changes to the rules were discussed at its November 2006 monthly meeting.

In January 2007, after changes to the draft rules they were placed on the EFSEC web site and sent to stakeholders for comment. A number of these comments offered alternative language to clarify the intent of the proposed revisions. The council incorporated several of the suggested clarifications in areas of the rule. In March 2007, the Council determined that there should be two public hearings on the rules, one in Olympia and one in eastern Washington.

On April 13, 2007 EFSEC filed Form CR 102 Proposed Rulemaking with the Code Reviser Office with the June 12, 2007 hearing in Olympia, and the June 13, 2007 hearing in Yakima. A notice of proposed rulemaking was sent to EFSEC's rulemaking mail list and extensive list of those who follow EFSEC issues. A deadline of 5:00 p.m. on July 13, 2007 was set for all comments.

Council did not receive any oral comments at either hearing. By the 5:00 pm June 13th deadline, the Council received 16 emails and/or letters commenting on the proposed rule revisions. The Council received an additional 7 emails and/or letters after the deadline commenting on the proposed revisions.

Final Council Rule Adoption

The Council approved issuance of a Proposed Rule-making notice, Form CR 102, at its monthly meeting of April 10, 2007. The Form CR 102 was filed with the Coder Reviser Office on April 13, 2007. That notice established a June 12 and 13, 2007 public hearing dates and July 10, 2007 intended rule adoption date.

The Council held a formal public hearing on the draft rules on June 12, 2007 in Olympia beginning at 3:00 P.M. and a second formal public hearing on the draft rules on June 13, 2007 in Yakima, beginning at 2:00 P.M... The Council did not receive any oral comments at either hearing. All written comments were required to be submitted by 5:00 p.m. on June 13, 2007. By the 5:00 pm June 13th deadline, the Council received 16 emails and/or letters commenting on the proposed rule revisions. The Council received an additional 7 emails and/or letters after the deadline commenting on the proposed revisions.

The Council scheduled July 10, 2007 to take action and issue a CR 103, however at the July 10, 2007 meeting the Council postponed issuance of the CR103 until a later date. A date of October 9, 2007 was chosen to take final action and issue the CR 103.

EFSEC staff prepared responses to all twenty-three comment email/letters for Council member consideration (Attachment 1). Those responses to the comments were distributed to the Council members prior to their October 9, 2007 monthly meeting. All comments were considered by the Council. There were some suggestions for changes that the council did not agree with and were not accepted by the council. Persons seeking further changes to the rules of the council are encouraged to discuss suggestions with council staff. It is possible that such discussions will clarify areas that may be confusing to some.

Many valuable comments were received and discussed by the council. The council wishes to thank everyone who has been involved in this rule revision process for their time, effort and comments on these rules. Without the stakeholder process and the many individuals that have been involved these rules could not have been revised so extensively and so thoroughly.

Proposed Final Rule

Following the formal public hearing and public comment period, the council found no compelling reason to make revisions to the proposed rule revisions, except for the changes to WAC 463-66-070 and repeal of WAC 463-66-080. The final rule changes do not include these proposed changes.

Throughout the rule development period, the council provided opportunity for interested parties to both participate in the rule revision process and to provide oral and or written comments for council consideration. In large part this involvement provided the basis for the council's acceptance of the changes to the rules.

Rulemaking Is Justified, Beneficial and Best Alternative

Justification

All agencies of state government are required to adopt operating rules. The rules of EFSEC are contained in Title 463 WAC. It is essential that the intent of legislative action be presented in a manner so as to be clearly understood, fairly applied and enforced consistently. To do so without adopting rules would be a recipe for chaos, uncertainty and unevenly applied requirements for siting energy facilities. The rulemaking process affords interest

groups and the public the opportunity to shape how the programs of government are implemented so as to ensure consistency and fairness in their application.

The council gains its authority and powers from Chapter 80.50 RCW. The authority granted to the council is for the most part described in Chapter 80.50.040 RCW. Specifically this provides the overall direction to the council including the promulgation of suitable rules to carry out the intent of the law and the policies and practices of the council.

In addition to the directives of Chapter 80.50 RCW, EFSEC and all other state agencies must comply with the provisions of RCW 34.05.328(1) and (2). Where Chapter 80.50 RCW gives the council the authority to adopt rules, Chapter 80.50 RCW provides the process and specifies that in instances of significant rules, additional steps need to be taken. This is done so as to fulfill a requirement to the citizens of the state that public health and safety as well as the natural environment are protected. It is essential that the authorities granted to state agencies by the legislature be easily understood and that they be implemented in a fair and uniform manner. In 1995, the legislature enacted laws to ensure that both the citizens and environment of the state are protected without stifling legitimate activities and responsible economic growth⁹. In doing so, it is intended that agencies when adopting rules ensure that;

- they are accountable to the legislature;
- the rules are justifiable and reasonable;
- regulatory efforts be coordinated and not overlapping or contradictory;
- members of the public have a meaningful role in their development;
- the public has an opportunity to challenge administrative rules; and
- cooperative partnerships exist between the agencies and the regulated public.

The principal purpose of the council's undertaking rulemaking at this time is to update and refine application review and SCA amendment operating procedures. The rulemaking process is established to provide agencies with open and meaningful discussion and review of proposed rules.

The council did not prepare a Small Business Economic Statement because over the past 30 years, the businesses that have come to EFSEC for the siting and operation of large energy facilities that the Energy Facility Site Evaluation Council's rules have all had more 50 employees. EFSEC currently regulates or is conducting siting reviews for the following companies: Energy Northwest (1,054 employees), Invenergy (130) employees, Horizon Energy (102) employees), Puget Sound Energy (2,400 employees), BP (700 local and 100,000 world-wide employees), and Suez Energy has thousands of employees. EFSEC does not expect small business to enter into this industry or be impacted by its rules.

This explanatory statement describes the rule revisions made by the council and what those rule revisions will mean once they are adopted. While the revisions that are being proposed are administrative in nature, all revisions and the administrative changes will be described. The process and steps that the council has followed in this rulemaking effort are described in this document.

⁹ Findings and intent of 34.05.328 RCW.

Consequences Of Not Adopting Rules

Not revising the council rules at this time would keep existing rules and practices in place. Some parties feel that the existing rules regarding processes in the finding of inconsistency with local land use regulations lead to unnecessary and expensive application reviews and the need for additional burdensome requirements that are not part of Chapter 80.50 RCW. Some parties have feel that existing SEPA rules cause unnecessary additional time and large costs for environmental document preparation as well as improper timing for these documents. Lastly the Council feels that the existing requirement for Governor approval of certain SCA amendments is not clear or concise and they find no requirement in statute.

Under the revised rules changes to Chapter 463-28 WAC will streamline EFSEC's procedure where a project is inconsistent with local land use plans and zoning ordinances. The proposed changes to Chapters 47 will streamline EFSEC's regulatory process and will provide savings in time and costs to applicants and certificate holders by eliminating or providing options to EFSEC so it can conduct its business more efficiently. The consideration of site restoration in the Council's consideration of amendments in WAC a463-66-040 adds importance of site restoration in any amendments to Site Certification Agreements.

Consistency with State and Federal Law

The proposed changes to Chapter 463-28, 47, and 66 WAC are consistent with state laws. In particular they are consistent with Chapter 80.50 RCW, EFSEC enabling statute and Chapter 43.21C RCW the State Environmental Policy Act. These changes do not impact any procedure that is guided by federal law, in particular the delegated authority under the federal Clean Air or Clean Water Acts.

The Best Alternative

The rulemaking process that the council is undertaking is the appropriate approach to establish construction and operation standards for energy facilities and to update its existing operating rules. The combination of establishing complex energy facility siting standards and making hundreds of other changes in its operating rules dictates that the council needs to follow the traditional rule-making process. The decision to consider Chapter 34.05 RCW, Significant Legislative Rules and to prepare a concise Explanatory Statement of the proposed changes to these rules is to provide a full understanding of the complete Energy Facility Siting requirements of the state of Washington. A complete description of all the additions and changes, their intended purpose and the expected outcome will provide a basis for determining if the revisions meet their intended purpose of creating clear, concise, and streamlined procedural requirements.

What New Rules Will Mean (RCW 34.05.328)

Effect Of Adopting Updated Rules – Greater Understanding

The Energy Facility Site Evaluation Council was created to provide a one-stop siting and approval entity for persons wishing to construct energy facilities in Washington State. The

intent of its authorization was to “ease the burden” of applying for and receiving approval to construct and operate an energy facility. In the period since EFSEC was created there have been several amendments to Chapter 80.50 RCW, the EFSEC enabling legislation. There have also been a number of legislative and administrative changes that have had an impact on the manner in which the council considers proposals for siting energy facilities and those that have received approval.

The council is the one-stop permitting entity for siting, constructing and operating energy facilities. The council has made a number of incremental changes to its rules as they were required. During recent application reviews, in the development and preparation of environmental documents under SEPA, and the need for changes to Site Certification Agreements, the Council has found that some of these rules difficult and cumbersome. Following the Governor’s Executive Order and the Council’s own desire to streamline its siting and compliance process, these changes to these rules provide a faster and more economical way of processing applications and developing environmental documents without compromising the intent of the legislature.

Comparison of Existing Rules and Proposed Final Rules

Below is a side-by-side comparison of the existing rules and the proposed changes.

Old Chapter 463-28 WAC State Preemption	Revised Chapter 463-28 WAC State Preemption
<p>Section 010 Purpose</p> <p>Sets procedures to be followed in determining whether to recommend the Governor preempt local land use plans and zoning ordinances for energy facilities.</p>	<p>Section 010 Purpose</p> <p>Adds “other developmental regulations” to land use plans and zoning ordinances that EFSEC could recommend the Governor preempt, and adds alternative energy facilities to energy facilities for consideration.</p>
<p>Section 030 Determination of Non Compliance – Procedures.</p> <p>Set three conditions necessary for an applicant to follow if there is a finding of non compliance with local land use plans or zoning ordinances: 1. applicant to apply for changes to land use plans and zoning ordinances and make reasonable efforts to resolve the noncompliance; 2) the applicant can request the Council stay the application review when local governments are processing an application; 3) the applicant shall submit regular reports to the Council.</p>	<p>Section is repealed.</p>
<p>Section 040 Inability to Resolve non compliance.</p>	<p>Section is repealed..</p>

Old Chapter 463-28 WAC State Preemption	Revised Chapter 463-28 WAC State Preemption
<p>If after 90 days efforts to resolve non compliance are unsuccessful, the applicant can request state preemption and address: 1) good faith efforts; 2) unable to reach agreement with local governments; 3) alternative locations in the city or county are unacceptable; and 4) interest of the state as delineated in RCW 80.50.010.</p>	
<p>Section 050 Failure to Request Preemption</p> <p>Failure of an applicant to request state preemption are grounds for the Council to recommend denial of the application to the Governor.</p>	<p>Section is repealed.</p>
<p>Section 060 Request for Preemption</p> <p>If an applicant request state preemption, EFSEC will schedule an adjudicative proceeding where the Council will determine whether to recommend preemption to the Governor. Factors to be considered are in section 040 of this chapter.</p>	<p>Section 060 Adjudicative Proceedings</p> <p>If the Council determines a project is inconsistent, it will schedule an adjudicative proceeding. That adjudication may be combined or scheduled concurrent with the adjudication for the project. The Council will determine whether to recommend preemption to the Governor.</p>
<p>Section 070 Certification—Conditions—State/local interests.</p> <p>If EFSEC approves a request for state preemption it shall include conditions which “give due consideration” to local interests and local laws or ordinances that preempted.</p>	<p>Section 070 Certification—Conditions—State/local interests.</p> <p>No substantive changes to the requirement that EFSEC consider local interests and local laws or ordinances that preempted. Alternative energy facilities are added to this section.</p>
<p>Section 080 Preemption—Failure to Justify</p> <p>EFSEC shall issue an order if based on the findings from the adjudication that the applicant failed to justify preemption and report to the governor a recommendation of rejection of the application.</p>	<p>Section 080 Preemption</p> <p>EFSEC’s determination on a request for state preemption will accompany its recommendation on approval or denial of a project application under RCW 80.50.100.</p>

Old Chapter 463-47 WAC SEPA	Revised Chapter 463-47 WAC SEPA
<p>Section 060 Additional Timing Considerations</p> <p>Subsection (2) Allows EFSEC to initiate an adjudicative proceeding prior to issuance of a draft EIS and requires EFSEC to conclude and adjudicative proceeding prior to issuing a final EIS.</p>	<p>Section 060 Additional Timing Considerations</p> <p>The requirement to conclude and adjudicative proceeding prior to issuing a final EIS is eliminated.</p>
<p>Section 090 EIS Preparation</p> <p>This section outlined the EFSEC responsibilities for preparation of EIS's. The Council would normally prepare its own EIS's and could require an applicant for more information and EFSEC could have an outside party prepare the documents at the applicant's expense and at the Council's direction.</p>	<p>Section 090 EIS Preparation</p> <p>EFSEC has the option of: 1. preparing its own EIS; having it prepared by an independent consultant; or requires the applicant to prepare draft and final EIS, supplemental EIS, or addenda to an EIS. EFSEC can still require more information from an applicant and the applicant will bear all expenses. EFSEC's responsible official will be responsible for preparation and issuance of all SEPA documents.</p>
<p>Section 110 Policies and Procedures for Conditioning or Denying Permits or Other Approvals</p> <p>This section lists the policies for EFSEC to follow.</p>	<p>Section 110 Policies and Procedures for Conditioning or Denying Permits or Other Approvals</p> <p>No changes to this section except for and minor editing change in subsection (c) from "rejection of" to "rejecting."</p>
<p>Section 140 Responsibilities of the Council</p> <p>This section outlines the Council's SEPA responsibilities</p>	<p>Section 140 Responsibilities of the Council's Responsible Official</p> <p>The Council's SEPA responsibilities are now the Council Manager's. No other changes were made to this section</p>

Old Chapter 463-66 WAC SEPA	Revised Chapter 463-66 WAC SEPA
<p>Section 040 Amendment Review</p> <p>The Council must consider the following when reviewing a proposed amendment to a SCA: 1) intent of original SCA; 2) applicable laws and rules; and 3) public health, safety, and welfare.</p>	<p>Section 040 Amendment Review</p> <p>A fourth item was added for consideration during a Council review of a proposed amendment to a SCA: 4) the provisions of Chapter 463-72 WAC, the chapter outlining site restoration or preservation.</p>

ATTACHMENT 1

**Response to Comments
CR 102 filed April 13, 2007**

Chapters 463-28, 47, 66 WAC

Note: All comments have been copied into the Comment column and given a number (1-20). Each specific comment within each comment email/ letter has been given an identifier: comment email/letter number plus a sequential letter (e.g. 3a. 14c.). Each response can be found in the Response column and is matched with the comment number and letter. **Comments were due by 5:00 pm on 6/13/07.**

Comment No. 1

From: Mike Robertson
4101 Bettas Rd., Cle Elum, WA 98922
Date: 6/07/07
Type: Email

Comment	Response
<p>Allen Fiksdal, Manager</p> <p>Energy Facility Site Evaluation Council 925 Plum Street SE, Bldg. 4 PO Box 43172 Olympia, WA 98504-3172</p> <p>CC: Michael Tribble, Counsel for the Environment</p> <p>I would like the following comments on EFSEC proposed rule changes – CR 102 – entered into the public record.</p> <p>Proposed Rule Making Notice (CR 102 - http://www.efsec.wa.gov/Rulesreview/2007%20Rules/CR102%20Apr%2006.pdf) for revisions to Chapters 28, 47, and 66 of Title 463 of the Washington Administrative Code (WAC) with the State Code Revisers Office. The first proposed change is to <u>Chapter 463-28 WAC State Preemption.</u> (http://www.efsec.wa.gov/Rulesreview/2007%20Rules/Ch%2028.pdf) “EFSEC will schedule an adjudicative proceeding if an energy facility or alternative</p>	

energy resource is found to be inconsistent with local land use plans and zoning ordinances rather than requiring an applicant to apply to local governments for changes to the land use plans or zoning ordinances.”

1a. Comment: This would effectively remove county authority completely from siting energy facilities. This goes completely against the purpose of the Growth Management Act; a bottom up deference to the local process. This is just plain wrong and circumvents accountability that was designed into the GMA. The EFSEC consists of appointed bureaucrats; not elected officials.

The other change is to **Chapter 463-47 WAC SEPA Rules.**

(<http://www.efsec.wa.gov/Rulesreview/2007%20Rules/47r.pdf>)

“EFSEC will have the option of having SEPA documents prepared by EFSEC, independent consultants, or the applicant; gives EFSEC the option of preparing a Final Environmental Impact Statement before or after an adjudicative hearing; and changes the immediate responsibility for SEPA activities from the Council members to the Council’s Responsible Official.”

1a. Under state law (RCW 80.50.120) EFSEC certification is “..in lieu of any permit, certificate or similar document required by any department, agency, division, bureau, commission, board, or political subdivision of the state..” This means that a county or city does not have authority for siting of energy facilities that are under EFSEC jurisdiction (wind farms can choose to come under EFSEC jurisdiction). As it has done for over 36 years, EFSEC will continue to be required to hold a hearing on land use consistency where local governments and the public may testify and present evidence pertaining to whether a project is consistent or inconsistent with local land use regulations and make a finding based on the testimony and evidence given.

Under the proposed rules in Chapter 463-28 the issue of inconsistency with local land use regulations will continue to be reviewed through an EFSEC adjudicative process where the local government and others may bring to EFSEC whatever evidence they feel is appropriate. However the rule does not change the fact that EFSEC retains (as it has throughout its 36 year history) the authority to recommend the Governor preempt local land use regulations.

The Growth Management Act requires local governments to plan for all growth including energy facilities. State rules adopted to implement GMA require local governments to consider state regulatory processes and specifically cites EFSEC as one of the state issued permit or certification that should be considered when developing plans under GMA (WAC 365-195-735).

<p>1b. Comment: This one is flawed. There is absolutely NO WAY an applicant should be allowed to create SEPA documents. This is openly in conflict with protecting the interests of Washington State residents.</p> <p>Mike Robertson 4101 Bettas Rd. Cle Elum WA 98922</p>	<p>1b. All SEPA documents are the responsibility of local and state governments. Many state and local governments have applicants prepare SEPA documents for them. Ultimately the government agency is responsible for its contents and any challenges to these documents are made against the state or local agencies so they have to ensure their quality. The proposed changes to Chapter 463-48 WAC will not change that responsibility. The proposed changes would give EFSEC the flexibility to choose from a variety of options for who will prepare the SEPA document. EFSEC will need to base that decision on many factors including reliability, availability, cost, and timeliness for each SEPA document development.</p>
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Comment No.2

From: Felicia M. Persson
No address given
Date: 6/11/07
Type: Email

Comment	Response
<p>2a. I am writing to voice my opposition to the proposed EFSEC rule changes. Regarding the proposed change to Chapter 463-28 WAC: The current process works and allows local input in the siting process. Leaving the question of land use and zoning compatibility entirely with EFSEC is contrary to the growth management act and removes all local authority from the siting process. Local government is more attuned to the existing use and character of areas proposed for energy facilities and so can better make an informed decision on these matters.</p> <p>2b. Regarding the proposed changes to Chapter 463-47: Allowing an applicant to prepare SEPA documents makes absolutely no sense at all. Documents prepared by an applicant would be suspect. To preserve some semblance of independence and protect the interests of Washington State residents SEPA documents should be prepared by</p>	<p>2a. See response 1a above.</p> <p>2b. See response 1b above.</p>

<p>independent consultants.</p> <p>2c. These changes may streamline the process but only by sacrificing protection of the interests of Washington State residents and usurping local authority.</p> <p>Felicia M Persson</p>	<p>2c. No response necessary.</p>
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Comment No. 3

From: John & Barb Foster
 2263 Killmore Rd. Ellensburg, WA 98926
 Date: 6/07/07
 Type: Email

Comment	Response
<p>To whom it may concern:</p> <p>3a. I am disturbed by the proposed changes by EFSEC to the Washington Administrative Code which will remove authority from the counties regarding siting of energy facilities.</p> <p>It is my understanding the EFSEC wants to schedule an adjudicative proceeding if an alternative energy source is found to be inconsistent with local land use plans and zoning ordinances rather than requiring an applicant to apply to local governments for changes to land use ordinances. This would remove local authority completely from siting energy facilities and defies the purpose of the GMA act.</p> <p>3b. Counter to a second proposal, an applicant should not be allowed to create SEPA documents. This conflicts with protecting the interests of state residents.</p> <p>3c. It is unfathomable that a board appointed by the governor would have the audacity to change these rules to take away the power of the county boards of commissioners. The county commissioners represent the people of the county and are subject to the vote of the PEOPLE. The EFSEC represents the</p>	<p>3a. See response 1a above.</p> <p>3b. See response 1b above.</p> <p>3c. No response necessary.</p>

<p>governor and answers only to the governor. Members are "untouchable" by the voters.</p> <p>John and Barbara Foster 2263 Killmore Rd Ellensburg, WA 98926</p>	
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Comment No. 4

From: Steve Kulchin
28436 NE4th Place, Redmond, WA
And
5320 West Sun East Road, Ellensburg, WA
Date: 6/09/07
Type: Email

Comment	Response
<p>I am aghast at the news I just read.</p> <p>I request immediate clarification from you (EFSEC) on the two changes to the rules EFSEC must abide by when approving energy projects.</p> <p>Further, I seek confirmation from you, (EFSEC) that these two proposed rule changes <u>were</u> or <u>were not</u> proposed by EFSEC.</p> <p>I Understand EFSEC has proposed:</p> <p><i>Proposed Rule Change 1: "EFSEC will schedule an adjudicative proceeding if an energy facility or alternative energy resource is found to be inconsistent with local land use plans and zoning ordinances rather than requiring an applicant to apply to local governments for changes to the land use plans or zoning ordinances."</i></p> <p>4a. My comment / Question: Doesn't it seem this would effectively remove county authority completely from siting energy facilities? Isn't this completely against the purpose of the Growth Management Act? I understand the GMA is</p>	<p>4a. See response 1a above.</p>

<p>a bottom up process, both requiring and respecting local decisions.</p> <p><i>Proposed Rule Change #2:</i> <i>“EFSEC will have the option of having SEPA documents prepared by EFSEC, independent consultants, or the applicant; which gives EFSEC the option of preparing a Final Environmental Impact Statement before or after an adjudicative hearing and changes the immediate responsibility for SEPA activities from the Council members to the Council's Responsible Official.”</i></p> <p>4b. My comment / Question: Say this isn't so. Are you kidding me? There is absolutely no way EFSEC or the Applicant should be allowed to create SEPA documents. This is blatantly & openly in conflict with protecting the interests of Washington State residents.</p> <p>Your immediate reply is appreciated.</p> <p>Steve Kulchin 28436 NE4th Place, Redmond WA & 5320 West Sun East Road Ellensburg, WA</p>	<p>4b. See response to 1b above.</p>
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Comment No. 5

From: Troy Gagliano
 Renewable Northwest Project
 917 SW Oak, Portland, OR 97205
 Date: 6/11/07
 Type: Email/letter

Comment	Response
<p>Jim Luce Chair, Energy Facility Site Evaluation Council 925 Plum St SE, Bldg 4 PO Box 43172 Olympia, WA 98504-3172</p> <p>RE: Changes to Washington Administrative Codes, Chapter 463</p>	

Chairman Luce,

The Renewable Northwest Project (RNP) is a unique coalition of environmental organizations, consumer interest groups and businesses that promotes the responsible development of renewable energy in the Pacific Northwest. We submit these brief comments regarding the proposed changes to EFSEC's administrative rules, chapter 463 of the Washington Administrative Code (WAC).

5a. The responsible development of renewable energy is of vital importance to the health of the citizens and the economy of Washington. EFSEC, through its statutory authority, plays an important role in aiding the implementation of major statewide energy policy decisions. The proposed modifications to the EFSEC rules will create the consistent regulatory environment that is essential to achieving the goals of I-937. They will also assist in implementing the Governor's energy policy, including measures to address global warming issues.

5b. The proposed modifications to the EFSEC rules will create the consistent regulatory environment that is essential to achieving the goals of I-937. They will also assist in implementing the Governor's energy policy, including measures to address global warming issues.

With regard to local land use consistency, the existing administrative rules conflict with RCW Chapter 80.50, which clearly establishes a "one-stop" permitting structure for major energy facilities. We believe that the proposed changes align the EFSEC rules with the EFSEC statute on the issue of land use compliance. This change will avoid disputes in the future over the ambiguities inherent in the current administrative rules and provide a clear process that will benefit the public, local and state agencies as well as applicants.

5c. In addition to the current process where EFSEC typically prepares its own

5a. No response necessary.

5b. No response necessary

5c. No response Necessary.

<p>environmental document, the SEPA-related changes would establish several options including allowing an applicant to prepare an environmental document and submit it to EFSEC for review and approval. This aligns EFSEC practice with that of other local and state agencies, and with the statewide SEPA rules. This change will help EFSEC provide a more expeditious process, thereby better achieving the legislative policies and intent in RCW 80.50.010.</p> <p>Thank you for considering these comments.</p> <p>Sincerely, Troy Gagliano Senior Policy Associate</p>	
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Comment No. 6

From: Hubert S. Sandall
 PO Box 954, 8560 Elk Springs Rd., Ellensburg, WA 98926
 Date: 6/12/07
 Type: Email

Comment	Response
<p>Allen Fiksdal, Manager (EFSEC)</p> <p>I request that the following comments on the proposed EFSEC rule changes (CR-102) are entered into the public record:</p> <p>6a. Chapter 463-28 WAC State Pre-Emption: The proposed change to this rule will in fact remove all County authority from the process of siting energy facilities in its' own jurisdiction. It will give too much power to a few appointed bureaucrats who are not representative of the voting public. This change goes against the Growth Management Act and should not be adopted.</p> <p>6b. Chapter 463-47 WAC SEPA Rules: The proposed change to this rule should not be implemented. It would be irresponsible to allow an applicant to create SEPA documents. This is where the "fox guarding the hen house" falls into play!</p>	<p>6a. See response 1a above.</p> <p>6b. See response 1b above.</p>

<p>6c. Chapter 463-66 WAC Amending, Transferring, or Terminating A Site Cert. Agreement: This change again would take any power of authority out of the hands of the local county government and place it in the hands of non-elected officials. This change should not be implemented.</p> <p>Respectfully, Hubert S. Sandall PO Box 954 8560 Elk Springs Road Ellensburg WA 98926</p>	<p>6c. The proposed change to Chapter 463-66 WAC does not change any authority by local government or the state. Local governments have never had any authority over amendments to Site Certification Agreements. The proposed changes are consistent with Chapter 80.50 RCW and a one-stop regulatory framework.</p>
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Comment No. 7

From: Emilia Burdyshaw
2806 SW Adams St, Seattle, WA 98126
Date: 6/12/07
Type: Email

Comment	Response
<p>I strongly object to the proposed rule changes that EFSEC is proposing for approving energy projects, specifically CR 102.</p> <p>7a. The first proposed change regarding state preemption will remove the requirement that an energy facility applicant apply to local governments for changes to land use plans or zoning ordinances when a project is found to be inconsistent. This would eliminate local authority from siting energy facilities and conflicts with the Growth Management Act.</p> <p>7b. The other proposed change that will give EFSEC the option of having SEPA documents prepared by the applicant for its own project is like having the fox guard the hen house. The documents would be skewed to favor the project at the expense of the interests of Washington State residents.</p> <p>7c. These rule changes would delegate EFSEC as the sole agency responsible for approving power project applications and is</p>	<p>7a. See response 1a above.</p> <p>7b. See response 1b above.</p> <p>7c. EFSEC only makes recommendations to the Governor. It is only the Governor who may approve or deny applications to EFSEC. The</p>

<p>in violation of the state constitution. The state Supreme Court would, no doubt, agree that EFSEC does not have the power to take administration of local rules away from local authority. Sincerely</p> <p>Emilia Burdyslaw 2806 SW Adams Street Seattle, WA 98126</p>	<p>proposed rule changes do not change the Governor's authority of approving applications for site certification under Chapter 80.50 RCW. See response to 1a above.</p>
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Comment No. 8

From: Maren Sandall
PO Box 954
8560 Elk Springs Rd, Ellensburg, WA 98926
Date: 6/12/07
Type: Email

Comment	Response
<p>Allen Fiksdal, Manager (EFSEC)</p> <p>Please put my following comments into the public record regarding PROPOSED RULE MAKING CR-102:</p> <p>8a. Proposed change to CHAPTER 463-28 WAC State Pre-emption: The change requested to this chapter will take away all authority from the elected county government and put it in the hands of non-elected officials. This change would in fact go against the purpose of the Growth Management Act and therefore in my view be unconstitutional.</p> <p>8b. Proposed change to CHAPTER 463-47 WAC SEPA Rules: There is NO WAY that an applicant should be allowed to create any SEPA documents. There would be no check and balances to protect the interests of Washington State citizens if this is allowed. This rule change should not even be considered let alone implemented.</p> <p>8c. Proposed change to CHAPTER 463-66 WAC Amending, Transferring, or</p>	<p>8a. See response to 1a above.</p> <p>8b. See response to 1b above.</p> <p>8c. See response to 6c above.</p>

<p>Terminating a Site Certification Agreement: This change should not be adopted as it again will take authority out of the hands of local government and place it in the hands of non-elected officials. Local government should always play a part in the decision making process.</p> <p>8d. Further comments: EFSEC's comments concerning these changes is that they "will streamline EFSEC's regulatory process and will provide savings in time and cost to the applicants and certificate holders". The cost incurred by an applicant to take their project through the evaluation process IS NOT the concern or purpose of EFSEC! An energy facility of any type should not be "rubber stamped" through the system. It needs to be scrutinized at every level to assure protection to the interest of Washington State residents. Most importantly is that LOCAL government must play the major role in all decision making processes.</p> <p>Maren Sandall PO Box 954 8560 Elk Springs Road Ellensburg WA 98926</p>	<p>8d. Governor Gregoire Executive Order 06-02 cites as one of her top priorities is for state agencies to “simplify licensing, permitting, tax collection, and other state business systems” and to “simplify services to Washington citizens and business.” EFSEC has determined that these regulatory changes are consistent with the Governor’s Executive Order.</p>
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Comment No. 9

From: Kieth Johnson
3035 Arport Rd., Cle Elum, WA 98922
Date: 6/12/07
Type: Email/letter

Comment	Response
<p>Subject: Changes to Chapter 463-28 WAC State Preemption and Chapter 463-47 WAC SEPA Rules.</p> <p>9a. I am definitely opposed to these rule changes, as I am concerned that they will eliminate local governments from making final decisions regarding siting of energy facilities.</p>	<p>9a. See response to 1a above.</p>

<p>9b. It is my wish that the process of energy facility siting should continue to be cumbersome, not less, to ensure that Local Governments have a means to stop EFSEC or the energy facility applicant from overriding them.</p> <p>9c. These changes are equivalent to letting the Fox into the chicken house to check on egg production.</p> <p>These changes should not be allowed.</p> <p>Thank you for allowing me to comment. Keith Johnson 3050 Airport Rd Cle Elum, Wa 98922</p>	<p>9b. See response to 8d above.</p> <p>9c. EFSEC assumes this comment relates to the proposed changes to Chapter 463-47 WAC. See response to 1b above.</p>
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Comment No. 10

From: Kenneth G. Matney,
Ellensburg, Wa
Date: 6/12/07
Type: Email

Comment	Response
<p>10a. I'll keep this short and not so sweet, I think it is an attempt to bypass local government and local citizen concerns. While many people my take time to testify locally, a much smaller number will be able or willing to travel to give the same testimony. This will only benifit the "Developers" and not the state overall. Bad,bad, bad, idea.</p>	<p>10a. See response to 1a above.</p>

Comment No. 11

From: Linda Schantz
No address given
Date: 6/12/07
Type: Email

Comment	Response
<p>Dear Mr. Fiksdal,</p> <p>Please submit these comments into the record</p>	

regarding the public comment regarding EFSEC Rule Changes.

11a. Proposed Rule Change 1: "EFSEC will schedule an adjudicative proceeding if an energy facility or alternative energy resource is found to be inconsistent with local land use plans and zoning ordinances rather than requiring an applicant to apply to local governments for changes to the land use plans or zoning ordinances."

I recommend that this proposal is denied. This only will direct ALL Wind FARM Applications to come directly to your agency and will as a result take the County out of any decision making processes. One vote in seven is not a voice.

A better rule change would be to REQUIRE the WF/Energy companies to work SOLELY with the County and to meet their requirements. If they can't run to a 'Sympathetic agency', they will have to work things out within the County and if they want to do business bad enough, they WILL work it out.

If you are representing a Governor that requires "grass roots support" and "bottom up community support", you MUST deny this proposed rule. If you do not, you are playing directly into the WF companie's hand and you are paid to be smarter than that.

11b. Proposed Rule Change #2: "EFSEC will have the option of having SEPA documents prepared by EFSEC, independent consultants, or the applicant; which gives EFSEC the option of preparing a Final Environmental Impact Statement before or after an adjudicative hearing and changes the immediate responsibility for SEPA activities from the Council members to the Council's Responsible Official."

Remove the Applicant in this proposal and

11a. EFSEC cannot delegate its responsibility to local government. State law requires EFSEC to review applications and make a recommendation to the Governor. See response to 1a above.

11b. See response 1a above.

<p>you will be making a good decision for the State of Washington. The applicant should be restricted from providing ANY of the EIS. It throws the balance out of a "fair and balanced" review. With the controversy surrounding WF's killing birds and raptors and the health issues of noise, shadow flicker, etc, an independent EIS is essential to the health and safety of the humans and animals of Washington State.</p> <p>Who allows a fox to design a hen house, then do a review of the safety impacts? I am sorry, this does not make sense to me, nor anyone else I talk to. I worked in the public sector for 30 plus years and I located and purchased property and built huge distribution centers for a large retailer.</p> <p>We NEVER provided an EIS for a project to the County or City. It was always completed by an independent consultant that was managed by the affected Government.</p> <p>You need to keep a distance from the applicant in order to "appear" fair.</p> <p>Thank you.</p> <p>Sincerely, Linda Schantz</p>	
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Comment No. 12

From: Ed Garret & Rosemary Monaghan
 19205 67th Ave SE, Snohomish, WA 98296 &
 2880 Kricklewood Land, Ellensburg, WA 98926
 Date: 6/13/07
 Type: Email

Comment	Response
<p>EFSEC Council,</p> <p>Please add these comments for the record.</p> <p>12a. I believe this "adjustment" to become more compliant with the WAC's is just a smoke screen. In reality, it only appeases the</p>	<p>12a. No response necessary.</p>

wind industry.

The KVVWPP has overstepped your "process" to be evaluated within 12 months. The process did not fail, but EFSEC's decision to grant extraordinary delays, just as with the DCWPP, causes delays. The Applicant is given every opportunity to delay an application and you sanction it. There is no need for a rule to "fast-track" these projects. EFSEC has an obligation to make a ruling within 12 months. EFSEC has failed in its obligation and should have remanded this KVVWPP as well as the DCWPP back to the developers with a preliminary denial. If they can not get their act together within 12 months, it should be denied.

The county and public comments did not cause these delays, but the developers themselves delaying for "political" reasons.

12b. Chapter 463-28: The current legislative laws, if I understand them correctly, allows preemption in extraordinary cases. Wind farm projects should be considered as not extraordinary. They cannot be relied upon for base generation, EFSEC should concentrate on reliable base generation projects. Wind farm applications should be reviewed by local elected officials where they are proposed.

Wind farms are land intensive and affect residents who live near them. The power generated is intermittent and can not be relied on for base generation. WHWPP recently reported only a 28% production statistic.

Local land use laws as adopted by the elected officials in the county should be respected.

This rule is not respecting local land use provisions. For EFSEC to propose a rule to run rough shot over local land use is an abuse of power. The legislature wants to call it preemption for the good of the state. It

12b. The facilities under EFSEC jurisdiction are identified in Chapter 80.50 RCW. EFSEC cannot "concentrate" on just one type of facility, it is required by law to receive and review applications from all those facilities listed in Chapter 80.50 RCW including alternative energy facilities that choose to come under EFSEC jurisdiction. See response to 1a above.

should be called "Eminent Domain". And should be treated as such with compensation to those heavily affected.

Politics are in command here, and not common sense. SB-6001, while in vogue now, does not allow for negative consequences. Who will be responsible, legally, if property values do decline?

Locally elected officials have to deal with this when an ill fated project is approved. If they are wrong, they are voted out of office. EFSEC has no legal responsibility other than to say, we recommend, only the Governor approves. I interpret this as scapegoating.

I oppose this change and recommend the applications before you must be agreed upon by the local elected officials.

If this change is invoked, every wind developer will apply to EFSEC to have their projects "forced" into unwanted areas. The next project may be in your back yard..think about that.

12c. Chapter 463-47: EFSEC is recommending that the developers, to save time, produce their EIS on their interpretation or at least have heavy input to the EIS.

This change cannot stand without challenge. In the evaluation of the DCWPP, the Golder Report specifically pointed out flaws in the DCWPP EIS, which DC had heavy input. Accepting the wind developer's "recommendations" is flawed and influenced by their "paid for experts".

It is obvious that EFSEC is influenced by the wind developers lobbying to make the process faster and more cost efficient. As a private, for profit entity, it should be their burden to prove that an independent evaluator's studies are flawed. It is called the cost of doing business! They are speculators hoping to

12c. See response to 1b above.

make a profit. It should not be up to EFSEC to facilitate their cause.

The Applicant is paying EFSEC to review these applications, not monies from the public. EFSEC should do the best they can to evaluate all the affects of such projects, and not fast track them to save THEM money. These developer's are not even US owned, KVVPP = Portugal and DCWPP = France.

Public and county input should be paramount in making these decisions. After attending and participating in the EFSEC process on the KVVPP, I must say I was minimized as well as other member of the public.

To say the Adjudicative process will give the county and the public ample opportunity to engage in the process is a joke. Even to be represented in these proceeding costs thousands of dollars in attorney time (read fees). Public testimony, while free, is discounted as it "is not under oath". The process is loaded against the public. To say the CFE will help in protecting the public, again, does not bear out in recent proceedings and experience.

I understand that wind power has the ears of the legislature right now, but wind developers also have to be held at a higher standard as to where you agree to sight them. Kittitas county is not the ONLY county, many others are being built in WA counties, and the county has approved a great project at Wild Horse. If wind developers follow common sense and work with the county where proposed, they will be approved. When unreasonable, the county involved will deny them. It is not up to EFSEC to second guess these local elected officials.

These proposed changes will do just that, discount local authority.

<p>12d. Making rule changes to make it easier and less costly for wind developers is ill conceived and a disservice to Washington residents, who pay taxes and expect protections from this state government.</p> <p>Respectfully submitted,</p> <p>Ed Garrett and Rosemary Monaghan 19205 67th Ave SE Snohomish, WA 98296-5347 2880 Cricklewood Land Ellensburg, WA 98926</p>	<p>12d. See response to 8d above.</p>
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Comment No. 13

From: Robert Kahn
Northwest & Intermountain Power Producers Coalition
7900 SE 28th St, Suite 200, Mercer Island, WA 98040
Date: 6/13/07
Type: Email

Comment	Response
<p>Dear Chairman Luce:</p> <p>I am writing on behalf of the Northwest & Intermountain Power Producers Coalition (NIPPC) to express our strong support for the Energy Facility Site Evaluation Council’s proposed changes to WAC 463-28, 47, and 66.</p> <p>NIPPC’s mission is to actively pursue laws, policies, rules and regulations that ensure a competitive wholesale electric power supply marketplace in the Pacific Northwest. Creating a predictable regulatory climate is an essential feature of achieving that mission whether the energy resource is a renewable, conventional, or advanced technology facility. Accomplishing this end is particularly important given the predicted and apparent rising demand for electric power in the Pacific Northwest and the importance of achieving the targets established in I-937.</p>	

13a. Recent facility siting experience has shown that there is an unanticipated disconnect between the EFSEC statute and rules related to achieving land use compliance. The proposed changes to WAC 462-28 address that disconnect and, when implemented, will assure that EFSEC's one-stop permitting procedures fully achieve their statutory intent.

13b. Proposed changes to Chapter 463-47, the SEPA provisions, are also an important move that will bring EFSEC's practices into alignment with other state agencies. While it remains possible to have EFSEC prepare the environmental materials, allowing the project developer the option to prepare the environmental analysis for review by EFSEC offers the potential to achieve the critical balance between assuring environmental protection while expediting the permitting process, a central goal of the statute.

NIPPC applauds the exceptional job EFSEC has done in achieving its statutory goals of providing abundant energy at reasonable cost while preserving and protecting the quality of the environment, and ensuring that decisions are both timely and made without unnecessary delay.

We appreciate this opportunity to comment on the proposed rulemaking, which makes a positive contribution to those statutory goals.

Sincerely,

Robert D. Kahn, Ed.D.
Executive Director
Northwest & Intermountain
Power Producers Coalition
7900 SE 28th Street, Suite 200
Mercer Island, WA 98040

13a. No response necessary.

13b. No response necessary.

Comment No. 14

From: Karen McGaffey
Perkins Coie
1201 Third Ave., Suite 4800
Seattle, WA 98101
Date: 6/13/07
Type: Email

Comment	Response
<p>Mr. Fiksdal, Please accept the following comments submitted in response to the Council's Notice of Proposed Rule Making dated April 19, 2007</p> <p>14a. WAC Chapter 463-28 Preemption The changes proposed to chapter 463-28 will improve the process that the Council uses to consider land use consistency. EFSEC's governing statute, RCW chapter 80.50, preempts local regulation of the energy facilities within EFSEC's jurisdiction. RCW 80.50.110(1) provides that "The state hereby preempts the regulation and certification of the location, construction and operational conditions of certification of the energy facilities included under RCW 80.50.060." RCW 80.50.120 similarly states that the SCA "shall bind the state and each of its departments, agencies, divisions, bureaus, commissions, boards, and political subdivisions" and that the SCA "shall be in lieu of any permit, certificate or similar document" otherwise required by other state agencies and local jurisdictions. The Legislature intended that EFSEC would be a one-stop permitting authority, the decision of which would override otherwise applicable local rules.</p> <p>Unfortunately, EFSEC's process seems to have evolved over time in a way that has departed from the one-stop shop envisioned by the Legislature. Rather than a single EFSEC siting process, local jurisdictions have argued that EFSEC's regulations require a developer proposing a project that is not an</p>	<p>14a. No response necessary.</p>

outright permitted use under local land use rules to attempt to obtain local siting approval as well as working through EFSEC's process to obtain site certification. This duplication is contrary to the Legislature's command in RCW 80.50.010 to "avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay." It also makes it very difficult for EFSEC to comply with the statutory requirement to provide a recommendation to the Governor within 12 months of receiving an application. See RCW 80.50.100(1).

The changes that the Council proposes to make in chapter 463-28 will make the Council's regulations consistent with the governing statute. They will make the permitting process more efficient, while still allowing the Council to continue to take local concerns into account. The Council should make clear that these proposed changes in chapter 463-28 will take effect immediately upon adoption and that they will apply to applications currently pending before the Council. The Council is amending its regulations to improve its process and make it more consistent with its governing statute. There's no reason that the Council should delay or postpone implementing this improved process.

14b. WAC Chapter 463-37 SEPA

The proposed changes to chapter 463-37 provide the Council with increased procedural flexibility so that the objectives of SEPA can be met in an efficient and timely way. The Council should be able to decide on a case-by-case basis who is in the best position to prepare SEPA documents as well as the timing of their preparation.

14c. WAC Chapter 463-66

The Council proposes to amend WAC 463-66-040 to include "the provisions of chapter 462-72" among the list of things the Council

14b. No response necessary.

14c. EFSEC's interest in site restoration issues have been heightened over the past several years. This proposed addition of consideration of Chapter 463-72 was to ensure that EFSEC

"shall consider" in reviewing a request for an SCA amendment. In the past, the Council has considered site restoration issues when relevant to amendment requests, so this change seems consistent with past practice. However, it is not clear why this change is necessary given that the regulation already directs the Council to consider "applicable laws and rules."

At this time, or at some time in the future, the Council should consider further changes to this regulation. Under EFSEC's governing statute, one would expect Council decisions regarding SCA amendments would be guided largely by the policies identified in RCW 80.50.010. The language in WAC 463-66-040 is already sufficiently broad to bring the policies of 80.50.010 into consideration, but a direct reference might be more appropriate than the current list of items to be considered. **14d.** In particular, the current requirement that the Council shall consider "the intention of the original SCA" seems odd. A certificate holder often requests an amendment when it wants to change an SCA condition in a way that would make it different than the original intent. Indeed, a request to terminate an SCA is considered an "amendment" under the Council's rules (463-66-020), and termination would surely be contrary to the original intention of the SCA. Although the Council can certainly "consider" the original intent, the current language may inappropriately imply a requirement or presumption that an amendment should be consistent with the original intent. Replacing the list of considerations (1)-(4) with a reference to RCW 80.50.010 would be more appropriate. Thank you again for the opportunity to provide comments on the proposed regulatory changes.

Karen McGaffey | Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101

and the certificate holder were looking forward and that any amendments to a site certification agreement did not somehow adversely impact, or cause increased difficulties for site restoration in the future.

14d. The "intention of the original SCA" may be seen in several ways. One important aspects of an SCA is protection of the environment through required actions or mitigation. Any amendment to a SCA should not conflict with that intent. The commenter's point is well taken and EFSEC may want to further consider the language of this rule in future rulemaking.

Comment No. 15

From: Chris Burtchett

Ellensburg

Date: 6/13/07

Type: Email

Comment	Response
<p>15a. I hope that you are sensible enough to realize that your proposal to change the way windfarms gain approval amounts to dictatorship. Firstly you are a non-elected group that proposes to take public opinion about proposed windfarm locations out of the picture. Who will suffer the most from your decisions? The people who have to wake up every morning to the sound of whirling blades and 450 foot towers across the street from their homes. The counties where the applications are filed are the ones who know their citizens and the adverse effects that can happen within their boundaries. Citizens cannot travel 150 miles to attend hearings in the middle of the week to express their concerns. They need to work for a living too. Please do not do this. Last I heard we still live in a Democratic Country. Please keep it that way.</p> <p>Chris Burtchett, Ellensburg</p>	<p>15a. See response to 1a above</p>

Comment No. 16

From: Hal and Gloria Lindstrom

1831 Hanson Road

Ellensburg, WA 98926

Date: 6/13/07

Type: Email

Comment	Response
<p>R.E. wind farm siting rule change</p> <p>Dear Mr. Fiksdal,</p> <p>16a. The proposed rule changes would in effect substantially limit local governments' involvement and authority on matters related to wind power development that directly</p>	<p>16a. See response to 1a above.</p>

<p>affect their constituents welfare. That seems to be the reason for the proposed change - to reduce the influence of those most directly affected.</p> <p>The rule change would shift responsibility to the State; developers would go through the motions of whatever remains of their obligation to deal with the local entity, but would shift quickly to EFSEC knowing that is where decision authority is vested. Why fool around with the local yokels when their concerns are of little significance in the outcome.</p> <p>This is a bad idea hatched to ignore local government.</p> <p>Hal and Gloria Lindstrom 1831 Hanson Road Ellensburg, WA 98926</p>	
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Comment No. 17

From: Jeff Slothower,
Lathrop, Winbauer, Harrel, Slothower & Denison L.L.P.
P.O. Box 1088
Ellensburg, WA 98926
Date: 6/12/07
Type: Email

Comment	Response
<p>Dear Mr. Fiksdal</p> <p>The purpose of this email is to provide comment on behalf of my client, F. Steven Lathrop, on EFSEC's proposed changes to the above referenced WAC provisions and as contained in EFSEC's Rule making notice.</p> <p>17a. The proposed rules are beyond the scope of EFSEC's enabling statute, Chapter 80.50 RCW. An agency of the state has no authority to adopt rules which purport to give the agency the ability to do things that conflict with and/or are beyond the scope of the agency's authority as set forth in the</p>	<p>17a. RCW 80.50.040(1) authorizes EFSEC to “adopt, promulgate, amend, or rescind suitable rules.....to carry out the provision of this chapter, and the policies and practices of the council...” The proposed amendments are consistent with this authorization and the intent found in RCW 80.50.010 and RCW 80.50.110.</p>

agency's enabling statute.

17b. More importantly the proposed rules conflict with the Growth Management Act (GMA) in that the proposed rules infringe upon the GMA's clear mandate for local decision making and deference by the courts and administrative bodies to a local jurisdictions decision making on land use issues. The Legislature amended the GMA to include an intent section enunciating its desire to provide greater deference to local governments. *See* Laws of 1997, ch. 429, §§ 2, 20 (codified as RCW 36.70A.320(3) and .3201); *see also* *Quadrant Corp. v. State Growth Management Hearings Board*, 154 Wn.2d 224, 237 (2005). The Legislature amended the statute in response to the GMA being “riddled with politically necessary omissions, internal consistencies, and vague language.” *Id.* at 232. The court in *Quadrant* noted that as a result of the ambiguity about the proper deference to be afforded to local governments when planning under the GMA, the Legislature “took the unusual additional step of enacting into law its statement of intent in amending RCW 36.70A.320 to accord counties and cities planning under the GMA additional deference.” *Id.* At 237.

The Legislature left no doubt what its intentions were when it came to the proper deference to be afforded to local governments planning under the GMA. The provision provides:

In amending RCW 36.70A.320(3) by section 20(3), chapter 429, Laws of 1997, the legislature intends that the boards apply a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the

17b. The GMA does not amend or repeal directly or impliedly the governor’s preemption authority under Chapter 80.50 RCW, specifically RCW 80.50.110. The GMA regulations are clear that comprehensive plans and development regulations enacted pursuant to GMA “...take their place among existing laws relating to resource management, environmental protection, regulation of land use, utilities and public facilities. Many of these existing laws were neither repealed nor amended by the act” WAC 365-195-700. In addition WAC 365-195-735 states that local comprehensive plans and development regulations should be developed in consideration of “[p]rograms involving state-issued permits or certifications including “[s]ite certifications developed by the energy facility site evaluation council”. WAC 365-195-735(3) (h). RCW 36.70A.320(3) and RCW 36.70A.3201 requirement that growth management boards to presume validity and grant a higher degree deference to local governments’ comprehensive plans and land use regulations does not negate the clear and unambiguous preemptive authority under RCW 80.50.110 granted to the governor.

legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.3201.

In light of this unambiguous language, the State Supreme Court explicitly noted: “In the face of this clear legislative directive, we now hold that deference to county planning actions, that are consistent with the goals and requirements of the GMA, *supersedes* deference granted by the APA and courts to administrative bodies.” *Quadrant*, 154 Wn.2d at 238 (emphasis added). This strong and unequivocally clear mandate providing local jurisdictions more deference planning under the GMA was further discussed in *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112 (2005). There, the State Supreme Court said that the “GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs.” *Id.* at 125-26.

The proposed rules are diametrically opposed to the GMA preference for and deference to local decisions on land use matters. EFSEC's entire statutory scheme and, in particular, EFSEC's perceived ability to preempt local land use rules, regulations and decisions is inconsistent with and contrary to the legislature's intent in adopting

the GMA. EFSEC's proposed rules fly in the face of legislative intent behind GMA and are an affront to cities, counties and citizens through out this state.

Thank you for the opportunity to comment on this rule. This comment is submitted specifically to preserve my clients standing to challenge these proposed rules in a court of competent jurisdiction. I request that this email become part of the record in this matter.

Jeff Slothower, Attorney at Law
Lathrop, Winbauer, Harrel, Slothower & Denison L.L.P.
P.O. Box 1088
Ellensburg, WA 98926

Comment No. 18

From: James Carmody (ROKT)
Velikanje, Moore & Shore
PO Box 22550
405 E. Lincoln Ave, Yakima, WA 98907
Date: 6/14/07
Type: Email

Comment	Response
<p>June 13, 2007</p> <p>Allen Fiksdal EFSEC Manager P.O. Box 43172 Olympia, Washington 98504-3172</p> <p>RE: Proposed Rulemaking – Chapters 463-28, -47, -66 WAC</p> <p>Dear Mr. Fiksdal:</p> <p>We are providing these comments on behalf of Residents Opposed to Kittitas Turbines (ROKT) with regard to proposed repeal and amendments of Chapters 463-28 WAC (State Preemption) and Chapter 463-47 WAC (SEPA Rules). These comments will</p>	

supplement comments provided by Members and the Public.

Energy Facility Site Evaluation Council – State Preemption.

Energy Facility Site Evaluation Council (EFSEC) has proposed to amend and/or repeal parts of Chapters 463-28 and 463-47 of the Washington Administrative Code (WAC). The short summary of the proposed changes and reasons for the changes are as follows:

Chapter 463-28 WAC State Preemption.

EFSEC will schedule an adjudicative proceeding if an energy facility or alternative energy resource is found to be inconsistent with local land use plans and zoning ordinances rather than requiring an applicant to apply to local governments for changes to the land use plans or zoning ordinances.

18a. The proposed rulemaking contemplates the repeal of the following sections: WAC 463-28-030 (Determination of Noncompliance – Procedures); WAC 463-28-040 (Inability to Resolve Noncompliance); and WAC 463-28-050 (Failure to Request Preemption). Four (4) sections are proposed to be amended: WAC 463-28-010 (Purpose); WAC 463-28-060 (Adjudicative Proceeding); WAC 463-28-070 (Certification – Conditions – State/Local Interests); and WAC 463-28-080 (Preemption – Recommendation). We strongly oppose the proposed rule amendments and repeals. An integral component of the planning process is a determination of consistency with local land use plans and zoning ordinances.

RCW 80.50.090(2) requires a public hearing to determine whether or not the proposed site “. . . is consistent and in compliance with city, county, or regional land use plans or zoning ordinances.” There is no statutory authority for consolidation of the public hearing for land use consistency with an

18a. The proposed changes in Chapter 463-28 WAC do not change the requirements of RCW 80.50.090(2) nor the requirements of Chapter 463-26 WAC. The council has the authority under RCW 80.50.094(1) “To adopt, promulgate, amend or rescind suitable regulations pursuant to chapter 34.05 RCW to carry out the provisions of this chapter, and the policies and practices of the council in connection therewith.” The regulations regarding use consistency are found in WAC Chapter 463-26 and are sufficient at this time to carry out the provisions of RCW 80.50.090(2).

“Consolidation” of the land use preemption adjudication with the requirement of RCW 80.50.090(3) is discretionary under the proposed rule. This proposed change is for the convenience of the parties and Council so travel and time commitments can be better organized and more efficient.

adjudicative hearing process under RCW 80.50.090(3). The statutory scheme contemplates a preliminary hearing and process with respect to land use consistency.

18b. The proposed amendments are also inconsistent with land use processes and determinations contained within the Growth Management Act (GMA). RCW Chapter 36.70A. Preemption authority is granted pursuant to RCW 80.50.110(2) which provides:

The state hereby preempts the regulation and certification of the location, construction, and operational conditions of certifications of the energy facilities included under RCW 80.50.060 as now or hereafter amended.

The preemptive authority related to statutes and regulatory schemes in place at the time of most recent amendment (1975). The preemption language does not extend to subsequently adopted legislation or processes. The proposed rule changes constitute a defect amendment of the Growth Management Act (GMA).

Comprehensive land use planning and zoning is vested exclusively with local jurisdictions. RCW 36.70A.040. State agencies are required to comply with local comprehensive plans. RCW 36.70A.103 provides, in part, as follows:

State agencies shall comply with local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter except as otherwise provided in RCW 71.09.250(1) through (3), 71.09.342, and 72.09.330.

Local jurisdictions are required by Growth Management Act (GMA) to “. . . include a process for identifying and siting essential public facilities.” RCW 36.70A.200(1). While the local jurisdiction may not preclude

18b. See response to 17b above. In addition the preemptive authority of the governor under Chapter 80.50 RCW is not limited to those comprehensive plans and land use regulatory codes in effect prior to the year 1977. The changes proposed to Chapter 463-28 WAC do not constitute a “defect amendment” of the GMA because the GMA does not preclude the preemption authority of RCW 80.50.110(1) and (2)

EFSEC is never the applicant for site certification for a project therefore there is no obligation under RCW 36.70A.103 for EFSEC to comply with the local land use plans and regulations see WAC 365-195-765(2). The changes contemplated to Chapter 463-28 WAC do not change that fact and are not prohibited by any provision of the GMA. There is no direct conflict of the GMA with the proposed rulemaking because Chapter 80.50 RCW stands alone in its preemptive authority.

As noted above, the public hearing process required for consistency under RCW 80.50.090(2) will not be effected under the proposed rule change to WAC 463-28-060(1).

the siting of essential public facilities, the primary responsibility for establishing siting standards rests with the local jurisdiction. RCW 36.70A.200(5). Growth Management Act (GMA) does not authorize state preemption or preclusion of local processes.

Local jurisdictions have primary responsibility for comprehensive planning and zoning determinations and such intent was clearly manifested by the legislature. RCW 36.70A.3201 provides, in part, as follows:

Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances.

The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

(Italics added). The proposed rulemaking is in direct conflict with the legislative intent and directives contained in the Growth Management Act (GMA).

The proposed amendment to WAC 463-28-060(1) is inconsistent with the statutory directive. The proposed regulation allows the Council to unilaterally determine whether a site or portions of any site are inconsistent with local land use plans and zoning ordinances. RCW 80.50.090(2) requires a specific public hearing for the purpose of determining whether or not a proposed site is consistent with and in compliance with land use plans and zoning ordinances. The hearing is required for the determination of compliance and not for the exercise of preemption.

Amendments to Chapter 463-47 SEPA.

EFSEC has also proposed modifications to WAC Chapter 463-47 – SEPA Rules. The rule changes were summarized as follows:

Chapter 463-47 WAC SEPA Rules.

EFSEC will have the option of having SEPA documents prepared by EFSEC, independent consultants, or the applicant; gives EFSEC the option of preparing a Final Environmental Statement before or after an adjudicative hearing; and changes the immediate responsibility for SEPA activities from the Council members to the Council’s Responsible Official.

18c. The proposed regulations are inconsistent with both statutory directives governing EFSEC as well as the State Environmental Policy Act (SEPA).

EFSEC does not have authority to delegate environmental study, assessment or evaluation to an applicant. RCW 80.50.175(3) establishes the appropriate statutory authority as follows:

After receiving a request to study a potential site, *the Council shall commission its own independent consultant to study matters relative to the potential site. The study shall include, but need not be limited to, the preparation and analysis of environmental impact information for the proposed potential site and any other matter the council and potential applicant deem essential to an adequate appraisal of the potential site.* In conducting the study, the Council is authorized to cooperate and work jointly with the county or counties in which the potential site is located, any federal, state, or local governmental agency that might be requested to comment upon the potential site, and any other municipal or public corporation having an interest in the matter. The full cost of the study shall be paid by the potential applicant. . . .

18c. RCW 80.50.040(2) grants EFSEC the power “To develop and apply environmental and ecological guidelines in relation to the type, design, location, construction and operational conditions of certification of energy facilities subject to this chapter.” RCW 80.50.040(4) gives the council the authority “To prescribe the form, content and necessary supporting documentation for site certification.” RCW 80.40.0040(6) allows EFSEC “To make and contract, when applicable, for independent studies of sites proposed by the applicant.” In addition RCW 80.50.060 (6) states “Applications for certification shall be upon forms prescribed by council and shall be supported by such information and technical studies as the council may require.” The above statutes provide the council the proposed rulemaking authority to WAC 463-47-060 and 090. The referenced RCW 80.50.175, on the other hand, is concerned with the study of future potential sites and is inapplicable for actual applications filed with the council pursuant to RCW 80.50.071. Specifically, RCW 80.50.175(6) states “Nothing in this section shall change the requirements for an application for site certification . . .” Under the proposed rule change, the council can prepare its own documents, hire an independent consultant (WAC 463-50) or have the applicant prepare the documentation with direct oversight

There is no statutory authority to delegate matters of environmental review to an applicant. This statutory regime is also clear that cooperation and joint work efforts must be considered in conjunction with the county or counties in which the potential site is located. The preemption process included in proposed WAC 163-28-060 is inconsistent with the consultation and coordination requirements contained in this statutory provision. The proposed regulation for EIS preparation impermissibly allows the applicant to prepare environmental documents. WAC 163-47-090(2). RCW 80.50.175(3) directs the Council to “. . . commission its own independent consultant to study matters relative to the potential site.” The independence of the review process and the integrity of environmental review is imperative in the absence of independent preparation of documents.

The proposed regulations also give EFSEC the option of preparing a Final Environmental Impact Statement before or after an adjudicative hearing. The Final Environmental Impact Statement should be prepared in advance of any adjudicative hearing process. SEPA rules prohibit any action prior to seven (7) days after issuance of the Final Environmental Impact Statement (FEIS). The FEIS must be made available to agencies and commenting parties. In the absence of a FEIS prior to adjudicative hearing, the public is effectively precluded from meaningful and substantive comment upon the project proposal. It is both imprudent and improper to defer the FEIS until completion of the adjudicative proceeding.

CONCLUSION

Thank you for consideration of these comments. It is our firm view that the proposed regulations are inconsistent with

of the responsible official, the EFSEC manager.

In regards to the potential preparation of the FEIS after the adjudicative process, until its issuance the council may not take any action under WAC 197-11-070(1) that would (1) have an adverse impact on the environment or (2) limit the choice of reasonable alternatives. As long as they are consistent with the two limitations, the SEPA Rule explicitly allows actions necessary to develop an application for a proposal to be undertaken before completion of the environmental review. WAC 197-11-070(4). Additionally , the proposed change allows the flexibility for the council to issue a DEIS and possibly the FEIS before the adjudicative hearing is concluded. There will no longer be any artificial time lines to conclude the SEPA process in a timely manner.

<p>statutory authority and fundamental processes under Growth Management Act (GMA) that recognize local jurisdictions with primary land use planning responsibility based upon a bottom up public participating process. The purpose and intent of the Growth Management Act (GMA) is emasculated by the proposed rule changes and decision making compromised by modifications to the environmental review process.</p> <p>Thank you for your consideration. Very truly yours, VELIKANJE, MOORE & SHORE, P.S.</p> <p>JAMES C. CARMODY</p>	
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Comment No. 19

From: Eloise Kirchmeyer
16281 Reecer Cr. Rd., Ellensburg, WA
Date: 6/15/07
Type: Email

Comment	Response
<p>19a. Mr.Fiksdal: I have lived in rhe Kittitas valley for four yrs. and I had heard about the windmills. I had been to Ca. and had seen cute little windmills on the rolling hills(none near homes, by the way) and was destated to find out the proposed windmills were four hundred ft. tall. And that a company from a different country thought they could put four of them along my property line. So, for the last four yrs. I've wrtten letters. I've testified at the hearings and been to most of the meetings along with my neighbors. To have a state agency come in and say that it was all for nothing is an insult and a slap in the face. I thought this is how this country was formed, by local goverment and concerned citizens who care about what happens to their surroundings. I think we, as taxpayers, landowners and caring people deserve better.Sincerely, Eloise Kirchmeyer, 16281 Reecer Creek Rd. Ellensburg</p>	<p>19a. No response necessary.</p>

Comment No. 20

From: Christine Cole
7430 Robbins Rd, Ellensburg, Wa. 98926
Date: 6/15/07
Type: Email

Comment	Response
<p>Dear Mr. Fiksdal,</p> <p>20a.What EFSEC is proposing to establish EFSEC as the "end-all and be-all" regarding siting applications on wind farms is so outrageous it cannot be believed nor understood.</p> <p>It all comes down to greed and little or no regard for the impact on residents of a community like Ellensburg and the surrounding areas. Shame on EFSEC and shame on the greed that fuels (angry pun intended!) these proposals.</p> <p>Every county in the state should be extremely afraid of how this governing and unelected body is shoving their power around. It is totally unacceptable and absolutely wrong.</p> <p>The turbines simply do not belong among people and this committee knows it and it also knows where turbines can and should and should not be placed. How can anyone of this group sleep at nights?</p> <p>Very sincerely,</p> <p>A property and home owner, voter and citizen of this county, state and union. It is becoming apparent that these factors mean nothing.</p> <p>Christine Cole 7430 Robbins Rd Ellensburg, Wa. 98926</p>	<p>20a. No response necessary.</p>

Comment No. 22

From: Roger Binette
7430 Robbins Road, Ellensburg, WA, 98926
Date: 6/18/07
Type: Email

Comment	Response
<p>22a. How can this committee, in any good conscience, undertake to arbitrarily take over making local, county decisions regarding wind turbine placements.</p> <p>22b. This is pretty much blatant arrogance by unelected and non-representative individuals which appear to be influenced by greedy land usurpers. That certainly is the message we are getting, loud and clear, from Olympia.</p> <p>This is a very dangerous and patently un-American way of doing business. Or, is this to become the way we now do business in America?</p> <p>Unthinkable.Outraged.</p> <p>Roger Binette 7430 Robbins Road Ellensburg, WA, 98926</p>	<p>22a. See response to 1a above.</p> <p>22b. No response necessary.</p>

Comment No. 23

From: Neil A. Caulkins, Deputy Prosecuting Attorney
Kittitas County
Date: 6/27/07 Attached to email to Governor's Office

Comment	Response
<p>23a. The Proposed Rules Would Reduce or Eliminate the Role of Counties.</p> <p>RCW 80.50.090(2) requires EFSEC to “conduct a public hearing to determine whether or not the proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances.” This requires both that EFSEC acknowledge and use local land use regulations to determine if the proposal is consistent with them, and that the</p>	<p>23a. The proposed changes to Chapter 28 WAC does not preclude an applicant from attempting to get changes to local land use designations if found inconsistent. This section of the law only says that if found consistent then a local jurisdiction cannot change it. This seems to imply that some local jurisdictions may want to try to block an energy facility by changing land use regulations during EFSEC’s review and the legislature has blocked that avenue. Chapter 80.50 RCW has no mention of a process for instances where there is a finding of</p>

<p>municipality have local land use regulations that regulate projects such as being applied for such that these regulations can be applied to the proposed project.</p> <p>RCW 80.50.090(2) continues by stating that “If it is determined that the proposed site does conform with existing land use plans or zoning ordinances in effect as of the date of the application, the city, county, or regional planning authority shall not thereafter change such land use plans or zoning ordinances so as to affect the proposed site.” This language implies that, if the proposal is inconsistent, work can continue with the local authorities to seek regulation change to create consistency, and that is in fact what the current WAC language on the subject does.</p> <p>The current WAC’s require the applicant to seek consistency with local land use by working with the local governments. WAC 463-28-030 requires that, if EFSEC determines that the proposal is inconsistent with local land use, (1) the applicant must make application and reasonable effort to resolve the inconsistency, (2) council proceedings can be stayed while the applicant is engaged in the municipality’s proceeding to resolve the inconsistency, and (3) that the applicant “submit regular reports to the council” as to how efforts to resolve noncompliance are going. WAC 463-28-040 states that “Should the applicant report that efforts to resolve noncompliance issues with local authorities have not been successful, then, if applicant elects to continue processing the application, the applicant shall file a written request for state preemption.” That request must address, among other things, demonstrated good faith by the applicant to resolve noncompliance issues with the local governments and that the applicant and local governments were unable to resolve these noncompliance issues. The current WAC’s embody the level of consideration and cooperation authorized and</p>	<p>inconsistency. It only states:</p> <p>“The council shall include conditions in the draft certification agreement to implement the provisions of this chapter, including, but not limited to, conditions to protect state or local governmental or community interests affected by the construction or operation of the energy facility, and conditions designed to recognize the purpose of laws or ordinances, or rules or regulations promulgated thereunder, that are preempted or superseded pursuant to RCW 80.50.110 as now or hereafter amended.” RCW 80.50.100(1)</p> <p>This does not impose any requirement for applicants to seek changes to land use regulations. The requirement is only if there is a recommendation for preemption, that there be conditions in the site certification agreement that recognize the purpose of “laws, ordinances, or rules” that are preempted.</p> <p>The driving statutory authority remains RCW 80.50.110(2) wherein the last statement on this issue by the legislature was and remains that “the state hereby preempts the regulation and certification of the location ,construction and operational conditions of certification of energy facilities included under RCW 80.50.060 as now or hereafter amended”</p>
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required by the Legislature in RCW 80.50.090(2).

This is congruous with the Governor’s written explanation of action taken in 1977 on Chapter 371 of the First Extraordinary Session. “The original Senate Bill No. 2910, an Executive Request bill, contained provisions that required the applicant to “exhaust all reasonable, available methods and remedies to reach agreement with the city and/or county governments before the state would consider preemptive action.” The purpose of that language was to codify the Council’s operating policy established during the Satsop hearings, which policy encouraged the applicant and local governmental authorities to deal with each other at arm’s length. I strongly endorse this policy because I believe state government should become involved in these issues, only when there are overriding state concerns that are being handled unreasonably at the local governmental level...In keeping with my concern for local determination, I intend to request the Council to adopt and promulgate regulation similar to the language in Senate Bill No. 2910 as originally introduced to ensure that the applicant makes a good faith effort to work with local governmental authorities to resolve disputes.”

The proposed changes remove all requirements to apply to and work with local governments, to seek consistency with local land use, and for the applicant to proceed in good faith. Preemptive action by the State government would be the only avenue, rather than the last resort, and requirements to consider alternative sites and to delineate implicated state interests are slated for removal. In short, the very things the Legislature authorized, and the Governor instructed EFSEC to do in 1977, EFSEC now seeks to undo.

The proposed version of WAC 463-28-060

The governors signing message is not part of the clear and unambiguous preemptory language found in RCW 80.50.110(2). In construing the meaning of a statute, courts are to ascertain and give effect to the intent and purpose of the legislature as expressed in the words of the statute itself. There is no need to look at extrinsic evidence, such as legislative history, when the words of the statute are, as in this case, unambiguous. All that the legislature authorized on the issue of preemption is found within RCW 80.50.110.

These changes are in keeping with the board statutory intent granted to the formation of Council in RCW Chapter 80.50. RCW 80.50.010(5)“To avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay” Again, RCW 80.50.090(2) simply requires that the proposed site for the facility is consistent with the local land use regulations and if so directs the local authorities not to change the regulations to affect the proposed site. The out right ability to preempt in RCW 80.50.110 on the state’s part remains the same as it has been since the chapter’s adoption in 1970.

would allow EFSEC, upon a determination of an application being inconsistent with local land use, to go directly into an adjudicative hearing to contemplate preemption, without a request for such from the applicant. In that hearing, EFSEC would not need to consider whether the applicant demonstrated good faith, whether the applicant was unable to reach agreement with a local government as to consistency, whether alternative sites were considered, or whether any interests of the state are fostered by the application. The proposed version of WAC 463-28-070 would require EFSEC merely to “consider” community interests rather than the current “give due consideration to” those interests. Perhaps most glaring is that WAC’s 463-28-030 and 040, described above as respectively requiring applicants to work with local governments to achieve land use consistency and setting the procedures for preemption applications should those efforts fail, are proposed to be repealed. All of this is contrary to the Legislature’s authorization and direction in RCW 80.50.090(2) and basically removes the local governments and their concerns from enormous land use decisions within their jurisdictions. This represents a tremendous diminution in influence for Counties and their ability to engage in land use decision-making.

As a side bar, it is worth noting that these changes also remove any ability for the applicant to work with local governments and demonstrate its concern for community interests or rapport. As explained above, the requirement to apply to local governments, work with them in good faith to seek land use consistency, and upon failure of such efforts, to affirmatively apply for preemption, are proposed for removal. Similarly, WAC 463-28-050, which provides for the denial of certification upon the applicant’s failure to request preemption within a certain time frame, is also slated for repeal. All of this

will conspire to make the applicant that wishes to be a good corporate citizen; that wishes to demonstrate its community spirit by going through the local process; that wishes to nurture community good will, to have to start of “on the wrong foot” by essentially “going over everyone’s heads” by applying initially, and only, to EFSEC for site certification. These proposed changes essentially strip the applicant of the ability to garner community good will and support by showing its concern for local regulation, process, and interests.

23b. The Proposed Changes Eliminate The Governor’s Role In Amendments To Site Certification.

RCW 80.50.040(12) requires that “new construction, reconstruction, or enlargement or operation of energy facilities” is only effective upon gubernatorial approval of an application for such, and the governor’s execution of a site certification agreement via the process outlined in Chapter 80.50 RCW. The Current version of WAC 463-66-070 allows EFSEC to make amendments to site certification agreements that do not substantially alter any of their provisions or which are not detrimental to the environment, without the governor’s approval. Currently, WAC 463-66-080 requires the governor’s approval for all other amendments to site certification agreements.

The proposed rule changes strip the governor’s office of its statutory role in amendments to site certification. EFSEC proposes the repeal of WAC 463-66-080 and a rewrite of WAC 463-66-070 giving itself complete authority over all site certification amendments, regardless of the resulting change in use or environmental impact. This is contrary to the legislative authorization embodied in RCW 80.50.040(12) requiring gubernatorial approval for any reconstruction or enlargement of an energy facility. This

23b. The Council has considered this comment and has withdrawn the rule change to WAC 463-66-070 and repeal of WAC 463-66-080.

constitutes an unauthorized acquisition of power by EFSEC at the expense of the office of the governor. This is clearly contrary to what the Legislature contemplated and authorized. This would allow the siting of a nuclear facility adjacent to a currently approved small energy facility such as a solar plant, as an enlargement, despite it taking up vastly more land area and having significant environmental impacts, without needing the Governor's review and approval.

23c. The Proposed Rule Changes Would Create A Potential Conflict Of Interest As To SEPA That Would Not Be Subject To The Public Disclosure Act.

EFSEC proposes an amendment to WAC 463-47-090(2)(c) that would allow the applicant to prepare the SEPA documents. Other proposed amendments to this section would make the giving of direction as to "areas of research and examination to be undertaken" in SEPA review to be merely optional rather than required.

This creates a conflict of interest if the project applicant is preparing the SEPA analysis that will later be the justification for the mitigation conditions, or the lack thereof, to which the applicant will be subject. The applicant will have an incentive to generate analysis and documents that minimize the environmental impact of their project so as to minimize the mitigation conditions to which they will ultimately become subject. These rule changes also would hamper public oversight of the SEPA process because the applicant, not being a governmental entity, would not be subject to the Public Disclosure Act, and so obtaining documentary information about the SEPA process would at least require litigation and discovery requests. This proposed amendment simply does not further the causes of stewardship for the environment called for in SEPA or open government required under the PDA.

23c. There is nothing in law that requires the preparation of SEPA documents to be solely by agencies. State and local agencies are responsible for the issuance and the contents of SEPA documents. This rule change gives EFSEC the option of only determining who prepares the SEPA document. EFSEC is still responsible for ensuring that it will adequately meet the requirements of the State Environmental Policy Act and the SEPA rules in Chapter 197-11 WAC. This rule change will allow EFSEC to determine the most efficient and cost effective means of document preparation.

Having the applicant prepare the SEPA document has been going on for many years throughout the state.

<p>Memo To: Kittitas County Board of Commissioners From: Neil A. Caulkins, Deputy Prosecuting Attorney Re: IMPACT OF PROPOSED EFSEC RULE CHANGES Date: May 11, 2007</p>	
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