

Wash. AGO 1977 NO. 1 (Wash.A.G.), 1977 WL 25947

\*1 Office of the Attorney General

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**OFFICES AND OFFICERS—STATE—ENERGY FACILITY SITE EVALUATION  
COUNCIL—GOVERNOR—CERTIFICATION OF ENERGY FACILITY SITES—PREEMPTION OF LOCAL  
ZONING CODES.**

The certification by the governor of designated energy facilities under chapter 80.50 RCW will have the effect of permitting the construction and operation of the facilities thus certified at whatever location is specified therein even where the otherwise applicable provisions of a county, city or regional zoning code are to the contrary in view of the preemptive language of [RCW 80.50.110](#), as amended by § 37, chapter 108, Laws of 1975-76, 2nd Ex. Sess.

Honorable Keith Sherman  
Chairman  
Energy Facility  
Site Evaluation Council  
820 East Fifth Avenue  
Olympia, Washington 98504

Dear Sir:

By letter previously acknowledged you have requested our opinion on a question which we paraphrase as follows:

Will a certification, approved by the governor under chapter 80.50 RCW, have the effect of permitting the construction and operation of designated thermal power plant other energy facilities at whatever location is specified therein even where the otherwise applicable provisions of a county, city or regional zoning code are to the contrary?

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

ANALYSIS

Chapter 80.50 RCW codifies the provisions of chapter 45, Laws of 1970, Ex. Sess., commonly known as the Thermal Power Plant Siting Act, together with certain later amendments and additions thereto. Principal among the later amendments are those contained in chapter 108, Laws of 1975-76, 2nd Ex. Sess., by which the basic thrust of the earlier law was extended to encompass the siting not only of thermal power plants but of other energy facilities as well.<sup>1</sup> Accordingly, as thus amended the law currently provides for the certification of any such facilities in this state by the governor after receiving the recommendation of what is now denominated the Energy Facility Site Evaluation Council (EFSEC). “Certification” is defined by [RCW 80.50.020 \(5\)](#) to mean:

“ . . . a binding agreement between an applicant and the state which shall embody compliance to the siting guidelines, in effect as of the date of certification, which have been adopted pursuant to [RCW 80.50.050](#) as now or hereafter amended as conditions to be met prior to or concurrent with the construction or operation of any energy facility:”

Insofar as other state agencies are concerned the effect of certification is spelled out in [RCW 80.50.120](#) as follows:

“(1) Subject to the conditions set forth therein any certification signed by the governor shall bind the state and each of its departments, agencies, divisions, bureaus, commissions or boards of this state 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 “(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 or board of this state whether a member of the council or not.”

See, AGO 1975 No. 10, copy enclosed. With regard to local units of government, however, a somewhat different approach was taken under the original, 1970, version of the law with respect to local controls. While § 11 thereof (later codified as [RCW 80.50.110](#)) provided, in subsection (2), that,

“(2) The state hereby preempts the regulation and certification of thermal power plant sites and thermal power plants as defined in section 2 of this act.”

In addition, an earlier section (11) of the 1970 act (now [RCW 80.50.090](#)) read in pertinent part, as follows:

“(1) The council shall conduct a public hearing in the county of the proposed site within sixty days of receipt of an application for site certification: Provided, That the place of such public hearing shall be as close as practical to the proposed site.

“(2) The council must determine at the initial public hearing whether or not the proposed site is consistent and in compliance with county or regional land use plans or zoning ordinances. 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 county or regional planning authority shall not thereafter change such land use plans or zoning ordinances so as to affect the proposed site.”

Thus, notwithstanding the original preemptive language of § 11, supra, this latter provision evidenced an apparent legislative intent to preclude the siting council from recommending - for certification by the governor - a thermal power plant site which was not consistent with the provisions of the local zoning code or land use plan covering the site in question. Accord, the following colloquy reported at page 281 of the 1970 Senate Journal between Senators Gissberg and McCormack, the latter being one of the original sponsors of the thermal power plant siting act:

“Senator Gissberg: ‘Will Senator McCormack yield? Senator McCormack, my inquiry has to do with following up the question of the site being in compliance with the county or regional land use plan or zoning ordinances. Let us assume that the proposed site is not consistent with the county land use plan. Under those circumstances then, is the council divested of authority to recommend that site as the site of the thermal power plant?’

“Senator McCormack: ‘Definitely yes.’

“Senator Gissberg: ‘It nowhere says that in the bill but that is the intention. Is that correct?’

“Senator McCormack: ‘Yes, that is certainly the intention. I think it is implied in the first sentence, Senator Gissberg.’”

\*3 Also to be noted is an immediately ensuing colloquy between Senators Mardesich and McCormack which is reported in the same Journal as follows:

“Senator Mardesich: ‘Will Senator McCormack yield? On the same line a question occurred to me. Well and good if the council decides that this did conform but what if some private citizen questions whether the land is properly zoned? There is actual zoning to accommodate this. In what situation are you then? You cannot preclude that individual certainly from . . . .’

“Senator McCormack: ‘There is nothing in this act that precludes any individual or even any political subdivision of the state from going to court to restrain the council from action. Any individual can take legal action against the council at any time.’”

This same theme, moreover, was continued in effect by the 1974 legislature which enacted what is now [RCW 80.50.175](#). That statute, originating as § 2, chapter 110, Laws of 1974, Ex. Sess., empowered the siting council to conduct studies of potential thermal power plant sites prior to receipt of a specific application for site certification. Subsection (7) of the statute, however, disclaimed any intent by the legislature to preclude a county or city from also “. . . requiring any information it deems appropriate to make a decision approving a particular location.” (Emphasis supplied.) Thus, the 1974 legislature still

manifested an understanding that insofar as the relationship between site certification and local land use regulations were concerned, the county or city in which a thermal power plant was to be situated would have a legally enforceable voice (through its land use or zoning ordinances) with respect to the actual location of any such facility.<sup>2</sup>

During its most recent 1976 session, however, the legislature (also as a part of chapter 108, supra) adopted an amendment to [RCW 80.50.110\(2\)](#), the preemption statute quoted earlier, which, basically, has given rise to your present opinion request. By § 37 of chapter 108, supra, the legislature amended that statute to read as follows - set forth in bill form for ease of comprehension:

“(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.”

The problem is that, at the same time, the legislature retained both § 9, chapter 45, Laws of 1970, Ex. Sess., ([RCW 80.50.090](#)) and subsection (7) of § 2, chapter 110, Laws of 1974, Ex. Sess., ([RCW 80.50.175\(7\)](#)); i.e., it neither repealed nor amended either of those prior statutes. Thus, on the one hand, what exists at the present time is an amended preemption statute which, when read in isolation, appears clearly to evidence an intent by the legislature to have the state preempt, among other things, the regulation and certification of the location of energy facilities - meaning, apparently, a preemption of the location of such facilities from any further local governmental land use controls. Yet within the same law another section ([RCW 80.50.090](#)) continues to require a determination by the council, after a hearing, on the question of whether a proposed energy facility will, or will not, be “. . . consistent and in compliance with county or regional land use plans or zoning ordinances’ - and then to say that:

\*4 “. . . 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 county or regional planning authority shall not thereafter change such land use plans or zoning ordinances so as to affect the proposed site.”

And, likewise, there also still exists, as a part of the law, [RCW 80.50.175\(7\)](#), supra, which, in referring to studies of potential sites by the state council, disclaims any intention of, “. . . preventing a city or county from requiring any information it seems appropriate to make a decision approving a particular location.”

In short, what we now have is a law passed by a legislature (the 1976 session) which appears to have had a state preemption of local control over the actual location of energy facilities in mind (as evidenced by § 37, chapter 108, supra) but which, nevertheless, failed to remove from the prior law certain provisions which are obviously more consistent with the concept of local control (or veto, if you will) than with state preemption as to the actual location of thermal or other energy facilities.

How, then, is the question which you have directed to us by your present opinion request properly to be answered? In the final analysis, of course, only the courts of our state can definitively respond to that question in the course of actual litigation. And, so long as the provisions of [RCW 80.50.090\(2\)](#), supra, and [RCW 80.50.175\(7\)](#), supra, remain a part of the law it is possible that, based thereon, a negative answer (i.e., no state preemption as to the location of energy facilities) may thus be given. Nevertheless, while acknowledging that possibility our own considered opinion on the question is to the contrary.

In terms of what the 1976 legislature did or did not do it can hardly be doubted that the single most significant and meaningful indication of legislative intent with regard to the preemption question is that which is to be found in the amended version of [RCW 80.50.110\(2\)](#), the original preemption statute. Repeated both for emphasis and for ease of immediate reference, that statute now reads as follows:

“(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.”

Clearly the legislature which enacted this amendatory provision must be deemed to have intended to change the law. As observed in [Home Indem. Co. v. McClellan Motors](#), 77 Wn. 2d 1, 459 P. 2d 389 (1969), at p. 3:

“. . . It is a well recognized rule of statutory construction that, where a law is amended and a material

change is made in the wording, it is presumed that the legislature intended a change in the law. E.g., [Alexander v. Highfill](#), 18 Wn.2d 733, 140 P. 2d 277 (1943). . . .”

\*5 Likewise, it is to be presumed that the legislature in passing the amendment did not deliberately engage in an unnecessary or meaningless act. As stated in [Kelleher v. Ephrata School Dist.](#), 56 Wn. 2d 866, 873, 355 P. 2d 989 (1960):  
“. . . The courts will presume that the legislature does not indulge in vain and useless acts and that some significant purpose or object is implicit in every legislative enactment. [Guinness v. State](#) (1952), 40 Wn. (2d) 677, 246 P. (2d) 433.”

It is true, of course, that this particular amendment also reflects the legislature’s extension of the overall provisions of the siting act to cover energy plant facilities as well as thermal power plants. Thus, to that extent, the amendment would have some meaning even without its further thrust - a state preemption of the location (*inter alia*) of all such facilities. But, likewise, it is equally evident, nonetheless, that this latter expansion of the scope of the original preemption statute ([RCW 80.50.110\(2\)](#), *supra*) would be rendered meaningless if the legislature’s at least arguably inadvertent retention of [RCW 80.50.090\(2\)](#) and [RCW 80.50.175\(7\)](#) were allowed to prevail over its obviously intentional action in thus amending that statute - contrary to both of the above described principles of statutory construction. While both this office and the courts, in construing acts of the legislature, would certainly prefer a more perfect job than typically is done, we cannot insist on such perfection as a minimal criterion of accomplishment.

Therefore, our direct answer to your question, as above paraphrased, is in the affirmative. A certification, approved by the governor under chapter 80.50 RCW, as amended, will have the effect of permitting the construction and operation of designated energy facilities at whatever location is specified therein even where the otherwise applicable provisions of a county, city or regional zoning code are to the contrary.

By having so answered your question, however, we do not mean to say that the siting council is no longer required, in the course of its proceedings, to make a determination of whether or not a proposed site is “. . . consistent and in compliance with county or regional land use plans or zoning ordinances. . . .” Accord, [RCW 80.50.090](#), *supra*. So long as that statute remains in effect such a determination will still be required and, along with other relevant factors, it will still be a factor to be weighed and considered both by the council in making its recommendation and by the governor in making his decision. But because of the 1976 amendment to the preemption statute, [RCW 80.50.110](#), a finding of inconsistency will no longer by itself bar the council from recommending the site in question to the governor for ultimate certification - or, by the same token, bar the governor from issuing the certification as recommended.

We trust that the foregoing will be of some assistance to you.  
Very truly yours,

\*6 Slade Gorton  
Attorney General  
Philip H. Austin  
Deputy Attorney General  
Thomas F. Carr  
Assistant Attorney General

#### Footnotes

<sup>1</sup> As defined in [RCW 80.50.010\(17\)](#) the term “energy plant” means:  
“. . . the following facilities together with their associated facilities:  
“(a) Any stationary thermal power plant with generating capacity of two hundred fifty thousand kilowatts or more and floating thermal power plants of fifty thousand kilowatts or more, including associated facilities;  
“(b) Facilities which will result in receipt of liquified natural gas in the equivalent of more than one hundred million standard cubic feet of natural gas per day, which has been transported over marine waters;  
“(c) Facilities which will result in the receipt of more than an average of fifty thousand barrels per day of crude or refined petroleum which has been or will be transported over marine waters, except that the provisions of this chapter shall not apply to storage facilities unless occasioned by such new facility construction;

“(d) Any underground reservoir for receipt and storage of natural gas as defined in [RCW 80.40.010](#) capable of delivering an average of more than one hundred million standard cubic feet of natural gas per day; and

“(e) Facilities which will result in the processing of more than twenty-five thousand barrels per day of petroleum into refined products.”

<sup>2</sup> Again, this reading of the intent of the legislature is also supported by dialogue reported in the Senate Journal - this time on p. 593 of the 1974 Journal where the following colloquy between Senators Washington and Bailey appears:

“Senator Bailey: ‘The question I have has to do with the amendment. Do the amendments in any way change the present powers of the local county commissioners to approve or disapprove the sites?’

“Senator Washington: ‘No, these amendments do not. However, you may want that same question on the bill.’

“Senator Bailey: ‘I may want that back in the record on final passage.’

“... ”

“The President [then] declared the question before the Senate to be the roll call on final passage . . .

“Senator Bailey: ‘Mr. President, a question of Senator Washington. Again, does this bill in any way change the present power of the local board of county commissioners to approve or disapprove a site?’

“Senator Washington: ‘No, it does not. They have to approve the site before the siting council can take any action.’

“... ”

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