

Wash. AGLO 1980 NO. 5 (Wash.A.G.), 1980 WL 99839

*1 Office of the Attorney General

State of Washington
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**OFFICES AND OFFICERS—STATE—DEPARTMENT OF LABOR AND INDUSTRIES—ENERGY FACILITY
SITE EVALUATION COUNCIL—INSPECTION OF CERTIFICATED ENERGY FACILITIES**

Neither [RCW 80.50.120](#) nor any other section of chapter 80.50 RCW precludes the State Department of Labor and Industries from conducting inspections, pursuant to chapters 19.28, 70.79 and 70.87 RCW, of an energy facility covered by a certification agreement duly executed in accordance with that chapter.

Honorable King Lysen
State Senator, 31st Dist.
12864 Shorecrest Drive S.W.
Seattle, Washington 98146

Dear Sir:

By letter previously acknowledged you requested our opinion on a question which we paraphrase as follows:
Following certification of an energy facility by the governor in accordance with chapter 80.50 RCW, does [RCW 80.50.120](#) or any other section of that chapter preclude the State Department of Labor and Industries from conducting inspections of the facility pursuant to chapters 19.28, 70.79 and 70.87 RCW?

We answer the foregoing question in the negative for the reasons set forth in our analysis.

ANALYSIS

Chapter 19.28 RCW relates to electricians and electrical installations. Electricians doing work which is covered by this law are required to be licensed in accordance with [RCW 19.28.120](#). In addition, chapter 19.28 RCW vests the Department of Labor and Industries with the responsibility for conducting inspections of “. . . all wiring, appliances, devices and equipment to which this chapter applies . . .” [RCW 19.28.210](#). In addition, this last cited section provides that electric utilities may connect to such installations, with one stated exception, only if approval is clearly indicated by certification through a safe wiring label furnished on payment of a fee to the Department of Labor and Industries.

Chapter 70.79 RCW relates to boilers and unfired pressure vessels. This chapter, which is also administered by the Department of Labor and Industries, provides, in some detail, for the on-site inspection of boilers and unfired pressure vessels in use within the state in order to insure that they have been installed and are being operated in accordance with both the statutes and such rules and regulations as have been promulgated thereunder. See, [RCW 70.79.220-.330](#), the next of last of which sections ([RCW 70.79.320](#)) also provides that it is unlawful to operate under pressure a boiler or unfired pressure vessel “. . . without a valid inspection certificate as provided for in this chapter . . .”

Finally, chapter 70.87 RCW relates to elevators, lifting devices and moving walks. Again, as in the case of chapter 19.28 and 70.79 RCW, this law is administered by the Department of Labor and Industries. See, [RCW 70.87.030](#). It provides for the issuance of two types of permits, one for the installation of elevators or other conveyances which are subject to the law and the other for their continuing operation. See, [RCW 70.87.080](#) and .090. And, in conjunction therewith, [RCW 70.87.120](#) contains a provision calling for the periodic inspection, by inspectors employed by the department for that purpose, of all such conveyances.

*2 All three chapters also contain limited, express exemption provisions. See, e.g., [RCW 19.28.360-.380](#), [RCW 70.79.088](#) and

[RCW 70.87.110](#). None of those exemption provisions, however, purport to exclude a given facility, installation or conveyance from inspection by the Department of Labor and Industries merely because the place or thing to be inspected is part of an “energy facility” which has obtained certification from the governor in accordance with the State Energy Facilities Siting Act, chapter 80.50 RCW.

Your question asks whether, nonetheless, such an exclusion or exemption from the inspection procedures of chapters 19.28, 70.79 and 70.87 RCW, *supra*, must be deemed to exist by reason of [RCW 80.50.120](#) or some other provision of the aforesaid siting act. We would further note and underscore the fact that, as stated in your letter, your inquiry only relates to the inspection process itself and not the issuance or denial of either a safe wiring label ([RCW 19.28.210](#)), a valid inspection certificate ([RCW 70.79-.320](#)) or an elevator operating permit ([RCW 70.87.090](#)) as the result of any such inspection.¹ Seemingly, at least, these latter functions have been preempted, in the case of a certificated energy facility, by the following provision in [RCW 80.50.120\(3\)](#):

“(3) The issuance of a certification shall be in lieu of any permit, certificate or similar document required by any department, agency, division, bureau, commission, board, or political subdivision of this state, whether a member of the council or not.”

In our opinion, however, nothing in either that subsection of [RCW 80.50.120](#), *supra*, or elsewhere in chapter 80.50 precludes the Department of Labor and Industries from continuing to conduct the subject inspections themselves.²

In reviewing the pertinent provisions of the siting act, we begin with [RCW 80.50.020\(10\)](#) which, with certain exceptions, defines the term “energy facility” to mean “. . . an energy plant or transmission facilities . . .” [RCW 80.50-.030](#) then establishes the Energy Facility Site Evaluation Council; [RCW 80.50.040](#) sets forth the powers of the council;³ [RCW 80.50.060](#) delineates the energy facilities to which the law applies; and [RCW 80.50.070—100](#) provide for the submission and processing of applications for site certification. [RCW 80.50.110](#) then contains the following preemptive provisions with respect to other laws or regulations:

“(1) If any provision of this chapter is in conflict with any other provision, limitation, or restriction which is now in effect under any other law of this state, or any rule or regulation promulgated thereunder, this chapter shall govern and control and such other law or rule or regulation promulgated thereunder shall be deemed superseded for the purposes of this chapter.

“(2) 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](#) as now or hereafter amended.”

*3 Next, [RCW 80.50.120](#) (subsection (3) of which we have already noted) reads, in full, as follows:

“(1) Subject to the conditions set forth therein any certification shall bind the state and each of its departments, agencies, divisions, bureaus, commissions, boards, and political subdivisions, whether a member of the council or not, as to the approval of the site and the construction and operation of the proposed energy facility.

“(2) The certification shall authorize the person named therein to construct and operate the proposed energy facility subject only to the conditions set forth in such certification.

“(3) The issuance of a certification shall be in lieu of any permit, certificate or similar document required by any department, agency, division, bureau, commission, board, or political subdivision of this state, whether a member of the council or not.”

And finally, the other part of the siting act which must be examined in connection with your question is subsection (11) of [RCW 80.50.040](#) which provides that:

“The council shall have the following powers:

“ . . .

“(11) 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 [RCW 80.50.040\(14\)](#): 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 shall retain authority for determining compliance relative to monitoring;

“ . . .” (Emphasis supplied)⁴

We will take up these provisions in turn, commencing with [RCW 80.50.110](#), *supra*. Clearly, there is nothing in this section of the siting act which precludes the Department of Labor and Industries from conducting inspections of certificated energy facilities. First, insofar as subsection (1) of the statute is concerned, we find nothing in so much of chapters 19.28, 70.79 and 70.87 RCW as relate to inspections which is in conflict with the siting act—at least once [RCW 80.50.120](#) and [RCW 80.50.040\(11\)](#), *supra*, have been dealt with. Nor, of course, does the “state” preemption, in subsection (2) of the statute, of “. . . the regulation and certification of the location, construction, and operational conditions of certification of . . . energy facilities . . . ,”—whatever effect that preemption may have on local governmental bodies—in any way impair or limit the statutory authority of the Department of Labor and Industries. For, obviously, the department, like the siting council itself, is also a state agency.

As for [RCW 80.50.120](#), *supra*, we have already discussed subsection (3) of that statute and its apparent impact on the permit issuing or licensing functions of the Department of Labor and Industries in connection with certificated energy facilities—noting, again, however, that this issue is beyond the scope of your question. But, as we view it, it is quite another thing to say, in addition, that [RCW 80.50.120\(3\)](#) also precludes the Department of Labor and Industries from conducting such inspections as it is otherwise directed or authorized to conduct under the above-described provisions of [RCW 19.28.210](#), [RCW 70.79.220](#), *et seq.*, and [RCW 70.87.120](#). A requirement that a given individual or facility obtain a license or permit in order to do a particular thing is quite different from the requirement that the same individual or other entity allow its facilities to be inspected in order to insure that they had been installed and are being operated in accordance with applicable law.

*4 Nor do we believe that either of the other two subsections of [RCW 80.50.120](#) preclude the Department of Labor and Industries from conducting such inspections. Subsection (1) of the statute simply means that “subject to the conditions set forth . . .” in any energy facility certification signed by the governor, the Department of Labor and Industries—like all other state departments or agencies—must be deemed to be “bound” insofar as approval of the site and construction and operation of the proposed energy facility is concerned. But that no more precludes the conduct of inspections than does the license or permit preemption which is contained in subsection (3).

Subsection (2) of [RCW 80.50.120](#) (here repeated for ease of reference) then provides that:

“(2) The certification shall authorize the person named therein to construct and operate the proposed energy facility subject only to the conditions set forth in such certification.”

It is possible that a court might read this provision as meaning that the governor and siting council, in the process of certification, may truly authorize “. . . the person named therein . . .” to operate the proposed energy facility without regard to any otherwise applicable state laws whatsoever. We are, however, not persuaded that the legislature actually intended to vest either the governor or the siting council with such an unusual, all encompassing, power even if it constitutionally could have done so in this manner. *Cf.*, [Weyerhaeuser v. King County](#), 91 Wn.2d 721, 592 P.2d 1108 (1979). Moreover, in any event, we note that in all recent site certification agreements the council and governor have recognized the applicability of other state laws and regulations and have made continued compliance with those laws a condition of continued certification. See, *e.g.*, Article II B-2 of the site certification agreement between the State of Washington and the Washington Public Power Supply System (WPPSS) relating to a nuclear electric generating facility at Satsop in Grays Harbor County which reads as follows:

“2. This certification agreement may be revoked, suspended, or modified by the State for failure by Supply System to comply with any of the terms and conditions herein, or for violations of chapter 80.50 RCW, regulations issued thereunder, and any other applicable state or federal laws or regulations, or for violation of any order of the Council.” (Emphasis supplied)

This leaves us, then, with [RCW 80.50.040\(11\)](#), *supra*. But let us now note that the precise wording of the 1977 amendatory proviso contained therein reads as follows:

“ . . . PROVIDED, That any on-site inspection required by the council shall be performed by other state agencies pursuant to

interagency agreement: . . .” (Emphasis supplied)

Inspections conducted under chapters 19.28, 70.79 and 70.87 RCW, however, being provided for by independent statutory provisions, are conducted because the legislature, in its wisdom, has said that they are to be conducted—not because they are “required by the council” in furtherance of its “. . . monitoring of the effects arising from the construction and the operation of energy facilities to insure continued compliance with terms of certification . . .” [RCW 80.50.040\(11\)](#), *supra*. Therefore, while the Department of Labor and Industries (or any other agency authorized to conduct inspections of significance to the Siting Council) most certainly may enter into an interagency agreement to conduct inspections on behalf of the Siting Council for that latter purpose, no such agreement is necessary in order to allow those inspections separately called for by the provisions of [RCW 19.28.110](#), [RCW 70.79.220](#)—.330, or [RCW 70.87.120](#), *supra*.

*5 For the foregoing reasons, our direct answer to your question (as above paraphrased) is thus in the negative. We trust that the foregoing will be of assistance to you.

Very truly yours,

Slade Gorton
Attorney General
Philip H. Austin
Deputy Attorney General

Footnotes

- ¹ Also beyond the scope of your question is the effect of certification under the siting act on other laws administered by the Department of Labor and Industries such as chapter 18.27 RCW (electrician licensing), chapter 18.106 RCW (plumber licensing) and chapter 18.27 RCW (contractor registration). The application of [RCW 80.50.120](#) to those laws, however, could raise further difficult questions of interpretation that perhaps should receive legislative attention.
- ² In so concluding we should also point out, however, that the actual funding and enforcement of those inspection programs are largely dependent upon the issuance or revocation of permits. This necessarily presents a further problem which we understand is presently being addressed by way of negotiations toward an interagency agreement under [RCW 80.50.040\(11\)](#), *infra*, and which may well also need legislative attention.
- ³ We will later note, more specifically, subsection (11) of this section of the act.
- ⁴ The underscored proviso, notably, was added to the statute by an amendment in § 4, chapter 371, Laws of 1977, 1st Ex. Sess.

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