

State of Washington

Energy Facility Site Evaluation Council
(name of governing body)

(agency name, if applicable)

Resolution No.

Administrative Order No. 78-3

(1) Be it resolved by the Energy Facility Site Evaluation Council acting at Olympia, Washington that it does promulgate and adopted the annexed rules relating to:

- (1) 463-28 Procedure--State Preemption
(2) 463-54 Certification Compliance Determination and Enforcement

(2) ALTERNATIVE A. Use only for Adoption of Permanent Rules.

This action is taken pursuant to Notice No. filed with the code reviser on 4-3-78. Such rules shall take effect: 78-04-073
[ ] pursuant to RCW 34.04.040(2).
[ ] at a later date, such date being

(2) ALTERNATIVE B. Use only for Adoption of Emergency Rules.

We, find that an emergency exists and that the foregoing order is necessary for the preservation of the public health, safety, or general welfare and that observance of the requirements of notice and opportunity to present views on the proposed action would be contrary to public interest. A statement of the facts constituting such emergency is:

Such rules are therefore adopted as emergency rules to take effect upon filing with the code reviser.

(3) Pursuant to the requirements of RCW 34.04 (1977 c 19 § 2) that "every agency shall incorporate the most specific, but in no case omit all, of the following language alternatives when adopting or amending rules" (fill in statement (a), (b), or (c) as appropriate):

[ ] (a) This rule is promulgated pursuant to RCW and is intended to administratively implement that statute.
[ ] (b) This rule is promulgated pursuant to RCW 80.50.040(1) which directs that the Energy Facility Site Evaluation Council (agency)

has authority to implement the provisions of Chapter 80.50 RCW (name of act or RCW citation)

[ ] (c) This rule is promulgated under the general rule-making authority of the (agency) as authorized in RCW

(4) The undersigned hereby declares that he has complied with the provisions of the Open Public Meetings Act (chapter 42.30 RCW), the Administrative Procedure Act (chapter 34.04 RCW) or the Higher Education Administrative Procedure Act (chapter 28B.19 RCW), as appropriate, and the State Register Act (chapter 34.08 RCW).

(5) This order, when recorded in the order register of this governing body is herewith transmitted to the Code Reviser for filing pursuant to chapter 34.04 RCW and chapter 1.12 WAC.

STATE OF WASHINGTON FILED

APPROVED AND ADOPTED June 12, 1978

JUN 23 1978

By William L. Fitch Executive Secretary Title

CODE REVISER'S OFFICE WSR 78-07-036

STATE OF WASHINGTON  
ENERGY FACILITY SITE  
EVALUATION COUNCIL

STATEMENT OF PURPOSE AND IMPLEMENTATION  
NEW/AMENDED REGULATIONS

I. NAME OF AGENCY: Energy Facility Site Evaluation Council

ADMINISTRATIVE ORDER NO: 78-3

STATUTORY AUTHORITY: RCW 80.50.040(1)

II. RULE TITLE:

(1) Chapter 463-28 Procedure--State Preemption (new)

(2) Chapter 463-54 Certification Compliance Determination  
and Enforcement (Amend)

RULE SUMMARY and PURPOSE:

(1) Chapter 463-28 sets forth procedures to be followed  
when the council finds it necessary to recommend to  
the Governor that the state preempt local land  
use plans or zoning ordinances for a site or portions  
of a site for an energy facility.

(2) Chapter 463-54 sets forth rules relating to certifi-  
cation compliance determination and enforcement and  
is being amended to comply with requirement to con-  
duct on-site inspections through interagency agree-  
ments and to provide for emergency action enforcement  
authority by the chairman of the council.

III. AGENCY RESPONSIBILITY FOR DRAFTING, IMPLEMENTING AND ENFORCING:

A. Drafting: Legislative, Legal and Rules Committee  
Tom Stacer, Chairman 753-6417  
%Utilities & Transportation Comm.  
Olympia, WA 98504

B. Implementing: William L. Fitch, Executive Secretary  
Energy Facility Site Evaluation Council  
820 East Fifth Avenue  
Olympia, WA 98504 753-7384

C. Enforcing: Nicholas D. Lewis, Chairman 753-7384  
Energy Facility Site Evaluation Council  
820 East Fifth Avenue  
Olympia, WA 98504

IV. DATE OF HEARING: May 22, 1978

DATE OF ADOPTION: June 12, 1978

EFFECTIVE DATE: Filed with Code Reviser on June 23, 1978;  
effective 30 days thereafter

NAMES OF OPPONENTS AND/OR PROPONENTS:

(1) WAC 463-28 - Four opponents testified:

Craig Ritchie  
Clallam County Prosecuting Attorney

Eloise Kailin  
Protect the Peninsula's Future

Alice P. Ball  
Olympic Peninsula Audubon Society

Jim Williams  
Washington State Association of Counties

(2) WAC 463-54 - No one appeared for or against

V. AGENCY COMMENTS, IF ANY: None

## Chapter 463-28

## PROCEDURE--STATE PREEMPTION

## WAC

463-28-010	Purpose and scope.
463-28-020	Authority of council--Preemption by state.
463-28-030	Determination of noncompliance--Procedures.
463-28-040	Inability to resolve noncompliance.
463-28-050	Failure to request preemption.
463-28-060	Request for preemption--Contested case.
463-28-070	Certification--Conditions--State/local interests.
463-28-080	Preemption--Failure to justify.
463-28-090	Governing rules.

NEW SECTION

WAC 463-28-010 PURPOSE AND SCOPE. This chapter sets forth procedures to be followed by the council in determining whether to recommend to the governor that the state preempt local land use plans or zoning ordinances for a site or portions of a site for an energy facility.

NEW SECTION

WAC 463-28-020 AUTHORITY OF COUNCIL--PREEMPTION BY STATE. The authority of the council is contained in RCW 80.50.040(1) and 80.50.110(2) which provides that the state preempts the regulation and certification of the location, construction, and operational conditions of certification of energy facilities.

NEW SECTION

WAC 463-28-030 DETERMINATION OF NONCOMPLIANCE--PROCEDURES. If the council determines during the hearing required by RCW 80.50.090 that the site of a proposed energy facility or any portion of a site is not consistent and in compliance with existing land use plans or zoning ordinances in effect at the date of the application, the following procedures shall be observed:

(1) As a condition necessary to continue processing the application, it shall be the responsibility of the applicant to make the necessary application for change in, or permission under, such land use plans or zoning ordinances, and make all reasonable efforts to resolve the noncompliance.

(2) All council proceedings on the application for certification may be stayed at the request of the applicant during the period when the plea for resolution of noncompliance is being processed by local authorities.

(3) The applicant shall submit regular reports to the council regarding the status of negotiations with local authorities on noncompliance issues.

#### NEW SECTION

WAC 463-28-040 INABILITY TO RESOLVE NONCOMPLIANCE. 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 as authorized in WAC 463-28-020 within ninety days after completion of the public hearing required by RCW 80.50.090, or later if mutually agreed by the applicant and the council. The request shall address the following:

(1) That the applicant has demonstrated a good faith effort to resolve the noncompliance issues.

(2) That the applicant and the local authorities are unable to reach an agreement which will resolve the issues.

(3) That alternate locations which are within the same county and city have been reviewed and have been found unacceptable.

(4) Interests of the state as delineated in RCW 80.50.010.

#### NEW SECTION

WAC 463-28-050 FAILURE TO REQUEST PREEMPTION. Where noncompliance is at issue, failure of the applicant to file the written request as required in WAC 463-28-040 within the time permitted shall be sufficient grounds for the council to recommend to the governor denial of certification.

#### NEW SECTION

WAC 463-28-060 REQUEST FOR PREEMPTION--CONTESTED CASE. Should applicant elect to continue processing the application and file a

request with the council for state preemption, the council will schedule a contested case hearing on the application as specified under chapter 463-30 WAC. As the first order of business in the contested case, the council shall determine whether to recommend to the governor that the state should preempt the local land use plans or zoning ordinances for a site or portions of a site for the energy facility proposed by the applicant. The factors to be evidenced under this issue are those set forth in WAC 463-28-040. The determination of preemption shall be by council order, and shall be included in its recommendation to the governor pursuant to RCW 80.50.100. The council shall determine this issue on the record before proceeding further in the contested case; thereafter, the remainder of the contested case shall proceed only if preemption is ordered by the council. Otherwise, the procedure shall follow WAC 463-28-080.

#### NEW SECTION

WAC 463-28-070 CERTIFICATION--CONDITIONS--STATE/LOCAL INTERESTS. If the council approves the request for preemption it shall include conditions in the draft certification agreement which give due consideration to state or local governmental or community interests affected by the construction or operation of the energy facility and the purposes of laws or ordinances, or rules or regulations promulgated thereunder that are preempted or superseded pursuant to RCW 80.50.110(2).

#### NEW SECTION

WAC 463-28-080 PREEMPTION--FAILURE TO JUSTIFY. During the contested case hearing, if the council determines that the applicant has failed to justify the request for state preemption, the council shall do so by issuance of an order accompanied by findings of fact and conclusions of law. Concurrent with the issuance of its order, the council shall report to the governor its recommendation for rejection of certification of the energy facility proposed by the applicant.

#### NEW SECTION

WAC 463-28-090 GOVERNING RULES. Applications for certification of the energy facilities made prior to July 15, 1977 shall continue to be governed by the applicable rules in effect on the day immediately preceding July 15, 1977.

Chapter 463-54

~~((AUDITING-TO-DETERMINE))~~ CERTIFICATION COMPLIANCE DETERMINATION AND ENFORCEMENT

WAC

- 463-54-010 Intent and purpose of this chapter.
- 463-54-020 Compliance to be determined.
- 463-54-030 Compliance inspections and reports.
- 463-54-040 Compliance reports and determinations.
- 463-54-050 Noncompliance determinations and enforcement.
- 463-54-060 DOE monitoring and enforcement role.
- 463-54-070 Emergency action by chairman.

AMENDATORY SECTION (Amending Order 108, filed 11/4/76)

WAC 463-54-010 INTENT AND PURPOSE OF THIS CHAPTER. This chapter sets forth rules relating to effects and compliance ~~((auditing))~~ determination of ~~((the))~~ energy facility construction and operation pursuant to RCW 80.50.040(11).

AMENDATORY SECTION (Amending Order 108, filed 11/4/76)

WAC 463-54-020 ~~((AUDITING))~~ COMPLIANCE TO BE ~~((PERFORMED))~~ DETERMINED. ~~((Auditing--may-be-performed-by-personnel-from-interested state-agencies-pursuant-to-interagency-contracts-with-the-Council.--In the-event-any-state-agency-declines-or-is-not-qualified,--the--Council may-obtain-auditing-services-from-other-sources.))~~ Compliance determination procedures shall be implemented by the council as necessary to keep it and the public properly informed as to the status of compliance with the terms of certification agreements and NPDES permits.

AMENDATORY SECTION (Amending Order 108, filed 11/4/76)

WAC 463-54-030 ~~((ANNUAL-PRE-PAYMENT-SYSTEM))~~ COMPLIANCE INSPECTIONS AND REPORTS. ~~((At-the-beginning-of-each-fiscal-year,--the-Council shall-determine-the-total-reasonable-cost--necessary--to--perform--the auditing-function-during-the-next-twelve-months.--Operators-of-certificated--facilities-will-then-be-charged-an-amount-based-on-the-maximum~~

~~expected auditing activity--attributable--to--certificated--facilities maintained by that operator:))~~ Compliance determinations shall include consideration of on-site inspections, data analyses and/or reporting activities as prescribed by the council and performed by other state agencies pursuant to annual interagency agreements.

AMENDATORY SECTION (Amending Order 108, filed 11/4/76)

WAC 463-54-040 ((PAYMENTS,--A-CONDITION-OF-CONTINUED-CONSTRUCTION AND--OPERATION)) COMPLIANCE REPORTS AND DETERMINATIONS. ((Payment of the annual charges established by this chapter shall be a condition of continued construction and operation of the energy facility:)) Written reports by state agencies reporting to the council under interagency agreements shall be submitted regularly and contain certifications as to the certificate holders satisfactory compliance or noncompliance with the appropriate terms of the site certification agreement. Certifications of satisfactory compliance in the absence of compelling evidence to the contrary shall be deemed by the council as bona fide compliance by the certificate holder.

AMENDATORY SECTION (Amending Order 108, filed 11/4/76)

WAC 463-54-050 ((AMOUNT-PAYABLE-TO-STATE-TREASURER)) NONCOMPLIANCE DETERMINATIONS AND ENFORCEMENT. ((Payments shall be sent to the Council office in the form of a check made payable to the state treasurer:--Any--unexpended--amounts--shall be credited or refunded to the certificated operator:)) The council shall make the determination of noncompliance with the terms of a certification agreement or NPDES permit where circumstances so warrant and on such finding of noncompliance will institute appropriate enforcement action.

NEW SECTION

WAC 463-54-060 DOE MONITORING AND ENFORCEMENT ROLE. The DOE is delegated the monitoring activities pertaining to water discharges and when it reports to the council that appropriate enforcement activities are required relative thereto the council shall take or initiate action to enforce the terms of the appropriate certification agreement and the incorporated NPDES permit. Immediate enforcement action as needed may be undertaken by DOE subject to subsequent confirmation or modification by the council.



NEW SECTION

WAC 463-54-070 EMERGENCY ACTION BY CHAIRMAN. (1) The chairman of the council is authorized and shall take action to immediately and effectively halt or eliminate any imminent or substantial endangerments to the health or welfare of persons resulting from the discharge of pollutants from facilities sited under chapter 80.50 RCW including as appropriate:

(a) The issuance of a stop work order to immediately terminate an endangering discharge and suspend the NPDES permit.

(b) The requesting of the departments of emergency services and social and health services and other appropriate agencies, as necessary, to immediately take protective measures to safeguard the health or welfare of persons resulting from the discharge of pollutants.

(c) The reference of matters to the attorney general for appropriate enforcement action for violations of site certification agreements and NPDES permits.

(2) The chairman's action will be confirmed or modified by the council within seventy-two hours of execution at a special or regular meeting of the council, whichever will occur the earliest.